



July 18, 2023

Wade Crowfoot, Secretary  
California Natural Resources Agency  
Attn: Outdoors for All  
715 P Street, 20<sup>th</sup> floor  
Sacramento, CA 95814

Sent via email: [outdoors@resources.ca.gov](mailto:outdoors@resources.ca.gov)

**RE: Outdoors for All – Public Comment**

Dear Secretary Crowfoot,

California Coastkeeper Alliance (CCKA) represents a network of California Waterkeeper organizations, with a long history of advocacy to provide communities with fishable and swimmable waters to allow all Californians access to nature. California is known around the world for its iconic rivers. Yet for too many Californians, these waterways, recreational opportunities, and their benefits remain out of reach – particularly for inland, environmental justice communities. Access to nature should not only be for the coastal elites. As outlined below, California has put a great emphasis on access to the coast – both physical access and safe access – yet inland fresh waterbodies have not received the same attention. Access to rivers and streams are often inaccessible – particularly in rural, environmental justice communities where private agricultural property restricts the public’s ability to reach their public trust rights. Freshwater beaches are not monitored the same way that coastal beaches are monitored to determine whether it is safe to swim. With increasingly hotter summers and the desire for California to provide access to nature more equitably, is time California provide safe and attainable access to inland, freshwater beaches and recreational sites with the same passion that we provide white, affluent communities access to coastal beaches.

Outdoors for All is expanding parks and outdoor spaces in communities that need them most, supporting programs to connect people who lack access, fostering a sense of belonging for all Californians outdoors. In 2021, Governor Newsom made a historic \$1 billion-plus investment to expand access to parks and open space, creating a once-in-a-generation opportunity to improve outdoor access for all Californians. Outdoors for All is focused on providing all Californians with equitable access to the state’s cultural, historical, and natural resources.<sup>1</sup> “Equitable access” means that all people can experience and enjoy California’s outdoors regardless of who they are or where they live. It also means that everyone can experience the outdoors in a way that is safe, welcoming, convenient, affordable, and culturally relevant.<sup>2</sup>

California is a magnificent state and one that affords all our communities with opportunities to recreate outdoors. Our lakes, rivers and streams should be enjoyed by residents throughout the state, but we need to ensure that their public health is protected while doing so. California has nearly 190,000 miles of rivers and more than 3,000 named freshwater lakes and reservoirs that support recreational use. As a booming state population increasingly seeks the outdoors to recreate, California’s water-based recreational activities have grown more popular and diverse. Water recreation in California, which includes swimming, wading, boating, fishing, surfing, diving, and water skiing, among other activities, occurs in a multitude of venues: swimming pools and spas, and ocean waters, beaches, reservoirs, natural lakes,

<sup>1</sup> Administration of Governor Newsom, Outdoors for All: Providing Equitable Access to Parks and Nature, Pg. 14; available at <https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/Access-for-all/Outdoors-for-All-Draft-Strategy-51823-English.pdf>.

<sup>2</sup> *Id.*

streams, and rivers. Public water supply projects, such as the State Water Project, provide additional recreational opportunities for Californians. California is home to the nation's largest active outdoor-industry economy, contributing \$54 billion in economic spending annually and 517,000 direct jobs.<sup>3</sup>

Public access to waterways is a right California residents enjoy under the state Constitution. Under state law, it is the California State Lands that owns and manages these coastal and shoreline resources, in trust for current and future generations of Californians. It was the concern over being “walled off from the coast” by private development that prompted California voters in 1972 to approve an initiative measure that created the California Coastal Commission and led to California’s Coastal Act—the strongest coastal planning and regulatory statute in the nation. Unfortunately, California has not acted similarly to prevent inland, largely rural environmental justice communities of color from being “walled off” from private agricultural property. The public’s desire to exercise their constitutionally protected right of access to these waterways often runs up against claims that rights of adjacent private property owners limit or override the public’s right of access.

California residents are passionate about their inland waterways—and especially their ability to access and enjoy these natural resources. The public trust doctrine establishes the concept that certain resources are to be held in “trust” by the government, and the government has the duty to preserve those resources, including access to those resources, for the benefit of the public. In California, the public trust doctrine applies to surface waters and the lands adjacent to and under those water bodies, and the State is responsible for ensuring that the public has the right to access those resources. While the State has established robust mechanisms to ensure public access to coastal beaches, it does not have such stringent mechanisms to ensure public access to freshwater bodies. This discrepancy manifests as an equity issue; the coastal communities that get access to the beach are often white and affluent, yet the inland communities that are not as readily able to access their inland freshwater systems tend to be low income and communities of color.

If California is serious about providing outdoor access to all, then we call on the State to develop a freshwater beach access program similar to what white, affluent coastal communities currently enjoy. The state needs to provide better public access to freshwater beaches and recreational opportunities – particularly in environmental justice communities. And the state needs to develop a monitoring and notification program so the inland communities know whether it is safe to go swimming at their favorite freshwater beach on a hot summer day. With the goals of better freshwater recreational access for all and keeping all Californians safe while enjoying freshwater recreation, we recommend the following:

- (1) The State should create a recreation fee to generate funding for Recreation Access Sites similar to Montana’s Fish Access Sites program.
- (2) The State Lands Commission should develop a public access program for freshwater beaches and recreational areas similar to the California Coastal Commission’s public access program.
- (3) The State Lands Commission should report to the Legislature a map of existing public freshwater access points and assess areas of strategic and intrinsic value to prioritize the creation of new public freshwater access points.
- (4) The Legislature should pass legislation – similar to AB 411 – to require and fund the State Water Board to develop a monitoring and notification program for when and where it’s safe to swim.

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<sup>3</sup> *Id* at 9.

