PACIFIC LEGAL FOUNDATION

October 24, 2017

Mr. Patrick Huber
California State Lands Commission
100 Howe Avenue Suite 100-S
Sacramento, CA 95825

VIA E-MAIL: CSLC.PublicAccess@slc.ca.gov

Re: Comments on Draft Public Access Guide to California's Navigable Waters

Dear Mr. Huber:

The following comments are submitted on behalf of Pacific Legal Foundation (PLF), regarding the California State Lands Commission's Draft Public Access Guide to California's Navigable Waters (Guide). PLF appreciates the opportunity to comment on the draft Guide. As an advocate for property rights, PLF's comments focus on several issues with the proposed Guide including its lack of legal effect, the scope of the public trust doctrine, and just compensation requirements under the Takings Clause of the Fifth Amendment.

STATEMENT OF INTEREST

Pacific Legal Foundation is the oldest donor-supported public interest law foundation of its kind. Founded in 1973, PLF provides a voice for those who believe in limited government, private property rights, balanced environmental regulation, individual freedom, and free enterprise. Thousands of individuals across the country support PLF, as do numerous organizations and associations nationwide.

Since 1973, Pacific Legal Foundation has litigated in support of property rights and has participated, either through direct representation or as *amicus curiae*, in nearly every major property rights case heard by the United States Supreme Court in the past three decades, including *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Sackett v. U.S. Envtl. Prot. Agency*, 566 U.S. 120 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

PLF has also been involved with many cases dealing with the scope of the public trust doctrine. *See, e.g., Envtl. Prot. Info. Ctr. v. California Dep't of Forestry & Fire Prot.*, 187 P.3d 888, 925-26, 44 Cal. 4th 459, 513-16 (2008) (addressing a proposed expansion of public trust doctrine over wildlife); *LBLHA, LLC v. Town of Long Beach*, 28 N.E.3d 1077 (Ind. Ct. App. 2015) (holding that the state is a necessary party in dispute over ownership of lakefront land); *State ex rel. Merrill v. Ohio Dep't of Natural Res.*, 955 N.E.2d 935, 950, 133 Ohio St. 3d 30, 44 (2011) (holding that "the public trust in Lake Erie extends to the natural shoreline, which is the line at which the water usually stands when free from disturbing causes"); *Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009) (addressing legislative expansion of public-beach access effecting a taking of private property).

Finally, PLF attorneys have contributed scholarly literature on the public trust doctrine and the background principles of property law. *See, e.g.*, David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis)Use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339 (2002); James S. Burling, *Private Property Rights and the Environment After* Palazzolo, 30 B.C. Envtl. Aff. L. Rev. 1 (2002).

COMMENTS

I. A government issued guide that has not undergone public rulemaking procedures has no legal effect

While the Guide purports not to be a regulation under Cal. Govt. Code § 11342.600, Guide at 5 n.2, PLF must emphasize that, as such, the Commission may not give the guide any legal effect, including relying on the Guide for determination of future cases or actions.

California law defines "regulation" as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." Cal. Gov't Code § 11342.600. Regulations include "[a] written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the agency will decide future cases" because such a statement "is

essentially legislative in nature even if it merely interprets applicable law." *Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal. 4th 557, 574-75, 927 P.2d 296, 307 (1996); *see also* Cal. Gov't Code § 11346 ("[T]he provisions of this chapter are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted . . . .").

If a rule constitutes a regulation, then "it may not be adopted, amended, or repealed except in conformity with 'basic minimum procedural requirements.'" *California Advocates for Nursing Home Reform v. Bonta*, 106 Cal. App. 4th 498, 507, 130 Cal. Rptr. 2d 823, 829 (2003) (quoting Cal. Gov't Code § 11346(a)). Among the procedures an agency must adhere to before adopting a regulation are:

> The agency must give the public notice of its proposed regulatory action; issue a complete text of the proposed regulation with a statement of the reasons for it; give interested parties an opportunity to comment on the proposed regulation; respond in writing to public comments; and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law, which reviews the regulation for consistency with the law, clarity, and necessity.

