

July 10, 2015

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**Subject: San Diego Unified Port District Comments on the California Coastal Commission's Draft Sea Level Rise Policy Guidance, 2<sup>nd</sup> Draft**

Thank you for the opportunity to provide comment and input on the California Coastal Commission's (Commission) revised Draft Sea Level Rise Policy Guidance published on May 27, 2015 (Revised Policy Guidance). As a trustee of State tidelands, the San Diego Unified Port District (District) is committed to addressing the challenges that may accompany sea level rise and we appreciate the opportunity to provide comments on the Revised Policy Guidance. The District would like to acknowledge the work performed by the Commission on the Revised Policy Guidance in response to stakeholder input, including addressing certain District comments on the previous draft. The District would further like to thank Commission staff for taking the time to meet with the District to discuss the Revised Policy Guidance, as well as embracing a collaborative process for ports to address their unique circumstances related to sea level rise.

The development of the Policy Guidance comes at a time when the District is beginning to transition from climate action planning to climate adaptation and resiliency planning. In addition, *AB 691: State lands: granted trust lands: sea level rise*, requires the District to prepare and submit to the State Lands Commission (SLC) an assessment of how it proposes to address sea level rise.

However, the District continues to have concern with the Revised Policy Guidance regarding the application of policies and principles both, in general and specifically related to ports and port master plans. The comments in this letter are organized as follows: Section 1 addresses the port-specific concerns, Section 2 provides general comments, and Section 3 addresses legal implications.

## **Section 1: Ports and Port Master Plans**

**1. The Revised Policy Guidance is too centric on Local Coastal Programs to be optimally useful for the District.** The District provided comment on the 1<sup>st</sup> Draft of the Sea Level Rise Policy Guidance, requesting: "Clarification on what parts of the Policy Guidance are intended to be used by ports versus cities and counties." Other commenters expressed the same concern that the Policy Guidance treated port master plans and Local Coastal

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Programs (individually, LCP) the same, potentially undermining the Coastal Act's regulatory structure and the discrete authority granted to ports under the Coastal Act. Despite these comments, the Revised Policy Guidance still contains little to no additional guidance for ports or port master plans.

The Revised Policy Guidance states that it "uses the term 'LCP process' to refer to the LCP process, but many of the concepts included here are applicable to other planning processes, including Long Range Development Plans, Public Works Plans, and Port Master Plans." In its response to the District's comment above, the Commission stated, "The Coastal Act and certified LCPs remain the standard of review for actions in the Coastal Zone," and provided no acknowledgement of the unique challenges and statutory treatment of ports under Chapter 8 of the Coastal Act.

While the District agrees that the Coastal Act remains, among other laws, the standard of review for development in the Coastal Zone and the establishment of a port master plan, LCPs are inapplicable and irrelevant to ports. Unfortunately, the Revised Policy Guidance continues to solely focus on LCPs and does not account for (a) District's rights, obligations and authority under Chapter 8 of the Coastal Act, (b) the purpose and duties of the District under Sections 4, 19 and 87 (among others) of the San Diego Unified Port District Act (Port Act), and (c) the urban character of the District's jurisdiction.

On the following pages of this letter, District staff has made several recommendations that are intended to serve as solutions to improve the usefulness of the documents for ports.

**2. The Coastal Act and the San Diego Unified Port District Act.** Chapter 8 of the Coastal Act provides policies specific to ports in California, including the District. In enacting Chapter 8, the Legislature recognized the unique role ports play to the economy and found that ports "constitute one of the state's primary economic and coastal resources" and that they "are an essential element of the national maritime industry." (Coastal Act Section 30701.) Consequently, the intent of Chapter 8 is to provide policies that assist the concentration of port-specific, coastal-dependent land uses by "encourag[ing] [ports] to modernize and construct necessary facilities within their boundaries in order to minimize or eliminate the necessity for future dredging and filling to create new ports in new areas of the state." (Coastal Act Section 30701.) As a result, ports, as a coastal-dependent resource, have very specific goals and objectives as compared to most California municipalities and this is reflected in Chapter 8. For example, ports should be developed to give the highest priority to the use of existing land in harbors for navigational facilities, shipping industries and accessory facilities, and encourage rail services to port areas. (Coastal Act Section 30708(c) and (e).) Additionally, the Coastal Act dictates that ports shall not "eliminate or reduce existing commercial fishing harbor space" unless specific circumstances exist. (Coastal Act Section 30703.) Accordingly, a port master plan has a specific set of criteria that do not apply to other coastal zone municipalities (see Coastal Act Section 30711), giving ports more flexibility to ensure that they continue to grow the maritime industry, preserve commercial fishing and modernize while "minimizing [not eliminating] substantial adverse environmental impacts." (Coastal Act Sections 30708(a) and 30711.)