**I. The State should create a recreation fee to generate funding for Recreation Access Sites similar to Montana’s Fish Access Sites program.**

**A. The California Constitution directs the legislature to enact laws that broadly construe the public right to access and use state waters.**

In 1850, California adopted the common law to serve as the basis for its legal system and, in so doing, adopted common law principles of the public trust doctrine.<sup>4</sup> As a result, California courts have held that the state government is obligated to hold certain natural resources, particularly its sovereign lands, in trust for current and future generations.<sup>5</sup> The public trust doctrine generally precludes the state from alienating its trust resources into private ownership.<sup>6</sup> Furthermore, the trust requires state officials to protect and ensure the long-term preservation of those resources for the public benefit.<sup>7</sup> In most instances, when the state has conveyed away its fee title to tideland or shoreline areas, the state retains authority and responsibility to protect the public’s rights in a public trust easement waterward of the high water mark.<sup>8</sup>

The California Constitution directs the legislature to enact laws that broadly construe the public right to access and use state waters.<sup>9</sup> Since 1879, the state Constitution has provided various additional protections for the public’s right to access and use the state’s navigable waterways.<sup>10</sup> For example, Article X, section 4 states: No individual or partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall always be attainable for the people thereof.<sup>11</sup>

In California, members of the public have rights to access and use navigable waters for many beneficial uses, including, but not limited to, navigation, fishing, and recreation.<sup>12</sup> These public rights are expressed in federal law, California’s Act of Admission, the California Constitution, court opinions, and state statutes. Under these laws, the public is entitled to access and enjoy all state waters “capable of being navigated by oar or motor-propelled small craft.”<sup>13</sup> Owners of lands underlying or adjacent to navigable waters are prohibited from interfering with the public’s right to use such waters.<sup>14</sup>

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<sup>4</sup> CAL. CIV. CODE § 22.2 (originally 1850 Cal. Stat. ch. 95).

<sup>5</sup> Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 UC DAVIS L. REV. 665, 667 (2012) [hereinafter *Public Trust Doctrine*].

<sup>6</sup> *See Ill. Cent. R.R. Co.*, 146 U.S. at 452-54; *Nat’l Audubon Soc’y v. Super. Ct.*, 33 Cal. 3d 419, 440-41 (1983); *see also* Frank, *Public Trust Doctrine* at 667; Sax at 475-91; Stevens at 210-14.

<sup>7</sup> *Nat’l Audubon Soc’y*, Cal. 3d at 441 (“Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.”); *San Francisco Baykeeper, Inc. v. California State Lands Commission*, 242 Cal. App. 4th 202 (2015); Frank, *Public Trust Doctrine* at 667.

<sup>8</sup> *Marks*, 6 Cal. 3d at 261; *State v. Super. Ct. (Lyon)* 29 Cal. 3d 210, 232 (1981); *Fogerty*, 29 Cal. 3d 240, 249 (1981); *People ex inf. Webb v. Cal. Fish Co.*, 166 Cal. 576, 584 (1913); *City of Berkeley v. Super. Ct.*, 26 Cal. 3d 515, 523-24 (1980) (an exception for filled Board of Tide Land Commissioners Lots in San Francisco Bay was found).

<sup>9</sup> CAL. CONST. art. X, §4.

<sup>10</sup> *See Cnty. of El Dorado*, 96 Cal. App. 3d at 406.

<sup>11</sup> CAL. CONST. art X, § 4.

<sup>12</sup> *See Marks v. Whitney*, 6 Cal. 3d 251, 259-60 (1971); *People ex rel. Baker v. Mack*, 19 Cal. App. 3d 1040, 1045, 1050 (1971).

<sup>13</sup> *Mack*, 19 Cal. App. 3d at 1050.

<sup>14</sup> *See infra* Part III; CAL. CONST. art. X, § 4.

The State has a duty to protect the public's access rights. Article I, section 25, of the California Constitution, protects the public's right to fish upon and from state public lands and in the waters thereof and restricts the sale of state land without preserving access rights.<sup>15</sup> Article X, section 1 sets forth the state's right of eminent domain to provide public access to navigable waters.<sup>16</sup>

B. California should look to Montana's Fish Access Sites program to create new access points for freshwater beaches and recreational sites.

California should provide freshwater public access similar to other states – like Montana. Montana's Fish Access Sites (FAS) Program provides public access to high quality waters for angling, boating, rafting, and other recreation opportunities. In addition, fishing access sites are often popular areas for hunting, wildlife viewing, hiking, bird watching, picnicking, etc. Montana's FAS program accommodate roughly 3.9 million visits from people every year. These visits happen on about 330 Fishing Access Sites across the state that vary in size from less than one acre to several hundred acres. These sites are owned and managed by Montana Fish, Wildlife & Parks to give recreationists access to the state's water resources. FASs are primitive or semi-primitive sites. Most but not all sites have access to features such as: Vault toilets, picnic tables, fire rings, small parking areas, boat docks, barriers necessary to preserve riparian vegetation/habitat, minimal signage, and trash collection facilities. Most sites are managed for day use only. Out of 332 FASs, camping is permitted at 99 of those locations.

