



*Surfrider
Foundation*®

LEGAL HANDBOOK



INTRODUCTION

Surfrider Foundation fights for clean oceans, preservation of waves and protection of beaches. This Legal Handbook is an informational resource aimed at enabling you, as a Surfrider activist, to further the mission of Surfrider Foundation.

Most of the cases that Surfrider deals with involve issues of beach access, beach preservation, water quality and protection of special places. Whereas the latter three issue areas fall under the subject matter of environmental law, the beach access issue falls primarily under the subject matter of property law and draws on the foundations of fundamental constitutional rights such as the public trust doctrine and equal opportunity to utilize recreational areas. Cases involving beach preservation, water quality and protection of special places usually deal with established environmental laws such as National Environmental Protection Act (NEPA), the Clean Water Act (CWA), Coastal Zone Management Act (CZMA), Endangered Species Act (ESA), etc...Of course, the relevant legal premises will vary by case and depend on whether you are operating under state or federal law. This manual is meant to serve as an overview of the laws and legal concepts that Surfrider Foundation is most likely to encounter in future legal battles.

WHY IT MATTERS

Citizen involvement in monitoring and reporting pollution and beach access violations are key to protection and preservation of the oceans and beaches that we love. In order to become further involved, it may become important to know the law surrounding these issues. A proactive citizen will want to know the legal standards that government and industry must abide by, at what point violations occur, and perhaps, when the laws should be changed.

Unfortunately, much of the legal work done by Surfrider must be to address past wrongs committed by an environmental polluter or impeder of beach access. Although enforcement litigation will normally act retrospectively to address violations that continually occur, its value and importance cannot be underestimated. For instance, this type of litigation serves to prove that there is a watchdog organization monitoring the quality of our beaches. Additionally, an inevitable assessment of laws and regulations occur during litigation, which serve to highlight the regulatory scheme at play. If the laws prove to be inadequate to serve as tools to protect our oceans and beaches, the litigation may highlight opportunities to change laws through legislative endeavors. In this sense, Surfrider Foundation's comprehensive experience and work within the legal system will help to strengthen and improve the environmental and beach access laws that serve to protect our coastlines.

HOW TO USE THIS MANUAL

This Legal Handbook is intended to serve as a tool to empower Surfrider Foundation Chapters, members and activists in their legal endeavors. The handbook is an informational resource meant to serve as a reference guide for work on the legal aspects of Surfrider Foundation's local campaigns. This manual also serves as a general background guide to legal advocacy and litigation processes. The table of contents lists the legal topics by subject matter and page

number so that you may utilize a specific section of the manual relevant to your particular topic. The manual contains summaries of various environmental law subjects and other reference materials, links, example language, petitions and letters that you can use in furtherance of your campaign. This Legal Manual is by no means a comprehensive guide to the various legal subjects, and we encourage you to use the referenced materials and other outside sources when developing legal campaign components. For a general “coastal encyclopedia”, look to the online state of the beach report at www.surfrider.org/stateofthebeach and Coastal A-Z www.surfrider.org/a-z. Of course, the Surfrider Foundation Legal Department stands ready to assist with any legal issues that will help to further the protection and enjoyment of the world’s oceans, waves and beaches.

DISCLAIMERS

This book is necessarily vague in some areas, with the intent of capturing the concept of the legal issues without becoming too technical or geographically specific. You will find that many times, examples of California laws are used. The reason for this is two-fold: 1) Surfrider has carried the majority of its litigation and legal campaigns within the state of California and 2) the primary author of this manual is bar-certified in California. If you are an activist located outside of the state of California, please understand that this information may be helpful in that it may be analogized to your own state system. The same is true for the examples of other state laws and regulatory regimes that are mentioned in this document.

While this handbook will hopefully provide a general overview and helpful assistance in understanding when and where litigation would be appropriate, it should in no way be considered a substitute for legal advice from a licensed attorney. Depending on the specific matter and the resources available to your Chapter, each legal challenge that Surfrider takes part in should be analyzed by the Legal Manager and/or a licensed practitioner.

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Chapter 1 SURFRIDER FOUNDATION

LITIGATION HANDBOOK

The Surfrider Foundation is a single legal entity (a California nonprofit corporation), and all litigation is therefore brought in the name of the Surfrider Foundation rather than a Chapter. Surfrider Foundation Global Office or Headquarters (“SFHQ”) has ultimate and complete supervisory authority over all Chapter litigation.

Environmental litigation is far more effective when it is one part of an integrated campaign with clearly agreed-upon environmental goals.

Surfrider Foundation participation in **all** court proceedings and **some** administrative proceedings requires SFHQ authorization. SFHQ authorization is also required to settle Surfrider Foundation lawsuits, to participate as amicus curiae (“friend of the court”), and to send 60-day notice letters. When in doubt about whether SFHQ approval is required, call the Legal Manager for advice.

The Surfrider Foundation recognizes that involvement in litigation, whether as a party or amicus curiae, is a serious undertaking. Costs of litigation can be extensive and risks such as countersuits and frivolous litigation suits abound. In light of those risks and costs, Chapters should become involved in litigation only when preferable means of resolution, such as the political process and community involvement, have been unsuccessful. Moreover, Surfrider Foundation must be vigilant in ensuring that it only becomes involved in litigation that furthers the goals of Surfrider Foundation as set forth in its mission statement. SFHQ must ensure consistency of positions that the organization takes in litigation. In keeping with the foregoing principles, Surfrider Foundation will not consider taking part in any lawsuit, in any capacity, upon the request of a Local Chapter, unless the requesting Chapter has a developed campaign in which the litigation is a tactic necessary for the success of the campaign goal.

I. Surfrider Foundation’s Environmental Litigation Program

The primary purpose of the litigation program is to enforce existing environmental laws and to do so in a manner that advances the mission of the Surfrider Foundation. Litigation is most effective when it is used as a component of a well-planned campaign to address a particular problem.

Care and deliberation are essential in deciding whether to participate in legal action. It is important that cases that are strongly based in law and principle, have realistic goals and

objectives and are a tool in an overarching environmental campaign be brought forward to the board for approval.

Although we strive to resolve matters outside of the courtroom, litigation is often essential to defend the environment. When all administrative remedies have been exhausted there is no alternative but to defend the coast in court.

The Surfrider Foundation litigation approval process is designed so that the Surfrider Foundation's global staff and members of the Legal Issues Team (LIT) can provide advice to the Chapter and help the Chapter develop a campaign for the issue they are battling.

SURFRIDER FOUNDATION IS A SINGLE LEGAL ENTITY

The Surfrider Foundation is a single California corporation, and Surfrider Chapters are part of this single legal entity. Chapters are not independent legal entities and cannot conduct legal proceedings in their own names. Participation in litigation by the Surfrider Foundation can only be in the name of the entire organization: Surfrider Foundation.

Surfrider Foundation litigation must be authorized by the Chapter's Executive Committee, and then approved by the global board of directors after they have been fully briefed on the new legal matter. Settlements of lawsuits, participation in certain administrative proceedings, participation as amicus curiae, and sending 60-day notice letters also require SFHQ approval. The authorization process is discussed in detail in Part III below.

The global board of directors of the Surfrider Foundation retains ultimate and complete supervisory authority over Surfrider Foundation litigation. One of the most important functions of the legal committee and, ultimately, the Surfrider Foundation board of directors is quality control over Chapter litigation, including avoidance of inappropriate litigation.

LEGAL REPRESENTATION

The Surfrider Foundation is represented in litigation by lawyers from its Legal Issues Team, nonprofit public interest law firms, or private lawyers in small and large firms. SFHQ staff will assist in locating experienced lawyers to handle Chapter cases and will offer guidance regarding the selection of attorneys, but generally the Chapter secures legal representation for the lawsuit.

1. Legal Issues Team

The Surfrider Foundation global office maintains a database of attorneys who are members of the Legal Issues Team (“LIT”). Most LIT members offer to work on a pro bono basis or at a reduced fee. These attorneys add strength to the Chapter's legal program and allow the Chapter to bring lawsuits that would otherwise not be possible with the Chapter's limited resources.

2. Nonprofit Public Interest Law Firms

The Surfrider Foundation also is represented by staff attorneys working for nonprofit public interest law firms, such as Earthjustice, Natural Resources Defense Council (NRDC), Environmental Defense Center, law school clinics, etc. We encourage Chapters to explore this type of representation.

3. Retainer Agreements

Lawyers representing the Surfrider Foundation often ask the Chapter to sign a retainer agreement. Retainer agreements must be approved by the Legal Manager. One of the most important provisions of any retainer agreement is the one setting forth the financial obligations of the Chapter to the lawyer. Activists should take special care to review that section of the proposed retainer agreement to assure themselves that it accurately sets forth the financial obligations. In general, the Surfrider Foundation will not sign retainer agreements that contain pre-litigation waivers of a conflict of interest, or any similar provision (e.g., majority voting among clients) that purports to resolve disagreements among clients by diluting the absolute loyalty the attorney owes to the Surfrider Foundation as client. If you have questions about whether a retainer term is, in fact, a conflict-of-interest waiver, you should notify Surfrider Foundation's Legal Manager for assistance.

CRITERIA FOR APPROVAL OF LAWSUITS

Some important considerations for pursuing legal action:

- (a) the significance of the suit's particular coastal environmental objectives and the relative importance of the issue at the local, state, or national level;
- (b) the strength of the legal theories and supporting facts advanced in the suit, and the likelihood that the suit will achieve the stated objectives;
- (c) the degree to which a case might establish an important national or state legal precedent or otherwise provide effective leverage to remedy a coastal environmental problem;
- (d) the degree to which the suit advances a public interest as opposed to a private or pecuniary purpose or an intention merely to cause delay;
- (e) the political consequences of the suit, including whether legal success can be sustained in subsequent legislative considerations of the matter;
- (f) the degree of previous involvement of the Surfrider Foundation in the issue, and the extent to which the proposed suit is embedded in a well thought-out campaign plan;
- (g) the ability and experience of counsel;

- (h) the degree to which the Chapter and its co-plaintiffs share well defined goals and are capable of making joint decisions concerning the litigation;
- (i) the financial demands and risks of the suit and the prospects of meeting them; and
- (j) factors pertinent to particular suits, such as the status of the project in question when litigation is proposed and the extent to which adverse effects have been previously mitigated.

THE COSTS AND RISKS OF LITIGATION

1. Financial Implications

Litigation is an extremely valuable tool to environmental campaigns. A lawsuit or administrative proceeding can force proper government action when other means have failed. However, Chapters must be careful in selecting cases or litigation strategies. Of utmost importance is the potential for incurring substantial financial obligations over many years for attorney fees, expert witness fees, cost of transcripts of the administrative and trial court records, and individual out-of-pocket costs for travel, photocopying and telephone calls.

At present, the Surfrider Foundation's global budget contains no funds for these litigation costs. Chapters contemplating litigation must be prepared to meet the entire financial obligations of the suit.

Costs, even when no attorney fees are required, may amount to \$20,000 or more in major litigation. When attorney fees must be paid, the cost may rise to \$70,000 or more. While there are sometimes ways to structure litigation to avoid extremely high costs, Chapter leaders must be aware that litigation is expensive and that reliable funding must exist before a commitment to litigation can be made. **Chapters should be aware that filing a lawsuit can sometimes result in a greater financial commitment than originally contemplated or than may be justified by the suit's relative importance.**

Chapter entities also must always consider the possibility that a court may require the Chapter, if it loses the litigation, to pay the adverse parties' costs; the possibility of countersuits for damages; and the possibility of large bonds being imposed as a condition for injunctive relief.

2. Other Risks

Other litigation risks include the chance that litigating an unsatisfactory fact situation will establish a legal precedent harmful elsewhere; the possibility of inconsistent legal or policy positions in different lawsuits which might compromise the Chapter's credibility; the possibility that courts will become less receptive toward Surfrider as a litigant; and the risks of adverse political consequences of winning a suit, or even of filing it.

For these reasons, Chapters, groups, and other chapter entities are urged to use restraint and discretion in presenting proposals for litigation. Careful initial organization, review, and screening of proposed litigation at the Chapter level are crucial to the success of the Chapter's environmental campaign. Careful attention must be given to Chapter priorities because involvement in a lawsuit may foreclose pursuit of other objectives, including the filing of a lawsuit on another issue.

INVOLVEMENT IN LAWSUITS BROUGHT BY OTHER GROUPS

1. Assistance Without Joining the Litigation

The litigation approval process need not be followed if the Surfrider Foundation supports but is not a named party to a legal proceeding. Many cases can be litigated just as well by other plaintiffs or an ad hoc organization, with interested Chapter entities providing such assistance as they care to, short of formally joining the suit.

Assistance may be offered, without SFHQ approval, in the form of public statements in favor of a lawsuit brought by others and its objectives; press releases and articles in Chapter publications; financial assistance; and help in locating expert witnesses. Where any assistance is given, of course, the conservation positions taken should be consistent with those of the Chapter.

2. Litigation as Part of a Coalition

Litigation is sometimes initiated by a coalition of organizations to which the Surfrider Foundation belongs. In these lawsuits, the coalition is not authorized to, and does not, represent the Chapter. The Surfrider Foundation can only participate in litigation if the global board of directors has specifically approved the lawsuit and the Surfrider Foundation is a named party. Coalition officers and other coalition members should be advised of this fact whenever a coalition is discussing potential litigation.

LIAISON

Each Surfrider Foundation litigation matter should be followed on the local level by a single designated liaison appointed by the Chapter. While the SFHQ leadership retains ultimate and complete authority over each Surfrider Foundation litigation matter, the liaison will coordinate local decision-making concerning the lawsuit.

The attorney representing the Chapter should have to turn only to two people in dealing with the Chapter as client in the lawsuit: the appropriate Surfrider Foundation staff on the organizational level and the liaison on the local level. It is the responsibility of the liaison to understand and implement Chapter litigation policies and to communicate with the Surfrider Foundation staff, local Chapter leaders, and other appropriate Chapter members when litigation decisions must be made.

The liaison should be one of the Chapter members most active and interested in the proposed litigation. In most instances, the liaison should not be the regional SFHQ staff employee. While these people may be appropriately selected as liaisons for lawsuits involving issues of particular importance to them, chapters are urged against the practice of approving lawsuits with the expectation that a staffer will supervise them. Requiring that a volunteer activist be willing to take on the responsibility of supervising a proposed suit acts as a brake against the overextension of limited Chapter resources; it ensures that the Chapter only takes on what it can realistically handle.

II. Environmental Litigation As a Campaign Tactic

If your Chapter is considering initiating a lawsuit to stop an environmental threat, it is wise to first ask: Why? What is the ultimate goal, and is using litigation going to help the Chapter achieve this goal? Are there other tools that would be as effective, such as enacting legislation? Rarely does litigation in itself permanently eliminate an environmental harm. Litigation can be an extremely effective tool to achieve a conservation goal when it is part of a well-planned campaign that generates community opposition to the environmental harm, strengthens the local Chapter, and mobilizes the community to action. Please refer to the Chapter Resources Book for details on how to organize and execute a campaign.

LITIGATION AS A CAMPAIGN TACTIC

Once your Chapter has all the steps of a campaign plan outlined, it is easy to see why litigation is not very useful by itself. A lawsuit is clearly not the environmental issue and it's clearly not the goal; even winning a lawsuit is not the goal. Rather, protecting the marsh or stopping the sprawl subdivision is the goal.

Litigation is a tactic, usually one of many tactics, to implement the strategy chosen to achieve the conservation goal.

KEY CONSIDERATIONS IN INTEGRATING LITIGATION INTO A CAMPAIGN

To integrate a legal component into a campaign, the most important special consideration is the need to find, and work with, the right lawyers. Chapters should seek attorneys prepared to spend the extra time needed to understand the ultimate conservation goals of the overall campaign. Chapters and their attorneys need to discuss how to prosecute the litigation to the best advantage as a tool in the environmental campaign; and how the overall campaign goals affect the specific legal relief the attorneys will seek, on behalf of the Chapter, in the lawsuit. Always have the ultimate goal for the action clearly identified.

The second key consideration is the use of media coverage concerning the litigation. It is vital that the lawyers and activists dealing with the litigation be fully briefed on the communication strategy and key messages of the environmental campaign. The point here is to employ "message discipline" by ensuring that the litigation, which is likely to generate a good deal of media coverage, is used to broadcast the Chapter's primary campaign messages. There is a tendency for lawyers and activists in litigation, when talking with the media, to focus too much on the legal issues and legal goals of the suit rather than the overall campaign messages.

III. The Authorization Process For Surfrider Foundation Litigation

SURFRIDER FOUNDATION HEADQUARTERS STAFF LEGAL MANAGER

Surfrider Foundation's global Legal Manager is responsible for obtaining the required SFHQ approval to initiate litigation. The Legal Manager (LM) and Legal Committee make recommendations on proposed legal matters to the global board of directors. The LM also is responsible for continuing supervision and review of Surfrider Foundation litigation. Chapter members considering litigation should use these resources in developing their litigation proposal.

NEW MATTERS REQUIRING APPROVAL

1. Lawsuits

Participation as a party in any lawsuit requires approval of the SFHQ board of directors. While the SFHQ leadership retains ultimate supervisory and decision-making authority over all aspects of Chapter litigation, once a lawsuit has been approved and filed, any subsequent appeal of the court decision will generally not require an additional formal SFHQ approval. **However, an appeal to the courts from an administrative decision always requires separate SFHQ approval**, even where SFHQ approval was already obtained (or was not needed) for participation in the underlying administrative proceeding.

All Chapters engaging in lawsuits and important administrative proceedings should make every effort to advise, in advance, other Chapters and staff that may have a significant interest in the activity (for example, if the Las Vegas Chapter is contemplating filing a Nevada lawsuit that will have an impact in California, it should consult with the California Chapters before initiating the litigation).

2. 60-Day Notice Letters

Some environmental laws require that a 60-day notice letter to the defendants precede the filing of a lawsuit. SFHQ authorization is required before sending a notice letter on the Chapter's behalf, though such authorization can usually be expedited.

3. Amicus Curiae (Friend of the Court) Participation

Authority to approve the filing of an amicus curiae (friend of the court) brief can be granted by the global board of directors through SFHQ. An amicus brief, like all other legal actions, is filed in the name of the Surfrider Foundation as a whole, not on behalf of a Chapter.

Chapter activists are urged to carefully evaluate whether an amicus brief is likely to be effective in achieving a conservation goal. An amicus brief is appropriate when the Chapter desires to make a point of law or policy not being argued at all, or not being well argued, by other parties. A well-argued, strategic brief can have a significant effect on the court's ruling. A brief filed, on the other hand, merely to show solidarity with the environmental parties in the lawsuit is unlikely to affect the outcome and, in the long run, harms the Chapter's credibility with judges.

4. Settlements

Approval by global board of directors is required for any settlement of a Chapter lawsuit, and, in many cases, for any pre-litigation settlement.