In 1962, the District was entrusted with the tidelands and submerged lands of the San Diego Bay for the people of California. Consistent with goals and policies of Chapter 8 of the Coastal Act, the District was formed “for the acquisition, construction, maintenance, operation, development and regulation of harbor works and improvement . . . and the promotion of commerce, navigation, fisheries and recreation.” (Port Act Section 4.) Section 87 of the Port Act includes the public trust uses allowed within the District’s jurisdiction, which were promulgated specifically to enable the District to acquire, construct, maintain, operate and develop harbor works and improvements, as well as promote commerce, navigation, fisheries and recreation for all of California. Those uses, include, but are not limited to, the establishment and improvements of harbors, marinas, wharves, docks, piers, slips, quays, hotels, restaurants, parking, commercial and industrial uses, recreational opportunities and all other works for the promotion of commerce and navigation. (Port Act Section 87.) Pursuant to the Port Act and the public trust doctrine, it is the District’s duty and obligation to develop a balance of such uses. Similar to Chapter 8 of the Coastal Act<sup>1</sup>, the Port Act requires the District draft and adopt a port master plan designating the public trust uses within its jurisdiction. (Port Act Section 19.) This requirement is intended to assist the District in carrying out its obligation to provide a variety of public trust uses to both the California residents and visitors.

Read together, Chapter 8 of the Coastal Act and the Port Act recognize the unique role of the District and require the District to continue to develop and modernize port resources and also maintain and improve those same vital resources for the entire State of California.

Unfortunately, by focusing on LCPs, the Revised Policy Guidance does not recognize the distinctive nature of ports and the District – both physically and statutorily. The District appreciates the efforts made in relation to LCPs and does not suggest delaying the Revised Policy Guidance as it applies to the same. Additionally, at this time (if ever), the District does not intend to debate the science in Revised Policy Guidance. However, the District requests that the Revised Policy Guidance exclude port master plans and, as part of the next steps, requests that the Commission and port stakeholders collaborate on further developing sea level guidance focused on ports and port master plans, taking into account the regulatory framework for ports. If Commission staff finds this to not be practical at this time, the District requests, as an alternative and at a minimum, that the document reflect the need for additional port-specific guidance and make appropriate references to the current version, while acknowledging subsequent specific guidance for ports may be created.

**3. Clarify how the document will address urban character of District tidelands.** Like all ports, the District’s land holdings include a wide range of land uses including maritime, commercial, industrial uses, and public recreation. While a portion of the District’s land holdings are open space and/or conservation areas, the remaining lands are predominately urban in character. These urbanized areas represent a continuum of uses from high-density development to undeveloped parcels. Additionally, much of the urbanized District-owned land is leased to developers and operators and was developed through the issuance of coastal development permits to the same.

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<sup>1</sup> While the Coastal Act allows for the adoption of a Port Master Plan, the Port Act requires such adoption. (Port Act Section 19.)

The Revised Policy Guidance recognizes the unique character of urban areas, stating: "in urban areas, sea level rise can present unprecedented challenges, and the options are less clear." [P 87.] However, there is no guidance addressing urbanized areas and how property-rights may be affected in these areas.

In further responses, the Commission states the Revised Policy Guidance provides only "a starting point for additional planning on the topic-specific level" and that permitting decisions for seawalls and other shoreline protective devices will continue to be evaluated on a case-by-case basis." While the District appreciates this acknowledgment, since the Revised Policy Guidance is intended to guide these permitting decisions and review processes, we request that it address the urbanized areas and in particular, the urbanized nature of ports in the same manner it addresses development outside of ports to provide a more useful starting point in evaluation of port development. This could be done through a subsequent guidance policy specific to ports, as requested under Comment No. 2, above.