Funding available for the purchase and maintenance of important FAS are derived from the sale of sportsman's licenses, state motorboat registration fees, federal Sport Fish Restoration fees, and portions of the Light Vehicle Registration fee. General License funds come from the sale of hunting and fishing licenses that are not earmarked for another specific purpose. The funds must be spent only on fish and wildlife management, in addition to it being the main source for the required state match to receive federal funding. The department during the fiscal year 2021 accumulated \$58.5 million, making up 54% of the Fish and Wildlife budget. Federally funds through excise taxes paid by Montana residents through the purchase of firearms, ammunition, and fishing equipment. Additional funds are also sources from the funds received from Coast Guard and other federal agencies. These funds are usually distributed to Montana at an annual apportionment and eligible expenditure reimbursement. The federal funding must be matched by the FWP at a ratio of 1 to 3. The program in 2021 raised 28.4 million for the FWP, 26% of their total funds received. Statutorily Earmarked funds come from money retrieved from earned licenses, vehicle registrations, and other state special revenue funds. Most of the programs are earmarked by the Montana Statue to be used for specific purposes, and those funds must only be used for that specific purpose. The programs accumulated 21.7 million during the 2021 fiscal year with approximately 30 earmarked programs, making up 20% of the FWP total funds.

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<sup>15</sup> CAL. CONST. art I, § 25. The right to fish has been held by the courts to constitute a privilege and subject to the state's police powers to regulate (Matter of Application of Parra, 24 Cal. App. 33 (1914) and Paladini v. Superior Court, 178 Cal. 369 (1918)); Public lands sold by the state and subject to Article I, § 25 have a reserved right of access to fish (Attorney General's Opinion No. NS3679, August 5, 1941); The provision that "no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon" was interpreted by the Attorney General as not applying to all state owned lands only public lands (Attorney General's Opinion No. 53-193, October 14, 1953); Atwood v. Hammond, 4 Cal. 2d 31, 39-40 (1935) held that the legislature has, under certain limited circumstance, the power to eliminate not only public fishing rights, but also the public's additional public trust rights of commerce and navigation; State of California v. San Luis Obispo Sportsman's Assn., 22 Cal 3d 440, 446-448 (1978) held that lands acquired by the state after 1910, where fishing was compatible with their use, were also "public lands" and subject to the public's right to fish. See *infra* Part III.C.3 ("Reasonable Time, Place, and Manner Restrictions") for further discussion.

<sup>16</sup> CAL. CONST. art X, § 1.

C. California should develop a Recreation Fee to generate funding for Recreation Access Sites.

The State should use a Recreation Fee to purchase voluntary easements to establish Recreation Access Sites similar to Montana’s Fish Access Sites program. The State’s Recreation Fee should be derived from the sale of sportsman’s licenses, state motorboat registration fees, federal Sport Fish Restoration fees, and portions of the Light Vehicle Registration fee, and the funds should be used for the purchase and maintenance of Recreation Access Sites in California to provide all Californians with equitable public access to freshwater beaches and recreational sites.

**II. The State Lands Commission should develop a public access program for freshwater beaches and recreational areas similar to the California Coastal Commission’s public access program.**

The California State Lands Commission, established in 1938, is responsible for managing the 4 million acres of California’s public trust lands such that they are used in ways consistent with the Public Trust Doctrine. Also known as sovereign lands, these lands and resources under the Commission’s care include the navigable waterways, tidelands, and submerged lands that California acquired when it became a state and holds in trust for the benefit of Californians.

The Commission's mission is to provide California residents “with effective stewardship of the lands, waterways, and resources entrusted to its care...through preservation, restoration, enhancement, responsible economic development, and the promotion of public access.” In describing its own responsibilities, the Commission emphasizes its role in ensuring public access to these public trust lands: “Through its actions, the Commission secures and safeguards the public’s access rights to natural navigable waterways and the coastline and preserves irreplaceable natural habitats for wildlife, vegetation, and biological communities.” As such, the SLC has a similar mandate as the California Coastal Commission (CCC): to protect and promote public access.

A. The State Lands Commission has committed to increasing public access to public trust lands and resources for environmental justice communities.

The Commission envisions a future in which environmental justice communities are no longer disproportionately impacted by pollution or environmental hazards, and all Californians can access and enjoy our beautiful public lands and natural resources.<sup>17</sup> Specifically, the Commission’s Environmental Justice Policy identifies supporting “projects that increase access to Public Trust lands and resources for vulnerable communities that have traditionally not been able to enjoy them.”<sup>18</sup> As we have explained, access to public trust lands has been primarily focused on coastal beaches, and not access for more inland communities to access their freshwater beaches and recreational sites. Additionally, the Commission’s Policy calls for the increase and enhancement of trails and recreational amenities, habitat preservation or restoration, open space, parks, and beach access. This call to action should be advanced to increase and develop a statewide freshwater public access program at the Commission.

Guided by the Principles of Environmental Justice (EJ) and a recognition that indigenous peoples inhabited these lands before California was established, an Environmental Justice Working Group was convened in early 2018 to develop recommendations for the California State Lands Commission (SLC) update of its Environmental Justice Policy. The EJWG recommended:

- Increase access for EJ communities and the public to river corridors, including the San Joaquin

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<sup>17</sup> California State Lands Commission, Environmental Justice Policy; available at: <https://www.slc.ca.gov/wp-content/uploads/2018/11/EJPolicy.pdf>

<sup>18</sup> *Id.*

- River. Encourage conservancy boards and other government entities to do the same.
- Actively encourage public access to the state’s natural areas especially for disadvantaged communities that live nearby but haven’t traditionally been able to enjoy them.
  - Enhance the quality of life of residents living in EJ communities through safer and improved public access, in conjunction with wildlife habitat restoration projects across the state. Work with coastal management agencies to promote construction of public access trails, signs, and related facilities on public lands, and to ensure communities have access to interpretive materials and special outreach events about pollution prevention, wildlife habitat, public access, and flood protection.

We believe our recommendations articulated herein are in alignment and advance the goals of the Commission’s Environmental Justice Policy and the recommendations of the Environmental Justice Working Group.

- B. The State Lands Commission should have a public access program to freshwater beaches and recreational areas similar to the California Coastal Commission’s public access program to coastal beaches.