5. Administrative Proceedings

Surfrider Foundation participation as a named party in federal administrative rulemaking or formal adjudicative proceedings requires SFHQ authorization. Formal adjudicative proceedings are those that result in a final administrative decision based on a proceedings record where (a) a public hearing is required, (b) evidence is required, and (c) cross-examination is permitted. These formal proceedings tend to be protracted in nature and often are as demanding and costly as lawsuits. Giving testimony in such proceedings as a witness, or member of the public, and participation in informal hearings before federal agencies do not require SFHQ approval.

Except for state proceedings in California, participation as a named party in state and local administrative proceedings requires Surfrider Foundation global approval if:

- (a) the Chapter appears or is named as a party or the Chapter presents evidence and cross-examines on the record; or
- (b) there is a substantial likelihood that an appeal will be taken to the courts.

Authority to participate in state and local administrative proceedings and non-formal federal matters has been delegated to the regional conservation committees for regional issues and otherwise to the Chapters. Submission of Chapter concerns to appropriate agencies during "public comment periods" concerning, for example, environmental impact statements under NEPA, listing decisions under the Endangered Species Act, and so forth, should be proofed by SFHQ staff but would not require formal SFHQ approval. (Formal hearings concerning these agency decisions would require SFHQ approval.)

Chapter entities are encouraged to consult with the SFHQ staff on all administrative proceedings, which may be of regional, national, or international significance. Finally, even when an agency hearing is informal, it is always a good idea, if possible, to consult with an attorney if the agency decision is likely to be appealed to the courts.

TIME FOR SEEKING APPROVAL: 3 - 4 weeks

In cases where approval by the Chapter is required, the approval must be obtained in advance. Difficulties in both the approval process and in the underlying litigation have arisen far more often in "emergency" situations where there was inadequate time to evaluate and prepare a lawsuit, even if experienced environmental attorneys are available. If that time is not available, the best decision is often to forego the litigation.

It usually takes 3 - 5 weeks, after all material has been sent to the global office, to complete the approval process. The LM must review and evaluate the facts and legal theories, the financial arrangements, and whatever other issues the particular lawsuit presents. This evaluation usually requires the LM to discuss the proposed case with a number of leaders within the Chapter as well as the attorney handling the matter. Their written recommendation is then reviewed by the global legal committee, which decides whether to bring the issue to the full board for approval.

Even emergencies require about two weeks. Emergency approval is authorized only in cases where an applicable statute of limitations, an imminent start of construction, or an equivalent circumstance makes immediate approval necessary.

It is desirable to inform the LM early of any potential litigation being seriously considered, particularly where the Chapter entity involved lacks litigation experience, a novel legal theory may be involved, or the environmental issue is especially controversial. The LM may be able to assist in structuring the suit, advise who can help, point out potential problems or suggest more efficient alternatives. Early contact with the LM is particularly important where the suit may have to be filed quickly after a future event, such as the granting of a permit.

NEW MATTER FORM: Obtaining Authorization for Chapter Litigation

To obtain authorization for Surfrider Foundation litigation, activists should prepare and submit a "new legal matter form," a copy of which is located in the appendix. Additional copies may be obtained from the LM. To save time and phone calls, the form should be filled in as completely as possible, should be e-mailed, if possible, or else faxed or mailed to the LM. A legal memorandum setting forth the facts and legal theories should accompany the new matter form.

The Chapter should not provide final approval until it fully understands the consequences of proposed litigation. No matter how environmentally pressing the issue, a Chapter should authorize litigation only after having done the following:

- (a) obtained a competent, experienced attorney, preferably with environmental litigation experience;
- (b) worked out the financial arrangements with the attorney and co-plaintiffs;
- (c) evaluated the legal merits of the case;
- (d) established realistic goals to be achieved by the litigation; and
- (e) analyzed the risks of financial liability from countersuit or from court costs being awarded to the opposition.

The full new matter form is not required for requests to file an amicus curiae brief. A copy of the lower court decision and other pertinent legal papers should be sent to the LM with a request for authorization of such a brief; a short narrative memo is very helpful and will expedite consideration of the request.

OBTAINING AUTHORIZATION FOR SETTLEMENT OF LAWSUITS

Settlement of litigation also requires the approval of the SFHQ leadership. While the full new matter form is not required, the liaison should send to the staff attorneys a memorandum describing:

- (a) the original theory and goals of the lawsuit;
- (b) the proposed settlement;
- (c) what original goals are not being achieved by the settlement; and
- (d) why the Chapter is nonetheless recommending acceptance of the settlement.

The liaison should also send other helpful documents, including the proposed settlement itself, to the LM.

When negotiating and reviewing potential settlement agreements, Chapter leaders should alert their attorneys that the Chapter will not agree to settlements with certain objectionable provisions:

1. "Gag" or other "confidentiality" terms

Defendants often try to include a provision that in some manner restricts the ability of Chapter representatives to discuss elements of the agreement. These provisions are against the public interest nature of Chapter litigation, and they present significant risks to the Chapter because it is usually impossible to ensure that every present and future Chapter representative will be aware of and comply with the restrictions. Thus, these provisions expose the Chapter to the risk of future breach of contract actions. **Under no circumstances will the Chapter agree to any type of gag provision or other confidentiality term in a settlement agreement.**

2. Overly broad waiver of claims or "noninterference" provisions

An overly broad waiver of claims requires the plaintiffs, in exchange for the benefits of the settlement, to waive not only the claims raised in the lawsuit, but also any future claims regarding aspects of the challenged project or decision other than those addressed in the lawsuit. It is particularly objectionable if the defendants seek a commitment that the Chapter will not interfere in any manner -- even by spoken opposition at a public hearing -- with the project. Chapter liaisons and chapter leaders should examine such provisions closely and carefully consider what they are prepared to give up in exchange for the benefits of the settlement. **Under certain rare circumstances, the Chapter may agree to an overly broad waiver of legal claims, including future legal claims, but the Chapter will not agree to a noninterference provision that restricts non-litigation Chapter activities, such as public speaking.**

COORDINATION

Local attorneys handling authorized Surfrider Foundation legal matters will be asked to keep the LM advised and to send copies of the important legal papers as the case progresses. The Chapter entity involved should make the same request. The LM should be promptly consulted if complications develop in the relationship with the attorney or in any other aspect of the litigation.

FUNDING

Time and money for Surfrider Foundation litigation are extremely limited. As already noted, there are no SFHQ funds presently available for direct support of Chapter lawsuits. Thus, chapters should assess their fundraising potential and the availability of local legal talent in their consideration of any lawsuit. The Surfrider Foundation LM may be able to recommend attorneys who will consider handling legal matters for the Chapter.

Most attorneys expect their clients to cover out-of-pocket costs of litigation, which can sometimes be substantial. In these instances, the Chapter will be expected to cover these costs.

This chapter of the legal handbook does not answer all questions on legal matters. If you have further questions, please contact the Surfrider Foundation LM at the address or telephone below.

Surfrider Foundation

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Chapter 2 ENVIRONMENTAL ADVOCACY

I. Administrative Procedure

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Many local and state ordinances are set up based on the philosophy that the public should be involved at every stage of the planning process. During the development of the “comprehensive plan” (a document used by local governments to regulate the zoning and development of most urban areas), the public usually has the most opportunity to comment. Amendments to the comprehensive plan and specific development permits involve more narrow subject matter, and normally a more discrete opportunity to participate. Once a comprehensive plan has been approved, permitting of individual development approvals can occur that are consistent with the plan. These could take the form of a subdivision approval, a conditional use approval, a variance and/or a building permit. Sometimes these actions are purely administrative in nature and provide no opportunity for public input; whereas other actions have an established citizen input procedure and certain required approval steps. The local government planning commission generally has the opportunity to appeal permitting decisions.

REVIEW OF THE ADMINISTRATIVE RECORD

The administrative record is the paper trail that documents the agency’s decision-making process and the basis for the agency’s decision. It is important that Surfrider’s concerns are documented completely and frequently in this record because it is what the court uses to evaluate whether an agency’s action was “arbitrary and capricious.” The Administrative Procedure Act (APA) governs judicial review of a challenged agency decision. However, several statutes specify what documents and materials must be provided in an administrative record, depending on the specific statute that is at issue in the case. For instance, Section 501 through 519 of the Clean Water Act generally lay out the requirements for a satisfactory record with respect to environmental quality.

The administrative record consists of all documents and materials directly or indirectly considered by the agency decision maker. It is not limited to documents relevant to the merits of the agency’s decisions. The record should include any emails, data files, graphs, charts and handwritten notes that are available to the decision maker. The record may also contain privileged or redacted documents due, for example, to attorney-client, attorney work product or Privacy Act privileges.

PUBLIC INVOLVEMENT/PUBLIC HEARINGS¹

Public involvement refers to the full range of activities that local, state and federal government entities use to engage the American people in the decision-making process. Public involvement begins when individuals and organizations seek information from an agency about a topic or issue, or when they receive information because the Agency identifies them as a potentially affected party.

Information exchange is the next step. Depending on the case, an agency may be willing to publicly share data, options, issues and ideas. Then individuals and groups may collaborate with each other and the Agency to provide the agency with recommendations for action. Some continue on to engage with the agency management in reaching agreement by consensus. In the instance where the agency does not willingly divulge information that should be public, you may be able to make a FOIA request for the specific document that you would like to see (see Freedom of Information).

Access to information is crucial throughout the progression. As individuals and groups move through the steps in the progression, they seek more detailed information, increased access to decision makers, and more influence on the ultimate decisions.

Not everyone chooses to be an active participant in policy or regulatory decisions of the Agency. The EPA's goal is to provide opportunities for people to engage at every point along the progression. Individuals and groups decide for themselves whether, when, and how to participate.

TIPS ON HOW TO INFLUENCE THE PROCESS

For public hearings that allow public comment, such as city council meetings, these communications will be most effective when planned out in detail and supported by a group of persons representing a cross-segment of the society.² Remember that these presentations are usually limited to 2 or 3 minutes in length, so keep your remarks well tailored to the issue with a short introduction to yourself and Surfrider Foundation (if you are speaking on behalf of Surfrider).

Concentrate on the agency's problems, not on your own. In order to have an agency act to change a policy, it is most persuasive to show how the policy will damage the interests of the

¹ Note that Surfrider is a 501(c)(3) non-profit and cannot devote a substantial amount of money or time to legislative lobbying efforts. We are primarily an educational, grassroots non-profit working through conservation, activism, research and education. The IRS requires us to strictly and meticulously keep track of our legislative lobbying efforts, in terms of monetary expenditures and time expenditures. Please note that the Chapters should communicate all lobbying efforts with SFHQ before engaging in lobbying campaigns in order to ensure that the aggregate amount of lobbying is not surpassed as an organization.

² See Campaign Case Studies & How To and Public Testimony Examples on Chapternet, <http://www.surfrider.org/chapternet>.

agency itself. For example, you should highlight how it will fail to promote the agency's mission, inhibit attainment of the agency's goals, damage other agency purposes that perhaps have not yet received adequate consideration, or cost the agency long-term legitimacy or political support. It is best to depict the solution to your problem as a natural by-product of the agency's efforts to solve its own.³

Understand the bureaucratic process. Know that you should speak the language that the government official is used to hearing. You do not want to speak in legal terms to a scientist, and vice-versa. You should also focus on the format you are using to communicate with agencies and government officials. The government tends to use a format that includes an executive summary (to allow higher officials to scan the important information), a synthesis (to bring the pieces together into a coherent story), and a set of appendices (to discuss technical issues in more detail). This familiar form of communication is worth copying because it gives each office the overall idea of the issue and then allows certain officials to concentrate on the issues within their sphere of responsibility.⁴

Use the power of paper. Whereas oral presentations can be very effective to communicate a point, they should always be accompanied by a hard copy (or eco-friendly email version) in the form of a report or submitted power point presentation on the issue that details Surfrider's position. Due to the nature of the bureaucratic process, the decision process is diffused and relevant decision makers are seldom all in one place. Additionally, most government decision processes work slowly and the impact of the even the best oral presentation may quickly fade.

Communicate with elected representatives. In any sort of grassroots campaign, effective communication with your elected representative is key.⁵

1. Writing an Effective Letter to Your Elected Official

The following are some ways in which you may choose to communicate with elected officials:

- (a) Identify yourself (and/or Surfrider Foundation) early on in the letter, including the fact that you are a constituent. If you have received approval and are writing on behalf of your Surfrider Chapter, stress that there are 50,000 members in our organization and over 60 Chapters and note how the purpose of the letter ties in with

³ James V. DeLong, "How to Convince an Agency: A Handbook for Policy Advocates," *AEI Journal on Government and Society*, (Sept/Oct 1982) at p.28.

⁴ *Id.* at p.28-29.

⁵ Please note that if you are contacting your representative to lobby for a certain piece of legislation on behalf of Surfrider Foundation, you must adhere to specific mandatory reporting requirements required for non-profit organizations. These requirements are described in detail in the lobbying memo in the legal section of Chapternet.

our mission statement and strategic goals. Include state or chapter membership numbers as appropriate.

- (b) State the specific reason for your letter and/or legislation that you oppose or support.
- (c) Explain how the issue directly affects you and the elected official's district.
- (d) Be specific about the action you would like your legislator to take.
- (e) Try to keep the letter short, and know that it is not always necessary to type the letter. A handwritten letter may be just as effective, if legible.
- (f) If writing on behalf of Surfrider or your local Surfrider Chapter, be sure to obtain consensus within your Chapter's Executive Committee and approval from SFHQ if it is regarding an issue of national or international importance.

2. Testifying at a Public Hearing

Public testimony is one of the most powerful means of public involvement. Not only do you have the attention of decision-makers and staff at public hearings, you also have an opportunity to make your point in front of other community members and oftentimes media reporters. Verbal testimony has an emotional impact, especially on elected officials who may only give a cursory read of the written record, or not read it at all. The fact that you made the extra effort to come out and participate in person sends an important message to the agency and the public regarding your level of commitment to the issue. Agencies are always under pressure to do the wrong thing and appreciate some support to do the right thing.

Public testimony is generally taken at the committee level during a public hearing, usually speakers are given anywhere from 2 to 5 minutes to present and speaker's names and position on the issue are recorded by the entity holding the hearing. You may be required to submit a "speaker slip" before the public comment period of the hearing, which is used to organize and estimate the number of speakers.

The following are some tips on how to effectively give public testimony:

- (a) Prepare and Practice. Prepare your presentation to include two or three key points and know them well. Practice or role-play your testimony. And prepare a written version of your testimony to submit.
- (b) Dress appropriately. A good impression can only help your message, not detract from it. This could include wearing a Surfrider T-shirt or Polo and carrying a surfboard to clearly identify your cause.

- (c) Listen to other testimony. In addition to getting a feel for the whole community's view on the issue, you also want to make sure that your own testimony is not repetitive.
- (d) Identify yourself. Give your full name, address, and if you are testifying on behalf of Surfrider briefly describe our mission and member count (specific to the Chapter, if possible).
- (e) Clearly state your position. Give a clear and concise description of your position on the issue or the bill upfront.
- (f) Personalize your testimony. Tell how this issue was presented to you and what motivated you to come out to speak about it. Formulated testimony is not as impressive or as eloquent as speaking in your own words.
- (g) Try not to read your testimony. The committee or council will listen to and appreciate your testimony more if you tell it from the heart and not from a script.
- (h) Request action and offer solutions. Concisely restate what you'd like the decision-makers to do. Never blame anyone or make accusatory remarks, this detracts from your point.
- (i) Thank the committee. Close your presentation by thanking the committee or council.
- (j) Submit your testimony in written format. If possible, submit your testimony in written format along with any other information supporting your message to the committee or council.

3. Meeting with Your Elected Official

If you have the opportunity, meeting with an elected official is also an effective advocacy tool. Most legislators want to meet with citizens to hear their concerns and recommendations. Any citizen who is passionate about an environmental issue may meet with an elected official to get their message across; you do not have to be an expert lobbyist. Because you hold the power of the vote, your opinions carry more weight than any number of lobbyists. Here are a few tips for a meeting with your elected official:

Before the Meeting: first, you want to make an appointment with the legislator, or alternatively a legislative aide/staffer, by calling the legislator's secretary or scheduler. Send a note to confirm the appointment a day or so before the meeting. To prepare, it is good to write a formal letter or fact sheet of information to leave with the legislator. You will also want to be able to relay why this issue is important to you/Surfrider and include any personal stories. If possible, a small group of members (three is optimum) should meet with the legislator. The speaking time and issues should be divided within the group. Also, you may want to have a

signed petition or results of an action alert that you can submit to the legislator in person at the time of the meeting to illustrate the numerous individuals that you are representing.

During the Meeting: begin with a compliment, for example by commenting on their outstanding environmental voting record or thanking them for taking the time to meet. Make your opening remarks brief. Give a clear description of the issue, your position on the issue and what you want the elected official to do. If legislation is involved in the discussion, be sure to state the bill number, name, and sponsors. Unless the official is clearly opposed to your position, ask them if they will commit to supporting the issue by speaking out on the floor or voting for or against the item.

After the Meeting: promptly follow up the meeting with a thank you letter that restates your key points, gives the answer to any outstanding questions, reiterates any commitments the legislator made, and is signed by all persons who attended the meeting with you.

Other helpful tips:

- (a) Know the starting point of the decision maker, including where the issue currently stands in the administrative process.
- (b) Do not insult the agency staff (even if they have proven themselves to be ignoramuses, take the high road).
- (c) Deal with the political environment. Agencies are vulnerable to reports of scandal and incompetency and to raids on their authority or budget by legislative bodies or executive decision-makers.⁶

USEFUL LINKS

From the Environmental Protection Agency:

Tools for Public Involvement: <http://www.epa.gov/publicinvolvement/involvework.htm>

EPA Resources for Non-Profit Organizations: <http://www.epa.gov/epahome/nonprof.htm>

Environmental Violations: <http://www.epa.gov/epahome/violations.htm>

Public Involvement in EPA Decisions: <http://www.network-democracy.org/epa-pip/> (A national Internet-based dialogue convened by the U.S. Environmental Protection Agency and hosted under contract by Information Renaissance. From July 10 - July 20, 2001 EPA convened a public discussion on improving public involvement in EPA decision-making. The dialogue was based on the EPA's newly drafted Public Involvement Policy. Interested citizens, representatives of industry, environmental groups, small businesses, states, local governments, tribes, and other

⁶ *Id.* at 30-32.

groups examined the draft policy and shared thoughts and concerns on how EPA should implement it.)

Other Links:

Oregon League of Conservation Voters Education Fund Citizen Tool Kit:
<http://www.olcveducationfund.org/trainings/CitizenToolKit/>

II. Standing

IN GENERAL

Standing is one of the most difficult hurdles faced by environmental organizations when bringing suit. Basically, the term “standing” refers to the ability to be heard in court as a proper plaintiff; legally, it is defined as “the legal right of a person or group to challenge in a judicial forum the conduct of another, especially with respect to governmental conduct.”⁷ The concept of standing is not clearly defined in a simple doctrine, and often even Supreme Court Justices cannot agree on when to grant standing. The concept of standing will vary from case to case, depending on the causes of action that apply and the statutes that are implicated. For our purposes, the standing issue will always have to be analyzed by at least two attorneys who have been fully briefed on the background of the particular case that Surfrider is considering.