**4. The Revised Policy Guidance lists "Ports" as "Coastal Act Resources" along with public access and recreation, coastal habitats, biological productivity, water quality, coastal agriculture, and archaeological and paleontological resources." (P 60.) Yet, despite this acknowledgement, the Revised Policy Guidance fails to provide any specific guidance for ports.** The District has a wide variety of land uses, many of which are coastal-dependent use such as marinas, maritime terminals, shipbuilding operations, commercial fishing harbors, etc. Because of the distinct statutory context that regulates ports and the fact that ports and their coastal-dependent land uses are unique Coastal Act resources, we respectfully request that the Coastal Commission draft separate sea-level guidance for ports. Alternatively, and at a minimum, District staff recommends that the document reflect the need for additional port-specific guidance and make appropriate references to the current version, while acknowledging subsequent specific guidance for ports may be created with further review and comments from those stakeholders. The first alternative is the District's preference and would allow the Commission to adopt the guidance for LCPs without delay.

**5. The lack of port-specific direction comes at a time when the District is: A) Responding to AB 691 and B) updating its port master plan.**

**A. Responding to AB 691**

Like the Coastal Act and Port Act, AB 691 (codified as Public Resources Code Section 6311.5) recognizes the importance of ports, as well as other coastal resources, to the state tidelands. It states: "Port activities in California generate an estimated \$7 billion in state and local tax revenues annually and employ more than 500,000 people in California. Nationwide more than two million jobs are connected to California ports." The Bill also recognizes the fact that "[t]he effects of climate change and sea level rise will have enormous implications for the state's economic and social future, and have the potential to have a wide range of impacts to critical infrastructure, such as schools, roads, hospitals, emergency facilities, wastewater treatment plants, airports, ports, and energy facilities."

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For these reasons and others, AB 691 requires the District to submit a sea-level rise assessment to the SLC by July 1, 2019. In particular, Public Resources Code Section 6311.5(d) provides that the District must consider and use relevant information from a variety of sources specifically listed in the bill. Additionally, the District's assessment must include the following (as well as other items).

"An assessment of the impact of sea level rise on granted public trust lands, as described in the Resolution of the California Ocean Protection Council on Sea-level Rise and the latest version of the State of California Sea-Level Rise Policy Guidance."  
[Public Resources Code Section 6311.5(d)(1)]

Although the Commission's Revised Policy Guidance is not listed as one of the documents to be consulted in AB 691, its value to those ports that wish to consult it in promulgating the AB 691 assessment is severely limited by not providing port-specific guidance.

### **B. Incorporate Sea Level Rise into Port Master Plans**

The District is currently in the process of updating the San Diego Port Master Plan. The District follows in the footsteps of the recently certified, updated Port of Los Angeles Master Plan (Amendment No. 28).

The Commission staff recommendation to certify the Port of Los Angeles Master Plan Amendment No. 28, dated February 20, 2014, included a section related to "Conformance with the Coastal Act". The Commission specifically identified sea level rise as an issue area, stating: "An issue not addressed in the [Port of Los Angeles] Plan amendment and not covered in the certified plan is the issue of sea level rise." [W17a.] In addition, the report states: "The Port [of Los Angeles] is taking a proactive role in planning for sea level rise and although they were not prepared to address sea level rise in this amendment, the Port [of Los Angeles] has agreed to address this issue and incorporate it into the PMP through another amendment in the near future." (W17a.) It appears by the preceding statements from Commission staff, that Commission staff believes that sea level rise needs to be addressed in Port Master Plans. The Revised Policy Guidance reinforces this expectation stating: "Address sea level rise science in all applicable coastal management and decision-making processes, including Local Coastal Programs (LCPs), Port Master Plans (PMPs)..." (P 34.)

The Commission staff's expectations for sea level rise policies in a port master plan reinforce the need for specific policy guidance for ports and port master plans, including the authority to require such policies. Therefore, the District requests that the Revised Policy Guidance not apply to port master plans and port-specific guidance be provided in separate policy guidance as part of the next steps with additional input from port stakeholders, as outlined previously.

The District also requests that adaptation strategies specific to ports be presented to avoid conflicts with the Port Act and Chapter 8 policies that promote the modernization of ports, the development of harbors and supporting facilities, as well as commercial fishing.

## Section 2: General Comments

In addition to port-specific concerns, the District also has the following general comments and recommendations on the Revised Policy Guidance.