California Advocates for Nursing Home Reform, 106 Cal. App. 4th at 507, 130 Cal. Rptr. 2d at 829 (internal citations omitted). "Any regulation or order of repeal that substantially fails to comply with these requirements may be judicially declared invalid." *Id.* (citing Cal. Gov't Code § 11350); *see also Morning Star Co. v. State Bd. of Equalization*, 38 Cal. 4th 324, 333, 132 P.3d 249, 254 (2006).

Here, the Commission has decided to not conduct the procedures required by the California Administrative Procedure Act in adopting a regulation and has explicitly stated that the Guide is not a regulation. As a result, the Commission may not give the Guide any legal effect, rely on the Guide to decide future cases, or use the Guide to justify future actions by the agency. To do so would violate the law regarding how an agency can adopt regulations.

Despite the Guide having no legal effect, the Commission should strive to restate accurately the law related to the public trust doctrine. Some portions of the Guide

either misstate or misrepresent the law, and the Commission should amend the Guide before it is finalized.

II. Both historical interpretations and relevant case law limit the scope of the public trust doctrine

The Guide implies that the scope of the public trust doctrine is broad, applies to nearly all waters in California, and protects a nearly limitless amount of uses. In reality, the scope of the public trust doctrine is much more narrow and limited by both historical interpretations of the doctrine and relevant case law. Therefore, the Guide should be amended to recognize these limits.

While the Guide purports to only restate the California Supreme Court's flawed opinions, the Guide should recognize the criticisms of California's application of the doctrine and how it differs from the application in other states. Traditionally, the public trust doctrine in this country applied only to tidelands and navigable waters. *See Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 436-37 (1892). And when it applied, the trust protected only navigation, commerce, and fishing uses. *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 521, 606 P.2d 362, 364-65 (1980). During the latter half of the twentieth century, however, the California Supreme Court expanded the trust to include shorezones of nontidal navigable waters. *California v. Superior Court (Lyon)*, 29 Cal. 3d 210, 625 P.2d 239 (1981). Other cases from the court held that the doctrine applies to diversions from tributaries of navigable waters, *Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 437, 658 P.2d 709, 721 (1983), and that it protects recreational and ecological uses, *Marks v. Whitney*, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 379-81 (1971). These decisions were a radical expansion of the public trust doctrine and were likely based on flawed interpretations of precedent from the United States Supreme Court. *See* Janice Lawrence, Lyon *and* Fogerty*: Unprecedented Extensions of the Public Trust*, 70 Cal. L. Rev. 1138 (1982). Consequently, other courts have criticized the California Supreme Court's decisions. *See Lyon v. W. Title Ins. Co.*, 178 Cal. App. 3d 1191, 1203, 224 Cal. Rptr. 385, 393 (Ct. App. 1986) ("We are not alone in our criticism of *Lyon* . . . .").

Even though the Court greatly expanded the scope of the public trust doctrine, it is still not unlimited. Importantly, California courts have consistently maintained that a necessary (although not sufficient) condition for application of the public trust is an immediate and direct connection to navigable surface water. *See*

California v. Superior Court (Lyon), 29 Cal. 3d 210, 227, 625 P.2d 239, 249 (1981) ("[T]he applicability of the public trust doctrine does not turn upon whether a body of water is subject to the ebb and flow of the tide, but upon whether it is navigable in fact."); *Personal Watercraft Coal. v. Bd. of Supervisors*, 100 Cal. App. 4th 129, 144, 122 Cal. Rptr. 2d 425, 437 (2002) ("The public trust doctrine is no longer confined to coastal areas lapped by the waves of the Pacific, but extends to nontidal bodies such as inland waterways and lakes, the lands beneath them, as well as any streams and tributaries that affect any navigable waters."). *Cf. Golden Feather Community Ass'n v. Thermalito Irrig. Dist.*, 209 Cal. App. 3d 1276, 1284-87, 257 Cal. Rptr. 836, 841-44 (1989) (declining to extend the public trust doctrine to man-made reservoirs and non-navigable streams that do not affect navigable waters). Accordingly, the Guide should be amended to reflect the limits on the scope of the public trust doctrine.