In the federal court system, the concept of “standing to sue” stems from the litigant’s requirement of “case or controversy” within the meaning of Article III of the United States Constitution. The doctrinal components of standing, as interpreted under Article III, include (a) an injury in fact that (b) is due to defendant’s behavior and (c) is likely to be redressed by a decree in the plaintiff’s favor. The doctrine of standing has also been supplemented by “prudential requirements” that are derived out of case law. The “prudential requirements” of standing include: (a) interests must be arguably within the statute’s “zone of interests,” (b) injury must not be that of a third party, and (c) the injury must not be broadly generalized.

In general, plaintiffs must be able to show:

1) “Injury in Fact”

- Harm is concrete rather than abstract, speculative or hypothetical
- Affects the plaintiff directly rather than litigating on behalf of an outsider
- Must be actual or imminent, and not conjectural or hypothetical

⁷ *Barron’s Law Dictionary* by Steven H. Gifis (1996).

2) Causation/Nexus

- Causal connection between the injury and the conduct complained of
- Arguably within the zone of interests that the law at issue is trying to protect (prudential requirement of *Akins*)

3) Redressability

- Able to be redressed by a favorable judgment
- Note that if there are other contingencies with must be satisfied by the plaintiff's "injury" to be redressed, he may lack standing⁸

If the plaintiff is an **organization**:

- 1) The members would have standing
- 2) The interests at stake are germane to the organization's purpose
- 3) Individual member's participation in the suit is not needed

States vary widely in their standing requirements. Interpretations of the constitutional requirements of standing will vary depending on the court that is hearing the case. The Ninth Circuit is known for being lenient in granting standing, while the DC Circuit court has been somewhat more restrictive in determining who is a proper plaintiff entitled to standing.⁹

In regard to state law causes of action, states again will vary. Many state environmental protection acts will have distinct statutes that delineate when a suit may be brought and by whom. Further, these statutes will likely be interpreted by state judges in state case law. This is why it is imperative to have an attorney who is licensed to practice in the specific state evaluate the issue of standing from a legal perspective.

1. "Citizens' Suits"

Many state and federal environmental statutes and amendments, including the Federal Water Pollution Control Act and Clean Air Act, expressly confer standing to challenge agency actions on "any person" or "citizen."¹⁰ On the other hand, in cases where judicial review is provided for the granting or denial of a permit, statutes customarily confer standing only upon an "aggrieved" party.

2. Administrative Procedure Act (APA)

⁸ See *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 253 (1977).

⁹ See, e.g., *Center for Law & Education v. Dept. of Education*, 396 F.3d 1152, 1161-62 (D.C. Cir. 2005) ("frustration of an organization's objections is the type of abstract concern that does not impact standing").

¹⁰ 33 U.S.C. § 1365; 42 USC § 7604.

The general rule for standing under the APA is that a potential plaintiff must show there is an “injury in fact” and that he or she is “arguably within the zone of interests” protected or regulated by the statutory scheme.¹¹ APA § 702 provides judicial review of an administrative action for a “person suffering legal wrong because of agency action, or adversely affected or aggrieved within the meaning of a relevant statute.” The court will look at who is the intended beneficiary of the regulation. The core of the reviewability question turns on congressional intent. The interests asserted by the plaintiff must have a plausible relationship to the policies underlying the statute.

3. Taxpayer Standing

There is an entire body of law surrounding taxpayer standing, with several Supreme Court cases attempting to delineate when a suit can be brought as a taxpayer. In general, a taxpayer cannot attain standing unless the plaintiff-taxpayer can meet a two-part “nexus” test, which requires that (a) there be a “logical link” between the taxpayer status and the statute challenged, and (b) there is a nexus between the taxpayer status and the constitutional provision used in the cause of action. For example, taxpayer standing will likely be granted when it is used to fight a law on the basis of the establishment clause. In *Flast v. Cohen*, 392 U.S. 83 (1968), the Supreme Court upheld standing of federal taxpayers to challenge, as a violation of the establishment clause of the first amendment, a law authorizing federal grants for instruction and teaching materials in religious schools. One cannot get standing unless he or she alleges that, as a taxpayer, he or she is in danger of suffering a particular concrete injury as a result of the operation of the statute.

4. Important Supreme Court Cases

Sierra Club v. Morton, 405 U.S. 727 (1972) – Organization tried to fight the construction of a recreation area in a national park, but standing was denied because even though the Sierra Club alleged to have “a special interest in the conservation and sound maintenance of the national parks,” they failed to allege that they suffered a specific harm because they used the site in question.

United States v. SCRAP, 412 U.S. 669 (1973) – Supreme Court granted environmental groups standing to challenge to railroad surcharge suspension because the group claimed that its members used the forest, streams and mountains affected by the decision. This case upheld an “attenuated line of causation to the eventual injury.”

Lujan v National Wildlife Federation, 498 U.S. 871 (1990) – An environmental organization was denied standing to challenge the Interior Department’s reclassification of vast tracts of federal land, even though the NWF asserted that two of its members visited places “in the vicinity” of the tracts.

¹¹ *Data Processing v. Camp*, 397 U.S. 150, 153 (1969).

FEC v. Akins, 524 U.S. 11 (1998) – Supreme Court held that the ban on generalized grievances did not apply when Congress expressly gives a cause of action to “any person.” The Court also noted that those adversely affected by a discretionary agency decision also generally have standing.

Steel Company v. Citizens for a Better Environment, 523 U.S. 83 (1998) – Plaintiff environmental organization was denied standing because the polluter company agreed to comply with its duties under its permit after the suit was filed; therefore, the injury was no longer redressable. The suit was brought as a private enforcement action under a citizen-suit statute; the court found that none of the relief sought by the plaintiff would likely remedy its alleged injury in fact; therefore, there was no standing for wholly past violations.

Friends of the Earth v. Laidlaw, 120 S. Ct. 693 (2000) – Because plaintiffs sought civil damages and the violations here were ongoing at the time of complaint which could continue into the future if undeterred, there was standing. Here a suit was brought under the citizen-suit provision of the Clean Water Act

Massachusetts v. EPA, 549 U.S. ____ (April 2, 2007) – Supreme Court upheld the standing of the state of Massachusetts to challenge the EPA’s denial of a rulemaking petition to compel it to regulate auto emissions of “greenhouse gases,” noting that normal standards of redressability and immediacy are applied less stringently when the suit is based on “procedural right to protect his concrete interests” and that the harms associated with climate change are serious and well recognized. The fact that “these changes are widely shared does not minimize Massachusetts’ interest in the outcome of this litigation.”

EXAMPLE: California Coastal Act Provision

Section 30801 Petition for writ of mandate; aggrieved person; any aggrieved person shall have a right to judicial review of any decision or action of the commission by filing a petition for a writ of mandate in accordance with Section 1094.5 of the Code of Civil Procedure, within 60 days after the decision or action has become final.

For purposes of this section and subdivision (c) of Section 30513 and Section 30625, **an "aggrieved person"** means any person who, in person or through a representative, **appeared at a public hearing** of the commission, local government, or port governing body in connection with the decision or action appealed, **or who, by other appropriate means prior to a hearing, informed the commission, local government, or port governing body of the nature of his concerns or who for good cause was unable to do either.** "Aggrieved person" includes the applicant for a permit and, in the case of an approval of a local coastal program, the local government involved.

III. Enforcement Litigation

Enforcement litigation acts to address violations that continually occur, gives a legal mechanism or “voice” to people and organizations who are monitoring the quality of our beaches, and lets government agencies know that when they fail to act to regulate polluters and other wrongdoers they will be held accountable for this failure.

One example of enforcement litigation is filing a citizen suit under the Clean Water Act (CWA). Both private parties (polluters) and government agencies (for failure to pursue a mandatory duty) may be sued under this provision. The citizen (or organization) bringing the suit must have been potentially adversely effected by the violation to procure standing. In addition, the filer of the suit must give the EPA notice of intent to sue before officially filing the suit. After receiving notice, the EPA may instigate an enforcement action against the violator at which time the citizen suit becomes moot, as it is no longer needed. Finally, a citizen suit may not be brought for violations occurring entirely in the past; the violation must be continually occurring the moment the suit is filed (or assumed to be occurring the future).

The mechanics of filing a citizen suit include (1) obtaining approval from Surfrider Foundation (see Chapter 1 Surfrider litigation approval description), (2) issuing of notice of intent to sue, and (3) if necessary, filing a complaint. “Prior Notice of Intent to Sue” is subject to EPA regulation.¹² Regulations of the Clean Water Act describe what information must be contained in the intent to sue letter.¹³ The letter must be sent sixty (60) days before a suit may be filed. The letter must be sent to the Administrator of the EPA, the Regional Administrator of the EPA (in the region where the violation is taking place), the Chief Administrative Officer for the State Agency in which the violation is taking place (such as the Oregon Department of Environmental Quality), and the defendant/violator.

Once sixty (60) days have passed, the suit may be brought by filing all the appropriate paperwork with the court clerk. To file suit, several forms must be given (or “docketed”) to the court clerk. These document requirements will vary depending on the local rules of the court, but normally include an original signed Complaint, an original Summons, sometimes a civil cover sheet and disclosure form, and a check for the filing fee. Also, formal “service of process” must be made on the defedant. This means that the defendant must recieve a copy of all of the above documents by personal delivery, unless they have waived formal service.¹⁴ A copy of the documents must also be sent to the defedent’s attorney, defendant’s registered agent (if needed), US Attorney General, EPA Admistrator and Regaional Administrator, and the relevant state agency. Don’t forget to keep a copy of everything for Surfrider Chapter files and Headquarters files.

¹² 33 USC § 1365(b)(1); 42 USC § 6972(b)(1),(2).

¹³ 40 CFR §§ 135.10-135.13.

¹⁴ Fed Rules Civ Proc 4(d).

IV. FOIA/CPRA

The Freedom of Information Act (“FOIA”) found in 5 U.S.C.A. §552 applies to federal government agencies such as EPA, NOAA, and the Army Corps. The Act serves as a powerful tool to enforce government accountability. It allows any person to view and copy federal agency documents. Government agencies are subject to regulations which force them to comply with public solicitation of information. FOIA allows for the full or partial disclosure of previously unreleased information and documents controlled by the U.S. Government. The Act defines agency records subject to disclosure in section (a), and outlines mandatory disclosure procedures and grants nine exemptions to the statute in section (b).

Under section (a)(1) of the FOIA, each agency shall separately state and currently publish in the Federal Register for the guidance of the public:

- (A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
- (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
- (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
- (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
- (E) each amendment, revision, or repeal of the foregoing.

Additionally, FOIA mandates that each agency, in accordance with published rules, shall make available for public inspection and copying:

- (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
- (B) those statements of policy and interpretations that have been adopted by the agency and are not published in the Federal Register;
- (C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D).¹⁵

Any person may request public access to federal agency records or information under FOIA. However, FOIA does not provide a right of access to the following records: (1) Records held by Congress; (2) Federal courts; (3) State or local government agencies; and (4) Private businesses, organizations or individuals.

The law carries a presumption of disclosure. Therefore, the government, not the public, carries the burden to show why the information may not be released. The federal agencies must release the records upon receiving a written request, unless they can be lawfully withheld under one of the nine specific exemptions or the three exclusions in the FOIA. Upon a request for records, a public agency must make the records promptly available. The agency shall determine within twenty (20) days of the request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination.¹⁶ The agency must produce the record in whatever form the person asks for it, if that form or format is readily reproducible by the agency. In order to carry out the provisions of section (a), each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced.¹⁷

The nine exemptions which allow an agency to deny a request for information are defined in 5 U.S.C.A. §552 (b) and state that section (a) of FOIA does not apply to matters that are:

- (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
- (B) related solely to the internal personnel rules and practices of an agency;
- (C) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes

¹⁵ §552 (a)(2).

¹⁶ 5 U.S.C.A §552 (a)(6)(A)(i).

¹⁷ 5 U.S.C.A. §552(a)(4)(A)(i).

particular criteria for withholding or refers to particular types of matters to be withheld;

- (D) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (E) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (F) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (G) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
 - (1) could reasonably be expected to interfere with enforcement proceedings,
 - (2) would deprive a person of a right to a fair trial or an impartial adjudication,
 - (3) could reasonably be expected to constitute an unwarranted invasion of personal privacy,
 - (4) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,
 - (5) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or
 - (6) could reasonably be expected to endanger the life or physical safety of any individual;
- (H) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (I) geological and geophysical information and data, including maps, concerning wells.

FOIA also has three exclusions which allow an agency to exclude the records from to the act. These three exclusions include:

- (A)** Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--
 - (1)** the investigation or proceeding involves a possible violation of criminal law; and
 - (2)** there is reason to believe that (a) the subject of the investigation or proceeding is not aware of its pendency, and (b) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.
- (B)** Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.
- (C)** Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

The Electronic Freedom of Information Act Amendments of 1996 (E-FOIA) states that all agencies are required by statute to make certain types of records, created by the agency on or after November 1, 1996, available electronically. Agencies must also provide electronic reading rooms for citizens to use to have access to records. The Electronic Reading Room provides access to frequently requested documents released under the FOIA, special records collections of continuing public interest, and the Department's Annual FOIA Reports. Some publications, including forms, reports, and policy statements are electronically available through the Bureaus or Offices within the Department. Given the large volume of records and limited resources, the amendment also extended the agencies' required response time to FOIA requests from ten days to twenty.

Along with making public and accessible all bureaucratic and technical procedures for applying for documents from that agency, agencies are also subject to penalties for hindering the process of a petition for information. If “agency personnel acted arbitrarily or capriciously with respect to the withholding, [a] Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding.”¹⁸ In this way, there is recourse for one seeking information to go to a Federal court if suspicion of illegal tampering or delayed sending of records exists.

Government Agencies and their respective FOIA websites

EPA – has its own regulations for the FOIA. [40 C.F.R. 2.100 -- 40 C.F.R. 2.108]

NOAA – <http://www.rdc.noaa.gov/~foia/>

NMFS – <http://reefshark.nmfs.noaa.gov/f/pds/publicsite/documents/procedures/30-125-01.pdf>

Army Corps – <http://www.hq.usace.army.mil/CECI/FOIA/index.htm>

FERC – <http://www.ferc.gov/legal/ceii-foia/foia.asp#skipnavsub>

CALIFORNIA PUBLIC RECORDS ACT

The California Public Records Act (“CPRA”) is state law contained in the California Government Code §6250-6276.48. The fundamental purpose of CPRA is to make governmental records public, upon request, unless there is a specific reason not to do so. The legislature “finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in the state,” and this access must always be free outside of any duplication costs, or statutory fees applicable.¹⁹ Charges for search, review, or deletion are not allowed.²⁰ Cases interpreting CPRA have determined that the primary purpose is to give the public an opportunity to monitor the functioning of their government.

The CPRA covers all state and local agencies, including; (1) any officer, bureau, or department; (2) any “board, commission, or agency” and (3) nonprofit entities that are legislative bodies of a local agency. The CPRA however does not cover courts, the legislature (under the legislative open records act), private non-profit corporations and entities, and federal agencies (FOIA). Most court records are disclosable as a matter of public rights of access to courts under the First Amendment to the United States Constitution.

The public may inspect or obtain a copy of identifiable public records. Writings held by state or local government are public records. CPRA covers public records, which include all communications, related to public business “regardless of physical form or characteristics,

¹⁸ U.S.C.A §552 (4)(f).

¹⁹ Cal. Gov. Code §6250 and §6253.

²⁰ Cal. Gov. Code §6253 (b).

including any writing, picture, sound, or symbol, whether paper, magnetic, or other media. Electronic media is included.²¹ The agency must provide assistance by helping to identify records and information relevant to the request and suggesting ways to overcome any practical basis for denying access.²² The point of CPRA is to provide access to information, and not merely the documents and files.

The decision on whether to grant access must be prompt. An agency has 10 days to decide if the copies will be provided. In rare cases, the agency may, upon a written notice to the requester, give itself an additional 14 days to respond. If the agency denies the request, they must justify the withholding of any record by demonstrating that the record is exempt or that the public interest in confidentiality outweighs the public interest in disclosure.²³ If a record contains exempt information, the agency must segregate or redact the exempt information and disclose the remainder of the record. An agency may not make records only available in electronic form.²⁴ Finally, CPRA does not permit an agency to delay or obstruct the inspection of copying of public records.

What is Covered:

Although the CPRA covers a large amount of public records that must be made available, not everything is subject to disclosure. There are two recurring interests that justify most of the exemptions from disclosure. First, several CPRA exemptions are based on the individual's right to privacy. Second, they are based on the government's need to perform its assigned function in a reasonably efficient manner. CPRA generally exempts personnel records, investigative records, drafts and material made confidential by other state or federal statutes. Employees' private papers are not covered, unless they "relate to the conduct of the public's business and are prepared, owned, used, or retained by the agency."²⁵ Computer software "developed by a state or local agency" is not subject to disclosure.²⁶ Records that are not yet in existence are not covered by CPRA. CPRA only covers records that already exist, and an agency cannot be required to create a record, list, or compilation. Finally, CPRA does not cover attorney-client discussions, home addresses, records concerning agency litigation, medical and similar files, rap sheets, arrest records or otherwise privileged information. Although CPRA may exempt these documents from disclosure, this does not mean that disclosure is prohibited. An agency's decision is discretionary, which means it may withhold the records, but can also allow greater

²¹ Cal. Gov. Code §6252(e).

²² Cal. Gov. Code §6253.1.

²³ Cal. Gov. Code §6255.

²⁴ Cal. Gov. Code §6253.9(e).

²⁵ Cal. Gov. Code §6252 (e).

²⁶ Cal. Gov. Code §6254.9 (a),(b).

access if it wishes.²⁷ Once a record is disclosed to one requester, the record is public, and may be accessed by anyone.²⁸

REQUESTING PUBLIC RECORDS

A person does not need to give notice in order to inspect public records at an agency's office during normal business hours. However, if the record must be redacted in order to protect the exempt material, the agency must be given a reasonable period of time to perform these functions. When requesting public records, you want to always know which exemptions may apply. Ask informally before invoking the law. Make sure to look to other access laws that aren't subject to CPRA, such as the Legislative Open Records Act, court cases, or Freedom of Information Act. A written request is not required, but it may help to simplify your request if you think it may anticipate trouble. If the agency says that the records don't exist, offer any suggestions for search tips. Demand a written response within 10 days. The *First Amendment Project Society of Professional Journalists* created a six-step strategy for when your request is denied. Always keep a log of whom you spoke with, and the stated reason for the denial. Then, follow the acronym D-E-N-I-A-L.