**6. Allow for collaboration to distribute risks associated with sea level rise.** The Revised Policy Guidance puts a great deal of responsibility on the local authorities and property owners. The Revised Policy Guidance's intent is to "[e]nsure that current and future risks are assumed by the property owner." (P 127.) As the landowner of the San Diego Bay tidelands and submerged waters, this policy puts the full burden of risk on the District. Public Resources Code Section 2(4)(e), as part of AB 691, states: "In addressing the impacts of sea level rise, a local trustee shall collaborate with its lessees, appropriate local, state, and federal agencies, and other users of the granted public trust lands." This collaborative approach is the District's preferred method.

Unlike a municipal or private landowner, the District does not (and cannot) use the tidelands and submerged waters for any municipal or private interest. (See Port Act Section 87 (codifying the public trust uses allowed in the District.) Rather, the District legally holds and plans the tidelands and submerged waters for the People of California. Additionally, the vast majority of District owned-lands are leased for development and operation of the public trust uses. Placing the risk and liability on the District concerns us, especially when the tidelands are operated (with District oversight) through leaseholds. Accordingly, because of those distinctions, the District suggests revisions to the language that would allow public trust grantees and the District to solve this issue collaboratively with its tenants, other governmental agencies like the SLC charged with oversight of public trust land grantees, as well as public stakeholders, and not unilaterally as a landowner. Alternatively, if the policy is not relevant to ports or other holders of public trust lands, then the District would appreciate language be added to state so.

**7. Clarify how the document will be used as an interface between the Coastal Act and the California Environmental Quality Act (CEQA).** Although CEQA does not require the analysis of the impacts of sea level rise on projects (see *Ballona Wetlands Land Trust vs. City of Los Angeles* (2011) 201 Cal.App.4th 455), the District often acknowledges the importance of sea level rise as part of its permitting process. The District appreciates the Commission's response to comments on the previous draft of the Policy Guidance clarifying that the Commission would not apply the guidance in the context of CEQA.

However, we request that further clarification be provided in the Revised Policy Guidance that it is not intended to be used for (1) the establishment of significance thresholds under CEQA, (2) constitute a binding plan or policy in the context of consistency analyses required under CEQA, and (3) the Adaption Strategies do not represent mandated mitigation measures in the CEQA process. This is especially pertinent under Chapter 8 of the Coastal Act, which requires the District to "minimize" adverse environmental impacts, not eliminate them. Additionally, CEQA requires the adoption of all "feasible" mitigation measures to lessen significant environmental impacts. Similar to the Coastal Act, feasibility considers legal, technical, economic, environmental and social factors. (CEQA Guidelines Section 15346.)

Without the above-mentioned clarification, requiring adaptation measures that may be infeasible as mitigation or project features may turn CEQA on its head requiring unnecessary Environmental Impact Reports and Statements of Overriding Consideration.

**8. Revise “Step Three of the Planning Process for Coastal Development Permits”.** The Revised Policy Guidance further states: “In the context of a Coastal Development Permit (CDP) application, the goal is to understand how sea level rise will impact a specific site and a specific project over its expected lifetime so as to ensure that the proposed development is safe from hazards and avoids impacts to coastal resources.” (P 48.) The Revised Policy Guidance also provides further detail in the analysis of coastal resource impacts, directing project applicants to: “Determine how the project may impact coastal resources considering how sea level rise may alter the resources over the expected lifetime of the project.” (“Step Three of the Planning Process for Coastal Development Permits”, P 19.)

As directed by the Revised Policy Guidance, project applicants should analyze the potential hazards from sea level rise using best available science. (P 15.) The current sea level rise science addresses the “physical effects of sea level rise” including flooding and inundation; wave impacts; erosion; changes in sediment supply and movement; and saltwater intrusion. (P 49.) For project applicants to perform Step Three, it appears they must also understand the *secondary* impacts to evolving resources (e.g., sensitive habitat and/or marine resources) resulting from the primary physical impacts caused by sea level rise. The step appears unreasonable in the number of variables to address and outcomes to interpret. In addition, Step Three implies the project applicant is responsible for future impacts to coastal resources from sea level rise, not necessarily just from the project development, a concept that the District questions.

The District requests clarification and possible revision of Step Three.

**9. Recommend adding “Updates to Building Codes” as an Adaptation Strategy.** Adaptation Strategy ‘A.8’ recommends that LCPs: “Update development siting and design standards to avoid, minimize, and reduce risks from coastal hazards and extreme events.” (P 128.) The District recommends adding direct language to the policies about the use of updated building codes as part of an “accommodation” strategy.