The California Coastal Commission (CCC) obtained the authority to provide public access to the coast via a combination of (a) goals and regulations outlined in the California Coastal Act of 1976, (b) subsequent statute additions to the Coastal Act, and (c) public trust case law.

*1. The California Coastal Act of 1976 and its emphasis on public coastal access.*

In response to growing concerns about the impact of development on the California coast, including decreased public access, erosion, and loss of wildlife habitat, California voters approved the ballot initiative, Proposition 20, in 1972. Prop 20 created the California Coastal Zone Conservation Commission, later renamed the California Coastal Commission (“CCC”) and gave it the authority to regulate land use and development activities within the State’s coastal zone. The California Legislature then passed the California Coastal Act of 1976, which made the CCC a permanent agency, granted the CCC broad authority to regulate coastal development, and provided direction on how the California coast is to be developed or preserved.

The Coastal Act strongly emphasizes the importance of ensuring public access to the coast. Chapter 1 Section 30001.5 declares one of the State’s basic goals in managing the coastal zone to be: “maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners.” Chapter 3 Article 2 then outlines specific directives to guide coastal resource planning and decisions as they relate to maximizing public access (e.g., coastal development should not impede existing coastal access, new public accessways should be provided in new development projects). These sections draw authority from Article X Section 4 of the California Constitution:

*No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.*

Essentially, the public is entitled to maximum access to the State’s navigable waterways, and the State is

charged with ensuring that access is “always attainable.”

2. *Statute amendments strengthened public access and established the Coastal Public Access Program.*

While maximizing public access has been an overarching goal of the Coastal Act since its inception, the CCC’s authority to ensure public coastal access was later solidified with the establishment of the Coastal Public Access Program. This Program was created and added to the Coastal Act (Chapter 6 Article 3) as a statute amendment in 1979 (Chapter 840) with the primary goal of “maximiz[ing] public access to and along the coastline.” At that time, several different agencies had already begun implementing efforts and programs to ensure coastal public access, yet the piecemeal approach left open the possibilities of duplicated efforts or neglected areas. The Coastal Public Access Program therefore looked to coordinate efforts among agencies to strengthen those programs and develop an integrated system of public accessways along the coast. It charged the CCC with the responsibility of:

- Preparing the Program;
- Preparing and regularly maintaining a coastal access inventory;
- Developing recommendations “in consultation with the Department of Parks and Recreation, the State Coastal Conservancy, and other appropriate public agencies,” to guide other agencies in identifying, developing, and managing public accessways to and along the coast; and
- Identifying the public agencies most equipped to manage not-yet-managed public coastal accessways.

The California Legislature created the Joint Access Program in 1979. The Joint Access Program is a working partnership between the Commission and the Conservancy intended to implement both agencies’ mandates to protect coastal public access rights. The CCC primarily does so by imposing conditions on permits for coastal development projects. A typical condition that the CCC implements (at least in 1999) is an Offer to Dedicate (OTD) a public access easement. For instance, if a project can be expected to impact public access to a beach, the CCC may require an OTD to help mitigate that impact by providing an alternate area that’s permanently available for public access.

3. *Public trust case law helps to inform the Coastal Commission’s Coastal Public Access Program.*

Additionally, public trust case law has further enhanced the CCC’s authority to maximize public coastal access and cemented the CCC’s affirmative duty to protect public trust lands for public use. On the coast, the public trust is generally located on current tidelands – lands covered and uncovered by the ebb and flow of the tides.

The public trust doctrine is a background principle of state property law. Thus, regulations of property that constitute an exercise of the public trust doctrine—including but not limited to regulations that prevent the creation of nuisances that adversely affect public trust resources— do not give rise to compensable “takings.” Because the public trust doctrine is rooted in sovereign land ownership, it constitutes a background principle of property law and establishes limitations on private property interests. The “takings clause” of the Fifth Amendment of the United States Constitution, which states that private property may not be taken for public use without just compensation, does not apply to regulations that are consistent with background principles of property law.

C. The State Lands Commission has the existing authority to require public easements to allow the public to access their public trust resources.

When California became a state, it acquired title to the beds of navigable waterways and tide and submerged lands within its borders, pursuant to the Equal Footing Doctrine.<sup>19</sup> Since statehood these lands have been held in trust for the people of California. By the California Constitution of 1879 the state government was expressly mandated by the people to maintain and promote access to California's navigable waterways.<sup>20</sup> The California State Lands Commission was established in 1938 to manage these trust lands of approximately 4 million acres of ungranted tidelands, submerged lands, and the beds of navigable rivers, streams, lakes, bays, estuaries, inlets, and straits, as well as all the state's remaining jurisdiction and authority in lands that have been granted by the state. These lands, often referred to as "sovereign lands" or "public trust lands," stretch from the state's northern border with Oregon to the southern border with Mexico and include the tide and submerged lands on the Pacific Coast as well as world famous waters, such as Lake Tahoe, Mono Lake, and the Colorado River.

Furthermore, the state cannot sell lands contiguous to navigable waters unless convenient access to the waters is provided from a public road or roads.<sup>21</sup> If a tract of land owned by the state provides the only convenient means of access to a navigable waterway, the state, or its successors in interest, must provide an easement for convenient access to the waterway.<sup>22</sup> Lastly, municipal governments and local agencies must ensure that all navigable waters within or adjacent to their borders remain open and free to navigation and that waterfronts are accessible from nearby public streets and highways.<sup>23</sup>

The SLC already has the authority to protect access to waterways, particularly by accepting lateral offers to dedicate public access easements along the beach. In fact, the SLC has played a major role in the Joint Access Program and initiated an intensive Offer to Dedicate (OTD) acceptance program in 1996. Much, if not all, of this work pertained to coastal access and was in partnership with the CCC (as it was part of the Joint Access/OTD program).