D = Discretionary: exemptions are permissive and not mandatory. Ask the agency if they will waive the exemption and release the record.

E = Explanation: Insist that the agency explain in a written denial why the exemption applies to the requested record.

N = Narrow application: The act favors access. Exemptions must be narrowly construed.

I = Isolate: Request the release of any non-exempt portions of the record

A = Appeal: State your rights, and ask to speak to a higher agency official

L = Lawsuit: File suit to enforce your rights. A requester, and not a public agency may bring an action seeking mandamus, injunctive relief, or declaratory relief. The documents may be inspected at an in-camera hearing (a private hearing with the judge). If you win, the agency must pay your costs and legal fees. However be careful to not file a frivolous claim. A court may order attorney fees and costs to the public agency if they find that the lawsuit is frivolous.²⁹

Websites further explaining CPRA

<http://www.thefirstamendment.org/publicrecordsact.pdf>

²⁷ Cal. Gov. Code §6253(e).

²⁸ Cal. Gov. Code §6254.5.

²⁹ Cal. Gov. Code §6259(d).

V. Federal and State Agencies

Federal Agencies. Federal agencies that manage the coastal zone and ocean include:

- U.S. Coast Guard
- U.S. Environmental Protection Agency
- U.S. Minerals Management Service
- U.S. Army Corps of Engineers
- U.S. Fish and Wildlife Service
- National Oceanic and Atmospheric Administration (NOAA)
- and Federal Energy Regulatory Commission (FERC) for any energy-related projects, such as wave energy

California. Some prominent California state agencies that manage the coastal zone and ocean include:

- California Coastal Commission – see California Coastal Commission section
- State Lands Commission – along with the Department of Parks and Recreation, serves to manage important coastal resources, including near-shore marine reserves and dozens of state beaches and coastal state parks; any projects proposing to develop on or use areas up to 3 miles out in the Pacific Ocean must first acquire a lease from the State Lands Commission³⁰
- California Coastal Conservancy – created by the Coastal Act of 1976; serves as a “repository for lands whose reservation is required to meet the policies and objectives” of the Coastal Act.³¹ Its powers extend to acquiring state lands, funding design and construction of public access projects, providing technical and financial assistance to local agencies and nonprofit land trusts, accepting interests in land when agency is unwilling or unable to do so, and managing fees when required by the CCC to do so.
- Ocean Protection Council – created by the California Ocean Protection Act of 2004, serves to coordinate all state and coastal ocean management agencies³²

³⁰ Cal. Pub. Res. Code § 501, 530.

³¹ Cal. Pub. Res. Code § 31104.1.

³² Cal. Pub. Res. Code §§ 35500-35650.

Also, generally some government entities involved in developmental approvals include: Attorney General's Office, State Water Resources Board, Regional Water Quality Control Board, Department of Fish and Game, Regional Planning Agencies (e.g. BCDC, Tahoe Regional Planning Agency).

Chapter 3 WATER QUALITY

I. CLEAN WATER ACT

Water quality is of the utmost importance to the citizens of California, and maintaining it is one of the major goals of the Surfrider Foundation. The Clean Water Act is the national law most applicable to water quality, and was created by Congress to help maintain and protect the nation's waters for drinking, swimming, fishing, and surfing.

The Clean Water Act ("CWA") is one of the most important environmental laws in the county, and one that Surfrider deals with on an almost daily basis. In 1972, Congress promulgated the Federal Water Pollution Control Act Amendments, which was renamed the Clean Water Act in 1977. The Act was passed in order to protect, "restore, and maintain the chemical, physical, and biological integrity" of the United States' surface waters.³³ By placing regulations on sources of water pollution, the Clean Water Act attains and maintains a level of water quality that supports the "protection and propagation of fish, shellfish, and wildlife" and "recreation in and on the [United States'] waters."³⁴ In an effort to control water pollution, the CWA outlaws discharge of pollutants from any "point source."

DEFINITIONS

"**Point source**" refers to any "discrete conveyance" which includes but is not limited to any pipe, ditch, channel, tunnel, landfill leachate collection system, concentrated animal feeding operation ("CAFO"), or spillway that can transport pollutants into waterways.

"**Nonpoint source**" (also known as "urban runoff") is water that drains off of any urban area during both dry weather and wet weather.

³³ 33 U.S.C. § 1251 *et seq.*

³⁴ 33 U.S.C. § 1251(a)(2).

Nonpoint source pollution has been shown to be a leading cause of water pollution in rivers and oceans and is a frequent cause of beach closures. In response to this problem, the CWA was amended in 1987 to require medium and large municipalities to obtain National Pollution Discharge and Elimination System (NPDES) permits for storm water discharges.

NPDES PERMITS

A National Pollution Discharge and Elimination System permit will typically specify waste discharge requirements of the applicant. For instance, the permits regulate maximum flow rate, pollutant concentration levels, biological oxygen demand (BOD), allowable pH range, and maximum temperature. The permittee may choose which technologies to use in order to achieve the specified concentrations. The permit provides for inspection and monitoring, public notice and notice to the EPA and the state, and sometimes a pre-treatment program. Permits are issued for up to five years. The non-point source municipal stormwater permits may also require inventories and inspections of industrial, commercial and construction sites.

If an entity discharges from a point source into the waters of the United States, they are required to have a NPDES permit. Dischargers typically regulated by the NPDES permit program include: oil refineries, chemical manufacturing plants, metal plating shops, semiconductor manufacturing facilities, food processing plants, canneries, fish hatcheries, wineries, groundwater cleanup projects, pulp mills, and other general manufacturing plants. Facilities that discharge wastes directly into municipal or other publicly-owned wastewater collection and treatment systems are not required to obtain an NPDES permit, but must abide by waste discharge requirements issued by that entity.³⁵

CITIZEN SUITS UNDER THE CWA

The Clean Water Act empowers individual citizens as “private attorney generals” to bring their own lawsuits to stop illegal pollution discharges. A citizen suit can be brought by anyone who can prove that they have some interest that is or may be adversely affected (for instance, a surfer may bring a suit for pollution in the watershed of their home break). The statutory authority for citizen suits can be found in subchapter V, General Provisions, Section 505 of the Clean Water Act, which states “any citizen may commence a civil action on his own behalf.”³⁶ If a polluter is operating in violation with the Clean Water Act or outside of their permitted authority, then any person or entity that is or might be affected by the violation has a right to sue under this provision. The plaintiffs under citizen suits can seek injunctive relief (i.e. court orders prohibiting the pollution from continuing), civil penalties, and reimbursement of legal costs and attorneys’ fees. Note, however, that “the court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party,

³⁵ Rick Wilson, “Coastal A-Z: The National Pollutant Discharge Elimination System (NPDES),” available at <http://www.surfrider.org/srui.aspx?uiq=a-z/npdes>.

³⁶ 33 U.S.C. § 1365.

whenever the court determines such award is appropriate.” This means that a court may also award attorney’s fees be paid to the defendant if the plaintiff has brought a faulty action. The court may also require the filing of a bond or equivalent security if the Plaintiff seeks a temporary restraining order or preliminary injunction.³⁷

Suit can be brought against the polluter, that is, any person who causes the injury (including the United States). In addition, if the regulatory agency with jurisdiction over the polluter fails to take adequate enforcement actions and collect acceptable results, citizens have the right to file citizen suits against the state regulatory agency or the U.S. EPA. The suit must be brought in the federal district court that has jurisdiction over the “source” of the pollution.

Many citizen suits never go to trial. The regulated industries want to avoid Clean Water Act citizen suits due to their costly nature and will often work with the regulatory agency once the violation has been made public. Filed citizen suits often settle before final judgment. Penalties in settlements take two main forms: penalty funds are either directed to projects that have environmental benefits or dischargers are credited penalty amounts in exchange for additional environmental improvement measures.³⁸

1. When to sue?

There must be sufficient injury – The injury suffered can be aesthetic, conservational, recreational, or physical.

A CWA suit may be brought after giving a 60-day notice to (a) the alleged violator, (b) the state in which the violation occurs, and (c) the administrator of the relevant government agency. The notice must be of a harm that has already happened or for a harm that is imminent.

2. Notice of Intent Letter

Before a citizen can file suit under the CWA, they must send a 60-day Notice of their Intent to File Suit to the entity describing its alleged violation. A copy of this intent letter must also be sent to the state regulatory agency and the U.S. EPA Administrator. Receipt of this letter initiates a 60-day interim or “grace period” before a court case can commence and before the plaintiff can file an official complaint, in which time the violator must come into compliance with its permit or Administrative Order. The 60-day letter must be fairly specific regarding the alleged violations.

A citizen can file suit after the 60-day grace period only if the following two actions occurred during the 60-day period: (1) the regulatory agency failed to require a violator’s compliance with the CWA’s effluent standards and limitations or with an Order requiring

³⁷ 33 U.S.C. § 1365(d).

³⁸ Ohio Environmental Council, “Watershed Watchdog: Guide to Clean Water Act Citizen Suits”, available at http://www.theoec.org/PDFs/water/cwater_pollaw_suit.pdf.

compliance with these standards, AND (2) the regulatory agency did not begin, and did not continue to diligently prosecute a civil or criminal action against the violator. In cases where the relevant regulatory agency did initiate a criminal or civil action, citizens may have the right to intervene in these cases.

Similarly, when a citizen files suit against a state regulatory agency or the U.S. EPA for failure to regulate polluters under the CWA, they must send a 60-day Notice of Intent to Sue to this agency.

3. Steps to take to initiate a citizen suit

Collect information on the suspected violator. In order to have a successful citizen suit under the Clean Water Act, there must be reliable and sufficient evidence to show detrimental effect to water quality caused by the polluter. To show this, detailed and organized records must be kept of the investigation of the polluter. Without trespassing on the alleged polluter's property, investigate the site from points of public access such as bridges, and roads. Record your observations and details about the alleged violation, including the exact location, date, time of day, how the alleged violation is occurring and what it may be affecting. It is also very beneficial to collect water samples and take photographs with date imprinting to document this data. Especially effective pictorial evidence includes fish kills, sediment plumes, suspicious foams, strangely colored water, and unordinary erosion. Be sure to note any affected areas that may be considered special aquatic habitats, scenic areas, fishing access areas, riverside picnic areas, or swimming areas.

Contact a Surfrider attorney to draft a 60-day notice letter. Once the factual information is collected and verified, you should seek the advice of a licensed attorney to help draft a notice of intent to sue letter. Send a draft of the letter to the Legal Manager, who will consult with the Board of Directors Legal Issues Committee and ask for Board approval (please allow two weeks for this process to occur).

CIVIL AND CRIMINAL ENFORCEMENT UNDER THE ACT

In addition to enforcement of the CWA by a citizen suit, regulatory agencies can take civil enforcement actions and State Attorneys General or U.S. Attorneys may prosecute violators criminally. As an alternative to a civil action, the appropriate regulatory agencies may also require corrective actions in order to force violators to comply with the Clean Water Act and assess civil penalties of up to \$27,500 per violation per day. State regulatory agencies may also choose to sue under state water control laws, such as the Porter-Cologne Water Quality Control Act (California Water Code). Enforcement action can include Notices of Violation issued by agency staff, Cleanup and Abatement Orders, Cease and Desist Orders and Administrative Civil Liability Orders. Severe or intentional violations of operators may also be referred to the Attorney General's office for criminal prosecution. These criminal cases usually involve

companies or individuals who knowingly discharge without a permit, fail to use proper pollution control equipment, tamper with equipment and monitors, or falsify discharge reports.

II. NEPA/CEQA

It is important for Surfrider activists to have a basic understanding of the National Environmental Policy Act (NEPA), since NEPA is the piece of Federal legislation that requires consideration of environmental consequences of a project before the project can begin. If a study indicates that there are undesirable environmental consequences of a proposed project, NEPA requires either that consideration be given to “mitigating” measures built into the project that would lessen the environmental damage, or that alternatives (different ways of accomplishing the project goals) be considered that would be less damaging to the environment.

Prior to about 1970, there was no requirement that environmental consequences of projects be considered. NEPA was passed in 1969 and shortly thereafter several states, including California and Maryland, passed similar state laws. California’s legislation is the California Environmental Quality Act (CEQA), passed in 1970. The environmental study required by NEPA is called an Environmental Impact Statement (EIS), while the study required by CEQA is called an Environmental Impact Report (EIR). If these laws had been in effect earlier, thousands of acres of wetlands that were destroyed for highways and housing projects might have been saved. Many coastal structures that have destroyed surf spots and exacerbated coastal erosion may not have been built. NEPA applies to any major Federal action (a project undertaken by a Federal agency such as the U.S. Army Corps of Engineers) that may have an impact on the environment.

It also applies to local (state, county, city, or industrial) projects that require a Federal permit or receive funding from a Federal agency. Local projects that do not trigger the requirements of NEPA may still require an environmental review if they are performed in states that have similar laws. In California, CEQA applies to projects undertaken by state and local public agencies that must receive approval from a government agency which can cause either a direct physical change in the environment or a predicted indirect change in the environment. For both NEPA and CEQA, not only projects, but also government programs, decisions, and plans that may not immediately result in physical development (such as a general or community plan), require an environmental study.

The public, including Surfrider activists, have an important role in the NEPA or CEQA process, particularly during “scoping,” an initial phase of project planning where public input is sought on what issues should be addressed in the EIS or EIR and what other alternatives to the proposed project might be considered. After draft environmental study documents are produced, we can provide written or oral comments on these documents.

These comments must be addressed in the final EIS or EIR. Surfrider activists can provide important information that the general public and the project proponents may not be aware of. This information may include the location of coastal access routes used by surfers that may be lost as part of the project, the importance of a surf break that may be destroyed or altered, water quality impacts of a project, harm to the ocean coastal ecosystem, and increased coastal erosion that may be caused by building coastal structures or otherwise interrupting the natural supply of sand to a beach.

SURFRIDER NEPA/EIS GUIDE

Waves are considered to be natural resources whose potential loss must be considered as part of an environmental study of a coastal project. The basic process of NEPA compliance usually begins with the project proponent meeting with the Federal Agency that is sponsoring the EIS to define and discuss the project, existing site conditions, known feasible alternatives, and previous studies and reports relevant to the project. The methodology of completing the EIS is then submitted and approved. Then prior to holding a scoping meeting, a brief preliminary Environmental Analysis (EA) may be prepared.

The EA would next serve as a handout at the scoping meeting. A Notice of Preparation (NOP) of the EIS then is sent to interested parties and may be published in newspapers. The NOP may also announce the date and location of the scoping meeting. At the scoping meeting the proposed project is described, alternatives to be considered in the EIS may also be described, and public input is requested regarding important issues to be addressed. The product of the scoping meeting is a brief Scoping Report that summarizes the significant alternatives and issues related to them. Comments received from the public are typically included in this report.

Preparation of a draft EIS typically takes several months. The basic steps are data collection, assessment of potential environmental impacts, and preparation of the report. Data collection includes information related to the Natural Environment (local climatology, topography, geology, soils, and biology) and the Person-Made Environment (water quality, noise, air quality, land use, historic preservation and archaeology, demography, housing, local economy and other socioeconomic aspects, hazards and nuisances, aesthetics and urban design, community services, and transportation). The potential impacts of each project alternative, as well as for the “No Project” or “Do Nothing” alternative, are assessed. Both short term (during the construction phase) and long term impacts are assessed. These impacts are characterized as “avoidable,” “unavoidable,” and “capable of being mitigated.”

When the draft EIS is completed, it is released for public review and comment. The comment period is usually 45 days, but may be longer. Comments are normally submitted in writing, but there may also be a public meeting where oral comments are accepted. The final EIS is then prepared, which must include a response to any substantive public comments received. Public comment may help shape the proposed project into one that is more acceptable

(less damaging to the environment), may help indicate that an alternative is preferable to the original project, or (in rare instances) may cause the project proponent to abandon the project.

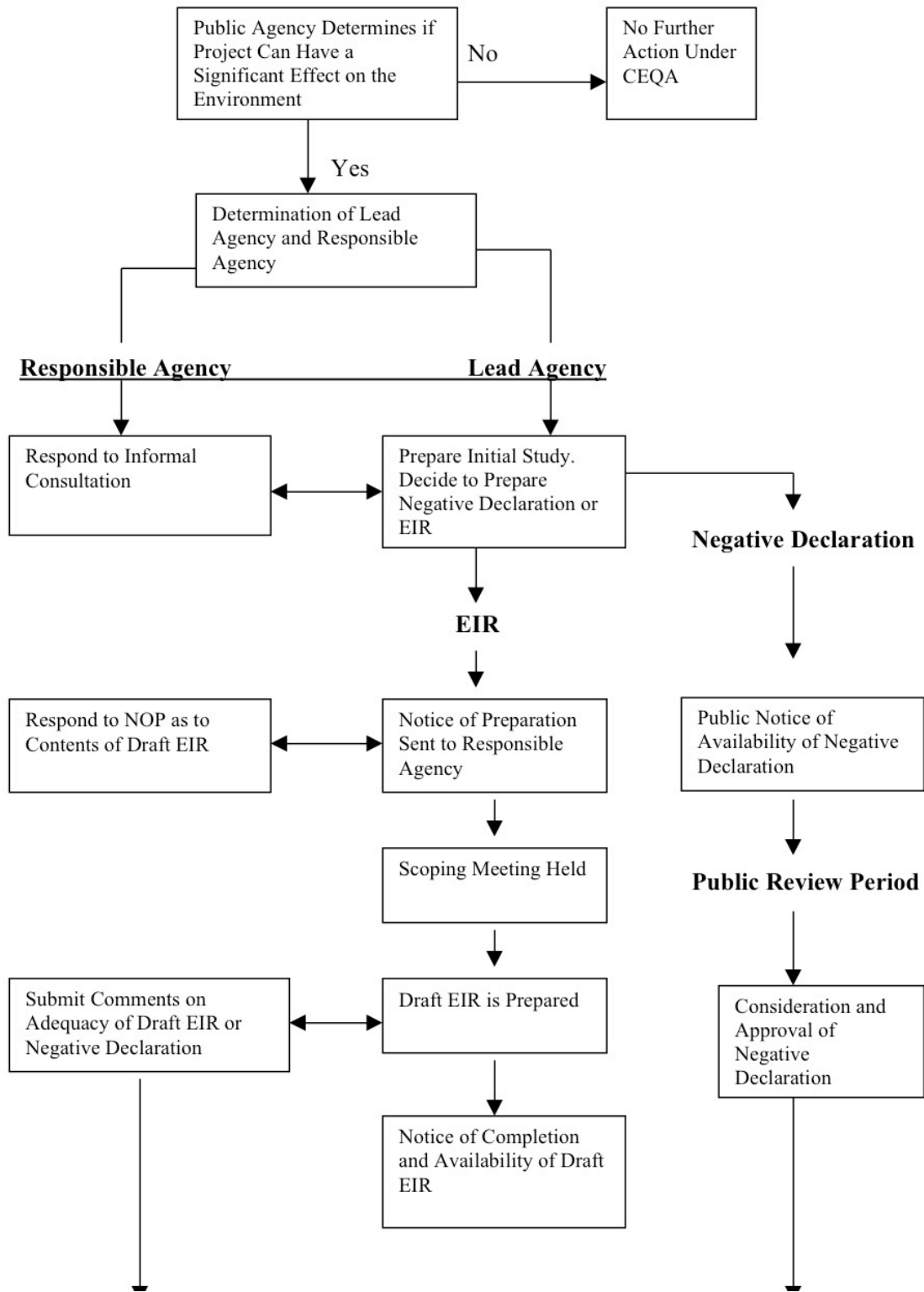
In some cases, the EIS process is short-circuited. If the project proponent feels that there are very few or no adverse environmental effects of the project, he may decide to prepare an Environmental Assessment (EA) rather than an EIS. The EA relies only on existing published data and is a much briefer document than the EIS. Also, no scoping meeting is required. The EA is reviewed by the lead regulatory agency and if there appear to be no environmental impacts worth considering, a Finding of No Significant Impact (FONSI) is issued and the project moves ahead. On the other hand, if the lead regulatory agency determines that there may be negative impacts, they will order that an EIS be prepared. Surfrider activists should be alert to the possibility of a project proponent trying the EA/FONSI approach to get fast approval of a project. If there are environmental impacts from a project that are not adequately described or considered in the EA, this can be legally challenged to force preparation of an EIS.