**10. Allow for greater flexibility in adaptation responses for coastal-dependent infrastructure.** Adaptation strategy “#27a” recommends: “Design [of] coastal-dependent infrastructure to accommodate worst case scenario sea level rise.” (P 138.) The preceding strategy is problematic for the District’s project applicants in the substantial development costs associated with accommodating worst-case sea level rise, which by itself is an evolving concept based on scientific advancements. Moreover, the District is unclear as to where this authority to require potentially infeasible improvements is rooted. The District suggests deleting “worst case” language and allow for the siting, design, and adaptation strategies to

align the results of the vulnerability assessment. This would address sea level rise concerns in a feasible manner.<sup>2</sup>

**11. Clarify the intent of “incremental” implementation of adaptation strategies.** The Revised Policy Guidance states: “In many cases, strategies will need to be implemented incrementally as conditions change, and planners, project applicants, and partners will need to think creatively and adaptively to ensure that coastal resources and development are protected over time.” (P 20.) This statement suggests a phased, *evolving* approach to implementation of adaptation strategies. This is potentially problematic for the District’s project applicants in the level of uncertainty it may create in regard to project features and cost. In addition, it puts greater responsibility on the District (i.e., the property owner) for long-term application of implementation strategies. The District requests the Commission clarify the intent of “implemented incrementally as conditions change” and how it will be incorporated into the CDP process.

**12. Distinguish between coastal-dependent and noncoastal-dependent uses when describing restrictions on new development or existing structures.** Coastal Act Section 30235 provides that seawalls and other forms of construction that alter natural shoreline processes “shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply.” (P 160.)

The District provided comment pertaining to the issue on the 1<sup>st</sup> Draft of the Sea Level Rise Policy Guidance, stating: “The Policy Guidance should more clearly distinguish how it will apply to existing development, new development and redevelopment, in highly urbanized environments, like those located in and around San Diego Bay. Specifically, the document should clarify its application to existing development, new development and redevelopment on State tidelands and open water.”

As the District’s Tidelands properties are, and will be, primarily composed of coastal-dependent uses or existing uses, and consistent with Section 30235 and Chapter 8 of the Coastal Act, may require seawalls or other shoreline protection devices, we are still concerned that the Revised Policy Guidance will limit or prohibit shoreline protection despite the Coastal Act’s allowance of such and if this is the case, we are unsure where such authority would originate. For clarification purposes, we respectfully request a statement be included, stating that the Revised Policy Guidance is intended to allow for the exploration of adaptation measures, but is not intended to limit or prohibit the application of Coastal Act Section 30235 to protect existing structures and coastal-dependent resources.

Additionally, throughout the Policy Guidance, the District recommends distinguishing between “coastal-dependent” and “non-coastal dependent” in the context of shoreline protection.

**13. Clarify the definition of “at-risk”.** The Revised Policy Guidance states: “LCPs should encourage and require, as applicable, existing at-risk structures to be brought into

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<sup>2</sup> “‘Feasible’ means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” (Coastal Act Section 30108.)

conformance with current standards when redeveloped. Improvements to existing at-risk structures should be limited to basic repair and maintenance activities and not extend the life of such structures or expand at-risk elements of the development, consistent with the Coastal Act." (P 36.) While we understand that a CDP may be needed for certain major repairs or redevelopment of "at-risk" structures and in turn, those structures' "life" may be extended, the District is unclear on how the Coastal Act prohibits such CDPs, provided the development is consistent with a port Master Plan. It is also unclear whether the phrase "at-risk" pertains to the location of a development or that the building standards are inadequate to withstand the hazards associated with sea level rise. Consequently, the District requests clarification of the definition of "at-risk", as well as how issuance of such CDPs would be prohibited.

Additionally, if this policy does not apply to ports or port master plans, we request such a statement be added to the Revised Policy Guidance.