D. The State Lands Commission should develop a public access program for freshwater beaches and recreational areas through the requirement of public trust easements, the voluntary purchase of public easements, and with incentives for conservation easements.

On non-tidal waters that meet the federal test for state title, private parties who own land abutting a navigable waterway generally hold title to the ordinary low water mark, and the state holds title to the beds and banks below the low water mark.<sup>24</sup> However, the state retains a public trust easement over the lands lying between the ordinary high and low water marks on waterways that satisfy the title test, and riparian owners may not utilize those lands in any manner that is "incompatible with the public's interest

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<sup>19</sup> Pollard's Lessee v. Hagan, 44 U.S. 212, 228-229 (1845); *Marks*, 6 Cal. 3d at 258 n.5; Submerged Lands Act of May 22, 1953, 43 U.S.C. sec. 1311 (a).

<sup>20</sup> Cal. Const. art. X, § 4; Cal. Const. art. I, § 26.

<sup>21</sup> CAL. PUB. RES. CODE § 6210.4.

<sup>22</sup> *Id.* § 6210.5; *see also id.* § 6210.9 (providing California State Lands Commission with authority to "acquire by purchase, lease, gift, exchange, or, if all negotiations fail, by condemnation, a right-of-way or easement . . . across privately owned land or other land that it deems necessary to provide access" to public trust lands).

<sup>23</sup> CAL. GOV'T CODE § 39933; *see also id.* §§ 39901, 54090-54093; Lane v. City of Redondo Beach, 49 Cal. App. 3d 251, 257 (1975).

<sup>24</sup> *See* CAL. CIV. CODE § 830.



in the property.”<sup>25</sup><sup>26</sup> The public does not have a right to enter private property where no right of access exists and where signs forbidding trespass are displayed, without the license of the owner or legal occupant.<sup>27</sup> Trespassers may be subject to civil penalties or criminal sanctions for entering private property without the owner’s consent.<sup>28</sup>

Public rights to access navigable waters may arise in a variety of ways. A right of way may be expressly dedicated to public use, impliedly dedicated through a long period of public use with the owner’s knowledge, or it may arise by prescriptive use. If an offer of dedication is accepted by express act or implication, public rights are established. The state may also use its eminent domain power to acquire access to navigable waters.<sup>29</sup>

1. *The State Lands Commission should require public trust easements for any new development or redevelopment adjacent to any freshwater body that restricts the public’s access to their public trust rights.*

As a core component of a Freshwater Public Access program, the State Lands Commission should look to the Coastal Commission’s efforts to obtain public trust easements during the permitting of new and re-development on private property adjacent to public trust lands. One of the goals of the California Coastal Act is to “[m]aximize public access to and along the coast and maximize public recreational opportunities in the coastal zone.”<sup>30</sup> Furthermore, “[i]n carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.”<sup>31</sup> The Coastal Act provides that “development shall not interfere with the public’s right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.”<sup>32</sup> Subject to the finding of a rational nexus between the proposed development and permit conditions implementing public policy<sup>33</sup> and the degree of private exaction being roughly proportional to the public benefit,<sup>34</sup> new coastal development projects must allow for public access from the nearest public roadway to the shoreline unless (1) it is inconsistent with public safety, military security needs, or protection of fragile coastal resources, (2) adequate access already exists nearby, (3) agriculture would be harmed, or (4) the new development project is otherwise exempted under the Coastal Act.<sup>35</sup>

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<sup>25</sup> See *State v. Super. Ct. (Lyon)*, 29 Cal. 3d 210, 226, 232 (1981); *Fogerty*, 29 Cal. 3d at 249 (1981); *Marks*, 6 Cal. 3d at 259.

<sup>26</sup> *Nat’l Audubon Soc’y*, Cal. 3d at 441 (“Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.”); *San Francisco Baykeeper, Inc. v. California State Lands Commission*, 242 Cal. App. 4th 202 (2015); Frank, *Public Trust Doctrine* at 667.

<sup>27</sup> See CAL. PENAL CODE §§ 552–555, 602–607; see also *Bolsa Land Co. v. Burdick*, 151 Cal. 254, 260 (1907); but see *People v. Wilkinson*, 248 Cal. App. 2d Supp. 906 (1967) where the Court of Appeal found that it was not a violation of Pen. Code § 602, subd. (l) by holding that transient overnight camping by four individuals on a large ranch did not constitute occupation.

<sup>28</sup> CAL. PENAL CODE §§ 555.3, 602.5; see also CAL. FISH & GAME CODE § 2016.

<sup>29</sup> CAL. CONST. art. X, § 1; CAL. PUB. RES. CODE § 6210.9.

<sup>30</sup> CAL. PUB. RES. CODE § 30001.5.

<sup>31</sup> *Id.* § 30210.

<sup>32</sup> *Id.* § 30211; see also *id.* §§ 30210–30214.

<sup>33</sup> *Nollan v. California Coastal Commission*, 483 U.S. 825, 836-37 (1987).

<sup>34</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 390-92 (1994).

<sup>35</sup> CAL. PUB. RES. CODE § 30212.

The California Coastal Commission works in partnership with coastal cities and counties to plan and regulate land and water use in the state's coastal zone.<sup>36</sup> The Coastal Commission works with 15 counties and 61 cities in the state's coastal zone to develop and implement their Local Coastal Programs (LCPs),<sup>37</sup> which guide coastal planning, land use, and zoning in their municipalities.<sup>38</sup> Each LCP must "contain a specific public access component to assure that maximum public access to the coast and public recreation areas is provided."<sup>39</sup>

The State Lands Commission should use its broad Constitutional authority and its specific regulatory authority to develop a Freshwater Public Access program similar to the CCC. The State Lands Commission should provide that development adjacent to freshwater public trust lands shall not interfere with the public's right of access. The State Lands Commission should develop a public easement program to require new development and redevelopment projects adjacent to public trust lands to allow for public access from the nearest public roadway to the freshwater public trust lands, 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.