III. California's title over the banks and beds of certain navigable waters is limited by applicable federal and state case law

The draft Guide implies that California retains title and control over a large number of waters within the state. *See* Guide at 30 ("Upon admission to the Union in 1850, California gained . . . pursuant to the Equal Footing Doctrine . . . ownership of the bed and banks of its tidal and 'navigable' waters."). As a result, according to the draft Guide, California "has more power to control those waterways and lands" than waters that do not meet the federal definition of navigability. Guide at 31.[1] The Guide, however, does not properly restate the scope of the equal footing doctrine.

Under the equal footing doctrine, California's gained title only to the beds of waters that were navigable in fact at the time California became a state. *PPL Montana, LLC v. Montana,* 565 U.S. 576, 591 (2012) ("The title consequences of the equal-footing doctrine can be stated in summary form: Upon statehood, the State gains

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[1] Citing *Marks*, the Guide states that California also has more control over these waters "whether or not title has since passed to a private party." Guide at 31. *Marks* does not mention the equal footing doctrine and, as stated above, its expansion of the public trust doctrine is extreme. But even if the draft Guide's recitation of *Marks* were correct, it would only reiterate the need to properly define the scope of lands acquired pursuant to the equal footing doctrine.

title within its borders to the beds of waters then navigable (or tidally influenced . . .)."). Although the draft Guide mentions the equal footing doctrine, it does not correctly state how it limits state authority over certain waters. For example, whether a state gained title to the bed of a certain body of water is determined not by present-day use, but rather "whether the river segment was susceptible of use for commercial navigation at the time of statehood." *PPL Montana*, 565 U.S. at 601. Furthermore, title is determined on a segment-by-segment basis, meaning that even if California gained title to one portion of a body of water, it may not have gained title to the entire body of water. *Id.* at 593. These aspects of the equal footing doctrine are important because they form the basis for litigation determining the scope of California's jurisdiction over certain waters. *See SOS Donner Lake v. California, et al.*, TCU-16-6532 (California Superior Court, County of Nevada).

Additionally, the draft Guide implies that California holds title to a greater number of accreted lands than is supported by the relevant case law. The draft Guide correctly points out that when land adjacent to a waterway grows from natural causes that upland owners gain title to the new shoreline, and that the state gains title to shores that grow via artificial means, but fails to properly distinguish between natural and artificial accretion. Guide at 40. The Guide's statement that "Accretion is not artificial merely because human activities far away and long ago contributed to it," Guide at 40, implies that the many different type of activities can be labeled as "artificial accretion." In fact, what constitutes "artificial accretion" is "limited to human activities in the immediate vicinity of the accreted area." *Cal. ex rel. State Lands Comm'n v. Superior Court (Lovelace)*, 11 Cal. 4th 50, 78, 900 P.2d 648, 665 (1995). Accordingly, the Guide should be amended to reflect that the definition of "artificial accretion" is narrow and, in nearly all cases, private landowners hold title to accreted land.

IV. The Takings Clause of the U.S. Constitution requires the state of California to pay just compensation when it takes private property

In the draft Guide, the Commission only briefly discusses issues of takings and just compensation, and, for the most part, the analysis is inadequate. Guide at 26-27. The draft maintains that the state must compensate property owners when it exercises the public trust easement and takes lawful possession of property. Guide at 26. The Guide also provides that the state must compensate property owners if it removes lawfully constructed structures or retakes absolute title to the land. Guide

at 27. In the final version of the Guide, the Commission should more thoroughly explain the applicable law and recognize that the law provides strong protections for property owners. This will ensure that state agencies are better informed of their duties under the Constitution and will avoid inadvertent takings liability.