**14. Recommend clarification of the definition and intent of the phrases: "acceptable levels of risk" and "community priorities."** The Revised Policy Guidance states: "The goal of updating or developing a new LCP to prepare for sea level rise is to ensure that adaptation occurs in a way that protects both coastal resources and public safety and allows for sustainable economic growth. This process includes identifying how and where to apply different adaptation mechanisms based on Coastal Act requirements, acceptable levels of risk, and community priorities." (P 26.) The District requests additional criteria be added for tideland trust grantees, such as the District, where enabling legislation and grants require a tidelands trustee to develop and maintain a balance of public trust uses for the People of California. Accordingly, we request the proceeding sentence be changed to state:

"This process includes identifying how and where to apply different adaptation mechanisms based on Coastal Act requirements, acceptable levels of risk, community priorities, and the enabling legislation and/or grants for trustees of public trust tidelands and submerged waters."

Even with this clarification, the District still requests that the Revised Policy Guidance be inapplicable to port master plans and separate guidance be developed specific to ports as part of the next steps, as previously outlined.

**15. Clarify whether the "expected life" of projects is a standard for permit authorization.** The District provided comment pertaining to the issue of "life expectancy" on the 1<sup>st</sup> Draft of the Sea Level Rise Policy Guidance, stating: "The SLR Policy Guidance includes a discussion that states the proposed project life expectancy of a project may need to be shortened, if constrained by hazards. However, it is unclear how this approach would be handled during the regulatory review process. To District staff's knowledge, project life expectancy is not associated as a standard with any other natural hazard and the Policy Guidance does not provide any direction on how this approach would be handled in practice by local or regional agencies. Further direction and a rationale for this approach should be provided to help the District clearly understand the intent of this concept."

In the Revised Policy Guidance, the “Planning Process for Coastal Development Permits” directs applicants to evaluate impacts over the “expected lifetime of the project” (P 19) and to “Minimize hazard risks to new development over the life of the authorized development. (P 37.) It is still unclear how this approach will be handled during the regulatory review process or whether resulting limitations on development are permissible considering the California Supreme Court’s review of *Lynch v. California Coastal Commission*.

Accordingly, similar to past Commission-issued permits and other commenter’s comments, the District instead requests the Revised Policy Guidance provide that CDPs should not be limited to the “expected life” of the structure. Instead, if necessary, an applicant would be required to demonstrate mitigation to Coastal Resources from such development at reasonable intervals.

**16. Allow for further consideration of the economic and financial constraints of implementing sea level rise policies for ports.** The Revised Policy Guidance uses phrases such as “Provide for maximum protection,” (P 37) or “Use a precautionary approach by planning and providing adaptive capacity for the highest amounts of possible sea level rise,” (P 13) “modify project if impacts cannot be avoided” (P 19) and “Require full mitigation of unavoidable coastal resource impacts” to name a few. Such concepts may be infeasible. Accordingly, the District suggests the insertion of qualifiers “...when feasible” or “when practical” to allow consideration of the technological, legal, social, environmental and economic constraints of adaptation strategies. The use of this language is consistent with language found in the Coastal Act, including its definition of “feasible,” Chapter 8 requirements to minimize adverse environmental effects, and as discussed in Comment No. 7, would not conflict with CEQA’s requirements that all feasible mitigation measures be implemented.

**17. Expansion of Public Trust Tidelands.** The Policy Guidance recommends Rolling Easements as an adaptation strategy. (P 132.) The District does not fully understand this concept from a practical and legal standpoint. A key feature of rolling easements is the prohibition of shoreline armoring, preserving public access to the shore. This means that if private land borders the public beach, as the shoreline moves inland, what was once private property will become the public’s right to access. However, under the “law of avulsion”, when the shoreline migrates, the property line does not move. This can be resolved through agreements with and cooperation of the private property owners, possibly through the Transfer of Development Rights, compensation, or through regulations by amending zoning ordinances. For the District – holder of public trust lands – this concept could have unintended consequences. For example, residential and other non-public trust uses are prohibited within the District. If sea-level rise expands the mean-high tideland inland and consequently, the District’s jurisdiction over residential property, the District would be prohibited from taking such jurisdiction or entering into any agreement to allow for the District to take over non-public trust uses. Accordingly, the District requests, as part of the next steps, the Commission clarify the matter.