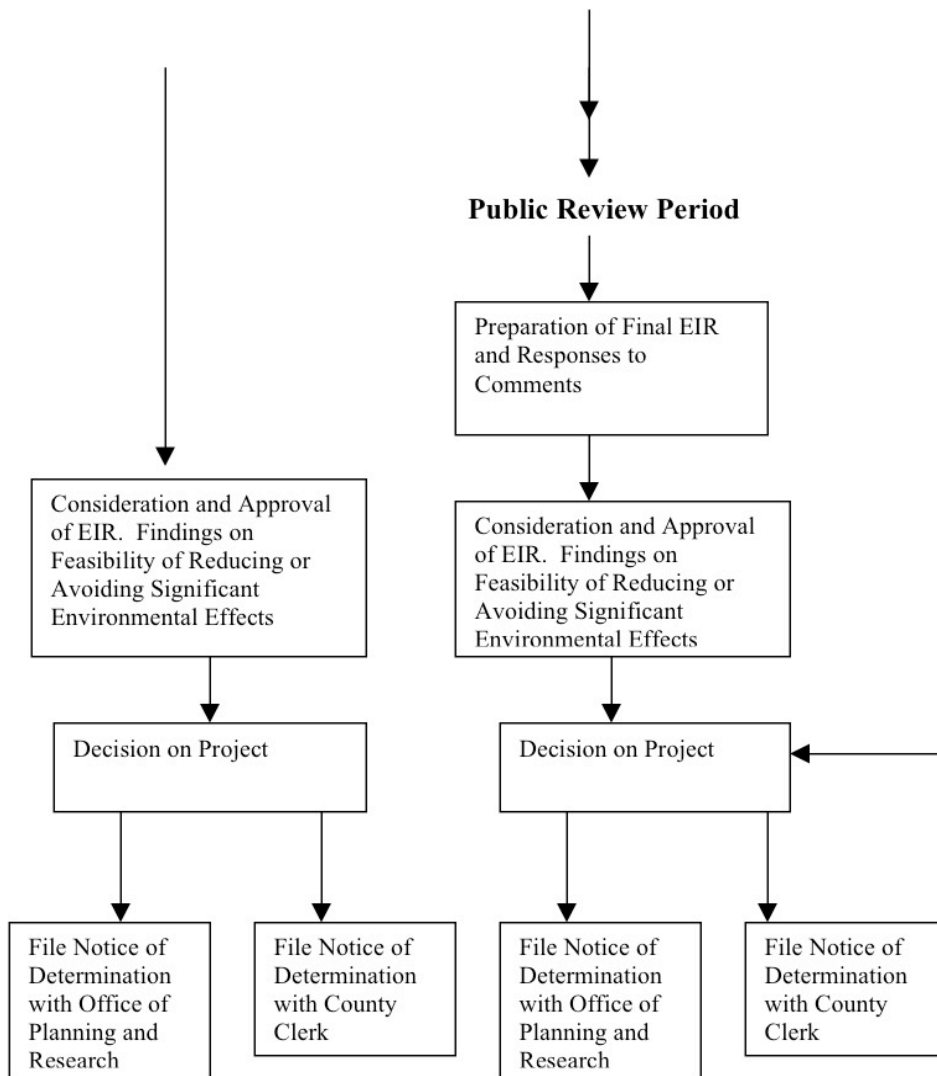
CEQA AND EIRs

In California, the CEQA process is very similar to the national NEPA process. Terminology for the different documents and process steps is discussed below. An evaluation of a project starts with the conduction of an Initial Study. Based on the results of the Initial Study, three courses of action are possible:

- (a) If the Initial Study finds no significant impacts, a Negative Declaration is prepared and, after approval by the lead regulatory agency, the project can proceed.
- (b) A Mitigated Negative Declaration can be prepared if the Initial Study finds significant impacts but the project is revised to avoid or mitigate those impacts.
- (c) If significant impacts are identified, an Environmental Impact Report (EIR) is prepared.

Again, the project may proceed after the lead regulatory agency approves this document. If significant impacts are identified an Environmental Impact Report (EIR) is prepared. As with the EIS, preparation of the EIR involves a scoping meeting; data collection; evaluation of impacts for the proposed project, one or more alternative projects, and a “no project” alternative; preparation of a draft EIR; a public comment period; and preparation of the final EIR. The attached figure shows the CEQA process for evaluation of projects that have the potential for significant environmental impacts.





HOW DO I FIND OUT ABOUT PLANNED PROJECTS?

Unfortunately, there is no single information source to find out about upcoming projects and the preparation of NEPA or CEQA documents. The best way is to be a regular participant in your local government. Attend city council meetings. Most cities and counties have web sites where you can look for announcements of new projects, view the agendas of upcoming meetings, and the minutes of past meetings. You may be able to get on an electronic mailing list or a regular mail list to receive meeting announcements, agendas, and meeting minutes. These documents are typically also available at your local city hall and county administrative offices.

For federal projects, the lead agency is often the U.S. Army Corps of Engineers. Checking their web site at <http://www.usace.army.mil/public.html#Environmental> and/or the web sites of your regional EPA office <http://www.epa.gov/epahome/aboutepa.htm#regiontext> or

local environmental agencies may allow you to receive advance warning of the preparation of NEPA or state equivalent documents.

III. MARINE PROTECTED AREAS

The establishment of Marine Protected Areas (MPAs) has created a valuable tool for preserving marine wilderness areas in much the same way that vast areas of land wilderness are already protected in the United States. The official federal definition of a MPA is: “any area of the marine environment that has been reserved by federal, state, tribal, territorial, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein” -- Executive Order 13158 (May 2000).³⁹ Marine Protected Areas can be established to preserve areas due to their unusual natural beauty, important biodiversity, or for recreational reasons. The Surfrider Foundation is committed to the idea that a network of sustainable, fully protected areas will safeguard biodiversity and maintain ecosystem integrity, as well as protect important surf breaks.

In 2000, President Clinton signed Executive Order #13158, which sought to establish a comprehensive national network of Marine Protected Areas with the National Oceanic and Atmospheric Administration (NOAA) in charge of developing the management framework. The order required federal agencies, which already held the authority to establish and manage MPAs, to “enhance and expand protection of existing MPAs and to establish and recommend new MPAs.”⁴⁰

At this time, a single cohesive national MPA system does not exist. According to the federal government MPA website, “there are hundreds of federal, state, territorial and tribal MPA authorities and more than 1,000 existing MPAs in U.S. waters.” Each system often has its own terminology, requirements, and level of protection. Advocates of a national system suggest that it would allow for greater communication and coordination, increasing the effectiveness of the MPA system.⁴¹

The State of California responded to the challenge of an incoherent MPA system by passing the Marine Life Protection Act (MLPA), with the goal of redesigning the state’s MPA system. The MLPA Initiative was put in place to help implement the Act. Participation by local stakeholders and the general public has helped facilitate the success of the MLPA Initiative through workshops, a regional stakeholder group, public meetings, and providing input on documents and MPA plans as they develop. The north central coast in particular had a series of

³⁹ See <http://www.mpa.gov>.

⁴⁰ Surfrider, *Making Waves*, “Marine Protected Areas: 3-Part Series,” available at <http://www.surfrider.org/makingwaves/makingwaves17-16/13.pdf>.

⁴¹ http://www.mpa.gov/national_system/nationalsystem_sup.html#whynsmpa.

workshops in March of 2007. Opportunities for involvement with the MLPA Initiative can be found at <http://www.dfg.ca.gov/mlpa>.⁴²

The many varieties of MPAs that exist in the California system are illustrative of the diversity that exists within the MPA program. For example, a State Marine Reserve provides the most extensive protection of resources and is managed solely to protect marine life and habitat and to maintain the area in an undisturbed and unpolluted state, with limitations on public use. The State Marine Park is similarly managed with the intent of protecting marine life and habitat, but it also is used to provide opportunities for "spiritual, scientific, educational, or recreational" uses, and public use of the area is encouraged. Finally, State Marine Conservation Areas can be designed to protect marine life and habitat as well as unique geological features or to provide for sustainable harvests of living resources. Within a conservation area, any resource may be taken, harmed, or possessed for recreational or commercial purposes unless such action would "compromise" the protection of a species, habitat, or geological feature of special interest.⁴³

While not technically considered MPAs under state law, California also allows for the creation of State Marine Cultural Preservation Areas, Water Quality Protection Areas, and State Marine Recreational Management Areas. State Marine Recreational Management Areas are particularly relevant to surfers, as they can be used to prohibit any activities that would compromise the recreational value for which the area is designated.⁴⁴ See the glossary for a fuller explanation of these terms.

Although lawsuits filed on behalf of MPAs are not common, litigation is sometimes used to ensure that governing bodies enforce the regulations of a given MPA, as well as to expand the protections given to a MPA or increase the geographical area it contains. More frequently, pressure applied by gathering a petition or threatening to file a lawsuit can be a very productive tactic.

An instance of successful litigation came in 2002, in a New England suit filed by five environmental organizations against the National Marine Fisheries Service (NMFS) and NOAA for violation of the federal Sustainable Fisheries Act.⁴⁵ A U.S. District Court agreed with the environmental organizations that NMFS had violated the Sustainable Fisheries Act by both failing to reduce over fishing and failing to reduce bycatch, and therefore jeopardized the long-term ecological and economic health of the fishery.⁴⁶ This legal victory created a climate for improvements in environmental management that extended to the west coast.

⁴² <http://www.dfg.ca.gov/mlpa/faqs.asp>.

⁴³ <http://www.surfrider.org/specialplaces/what.htm>.

⁴⁴ <http://www.surfrider.org/specialplaces/what.htm>.

⁴⁵ The suit was filed by Oceana on behalf of the Conservation Law Foundation, the Natural Resources Defense Council, the National Audubon Society, and The Ocean Conservancy.

⁴⁶ <http://www.nrdc.org/media/pressReleases/020103.asp>.

Lawsuits attempting to impede the protective measures of MPAs have also been brought. In California, organizations such as fishing associations have sued to prevent the implementation of the Marine Life Protection Act. Fortunately, those efforts failed.

There are several different avenues for public involvement in the ongoing campaign to establish a system of MPAs in US waters. By writing letters to our local senators and representatives expressing our support for the MPA initiative and its associated legislation, we can show that the issue of preserving marine wilderness is a priority. If your Chapter is particularly concerned with the protection of a certain coastal or near shore habitat, draft a petition to draw attention to the issue. The Santa Barbara, CA Chapter's efforts to protect the Gaviota Coast National Seashore provide a great example. Find out more about proposed plans to protect our marine resources. Visit websites, attend meetings, and share what you have learned with others.⁴⁷ In particular, the Surfrider Foundation's website is a good resource for learning how to get involved at the local level in preserving special places. See specifically <http://www.surfrider.org/specialplaces/index.htm> and click on Regional Campaigns, or visit the Surfrider Foundation Action Network webpage at <http://actionnetwork.org/surfrider/home.html>.

For more information on MPAs see the following websites:

http://mpa.gov/site_map.html

<http://oceanservice.noaa.gov/topics/oceans/mpa/welcome.html>

<http://www.dfg.ca.gov/mlpa/>

http://www.oceanconservancy.org/site/PageServer?pagename=issues_mpa

<http://www.surfrider.org/specialplaces/what.htm#references>

<http://www.surfrider.org/specialplaces/index.htm>

<http://www.surfrider.org/whatwedo4b.asp#mm> (Select "Marine Protected Areas: 3-Part Series" in Surfrider's *Making Waves*)

IV. USACE and WRDA

UNITED STATES ARMY CORPS OF ENGINEERS (USACE)

A major concern for Surfrider regarding the USACE (also known as "the Corps") is their role in regulating and permitting wetlands and waterways. Passage of the Clean Water Act in

⁴⁷ Surfrider, *Making Waves*, "Marine Protected Areas: 3-Part Series," available at <http://www.surfrider.org/makingwaves/makingwaves17-16/13.pdf>.

1972 broadened this role tremendously by giving the Corps authority over dredging and filling in the "waters of the United States," including most wetlands. Now, any person, firm, or agency planning to work in navigable waters of the United States, or discharge dredge or fill material into these waters (including wetlands) must first obtain a permit from the corps of engineers. A major aspect of the Permit Regulation program is determining which areas qualify for protection as wetlands.

The United States Army Corps of Engineers is made up of primarily civilian engineers, scientists and other specialists, working on engineering and environmental matters. With over 35,000 members, 34,600 are civilians and 650 are military personnel. Their stated mission is to provide quality, responsive engineering services to the nation through planning, designing, building and operating water resources and projects. These projects address issues in the fields of navigation, flood control, environmental protection and disaster response. Prominent projects that the Corps engages in are the Everglades restoration in Florida and wetland restoration after flood damage caused by Hurricane Katrina.

The Corps receives authorization for specific projects directly from Congress through successive Water Resources Development Acts ("WRDA"), generally passed every 2 to 3 years. Currently, the Corps is responsible for 1,481 projects under construction, 962 coastal and inland harbors, 11,000 miles of commercial navigation channels, 383 major lakes and reservoirs, along with numerous locks, levees, floodwalls and hydropower facilities.

The Army Corps of Engineers is required to carry out environmental and natural resource management programs at its projects, managing thousands of square miles as forest and wildlife habitat, monitoring water quality at its dams, operating fish hatcheries in cooperation with State wildlife agencies, and in some cases going back and restoring the environment at prior project sites.

The U.S. Army Corps of Engineers is charged with an environmental mission that has two major focus areas: restoration and stewardship. Efforts in both areas are guided by the Corps environmental operating principles, which serve to balance economic and environmental concerns. Despite these principles, that Army Corps of Engineers often conducts or approves of projects that can be extremely harmful to the surrounding environment. In these situations Surfrider is often required to challenge the actions taken by the USACE.

An example of this is the Montauk Lighthouse in New York. If left unprotected, the lighthouse will likely fail in the near future as a result of storms causing erosion to the bluff separating the lighthouse from the ocean. The USACE has responded by embarking on a \$14 million plan to build a sea wall of boulders to protect the bluff from further erosion. Surfers, however, oppose this action because the seawall could likely ruin a world-renowned surf break there (called Alamo). Surfrider is advocating moving the lighthouse back, and although this

would cost a considerable amount of money, it would preserve the surf break, which is so important to the people of the area.

CLEAN WATER ACT SECTION 404 DREDGING AND FILLING PERMITS

Section 404 of the Clean Water Act establishes a program to regulate discharges of dredged and filled material into US waters and wetlands. Activities in waters of the United States regulated under this program include fill for development, water resource projects (such as dams and levees), infrastructure development (such as highways and airports) and mining projects. Section 404 requires a permit before dredged or fill material may be discharged into waters of the United States, unless the activity is exempt from Section 404 regulation (e.g. certain farming and forestry activities).

The USACE and EPA share responsibility for administering and enforcing Section 404. The USACE administers the day-to-day program, including individual permit decisions, and enforces section 404 provisions. The role of the EPA is to develop and interpret policy, guidance and environmental criteria used in evaluating permit applications; determine the scope of geographic jurisdiction and applicability of exemptions; and to review and comment on individual permit applications. Additionally, the EPA has the authority to prohibit, deny, or restrict the use of any defined area as a disposal site (Section 404(c)), and the EPA retains the power to veto any USACE permit decision.⁴⁸ This may happen whenever the EPA determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.⁴⁹ Additionally, the Fish and Wildlife Service, and the National Marine Fishery Service are responsible for evaluating the impacts on fish and wildlife that a project may have, including endangered and threatened species.⁵⁰

The EPA may veto the issuance of a permit by USACE for a variety of reasons. Occasionally, the EPA will disagree as to whether USACE has jurisdiction over a specific project (for example, the army may have defined an area as a wetland, or as a navigable body of water, and EPA may disagree with their interpretation of the statute and thus their ability to regulate or permit in that area). Additionally, the EPA may disagree as to the amount and severity of ecological impacts that a permitted project might have on an area. It is very rare that the EPA actually vetoes a permit issued by USACE, and the typical course of action is for the two agencies to meet to arrange a feasible solution to the conflict.⁵¹

⁴⁸ http://www.epa.gov/owow/wetlands/pdf/reg_authority.pdf.

⁴⁹ <http://www.usace.army.mil/cw/cecwo/reg/sec404.htm>.

⁵⁰ "Joint Administration/Agency Roles in CWA Section 404," available at http://www.nga.org/Files/ppt/1002STATERESPONSES_GOODIN404.PPT#.

⁵¹ Doug Garman, USACE headquarters in Washington D.C.

In general, to obtain a Section 404 permit, applicants must demonstrate that the discharge of dredged or fill material would not significantly degrade the nation's waters and there are no practicable alternatives less damaging to the aquatic environment. Applicants should also describe steps taken to minimize impacts to water bodies and wetlands and provide appropriate and practicable mitigation, such as restoring or creating wetlands, for any remaining, unavoidable impacts. Permits will not be granted for proposals that are found to be contrary to the public interest. Compliance with the Endangered Species Act and/or Section 106 of the National Historic Preservation Act may also be required before a Section 404 permit can be issued. On average, individual permit decisions (standard permits and letters of permission) are made within 2 to 6 months from receipt of a completed application. For activities authorized by general permits, decisions are usually made in less than 30 days. Permit applications that require the preparation of an Environmental Impact Statement take an average of 3 years to process. Below is a list of permits and the public comment periods for each.