2. *The State Lands Commission should use funds from a Recreation Fee, violation fines, and other earmarked funds for public access to nature to purchase voluntary public easements on private properties that are adjacent to strategic and/or intrinsically valuable freshwater beaches and recreational sites.*

As discussed in Section I., the State should use a Recreation Fee to purchase voluntary easements to establish Recreation Access Sites similar to Montana's Fish Access Sites program. The State's Recreation Fee should be derived from the sale of sportsman's licenses, state motorboat registration fees, federal Sport Fish Restoration fees, and portions of the Light Vehicle Registration fee, and the funds should be used for the purchase and maintenance of important Recreation Access Sites in California to provide all Californians with equitable public access to freshwater beaches and recreational sites.

The State should also consider other creative funding partnerships to provide equitable access to freshwater public access sites. For example, the California Department of Parks and Recreation plays an important role in providing public access to the coast as it manages roughly 23% of the coastline for public recreational activities. As the main single-entity provider of public recreational facilities along the coast, the Department of Parks and Recreation works cooperatively with the CCC on projects to improve public access to the coast (e.g., identification of appropriate lands for Department of Parks and Recreation acquisition, completion of coastal trail segments, and coordination of state/local access issues). Considering the Department of Parks and Recreation plays an equally important role in managing public recreation activities inland, the Department should form a partnership with the State Lands Commission to provide cooperative public access projects to freshwater beaches and inland recreational sites similar to the collaboration between the Department and the CCC.

Additionally, a creative partnership between the California Coastal Commission, State Coastal Conservancy and the Mountains Recreation and Conservation Authority (MRCA) has resulted in two newly completed public beach access projects on surplus state land in the City of Malibu. With funds

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<sup>36</sup> *What We Do*, CAL. COASTAL COMM'N, <http://www.coastal.ca.gov/howeare.html> (last visited November 17, 2017).

<sup>37</sup> *Local Coastal Programs*, CAL. COASTAL COMM'N, <http://www.coastal.ca.gov/lcps.html> (last visited November 17, 2017).

<sup>38</sup> CAL. PUB. RES. CODE §§ 30500–30504.

<sup>39</sup> *Id.* § 30500.

from the Coastal Act Violation Remediation Account (VRA) MRCA designed, built, and now manages two new stairways from the Malibu Lagoon State Beach parking lot on Pacific Coast Highway to the beach at the foot of the Malibu Pier, complete with new trash bins and public access signage. Down the coast at Big Rock Beach, MRCA replaced an informal bluff trail with a new engineered stairway to a pocket beach called Maritime Rocks using VRA funding. The VRA is the account into which administrative penalties from successful Coastal Act enforcement actions are deposited for use on projects that expand public access and restore coastal resources. The State Lands Commission should create a similar Violation Remediation Account for infractions on public trust resources and lands and use that funding to help provide new Recreation Access Sites for freshwater beaches and inland recreational sites.

- 3. The State should create financial incentives for private property owners with land adjacent to freshwater bodies to dedicate public access points on their private property as a conservation easement held in trust by the State Lands Commission.*

Landowners who want to protect their land well into the future can enter into a conservation easement with a land trust, government agency, tribe or other qualified organization. Conservation easements offer effective and flexible protection and are one of the most frequently used tools for conserving private land. This voluntary legal agreement protects the land by permanently limiting some uses that would compromise the conservation values or the landowners' goals for the property. It allows landowners to own, use, bequeath, or sell their land. Each conservation easement is specifically designed to protect the conservation values of each property and meet the goals of the landowner and easement holder – typically a land trust. As a result, no two conservation easements are alike. Conservation easements offer great flexibility. For example, an easement on property containing rare wildlife habitat might prohibit any development, while an easement on a farm might allow continued farming and the addition of agricultural structures. An easement may apply to all or a portion of the property and need not require public access.

Conservation easements are based on the idea that when people own land, they own rights that go with the property – such as the right to graze cattle, hunt, build a home, subdivide or extract minerals. By voluntarily limiting some of these activities, a conservation easement allows a landowner to retain private ownership while also achieving other goals, like protecting a farming or ranching operation, preserving open space or conserving habitat for wildlife. Typically, a conservation easement limits subdivision and non-agricultural, commercial uses. Most conservation easements allow continued grazing, fencing, irrigation, hunting or other traditional land uses that are consistent with the conservation values of the property. Conservation easements do not require public access. As a legal agreement, a conservation easement is attached to the property's deed and recorded with the county. Easements are granted in perpetuity, meaning that all future owners of the land must respect the uses set forth in the document. The land trust or other easement holder is responsible for making sure the terms of the easement are followed. This is managed through “stewardship” by the land trust or easement holder.

Landowners choose to donate or sell conservation easements for a variety of reasons. Often, the decision comes from the landowner's connection to their land, and their desire to see it remain intact and used for agriculture, open space or wildlife habitat into the future. Many people also want to ensure that their children can inherit their property in its entirety. Estate taxes may be lowered by reducing the land's appraised value through a conservation easement, which often means that the family can inherit the land without having to subdivide it to pay the estate tax. Conservation easements are powerful estate planning tools that can help keep land in the family.

While available funds for the purchase of conservation easements are limited, land trusts have been very successful at raising the necessary funds for properties with considerable natural resource values. There

are other financial benefits as well. For example, landowners may qualify for significant income tax deductions by donating conservation easements to a land trust or other qualified organization.