**18. The District has concern regarding the following phrases and minor inconsistencies (in bold) and request that the Commission provide clarification.**

- Principles #2 – “Use the best available science to determine locally relevant and context-specific sea level rise projections for all stages of planning, project design, and permitting reviews.” and #4 “Use a precautionary approach by planning and providing adaptive capacity for the highest amounts of possible sea level rise.” (P 13.) The two principles appear to be in conflict with one another. The first is clearly tied to specific and known scientific data, whereas the second is based on the precautionary principle and not necessarily specific and known data.
- “4. Use a precautionary approach by planning and providing adaptive capacity for the **highest** amounts of possible sea level rise.” (P 13.) The District is concerned about the feasibility – economic, technological, legal, environmental and social factors - of the principle.
- “7. Minimize hazard risks to new development **over the life** of authorized structures.” (P 13.) This can be challenging when life expectancy may vary greatly depending on circumstances and especially, when adaption measures may limit or lessen life expectancy for the same.
- “8. Minimize coastal hazard risks **and resource impacts** when making redevelopment decisions.” (P 13.) How would this apply to ports?
- “11. Provide for **maximum** protection of coastal resources in all coastal planning and regulatory decisions.” (P 14.) Maximum protection again may be infeasible and contradict with CEQA and Chapter 8 of the Coastal Act, as well as the Port Act and the associated duties of the District.
- “12. Maximize natural shoreline values and processes; **avoid expansion** and minimize the perpetuation of shoreline armoring.” (P 14.) How would this affect ports, existing structures and other coastal-dependent uses? Additionally, does this limit living shorelines, which may provide protection while increasing coastal resources?
- “13. Recognize that sea level rise will cause the public trust boundary to move inland. Protect public trust lands and resources, including as sea level rises. New shoreline protective devices should not result in the loss of public trust lands.” (P 14.) We aren't clear on the intent of this statement. Wouldn't shoreline protective devices preserve public trust lands.
- “15. Address the **cumulative** impacts and regional contexts of planning and permitting decisions.” (P 14.) This sounds like CEQA compliance and we prefer it be addressed as such.
- “16. **Require full mitigation of unavoidable** coastal resource impacts related to permitting and shoreline management decisions.” (P 14.) This is in direct conflict with CEQA requirements and Chapter 8's requirement for minimizing – not eliminating – adverse environmental effects.
- Under the graphic, Planning Process for Coastal Development Permits, Step 4. – Identify project alternatives to both avoid resource impacts and minimize risks to the project, Bullet 3: **Modify project if impacts cannot be avoided.**” (P 19.) The phrase seems to indicate full mitigation and again, seems inconsistent with CEQA and the Coastal Act.
- “LCPs should encourage and require, as applicable, existing at-risk structures to be brought into conformance with current standards when redeveloped. Improvements to

existing at-risk structures should be limited to basic repair and maintenance activities and not extend the life of such structures or expand at-risk elements of the development, consistent with the Coastal Act.” (P 36.) Recommend the phrase be modified to exclude coastal-dependent uses, existing structures and port-specific obligations under Chapter 8 of the Coastal Act.

- “**Any actions** to minimize risks to new development should not result in current and/or future encroachment onto public lands or in impacts to coastal resources inconsistent with the Coastal Act.” (P 37.) We prefer that this be caveated to any feasible actions.
- “LCPs and **coastal permits should require** recorded assumptions of risk, “no future seawall” conditions, and other appropriate mitigation measures to internalize risk decisions with the private land owner.” (P 37.) As the owner of public trust tidelands and submerged waters along San Diego Bay and a port, we request that this be revised to include a collaborative process and indicate that seawalls require a CDP on a case-by-case basis depending on circumstances and consistency with the Coastal Act.
- “New and existing development, redevelopment, and repair and maintenance activities as well as associated sea level rise adaptation strategies should **avoid or minimize impacts to coastal resources**, including public access, recreation, marine resources, agricultural areas, sensitive habitats, archaeological resources, and scenic and visual resources in conformity with Coastal Act requirements.” (P 37.) This statement should be revised to clarify that ports are coastal resources or, as we have requested, the guidance not apply to ports and separate guidance be issued for ports as a next step.
- “However, if it is not feasible to site or design a structure to **completely avoid** sea level rise impacts, the applicant may need to modify or relocate the development to prevent risks to the development or to coastal resources. Other changes, such as managed retreat or added floodproofing, may be useful as **adaptive strategies that can be used after the initial project completion.**” (P 109.) We have concerns that “completely” avoiding sea level rise impacts may not be a requirement of the Coastal Act – especially under Chapter 8 – and request that the statement be changed to “minimize where feasible.” Also, these two phrases appear in conflict with one another. On the one hand, the applicant must completely avoid sea level rise impacts and on the other, they can apply adaptive strategies *after* project completion. This provides flexibility, but also an element of uncertainty in the development process.
- “Analyses **should be** conducted by a certified **Civil Engineer** with expertise in coastal processes.” (P 126.) Considering this is an evolving practice, we recommend the addition of the phrase “or equivalent”.
- “A.8 Update development siting and design standards to avoid, minimize, **and** reduce risks from coastal hazards and extreme events:” (P 128.) Recommend changing to “or” to be consistent with subsequent paragraph.
- “Define “redevelopment” as, at a minimum, replacement of 50% or more of an existing structure.” [P131.] and “Require redevelopment to meet the standards for new development.” (P 132.) We understand that certain redevelopment projects – like interior remodeling, exterior painting or façade improvements, roof or window replacement – are not considered “redevelopment” as the phrase is being used. We request clarification be included.