TYPES OF USACE PERMITS AND PUBLIC COMMENT OPPORTUNITIES

1. Standard permits

Standard permits can be issued in situations where, after a public notice and comment period, the USACE District Engineer determines that the proposed activity is not contrary to the public interest. USACE issues a public notice within 15 days of receiving a completed permit application. The public notice describes the proposed activity, its location, and potential environmental impacts and invites comments within a specified time period, typically 15 to 30 days. Public notice can occur by publication in a variety of ways, including publication in local newspapers, on the internet, or in the Federal Register (though this doesn't seem to be required). The public at large, as well as interested Federal, state, and local agencies, have an opportunity to comment on the proposed activity.

2. Letters of permission

Letters of permission can be issued in situations where the USACE District Engineer determines the proposed work would be minor, would not have significant individual or cumulative impact on environmental values, and will not encounter appreciable opposition. This usually only occurs for projects that are smaller than a certain specified size. Concerned fish and wildlife agencies and, typically, adjacent property owners who might be affected by the proposal are notified, but the public at large is not. Section 404 letters of permission can be issued only in cases where, after consulting with certain Federal and State agencies, the USACE District Engineer has previously approved categories of activities that can be authorized by letter of permission procedures. There is no way to sign up to receive notice of these letter of permission, however, information about all projects approved can be found by calling the local/regional

office where the project is occurring. Additionally, the USACE is working to develop an online database of the various permits and permissions granted.

3. General permits

General permits are often issued by USACE for categories of activities that are similar in nature and would have only minimal individual or cumulative adverse environmental effects, and can be issued for any category of activities involving discharges of dredged materials.⁵² General permits can be issued on a nationwide ("nationwide permit"), regional ("regional general permit"), or state level. A general permit can also be issued on a programmatic basis ("programmatic general permit"). This is done in order to streamline the permitting process, and to avoid duplication of permits for state, local or other Federal agency programs. For example, the mechanized clearing of riparian areas for the control of invasive species may be authorized by a nationwide permit. In some USACE Districts, nationwide permits have been suspended or revoked, and Section 404 standard permits, letters of permission, regional general permits, or programmatic general permits are used instead. The public is given opportunity to comment during the process of implementing a general permit, however, the public is not given opportunity to comment during the process of granting the permit (general permits are not required to meet the same notice and public comment requirements delineated in section 404(a)). The USACE claims that this is because the projects for which general permits are granted do not typically have the same degree of adverse environmental effects as individual projects.

LAWSUITS AGAINST USACE

Several environmental organizations have filed suits against USACE for various reasons. Sometimes the lawsuits are a result of a project that is being carried out directly by USACE, but more often the suits are to challenge the issuance of a permit. In challenging the issuance of a permit, environmental organizations must invoke procedural and substantive law, as well as principles of statutory interpretation.

One example is the 2007 case of *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*.⁵³ In this case, Southeast Alaska Conservation Council (SACC) along with other environmental organizations such as the Sierra Club filed an action to challenge the issuance of a permit by the USACE (and the subsequent Record of Decision by the Forest Service) allowing for the discharge of processed wastewater from a froth-flotation mill into a body of water protected by the CWA. At issue in this case was whether USACE was allowed to issue such a permit, or whether the permit's issuance was in violation of the CWA.

The permit issued in this case would have authorized Coeur Alaska, Inc., to discharge processed wastewater containing tailings from its gold mine into a lake that is a navigable water

⁵² Clean Water Act Section 404.

⁵³ 486 F.3d 638.

of the United States. Coeur Alaska proposed to discharge daily 210,000 gallons of processed wastewater containing 1,440 tons of tailings from its mine into Lower Slate Lake. The tailings in the discharge would have raised the bottom elevation of the lake by 50 feet. A 90-foot high, 500-foot long dam would be built to contain the discharge and the area of the lake would be increased about three-fold. The U.S. Army Corps of Engineers contended that the permit was properly granted under § 404 of the Clean Water Act, which relates to the disposal of “fill material,” and that it is not subject to the effluent restrictions of § 301 or § 306 of the Clean Water Act. The environmental organizations contended that this mine disposal discharge must comply with the effluent restrictions of § 301 and § 306, and that any permit allowing discharge must be issued by the Environmental Protection Agency. The district court held that the issuance of the permit was proper. The 9th circuit court of appeals, however, reversed and remanded the case with instructions to vacate the permit.⁵⁴

Another recent lawsuit against USACE was *Sierra Club v. U.S. Army Corps of Engineers*, where Sierra Club along with other environmental organizations sued USACE for issuing a general permit (the “Permit”) authorizing all landowners engaged in “suburban development” in a large contiguous area of the Florida panhandle to discharge limited types and amounts of dredged and fill material into some US bodies of waters, claiming that the issuance of this permit was in violation of the CWA. The 11th circuit court of appeals agreed with the lower court and found in favor of USACE.

Sierra Club pointed out that general permitting of this scope might lead to abuse of the permitting process. If general permitting were to be expanded and left unchecked, than the individual permitting process would be gutted and the Corps would be able to circumvent the notice and public hearing requirements of section 404(a). The court recognized the validity of this argument, yet decided that the permit was “considerate of the Act and yet tailored to the unique problems presented by this large area of northwest Florida,” and was thus permissible. The court also favorably noted USACE’s argument that the court should grant deference to its interpretation regarding the conditions under which it may issue a general permit under Section 404(e) of the Act.⁵⁵

WATER RESOURCES DEVELOPMENT ACT (WRDA)

The most recent WRDA was enacted in 2007, passing in the United States House of Representatives and the Senate over a presidential veto. The Act does not provide funding for projects but serves to authorize the Secretary of the Army and the United States Army Corps of Engineers (USACE) to work on particular water resource and conservation projects. It is not a spending bill but an authorizing bill that establishes which projects and programs are eligible for future funding according to strict criteria. Prior to 2007, the last WRDA was passed in 2000, as it failed to pass in 2002, 2004, and 2006 due mostly to gridlock over Corps reforms. As a result,

⁵⁴ 486 F.3d 638, 641.

⁵⁵ 508 F.3d 1332 (2007).

the WRDA of 2007 includes authorizations for 751 projects and studies (in comparison to the 247 of the 2000 WRDA) over the next 15 years. The WRDA provides the Corps with the authority to study water resource problems, construction projects, and make major modifications to ongoing projects. WRDA also contains general provisions as well as special study authorizations.

Although WRDA does not provide funding, it does place a maximum amount allotted to each project. Any modifications to those projects must go before the authorization committee again for approval before the appropriations committee can provide additional funds. All funding for Corps projects must be part of the Energy and Water Development Appropriations bill, which is a separate process managed by the House and Senate Appropriations Committees.

Generally, Congress has passed a new WRDA about every 2 years, with longer hiatuses from 1976 to 1986 and in more recent years. There is no requirement that the Congress pass a WRDA – but there is often congressional interest in doing so. Because WRDAs are the primary mechanism for authorizing new Corps studies and projects, it is necessarily a pork-barrel bill, as a result of the highly localized nature of many of the projects. This creates tremendous pressure by members of Congress seeking particular project authorizations to pass the bill.

WRDA are sometimes initiated by the administration sending a proposal to Congress or by the authorizing committees themselves. WRDA authorizing committees are the Environment and Public Works (EPW) Committee in the Senate and the Transportation and Infrastructure (T&I) Committee in the House. These committees usually hold one or two hearings in the spring with general questions of what various constituencies might like to see in a WRDA bill and what certain Members would like to include. In both houses of Congress, Committee staffs solicit other proposals from members of Congress, and particularly from powerful members in leadership positions, who can steer the bill through their house. This normally occurs in July and September—just before the elections. The public generally gets very little time to see the bills in advance of Committee action and many of the most controversial proposals are added in “manager’s amendments” on the House and Senate floors. Thus, the public and media are often kept in the dark about the matters of greatest concern. While this is always a difficult process for public interest organizations, there are important opportunities to include program reforms and good projects in WRDA bills.

Each successive WRDA is cumulative and does not supersede or replace the contents of the previous acts, unless expressly stated by de-authorization of a particular project. The WRDA of 2007 is divided into seven titles, each addressing new or continuing projects authorized by the act. A brief overview of the Act is as follows:

Title I authorizes new locks on the Upper Mississippi River and Illinois Waterway System and an accompanying ecosystem restoration plan for those waterways, in order to facilitate the movement of grain from the heartland. In addition, it also includes authorization

for the Louisiana Coastal Area ecosystem restoration program to reverse wetland losses and provide hurricane and storm damage reduction benefits. Also, the title includes small projects for flood damage reduction, navigation and aquatic ecosystem restoration under the continuing the authority programs of the corps.

Title II makes policy changes in how the Corps of Engineers authorities carry out its programs and contains administrative provisions known as “Corps reforms” including updates in the Corps’s planning process and water resources planning coordinating committee. These improvements were designed to ensure that the USACE does its job more effectively and thoroughly. In addition, Title II authorizes the National Levee Safety Program, which helps identify failing levees and provides Corps resources and expertise to improve and repair these levees.

Title III includes provisions that effect existing, ongoing or completed projects, making modifications to projected budgets and purposes or extending authorizations for annual programs and correcting existing deficiencies.

Title IV provides authorizations for new project studies and makes modifications to ongoing studies.

Title V makes modifications to the Estuary Restoration Act of 2000, which is an ongoing restoration project of the Corps already underway, and also includes program authorizations for regional approaches to water resources problems.

Title VI takes away authorizations for all or portions of 52 previously authorized Corps projects, resulting from lack of support by local interests.

USEFUL WATER QUALITY AGENCIES AND LINKS

Regional Water Quality Control Board – <http://www.waterboards.ca.gov/>

California Coastal Commission – <http://www.coastal.ca.gov>

Chapter 4 BEACH ACCESS

I. Public Trust Doctrine

Rooted in Roman and English law, “the public trust doctrine is based on the notion that the public holds inviolable rights in certain lands and resources, and that regardless of title ownership, the state retains certain rights in such lands and resources in trust for the public.”⁵⁶ The public trust doctrine vests the state and federal governments with title to navigable waters in trust for the people, and establishes the public's right to use those waters, shorelands, and submerged lands. The “trust” attaches to the shoreline regardless of where it may move. In this way, the doctrine may protect land that is closer to developed areas when there is an eroding shoreline, and may move seaward as the shoreline accretes.

Historically, the “public trust” lands referred to the basic right of the public to use its waterways to engage in “commerce, navigation, and fisheries” under common law. More recently, the doctrine has been broadened by various landmark court decisions to include the right to swim, boat and enjoy ocean recreation and even preserve lands in their natural state in order to protect scenic and wildlife habitat values.⁵⁷

The public trust doctrine requires both that the state hold its coastal resources in trust for its citizenry and that the state protect those same resources. In recent years, courts have understood trust purposes to include the maintenance of ecological values of public lands and waters.⁵⁸ California has read the public trust doctrine especially broadly, as seen in the California Supreme Court’s landmark Mono Lake case, “the objective of the public trust doctrine has evolved in tandem with the changing public perception of the values and uses of the waterways.”⁵⁹

The public trust doctrine will be the basis of nearly any argument for beach access and against any impediments thereto, such as coastal armoring.⁶⁰ Armoring prevents inward

⁵⁶ Grad, *Treatise on Environmental Law*, § 10.05 (2005); *see also* 3 Warren's *Weed*, *New York Real Property Law* 3.05 (“Under the public trust doctrine the State holds lands in its sovereign capacity as trustee for the beneficial use and enjoyment of the public. The doctrine grows out of the *jus publicum*, the public right of navigation and fishery.”).

⁵⁷ *See Marks v. Whitney*, 6 C.3d 251 (1971); *Nat. Audubon Soc. v. Sup. Court*, 33 C.3d 419 (1983); *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73, 75 (Fla. 1974).

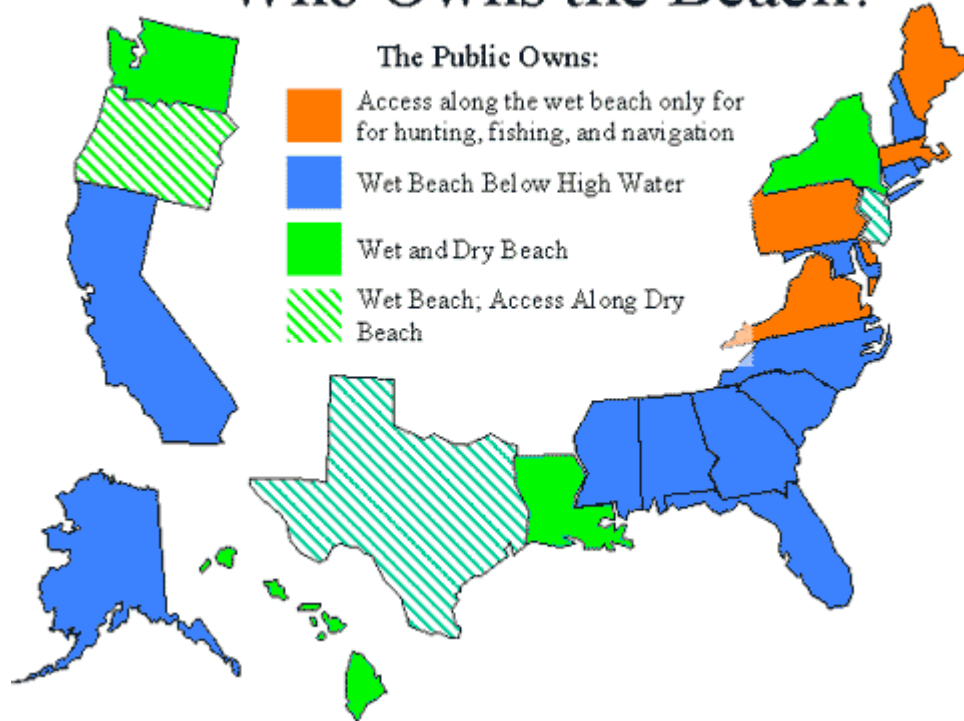
⁵⁸ Meg Caldwell and Craig Holt Segall, “No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast”, 34 *Ecology Law Quarterly* 533, 552 (2007), citing Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as Guardian of the State’s Natural Resources*, 16 *Duke Env’tl L. & Pol’y F.* 57, 61-88 (2005).

⁵⁹ *Nat’l Audobon Soc’y v. Superior Court*, 658 P.2d 709, 721-22 (Cal. 1983).

⁶⁰ Caldwell and Holt at 555, suggesting that courts should interpret the public trust doctrine so as to impede coastal armoring that would impair the public’s ancient trust rights. “Overly broad armoring privileges, which violate trust principles...must be viewed as illegal transfers out of the trust. Explicitly denying such ‘entitlements’ would therefore merely be an articulation of a background principle of state property law firmly rooted in the public trust.

migration of the coast's public trust lands, and neither state agencies nor the legislature have the power to cede the people's public trust rights.

Who Owns the Beach?



Part of Florida's beaches are also open to the public under the doctrine of custom. In addition to the common law interest, the public has obtained the right to access along many shores through voluntary assignment of easements by riparian owners, as well as public purchases of shorefront lands and easements.⁶¹

While land use is a state and local responsibility, the federal government has had a paramount role in efforts to stop people from destroying coastal wetlands, since those wetlands are generally found within the ebb and flow of our coastal waters, where the federal government has always had jurisdiction. The survival of our coastal wetlands as sea levels rise, however, depends on how people use land that is currently dry, and therefore in state and local jurisdiction. Nevertheless, the federal government could help to ensure that wetlands survive rising sea levels, both in its role as a major coastal landowner and in its many programs that foster research and policy implementation at the state and local level.⁶²

When suing to enforce the public trust doctrine, the State Lands Commission (or similar state agency) will likely be the defendant in a suit because they are charged with protecting public trust resources. In a recent twist on public trust doctrine litigation in Texas, the Texas Surfrider

⁶¹ http://epa.gov/climatechange/effects/coastal/SLR_long_desc.html#2.

⁶² <http://epa.gov/climatechange/effects/coastal/SLRTakings.html>.

Chapter decided to help fight the legality of the Texas Open Beaches Act. They entered a lawsuit as a defendant alongside the State Attorney General, who was being sued by a landowner that was made to give up their home due to the erosion of the beach. Public trust lands had migrated inward until the property where the Plaintiff's house resided became the public beach.

II. Overview of Easements and Property Law

PUBLIC PRESCRIPTIVE RIGHTS

Prescriptive rights refer to public rights that are acquired over private lands through use. Along the California Coast the general public has historically used numerous coastal areas. Trails to the beach, informal parking areas, beaches, and blufftops have provided recreational opportunities for surfing, hiking, picnicking, fishing, swimming, diving, viewing and nature study. The public may have the right to use the property by permission of the owner, or the public may acquire the right through consistent and long-term use of the property without permission.

A right of access acquired through *use* is, essentially, an easement over real property that comes into being without the explicit consent of the owner. The acquisition of such an easement is sometimes referred to as an "implied dedication" or "public prescriptive easement." This term recognizes that the use must continue for the length of the "prescriptive period" before a right to public access comes into being. That is, there must be established use on the property for the duration of the "prescriptive period" before a right inures. In California, the prescriptive period is generally five (5) years.

THE TEXAS OPEN BEACHES ACT – PUBLIC ACCESS BASED ON A HISTORY OF PUBLIC USE

The Texas Open Beaches Act applies the public trust doctrine to allow the public to enjoy unrestricted access to beaches between the mean low tide line and the vegetation line, including the "dry sand," and is enforceable since the public has gained access through an easement. The Texas courts generally regard the public as having gained beach access through prescriptive easements, based on a history of public use. This law is very protective of the public's right to use the beach. So much so, in fact, that if the vegetation line recedes past the former property line, homeowners could technically be required to remove any structure on that land.

The court reinforced the Open Beaches Act in 1986, after Hurricane Alicia hit the Gulf of Mexico. In *Feinman v. Texas*, the court decided that the location and extent of access to public beaches can change based on the accretion and erosion of land along the waterway.⁶³

OFFERS TO DEDICATE AND *NOLLAN* v. *CALIFORNIA COASTAL COMMISSION*

California Coastal Act section 30210 protects beach access by directing the California Coastal Commission (“CCC”) to work towards “maximum access...and recreational opportunities...for all people.”

The 1987 U.S. Supreme Court decision, *Nollan v. California Coastal Commission*, holds that an administrative body such as the California Coastal Commission cannot make approval of a permit contingent on a property owner sacrificing a property right for public use that is unrelated to the reason the permit would be denied. To do so would create a takings without compensation. In sum, the CCC cannot make a building permit contingent on the creation of a new easement if it is not directly related to the reason that permit would be denied.⁶⁴

Prior to the *Nollan* decision, the California Coastal Commission had broad power to create public access easements by requiring that an entity requesting a permit for coastal development or redevelopment provide an "Offer to Dedicate" (OTD). An OTD is an offer by a landowner to grant a public access easement across their property for future public recreational use. OTDs are still viable ways to create public access, but they are now required in more limited circumstances as they must be made consistent with both the *Nollan* decision and the Coastal Act. The Coastal Commission currently requires about ten OTDs per year. OTDs made in violation of the *Nollan* rule are enforceable if they were made prior to the *Nollan* decision.