While currently the majority of California conservation easements do not provide public access, the State should reconsider this position and provide conservation easements specifically for public access to public trust land and resources.

**III. The State Lands Commission should report to the Legislature a map of existing public freshwater access points and assess sites of strategic and intrinsic value to prioritize the creation of new public freshwater access points.**

- A. The State Lands Commission should report to the Legislature a map existing public freshwater access points throughout the state.

Often, the most logical location for access to a waterway is where a bridge crosses it. Kayakers, rafters, and others may legally utilize the public access easements around bridges to enter and exit navigable waterways.<sup>40</sup> With those factors in mind, the Legislature adopted three code sections<sup>41</sup> in 1974 to facilitate increased public access around bridges.<sup>42</sup> All state or county highway projects and all city street projects that propose construction of a new bridge over a navigable waterway must consider, and report on, the feasibility of providing public access for recreational purposes to the waterway before the bridge is constructed.<sup>43</sup> These code provisions apply to state agencies and city and county governments that approve bridge construction projects.<sup>44</sup>

There are also many other public access sites throughout the state that were created by means other than the California Streets and Highways Code. The State Lands Commission should do an inventory of all freshwater public access sites throughout the state and plot the sites on a publicly available map. That map should live on the Commission's website for the general public to reference when wishing to seek shelter from a hot summer day.

- B. The State Lands Commission should report to the Legislature an analysis of sites of strategic and intrinsic value to create new public freshwater access points.

It seems far too common that there are large swaths of freshwater ways that have no or very limited access for the public. Using a map creating by the Commission to identify all existing public access sites, the Commission should analyze and report to the Legislature on key areas where limited public access

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<sup>40</sup> People v. Sweetser, 72 Cal. App. 3d 278, 284 (1977).

<sup>41</sup> California Streets and Highways Code § 991 (2021) - Before any bridge on a county highway is constructed over any navigable river, the board of supervisors, after a study and public hearing on the question, shall determine and shall prepare a report on the feasibility of providing public access to the river for recreational purposes and a determination as to whether such public access shall be provided.

California Streets and Highways Code §84.5 - During the design hearing process relating to state highway projects that include the construction by the department of a new bridge across a navigable river, there shall be included full consideration of, and a report on, the feasibility of providing a means of public access to the navigable river for public recreational purposes.

California Streets and Highways Code §1809 - Before any bridge on a city street is constructed over any navigable river, the legislative body of the city, after a study and public hearing on the question, shall determine and shall prepare a report on the feasibility of providing public access to the river for recreational purposes and a determination as to whether such public access shall be provided.

<sup>42</sup> CAL. STS. & HIGH. CODE §§ 84.5, 991, 1809.

<sup>43</sup> *Id.* §§ 84.5, 991, 1809.

<sup>44</sup> *See id.*

exists – particularly in environmental justice communities – and also report to the Legislature where strategic and intrinsically valuable Recreation Access Sites might be available for purchase of a public trust easement to provide the public access the freshwater beach or recreational site.

**IV. The Legislature should pass legislation – similar to AB 411 – to require and fund the State Water Board to develop a monitoring and notification program for when and where it's safe to swim.**

- A. California needs to establish a comprehensive and coordinated freshwater Safe to Swim program similar to California's beach water quality program.

Equitable access to nature means safe access for all Californians – not just wealthy coastal elites. While California has a robust and extensive water quality monitoring and posting system for its coastal beaches, it has no such testing system in place for the thousands of freshwater bodies used for body-contact recreation. For Californians who do not live near the coast or for whom the coast is not easily accessible, these are the areas where they go to cool off, especially during the hot summer months, and they should be provided with the same protections that ocean beachgoers are given. Although the public can today view freshwater water quality data on some websites like Beach Watch or Safe to Swim, much of this data is irrelevant and/or outdated. This gives the public an inaccurate picture of the freshwater bathing recreation site water quality. The State should ensure that the thousands of children and their families that enjoy swimming and playing in the popular rivers, streams, and lakes across California are informed about the water quality of those inland water bodies. The State should create a uniform set of statewide monitoring standards and protocols that require testing for all freshwater bodies that have a high volume of usage by the general public. Hazardous water quality advisories should be made public through signage or on monitoring agency websites, and monitoring data should be posted in a single, publicly available database. These steps would be the first towards establishing a comprehensive and coordinated freshwater program similar to California's beach water quality programs.

Untreated recreational water–associated outbreaks can be caused by pathogens or chemicals, including toxins, in freshwater or marine water. Enteric pathogens can be transmitted when people ingest untreated recreational water contaminated with feces or vomit. Swimmers can contaminate water in untreated recreational water venues if they have a fecal or vomit incident in the water. Infants and young children especially contribute to microbiological contamination by accidental fecal releases. Others may cause contamination by intentional fecal releases due to a lack of proper sanitary facilities at or near the recreational area, or because such facilities, though present, are not used. Enteric pathogens can also be introduced into untreated recreational water venues by stormwater runoff and sewage system overflows and discharges. Other potential sources of fecal contamination and enteric pathogens include leaks from septic or municipal wastewater systems, dumped boating waste, and animal waste in or near swim areas.

Annually there are more than 90 million illnesses related to untreated recreational waters, both fresh and marine, in the United States resulting in \$3 billion in healthcare costs. The State Water Board notes that California has the most extensive and comprehensive monitoring and regulatory program for coastal beaches in the nation. Monitoring is performed by county health agencies in seventeen different coastal and San Francisco Bay Area counties; publicly owned sewage treatment plants and other dischargers along the coastal zone; environmental groups; and numerous citizen-monitoring groups. Unfortunately, there are times when it is not advisable to go to the coastal waters due to bacterial contamination. Local health agencies are responsible for issuing advisories (postings) and closures when the results of testing indicate that one or more bacterial levels exceed water quality standards.