The Fifth Amendment to the United States provides "nor shall private property be taken for public use, without just compensation" and applies to the states through the Fourteenth Amendment. *Palazzolo*, 533 U.S. at 617. This protection means that state and local governments cannot encroach upon or interfere with property rights without paying compensation to the landowner. *See id.* This protection also applies to the judiciary, and means that a state court cannot, through its decision-making, eliminate what had previously been a well-established property right, unless the state compensates the property owner for the loss. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 714-15 (2010) (plurality opinion). *See also County of Los Angeles v. Berk*, 26 Cal. 3d 201, 213, 605 P.2d 381, 389 (1980) (considering whether retroactive application of a judicial decision can "be deemed to so betray the legitimate and reasonable reliance interests of property owners that its application to them and their property amounts to an unconstitutional taking of vested rights"); *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985) (holding that a state court decision adopting the riparian ownership doctrine cannot divest property owners of pre-existing rights to divert water).

A taking of private property can occur in different ways. First, a physical invasion on real property categorically warrants compensation. *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (physical occupation of property requires compensation). Second, a state or local government will have to pay just compensation when a regulation considerably interferes with the right to own or use property. For example, a regulatory taking that denies all economic value requires compensation. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992). Application of the public trust could diminish a property owner's rights so as to deny all economically viable use of the property. *See id.* A regulatory taking can also occur if the economic impact of a regulation undermines the investment-backed expectations of the property owner at the time he acquired the property. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Thus, even if the expansion of the public trust beyond its traditional scope does not completely

eliminate the value of one's property, compensation would still likely be owed. *See id.*

An ever-expanding public trust doctrine would dramatically frustrate existing investment-backed expectations that have been based on the historic limitation of the public trust. *See* James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 Duke Envtl. L. & Pol'y F. 1, 103 (2007) ("[A] careful review of the history—the precedent—does not make the case for expanded application of the public trust doctrine."). *See also* Lawrence, *supra*, at 1142 (until the early 1980s, "California public trust law dealt almost entirely with tidelands"). *Cf. Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Thus, the Guide should accurately depict the rights of property owners to receive just compensation for any of the above takings.

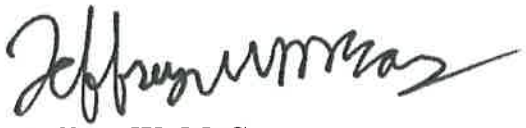
Finally, the Guide fails to accurately describe the legal standard that governs the conditions of development permits. The Guide provides that "Subject to the finding of a rational nexus between the proposed development and permit conditions implementing public policy and the degree of private exaction being roughly proportional to the public benefit, new coastal development projects must allow for public access from the nearest public roadway to the shoreline . . . ." Guide at 16 (footnotes omitted). No government can require a property owner to relinquish a property interest unless (1) there is an essential nexus between the public impact arising from the property owners' exercise of their property rights and (2) the condition is roughly proportionate in both nature and extent to the public impact arising from the property owners' exercise of their property rights. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013). The Guide should be amended to accurately state the governing Supreme Court precedent.

Thus, the Commission should amend the Guide to outline clearly the respective rights of property owners to be justly compensated for any loss of property or property rights that results from changes in the scope of public trust doctrine. Furthermore, the Guide should be amended to clarify the Supreme Court precedent of *Nollan, Dolan,* and *Koontz* in regards to developmental permitting.

CONCLUSION

The above important constitutional questions concerning the intersection of private property rights and the public trust doctrine are not adequately discussed in the draft Guide. Moreover, the Guide does nothing to reassure property owners that their rights to own and use their property will be protected. PLF encourages the Commission to amend the Guide to accurately state the limitations on the public trust doctrine and to reiterate that the Constitution protects the rights of property owners in California.

Sincerely,



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