However, OTDs are only offers of easements. Several steps must then be taken to turn the offer into a useable public accessway. If these steps are not taken within a proscribed period (generally 21 years), the opportunity to use the easement goes away, forever.

The most important action that needs to happen is that the OTD must be accepted by a government agency (city, county, state) or a nonprofit organization. State agencies include the State Lands Commission, the California Department of Parks and Recreation, the Coastal Conservancy, and the Santa Monica Mountains Conservancy. An example of a nonprofit group that has accepted OTDs is the Mendocino Land Trust. The accepting agency or organization must assume responsibility for liability and maintenance of the access segment. The accepting agency is responsible for managing the easement area to provide safe public access as well as to protect property rights. Once the OTD is accepted, the accepting agency obtains title to the property, installs improvements (fences, stairs, etc.), and opens the easement for public use.

⁶³ 717 S.W.2d 106 (Tex. App. 1986).

⁶⁴ *Nollan v. Cal. Coastal Com*, 483 U.S. 825, 1987.

OTDs (whether accepted or not) are recorded at the local county recorder's office. The Coastal Commission also maintains a statewide list of OTDs.⁶⁵

PARKING FEES

In California, every proposed development in the coastal zone must first obtain a coastal development permit (“CDP”) from the California Coastal Commission (“CCC”). The CCC must ensure that the proposed development meets the Coastal Act policies, as well as the requirements of the California Environmental Quality Act. In *Surfrider Foundation v. California Coastal Commission*, the Surfrider Foundation argued against the installation of parking fee collection devices at 16 state beaches. The California Appellate Court held that the devices were exempt from the California Environmental Quality Act because of the exemption for approval of fees charged by public agencies for the purpose of meeting operating expenses, as well as the categorical exemption for construction of small structures, provided there is not a reasonable possibility of a significant effect on the environment by the structures.

Every coastal development permit issued by the Coastal Commission for development between the nearest public road and the sea must include a specific finding that the development is in conformity with the Coastal Act's public access and recreation policies. The Surfrider Foundation argued that the parking fees would violate the public access and recreational policies of the California Coastal Act. Surfrider argued that, although the parking fees would not physically impede access to the beach, they might very well be indirect impediments to the public's access if they prevent people from accessing the state park facilities, or cause them to seek alternative routes. While the Court found that “public access and recreational policies of the Coastal Act should be broadly construed to encompass *all* impediments to access, whether direct or indirect, physical or nonphysical,” the Coastal Commission presented evidence of consistency with the policies, showing that attendance was not affected when vehicle fees were increased. Although the number of paid attendees dropped slightly directly after the fee imposition, they quickly rebounded to about normal attendance. The court therefore held that the parking fees were consistent with Coastal Act policies.⁶⁶

The installation of parking fee structures may also bring about consistency issues with requirements for lower cost visitor and recreational facilities under Cal. Pub. Res. Code §30213. In the parking fees case described above, it was argued that having to pay a fee to access the beach was not consistent with providing low cost visitor and recreational facilities. However, evidence was presented that annual passes could be purchased, and discounts were given to elderly, low-income users, and frequent users. The Court found that this undermined Surfrider's argument, and concluded that the parking fees were still consistent with lower cost visitor policies.

⁶⁵ http://www.surfrider.org/srui.aspx?pgTitle=COASTAL%20A-Z&uiq=a-z/coastal_access.

⁶⁶ *Surfrider Foundation v California Coastal Commission* 26 Cal. App. 4th 151, 158 (1994).

Therefore, while the courts have recognized that indirect impediments to beach access are problematic, it will be difficult to argue against usage fees under that Coastal Act without demonstrating that parking fees actually result in a decrease in usage of a particular area, or that an actual impediment to access would exist. While there haven't been any cases which discuss it, it may be possible to argue for environmental justice, since people such as lower income families are limited in their ability to access beaches with usage fees, and therefore may be forced to attend a different beach altogether.

Chapter 5 COASTAL DEVELOPMENT and

LAND USE

I. Coastal Zone Management Act (CZMA)

The CZMA was originally enacted in 1972 as a federal program to encourage states to voluntarily develop and implement their own programs to manage the nation's coastal resources. Specifically, it was designed to facilitate coastal states and Great Lake States (as well as territories) in developing and initiating comprehensive programs to manage and balance competing uses of, and impacts to coastal resources.

The CZMA is administered by the National Oceanic and Atmospheric Administration (NOAA), a division of the US Dept. of Commerce. NOAA determines which state's proposed coastal management plans are consistent with the goals and policies of the CZMA and meet its established minimum standards. NOAA then provides federal grant assistance and federal consistency authority to states with approved programs (e.g. the California Coastal Management Plan; see below).

NOAA looks to a number of factors to determine if a proposed plan qualifies for federal backing. The goal of the CZMA is to comprehensively manage coastal resources and balance often competing land and water uses while protecting sensitive resources. In accordance with this goal, state coastal zone management programs are expected to:

- (a) Protect natural resources
- (b) Manage development in high hazard areas;
- (c) Manage development to achieve quality coastal waters;
- (d) Give development priority to coastal-dependent uses;
- (e) Have orderly processes for the siting of major facilities;
- (f) Locate new commercial and industrial development in, or as near as possible to, existing developed areas;
- (g) Provide public access for recreation;
- (h) Redevelop urban waterfronts and ports, and preserve and restore historic, cultural, and aesthetic coastal features;
- (i) Simplify and expedite governmental decision-making actions;

- (j) Coordinate state and federal actions;
- (k) Give adequate consideration to the views of federal agencies;
- (l) Ensure that the public and local governments have a say in coastal decision-making;
and
- (m) Comprehensively plan for and manage living marine resources.

The CZMA was amended in 1990 passed in order to clarify and expand the breadth of State review authority over Federal agency actions and authorizations that result in coastal zone effects. The 1990 Amendments provide that:

“Because of their proximity to and reliance upon the ocean and its resources, the coastal states have substantial and significant interests in the protection, management, and development of the resources of the exclusive economic zone that can only be served by the active participation of coastal states in all Federal programs affecting such resources and, wherever appropriate, by the development of state ocean resources plans as part of their federally approved coastal zone management programs.”⁶⁷

The 1990 Amendments also expanded the scope of State consistency review by giving states the right to review activities that would pose any indirect, secondary, cumulative or reasonably foreseeable coastal zone effects. The CZMA Amendments also include specified enhancement areas that states are expected to address and focus on when developing and implementing coastal management plans. These 9 areas are:

- (1) public access,
- (2) coastal hazards,
- (3) ocean resources,
- (4) wetlands,
- (5) cumulative and secondary impacts,
- (6) marine debris,
- (7) special area management planning,
- (8) energy and governmental facility siting, and
- (9) aquaculture.

⁶⁷ 16 U.S.C. §1451(m).

Each state is required to develop a management plan for its own coastline. In California, this management plan is called the “California Coastal Management Plan.”

II. California Coastal Management Plan

The CZMA requires a management plan from every state, and in California there is the California Coastal Management Plan (“CCMP”). California developed the CCMP and submitted it for approval. It was subsequently approved as meeting the federal standards set by CZMA in 1977. Following federal approval, the CCMP has been administered by California Coastal Commission. The CCMP acts as umbrella legislation designed to encourage local governments to create their own individualized Local Coastal Plans (LCPs) to govern decisions that determine the short- and long-term conservation and use of coastal resources. These LCPs reflect unique characteristics of individual local coastal communities, but they must also be consistent with goals and policies set out by the California Coastal Act, which is at the heart of the CCMP.

The substantive policies of the CCMP are derived from the California Coastal Act of 1976, which delineates enforceable policies and seeks to balance the right to develop with strong policies to protect natural resources. These policies can be found in articles 1-7 of Chapter 3 of the Coastal Act:

Article 1 asserts that the following articles are the standards by which the adequacy of LCPs and the permissibility of relevant proposed developments are determined.

Article 2 addresses public access to coastal lands, providing for maximum access balanced with considerations for protection of natural resources and private property rights. It also regulates public access based on capacity of the site and impact of visitors on the area, as well as parking and facility availability.

Article 3 deals with recreational usage issues. The crux of article three is that public use of land has priority over private residential or commercial usage. Additionally, recreational boating and other water-oriented activities are encouraged by creating protected areas for these uses and by developing storage areas and public launching facilities.

Article 4 protects marine environments by requiring that marine resources shall be maintained and restored when possible, and by allowing special protection for areas or species of biological or economic significance. In addition, article four seeks to minimize the adverse effects of development on the quality of coastal waters by providing for protection against spillage of oil products or other hazardous substances. It also regulates diking, filling, and dredging of open coastal waters, wetlands, estuaries and lakes to avoid significant disruption of marine and wildlife habitats and water circulation. Additionally, it carves out special concessions for protection of the commercial fishing and recreational boating industries and

recognizes the economic, commercial and recreational importance of fishing activities. Finally, it allows for construction altering the natural shoreline in certain circumstances like erosion protection (sea walls), flood control, or necessary water supply projects.

Article 5 regulates land resources, providing protection for environmentally sensitive habitat areas against disruption. However, buffer zones are created to minimize land use conflicts between preservation and agricultural interests, and to protect economic interests in agricultural land usage. Article 5 also provides protection of long-term productivity of soils and timberlands and allows for mitigation measures when development would impact archaeological or paleontological resources.

Article 6 restricts development that would have significant adverse effects on coastal resources. First, it requires the protection of scenic and visual qualities of coastal areas. Second, it mandates that the location and amount of new development should maintain and enhance public access to the coast. It also seeks to minimize adverse impacts of new development, and mandates that coastal-dependent developments should have priority over other developments on or near the shoreline and should be accommodated within the reasonable proximity to the coastal-dependent uses they support.

Article 7 addresses industrial development by encouraging coastal-dependent facilities to expand within existing sites. In addition, it regulates oil and gas development to limit its effect on coastal visual qualities and minimize environmental impact and risks associated with those industries.

THE CCMP: ENFORCEMENT and USE IN LITIGATION

Violations of the articles of the Coastal Act can be met with declaratory orders (cease and desist or restoration orders), which force violators to halt activity that is detrimental to the coastal area, and even to restore the affected area if at all possible.

In addition, any party who violates a provision of the act may be civilly liable. These violations include inconsistencies with any Coastal Development Permit (“CDP”) issued by the California Coastal Commission. In determining the amount of civil liability, chapter 9 of the Coastal Act dictates that the following factors shall be considered:

- (a) The nature, circumstance, extent, and gravity of the violation.
- (b) Whether the violation is susceptible to restoration or other remedial measures.
- (c) The sensitivity of the resource affected by the violation.
- (d) The cost to the state of bringing the action.
- (e) With respect to the violator, any voluntary restoration or remedial measures undertaken, any prior history of violations, the degree of culpability, economic

profits, if any, resulting from, or expected to result as a consequence of, the violation, and such other matters as justice may require.

The Coastal Act further allows that if the violation is intentional (or the violator knew it was happening) penalties may be increased at the discretion of the court for the purpose of deterring further violations.

USEFUL LINKS FOR FURTHER INFORMATION:

California Coastal Commission: <http://www.coastal.ca.gov/>

National Oceanic and Atmospheric Administration: <http://www.noaa.gov/>

III. Developmental Approvals

CONSISTENCY CERTIFICATION AND CONSISTENCY DETERMINATION UNDER THE CZMA

Consistency certifications are for projects requiring a federal permit, authorization, or funding. Consistency determinations are for projects submitted by federal agencies.⁶⁸ Briefly:

1. Review periods

The consistency certification review period is up to 6 months. The consistency determination review period is up to 75 days. Applicants may extend either of these time periods. Note also the "90 day" rule for consistency determinations in 15 CFR §930.36(b): "The consistency determination shall be provided to State agencies at least 90 days before final approval of the Federal agency activity unless both the Federal agency and the State agency agree to an alternative notification schedule."

2. Legal Tests

The enforceable policy (in California, the Coastal Act Chapter 3) analysis is the same for both consistency certifications and determinations. However, they differ in that federally permitted projects (consistency certifications) must be "consistent" with the state coastal management plan, whereas federal agency projects (consistency determinations) must be "consistent to the maximum extent practicable" (defined in 15 CFR §930.32 as follows: "(a)(1) The term 'consistent to the maximum extent practicable' means fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency").

⁶⁸ See "Federal Consistency in a Nutshell" for more details, at <http://www.coastal.ca.gov/fedcd/guidecd.pdf>.

USACE 404 PERMIT

See USACE section in Ch.3.

ENDANGERED SPECIES ACT

The Endangered Species Act prohibits any activity that would “take” a protected species without a permit. “Under the statute, to ‘take’ means (1) to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture; or (2) to collect or to attempt to engage in any such conduct.”⁶⁹ Since the term “take” is read as broadly as possible, this law can have a very significant effect. For the purposes of determining if a “take” has occurred,

“‘harm’ means significant habitat modification or degradation that actually kills or injures wildlife by significantly impairing its essential behavioral patterns, including breeding, feeding, or sheltering. The term ‘harass’ is defined as any act or omission that creates a likelihood of injury to wildlife by annoying it to the point of disrupting its normal behavioral patterns, which again include breeding, feeding, and sheltering.”⁷⁰

“To obtain injunctive relief, for example preventing a development project from going forward, a plaintiff need only show that the defendants' activities are likely to cause a take in the future,” and “the balance... tip[s] sharply in favor of endangered species.”⁷¹

For an individual to legally engage in an activity resulting in a “take” they must possess a proper permit. It is possible to obtain a permit for two reasons: “for scientific research or to enhance the propagation and survival of the species, and... for taking species incidental to (not the purpose of) an otherwise lawful activity.” The second type of permit requires a Conservation Plan, also known as a Habitat Conservation Plan.⁷² Conservation Plans are designed to counter the harmful effects that a proposed activity may have on a listed species.⁷³

1. Section 7 Biological Opinion (USFWS)

Similarly, Section 7 of the Endangered Species Act, “requires all federal agencies to consult with the National Marine Fisheries Service (NMFS) for marine and anadromus species, or the United States Fish and Wildlife Services (USFWS) for fresh-water and wildlife, if they are proposing an ‘action’ that may affect listed species or their designated habitat... For local

⁶⁹ *Ctr. for Biological Diversity v. Marina Point Dev. Assocs.*, 434 F. Supp. 2d 789, 795 (2006).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² http://www.nmfs.noaa.gov/pr/permits/esa_permits.htm.

⁷³ <http://www.nmfs.noaa.gov/pr/permits/cp.htm>.

governments, any project that requires a federal permit or receives federal funding is subject to Section 7.”⁷⁴

NPDES

See Clean Water Act section in Ch.3.

STATE PERMITS

1. Permit for streambed impacts - Lake and Streambed Alteration Program (1600, 1602 permit in California)

The California Department of Fish and Game (“DFG”) is responsible for conserving, protecting, and managing California's fish, wildlife, and native plant resources. The law requires any person, state or local governmental agency, or public utility to notify DFG before beginning an activity that will substantially modify a river, stream, creek or lake. If DFG determines that the activity could substantially adversely affect an existing fish and wildlife resource within their jurisdiction, a Lake or Streambed Alteration Agreement is required.⁷⁵

2. Control Board 401 Certification

In order to be compliant with section 401 of the Clean Water Act, a project that requires a federal permit or license must receive 401 certification to confirm that the Clean Water Act will not be violated by the project. In many states, the federal government has deferred to the state in issuing this certification. In California, 401 certification is handled by the State Water Resources Control Board. Examples of projects that would require a federal permit or license, and therefore 401 certification, are wetlands restoration or dredge and fill type projects, as well as hydroelectric power projects.

3. State Coastal Development Permits

Coastal Development Permit (“CDP”): Most significant development along California’s coast will require a Coastal Development Permit. “The Coastal Commission, in partnership with coastal cities and counties, plans and regulates the use of land and water in the coastal zone. Development activities, which are broadly defined by the Coastal Act to include (among others) construction of buildings, divisions of land, and activities that change the intensity of use of land or public access to coastal waters, generally require a coastal permit from either the Coastal Commission or the local government.”⁷⁶

Hawaii Special Management Area Permit (“SMA”): In order to comply with state laws, development along Hawaii’s shoreline requires a permit. “Chapter 205A of the Hawaii Revised

⁷⁴ <http://www.mrsc.org/Subjects/Environment/esa/esa-bioass.aspx>.

⁷⁵ <http://www.dfg.ca.gov/habcon/1600/>.

⁷⁶ <http://www.coastal.ca.gov/howeare.html>.

Statutes mandates each county to establish special management areas (SMA's), and forty foot shoreline setbacks, within which permits are required for development. The Planning Commission on each island is the decision-making authority for an SMA permit or shoreline setback variance, except for Oahu, where the authority rests with the City Council.”⁷⁷

IV. California Coastal Commission

WHO THEY ARE

15 chosen people – 3 set as part of their job, 6 appointed and 6 elected officials

The Commission is comprised of fifteen (15) members: twelve (12) appointed members as well as the chair of the State Lands Commission, the State Secretary of Resources, and the State Secretary of Business, Transportation and Housing.⁷⁸ The twelve (12) appointed members consist of six (6) locally elected officials and six (6) public members.⁷⁹ Of these twelve, four (4) members are appointed by the Governor and serve at his pleasure; four members are appointed by the Senate Rules Committee and serve a four-year term; and four members are appointed by the Speaker of the Assembly and also serve a four-year term.⁸⁰

The Commission meets once a month for three to five days (usually toward the middle of the month) in locations throughout the Coastal Zone.

The Commission has a full time staff of 138 employees, with only 11 enforcement officers to investigate violations along California’s 1,100-mile coastline. They are headquartered in San Francisco, but have six (6) district offices up and down the coast.

CURRENT COMMISSIONERS

<http://www.coastal.ca.gov/roster.html>

HOW THEY VOTE

Conservation voting chart: http://www.sierraclub.org/ca/coasts/2006_votingchart.pdf

WHAT THEY DO

1. Enforce Coastal Act/Purpose
 - a. Federal Consistency Determinations

⁷⁷ http://habitat.noaa.gov/restorationtechniques/public/permits_regs_tab4.cfm#hawaii.

⁷⁸ Pub. Res. Code § 30301.

⁷⁹ Pub. Res. Code § 30301.

⁸⁰ Pub. Res. Code § 30302.