**19. Request the development of port and port master plan guidance as part of Next Steps.** The Revised Policy Guidance allows for next steps, including the “producing additional guidance documents.” (P 169.) The District request Coastal Commission clarify that the Revised Policy Guidance doesn’t apply to ports or port master plans, which would not delay adoption of the policy for municipalities and LCPs, and produce separate guidance specific to ports and port master plans in collaboration with port stakeholders. That guidance could then consider the unique character of ports; the rights, obligations, and authority under Chapter 8 of the Coastal Act and ports enabling legislation; and the requirements of AB 691.

### **Section 3: Legal Implications**

The District has some concerns about the legal implications presented by the Revised Policy Guidance, as follows:

**20. The Policy Guidance should be processed and reviewed under the Administrative Procedures Act before being applied to ports.** The District is grateful for the clarification that the Revised Policy Guidance is not intended to be a regulation. However, we remain concerned that the Commission and Commission staff may use the Revised Policy Guidance as a rule or standard of general application when determining Coastal Act consistency. We request the Commission and Commission staff be mindful of such usage without following Administrative Procedures Act (APA).<sup>3</sup> We also trust that such usage will not occur.

**21. Takings Issues.** The District appreciates the acknowledgement in Chapter 8 that “[v]arious recommendations of [the Revised Policy Guidance] may give rise to takings concerns.” The District remains concerned, however, that the Revised Policy’s Guidance’s approach of having the Commission and local jurisdictions address such issues on a case-by-case basis with little direction will result in an inconsistent application of the Policy Guidance, an increase in regulatory takings claims by permittees and a corresponding increase in costs to local jurisdictions and the District in defending litigation challenges. Certain Adaption Strategies recommendations propose specific limitations on property rights that are the subject on ongoing litigation involving takings issues. While the Revised Policy Guidance provides that “legislatively adopting rules that establish the exact criteria for determining when to require [such] exactions and, if so, their magnitude, may also reduce an agency’s exposure to takings claims,” the District requests that the guidance go further and provide specific recommendations for such rules and criteria based on input from legal counsel from local jurisdictions and stakeholders. Based on that input, the District further requests that the Revised Policy Guidance provide the type of detailed step-by-step guidance that it provides for the Port Master Plan adoption CDP permitting decisions for how to engage in such processes in a manner that avoids takings.

The District is dedicated to protecting and improving the environmental conditions of San Diego Bay, State tidelands, and neighboring communities, in balance with maintaining a

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<sup>3</sup> Please also note Public Resource Code (APA) Section 30333’s exemption of interim guidance/guidelines pursuant to Coastal Act Section 30620(a), which applied prior to May 1, 1977, as well as such application that arguably excludes Ports.

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thriving, enjoyable, and economically vital waterfront. We have already begun discussions with SLC and California Coastal Commission regarding the need to evaluate sea level rise, including but not limited to compliance with AB 691, and look forward to further collaboration with the SLC and California Coastal Commission as we address this important issue.

If you have any questions regarding these comments, please contact at (619) 686-6473 or via email at [jgiffen@portofsandiego.org](mailto:jgiffen@portofsandiego.org).

Respectfully,

A black rectangular redaction box covering the signature of Jason H. Giffen.

Jason H. Giffen

Director, Environmental and Land Use Management

cc: Randa Coniglio, President/CEO

John Bolduc, Vice President, Public Safety/Chief of Harbor Police

Rebecca Harrington, Deputy General Counsel

D2 #1020879