California's statewide beach program includes several components aimed at ocean water quality, including those listed below. Established by Assembly Bill (AB) 411 (Wayne, Chapter 765, Statutes of

1997), the California Clean Beaches Program is the state's coastal beach monitoring, reporting, posting, and closing program. AB 411 requires CDPH (the program has since been transferred to the State Water Board) to promulgate regulations that require the monitoring of water adjacent to public beaches (those with storm drains that discharge during dry weather and are visited by more than 50,000 people per year) at least weekly during the dry season (historically April through October), for microbiological contaminations, including total coliform, fecal coliform, and enterococci bacteria. AB 411 also requires the regulations to establish protocols for determining the location of monitoring sites and monitoring frequency based on risks to public health, and for public notification of health hazards, including posting, closing, and reopening of public beaches. This program is implemented by the local health officer or environmental health agency of a coastal county or city and is limited by statute to ocean beaches. As of 2018, coastal cities and counties spent around \$10 million annually on AB 411-required monitoring. The state allocates around \$1.5 million a year to counties based on program size, including \$500,000 annually from the US EPA's beach grant program. The state allocation only covers a small portion of monitoring program costs. The State Water Board's Division of Financial Assistance also runs a Clean Beaches Initiative Grant Program oriented towards "multi-benefit storm water projects addressing discharge to coastal waters" as a condition of the bonds that fund the program.

In addition to monitoring our coastal water quality, California is committed to improving and protecting beaches along its coast. California has invested \$100 million in Clean Beach Initiative grants to fund local projects that reduce bacterial contamination along the coast. The State has also funded research to development more rapid detection methods for knowing when to post beaches, tracking the sources of contamination, and studies to better understand the relationship between bacterial indicators and incidence of disease. Unfortunately, the same type of focus, funding and attention for coastal beaches has not been afforded to freshwater beaches and recreational activities.

According to the State Water Board, SWAMP was created in response to the need for a comprehensive surface water monitoring and assessment program in California. Prior to the creation of SWAMP, the State and regional water boards for decades conducted mostly discharge-focused, compliance-based water quality monitoring. This left most of California's water resources unmonitored. In 1999, the Legislature directed, by passage of AB 982 (Ducheny, Chapter 495, Statutes of 1999), the State Water Board to prepare a proposal for a comprehensive monitoring program for all of California's surface waters, and it provided funding for such a program beginning in 2000. At this direction, SWAMP was established. SWAMP is an ambient monitoring program. Ambient monitoring considers all waters of the State, while compliance-based monitoring is limited to determining compliance with permit limits or other specific regulatory requirements. Compliance-based monitoring, by itself, produces fragmented and inconsistent monitoring data, making broad synthesis and analysis difficult or impossible. In contrast, SWAMP's more comprehensive monitoring programs evaluate the overall condition of surface waters throughout the State, the goal of which is to provide information needed by state and regional water board staff, water managers, the Legislature, and the public to help understand and better manage California's water resources. However, SWAMP is not timely or sufficient to provide inland environmental justice communities with the real time monitoring results necessary to prevent Californians from getting sick when recreating in the State's freshwater bodies. The State needs to develop a timelier Safe to Swim monitoring program similar to the AB 411 coastal beaches program.

The State should require minimum standards for the sanitation of public freshwater beaches and require the testing of the waters adjacent to all public freshwater beaches for microbiological contaminations, including, but not limited to, total coliform, fecal coliform, and enterococci bacteria. The State should also establish protocols for determining the location of monitoring sites and monitoring frequency based on risks to public health. Furthermore, the State should provide public notification of health hazards, including, but not limited to, the posting, closing, and reopening of public beaches, and to require that public beaches, with certain exceptions, be tested for microbiological contaminations, including, but not

limited to, total coliform, fecal coliform, and enterococci bacteria on a weekly basis from April 1 to October 31.

The State should require the local health officer to immediately test the waters adjacent to a public freshwater beach and to take related action in the event of a known untreated sewage release, and in the event of an untreated sewage release that is known to have reached recreational waters adjacent to a public freshwater beach, would require the local health officer to immediately close those waters until it has been determined by the local health officer that the waters are in compliance with the standards. The State should require the local health officer to notify the agency responsible for the operation and maintenance of the public beach within 24 hours of any public beach posting, closure, or restriction, and would, subject to appropriation, require the agency responsible for the operation and maintenance of the public beach to establish a telephone hotline and update it as need to convey changes in public health risks, to inform the public of beach postings, closures, and restrictions.

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For too many Californians, freshwater recreational opportunities and their benefits remain out of reach – particularly for inland, environmental justice communities. Access to nature should not only be for coastal elites. California has put a tremendous emphasis on access to the coast – both physical access and safe access – yet inland fresh waterbodies do not receive the same attention. Access to rivers and streams are often inaccessible – particularly in rural, environmental justice communities where private agricultural property restricts the public’s ability to reach their public trust rights. Freshwater beaches are not monitored the same way that coastal beaches are monitored to determine whether it is safe to swim. With increasingly hotter summers and the desire for California to provide access to nature more equitably, is time California provide safe and attainable access to inland, freshwater beaches and recreational sites with the same passion that we provide white, affluent communities access to coastal beaches.

We look forward to working with the Natural Resources Agency and Outdoors for All to expand Californians’ access to freshwater recreation in communities that need them most.

Sincerely,

Sean Bothwell  
Executive Director  
California Coastkeeper Alliance