2. Review/Approve virtually any “development” that occurs in the “Coastal Zone”
 - a. “Development” includes almost any action that can affect the environment in the Coastal Zone.
 - b. As defined in the coastal act, “development” means
 - i. on land, in or under water, the placement or erection of any solid material or structure;⁸¹
 - ii. discharge or disposal of any dredged material or of any gaseous liquid, solid, or thermal waste;
 - iii. grading, removing, dredging, mining or extraction of any materials;
 - iv. change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to Subdivision Map Act and any other division of land, including lot splits;
 - v. change in intensity of use of water; construction, reconstruction, demolition or alteration to the size of any structure; and
 - vi. removal or harvesting of vegetation other than for agricultural purposes⁸²
 - c. The “Coastal Zone” includes California’s land and water area, extending seaward to the state’s outer limit of jurisdiction, including all offshore islands, and extending inland generally 1000 yards from the mean high tide line of the sea, but up to five miles inland in certain rural areas.⁸³
3. Review Local Coastal Programs (LCPs) – see section on LCPs infra
4. Review Coastal Development Permits (CDPs)⁸⁴
 - a. The California Coastal Act of 1976⁸⁵ requires that anyone who develops in the Coastal Zone first obtain a coastal development permit and that the permitted development be consistent with an approved CDP.

⁸¹ “Structure” includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, power or telephone line, gate, cell tower, or “no trespassing” sign.

⁸² Pub. Res. Code § 30106; *see also Cal. Coastal Comm. v. Quanta Investment Corp.* (1980) 113 Cal.App.3d (ruling that “development” includes a conversion of an apartment building into a stock cooperative).

⁸³ While the Coastal Zone is nearly continuous throughout California, it does not include the area of jurisdiction of the San Francisco Bay Conservation and Development (BCDC), established pursuant to Title 7.2 of the Government Code, or any area contiguous thereto.

⁸⁴ PRC 30101.5.

⁸⁵ Pub. Res. Code § 30000 *et seq.*

- b. Every CDP must include a specific finding that the development adheres to with the public access and public recreation policies of Chapter 3 of the Coastal Act.
- c. Enforcement can be either administrative or judicial. Administrative remedies include cease and desist orders and restoration orders, whereas judicial remedies include temporary and permanent restraining orders and civil monetary liability.

HOW TO GET INVOLVED

- Comments during Hearings
- Ex Parte’s – an “Ex Parte Communication” is any oral or written communication between a member of the commission and an interested person about a matter within the commission’s jurisdiction, which does not occur in a public hearing, workshop, or other official proceeding, or on the official record of the proceeding on the matter. The communication must be disclosed to the public, including date, time, location, identity of person initiating and receiving the communication, and a complete description of the content.⁸⁶
- 14 California Code of Regulations Article 7. Public Comments; Article 9. Oral hearing procedures; Article 14 Voting Procedures.
- The Commission maintains a website where meeting information, applicable laws, staff reports, prior Commission decisions and other items of interest can be found: <http://www.coastal.ca.gov>. The Commission’s meetings are also broadcast live via internet and some more recent meeting videos are archived.

EXAMPLE: TRESTLES JURISDICTION

The California Coastal Commission (“CCC” or “Commission”) has jurisdiction to review the Foothill-South Toll Road under the federal Coastal Zone Management Act (“CZMA”).⁸⁷ Specifically, the CZMA requires that “any applicant for a Federal license or permit, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state’s approved program and that such activity will be conducted in a manner consistent with the program.”⁸⁸ The applicant must also submit this certification to the state’s reviewing agency - in this case, the CCC.⁸⁹ The CCC reviews the project for consistency with the California Coastal Management Program, which includes the Chapter 3 policies of the Coastal Act.⁹⁰ It is the Transportation Corridor Agency’s

⁸⁶ PRC 30322.

⁸⁷ 16 U.S.C. § 1456

⁸⁸ *Id.* at §1456(c)(3)(A).

⁸⁹ *Id.* at 155(d)(6); 15 CFR § 930.11(o).

⁹⁰ 16 U.S.C. § 1455(12); Cal. Pub. Res. Code §§ 30008, 30330.

(“TCA”) burden to provide the Commission with all of the data and information necessary to support the certification.⁹¹ It is also TCA’s burden to “demonstrate that the activity will be consistent with the enforceable policies of the management program.”⁹² It is the Commission’s responsibility to determine whether TCA has met these burdens and to lodge a proper objection to the certification if TCA has not.⁹³

V. Local Coastal Plan

California’s Local Coastal Plan (LCP) is found in the California Public Resources Code. A “Local Coastal Program” means a local government’s (a) land use plans, (b) zoning and ordinances, (c) zoning district maps, and (d) other implementing action within sensitive coastal resource areas, all of which, when taken together meet the requirements of, and implement the provisions and policies of, this division at the local level.

“Local coastal element” is that portion of a general plan applicable to the coastal zone that may be prepared by local government pursuant to this division, or any additional elements of the local government’s general plan prepared pursuant to Section 65303 of the Government Code, as the local government deem appropriate.

Meg Caldwell suggests, in “No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast,” that LCPs can be an important tool for the Coastal Commission to address sea level rise and the responsive management of coastal resources. Specifically, she advocates using LCPs to steer new development away from areas vulnerable to the effects of sea level rise.⁹⁴

Changes to LCPs can have significant impact on statewide land use patterns. Because all coastal development requires a permit, local governments with permitting responsibilities have the authority to take action to defend their own coasts.⁹⁵ Seventy-four coastal cities and counties have adopted LCPs, which consist of land use plans and the legal mechanisms that put these plans into action.⁹⁶

⁹¹ See 15 C.F.R. §§ 930.57(a), 930.58(a)(1)(ii).

⁹² 15 C.F.R. § 930.58(a)(3).

⁹³ See Cal. Pub. Res. Code § 30330.

⁹⁴ Meg Caldwell and Craig Holt Segall, “No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast,” 34 *Ecology Law Quarterly* 533, 545 (2007).

⁹⁵ Cal Pub Resources Code § 30600.

⁹⁶ Caldwell and Segall, at 548.

Chapter 6 BEACH PRESERVATION

I. Sea Level Rise - Sea Walls & Takings⁹⁷

Global warming and sea level rise are the most threatening natural phenomena to the world's natural beaches and coastlines. In order for Surfrider to align its legal efforts with its strategic goals of beach preservation and coastal access, our response to sea level rise must be multi-faceted and grounded in the theory of the public trust doctrine. A balanced approach to address the issue of sea level rise will include appropriate setback provisions for new coastal development, official opposition to seawalls or other types of coastal armoring, and general support for rolling easements and managed retreat (see next section).

Global warming has become an accepted reality within the scientific community and now popular culture. The greenhouse gas emissions caused by human activity are causing average global temperatures to rise, which in turn contribute to sea level rise due to melting glaciers, increased beach erosion rates due to higher frequency and severity of storms, and increased water temperature and acidity changes. These negative effects of global warming pose a threat to almost every aspect of Surfrider's strategic mission to preserve and protect oceans, waves and beaches for all people, including the potential loss of surf breaks due to increased depth of water.

The problematic scenario concerning sea level rise and land use is this: beach-front homeowners are threatened by rising sea levels, increased erosion and damage from hurricanes and major storms. Their decision to build close to the ocean, combined with natural and human-induced erosion, has increased calls for either coastal armoring or massive, expensive, and temporary beach fill projects. Property owners often erect seawalls to protect their private property, but these seawalls can eliminate beaches, particularly bay beaches, which are usually less than 10 feet wide.

The public trust doctrine mandates that the lands lying under navigable waters be held in trust by the state for the benefit of the public. According to the doctrine, the coastal lands under the mean high tide line may not be sold or otherwise alienated by the state except in a manner that promotes the public interest.⁹⁸ It is a concept rooted in common law, which has been written into most state constitutions explicitly and extends deeper than any statute. It requires, in our interpretation, that no seawall permit should be granted for any structure that would abrogate the public trust, including those that would eventually take the beach away from the public. Armoring the coasts prevents inward migration of public trust lands, and neither a state agency nor the legislature has the power to cede the public's trust rights. The public trust is a fundamental principle of law and the state would be violating their fiduciary duties if they simply

⁹⁷ Seawalls are covered by Surfrider's "Coastal A-Z: Seawalls Harm the Beach and Restrict Beach Access:" <http://www.surfrider.org/seawall/>.

⁹⁸ *Barron's Law Dictionary* (1996).

ignored it and allowed for beach destruction. Indiscriminate armoring of the coast violates the public trust doctrine by blocking landward migration of the shore, and, in essence, “stealing” the public’s beach. It also cancels the long-recognized right of the public to navigate and recreate in the wet sand below the mean high tide line. “Indeed, it not only cancels beach access – it cancels the beach itself.”⁹⁹

Under the Supreme Court’s decision in *Lucas v. South Carolina Coastal Council*, a “taking” will occur if a regulation “denies all economically beneficial or productive use of the land.”¹⁰⁰ However, the public trust doctrine, as a background principle of property law, is not a “regulation” that would effect a taking. The common law of erosion and the public trust doctrine supersede any state regulation, as existing before the economically beneficial use of land is created. “The easement, simply put, has always been there: it is not an imposition on the property owner but part of the nature of his or her property.”¹⁰¹ Therefore, the public’s inherent right to the coastal property trumps any subsequently created private property right.

Climate change is happening. The resultant sea level rise is substantially altering our coastline, and is an issue that affects the core of Surfrider’s mission to protect oceans, waves, and beaches. The effects of the sea level rising must be dealt with on a dynamic level, recognizing the geographic diversity of the national coastlines, as well as the disparities in state laws currently enacted to deal with coastal erosion and sea level rise. The public trust doctrine should be used, in combination with other state legal coastal protection mechanisms, to bar injudicious armoring and to advance rolling easements and managed retreat. Ultimately, only a comprehensive and versatile approach will be able to address the threat to our coastal resources posed by the combination of population growth, coastal development, and climate change.

II. Rolling Easements and Managed Retreats

The common law public trust doctrine provides that the public owns the beach below the mean high tide mark. In order to protect these public assets, several states have adopted policies ensuring that beaches, dunes or wetlands are able to migrate inland as sea level rises. States work to ensure that public trust lands are preserved by implementing “rolling easements” in which people are allowed to build near the coast only on the condition that they will remove their

⁹⁹ Meg Caldwell and Craig Holt Seagall, “No Day at the Beach: Sea Level Rise, Ecosystem Loss and Public Access Along the California Coast,” 34 *Ecology L.Q.* 533, 566 (2007).

¹⁰⁰ 505 U.S. 1003, 1015 (1992).

¹⁰¹ Caldwell and Seagall at 568. Under public trust and rolling easement doctrines, when a house must be removed because it is in the public’s right of way or “trust” lands, it would not be a “takings” under the normal definition of takings. It would be an instance where the private property moved to the public’s realm on public beach land and is, therefore, no longer the property of the owner. Because the property no longer belongs to the owner, there is nothing to “take.” In essence, if the former property owner wants to blame someone for taking the property, they should blame mother nature. The state has not acted to force a takings.

structure if threatened by an advancing shoreline.¹⁰² The public trust doctrine and use of rolling easements is discussed in further detail below.

The public trust doctrine may serve as a justification for limiting new development to only projects with conditions in their permits that deny coastal armoring privileges, thereby beginning to codify a “rolling easement” policy. Such permit conditions protect the public trust rights at stake during sea level rise, by preventing the loss of the public’s reversionary interest in the moving shoreline and maintaining the public trust navigation and recreation interests on the beaches that would otherwise be lost.

While requiring these permit conditions is preferable to ignoring sea level rise, this is an “ad hoc” solution. Explicit recognition of public trust rights should be codified in state law. As Meg Caldwell and Craig Holt Seagall note, protecting the public trust rights through “a series of site-specific permit conditions rather than asserting them generally risks being haphazard or underprotective.”¹⁰³ They suggest rulemaking on a statewide level as a potential long-term solution.¹⁰⁴

If a state’s policy on sea level rise is rooted in the rolling easement concept, the public’s interest in the coastal land will roll with the changing tideline. As explained in a court’s interpretation of Texas’ statutory and common law of rolling easement, “not only can title change because of the advances and retreats of the sea, but *the location and extent of easements* along waterways can change because of accretion or erosion to land along a waterway.”¹⁰⁵ A rolling easement for the public will allow nature to take its course with respect to sea level rise and inland migration of coastal wetlands, thereby forcing landowners to incorporate the risk of erosion into land use decisions and provide incentive to avoid development of areas subject to loss.¹⁰⁶

According to the common law public trust doctrine, states should be able to impose a blanket rolling easement along its coastline without running into a takings prohibition. However, there are serious practical impediments to this work. If the political process inadequately addresses the issue of sea level rise and fails to implement a workable rolling easement, takings lawsuits will likely ensue. A mixed strategy, including the purchase of rolling easements from existing landowners in appropriate circumstances and the prospective requirement of setbacks and seawall bans, will most effectively preserve the spirit of the public trust doctrine and leave the coasts open for everyone to enjoy.

¹⁰² See http://www.surfrider.org/srui.aspx?uiq=a-z/global_warming citing Maine, South Carolina and Texas as states implementing “rolling easements.”

¹⁰³ Meg Caldwell and Craig Holt Seagall, *No Day at the Beach: Sea Level Rise, Ecosystem Loss and Public Access Along the California Coast*, 34 *ECOLOGY L.Q.* 533, 566 (2007).

¹⁰⁴ *Id.* at 566-67.

¹⁰⁵ *Feinman v. Texas*, 717 S.W.2d 106 (Tex. App. 1986).

¹⁰⁶ Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts*, 27 *Harv. Envtl. L. Rev.* 295, 346 (2003).

III. Beach Filling/Nourishment

One major issue that Surfrider encounters is that of beach filling. Also known as beach nourishment (although the beach is not necessarily being nourished in an ecological sense), this occurs when sand is artificially placed on the beach, usually by pumping sea bottom sediments onshore, to replace that being lost alongshore or offshore. Beach fill projects are usually large-scale, spanning many miles of shoreline to rebuild eroded beaches.

Several problems arise in the context of beach filling that often conflict with Surfrider's core principles. Beach filling may affect the quality of the ecosystem in the area as well as the wave quality. The sand used to "nourish" a beach is usually from a different source and displays very different biological characteristics than the sand originally found on the beach. Also of concern is the fact that the imported sand may not be properly tested or regulated. In the past this has led to sand being imported with a high bacteria count (which could cause people to get sick), or with dangerous materials present in the sand. For example, there were several reports of munitions and even active mortar shells (which can explode similar to hand grenades) that washed up on the New Jersey shore in the past couple of years after over 1,100 munitions—fuses and boosters—were pumped ashore during a beach replenishment project last year.¹⁰⁷

Surfrider often challenges these beach nourishment projects, using various legal claims. One argument that may be made, as discussed in further detail below, arises when a single large beach fill project is split into smaller steps in order to avoid the required environmental review procedures. Surfrider would then argue that the cumulative effects of the separate segments of the project should be considered together in determining whether the quality of the surrounding environment is significantly affected. In addition, the projects might violate various laws regulating water quality, sand quality, and sediment quality.

One major project in this area that Surfrider is working on is the contemplated beach filling of Reach 8 and Reach 9 in Palm Beach, FL. The Town of Palm Beach is currently seeking a permit from the U.S. Army Corps of Engineers (USACE) to "restore" the beach by importing sand from other locations. Surfrider asserts that the proposed Reach 8 Project would cause serious negative impacts, including: degradation of near-shore and off-shore reefs potentially increasing risk of shark attacks because of turbidity, harm to wildlife including sea turtles and their nesting areas, ruining surf spots as well as fishing and diving areas, and covering the beaches with silty, fine or coarse, gray fill.¹⁰⁸ Additionally, these projects are expensive, require frequent maintenance, and are not an effective long-term solution to the problem.

¹⁰⁷ <http://www.pressofatlanticcity.com/183/story/169174.html>.

¹⁰⁸ <http://www.surfriderpbc.org/campaigns2.html>.

IV. Dam Removal

In order to preserve or restore a beach, environmental organizations will sometimes advocate for the removal of the dam. Dam Removal has significant legal implications, and is an occurrence that Surfrider is sometimes involved in. Legal issues come up in determining whether removing a dam is the right course of action and, if so, how to go about doing it. Many different entities must be consulted in the process, and permits must be obtained. Additionally, the removal of a dam, even if it is for the overall enhancement of an ecosystem, usually results in significant changes to the environment and therefore must often be analyzed under other environmental laws such as the Endangered Species Act (ESA) or NEPA.

The Ventura County Chapter is working towards restoration of the Ventura River watershed, starting with the removal of Matilija Dam. Although removing the dam will be very expensive, the goal is to restore ecosystem connectivity in order to benefit anadromous fishery and restore coastal sediment supplies while enhancing water quality and reliability. The bioregion would benefit through the recovery of the Southern Steelhead trout and the restoration of the natural sediment supply to the beaches of Ventura. Surfrider is a member of the Matilija Coalition, which is an alliance of community groups, businesses, and individuals committed to the environmental restoration of the Ventura River watershed.¹⁰⁹

V. Segmentation/Tiering

Segmentation is the process of splitting up a project into two or more smaller projects to avoid having to prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA). Although each of these smaller projects may not individually affect the quality of the environment enough to require the preparation of an EIS, the cumulative effects of these projects on the environment may be very significant. They therefore must be looked at together when analyzing the harm that will ultimately be done to the surrounding environment. Federal courts have interpreted NEPA to mean that an “agency may not divide a project into multiple ‘actions,’ each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.”¹¹⁰ The California Environmental Quality Act (CEQA) also addresses segmentation, specifically stating that “a public agency may not divide a single project into smaller individual projects in order to avoid its responsibility to consider environmental impacts of the project as a whole.” Since developers often seek to avoid preparing an EIS (which is costly and time consuming), it often falls into the hands of environmental organizations such as Surfrider to ensure that the full effects of a project on the environment are taken into consideration and adequately analyzed.

¹⁰⁹ <http://www.surfrider.org/ventura/>.

¹¹⁰ *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (2006).

Both federal and state case law discuss what rules govern the segmentation of projects and what type of segmentation is forbidden (that done specifically to avoid having to prepare an EIS). In *Sierra Club v. West Side Irrigation District*,¹¹¹ the California Court of Appeals interpreted CEQA to mean that when individual projects are to be undertaken and where the total undertaking of them all comprises a project with significant environmental effects, the lead agency must prepare a single program Environmental Impact Report (EIR). Where one project is one of several similar projects of a public agency but is not deemed to be part of a larger undertaking or project, the agency must prepare an EIR for all individual projects and may prepare one for all projects together. Either way, the agency is required to comment upon the cumulative effects of related endeavors. Under federal law (NEPA), the United States Court of Appeals for the fifth Circuit set out a four part test in 2007 to determine whether a single project is improperly segmented into multiple parts. The court asks whether the proposed segment (1) has logical termini, (2) has substantial independent utility, (3) does not foreclose the opportunity to consider alternatives, and (4) does not irretrievably commit federal funds for closely related federal projects.¹¹²

Tiering is another method often used by developers to delay analyzing the significant impacts of a project. The term refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) followed by narrower statements or environmental analysis (such as regional or basin-wide program statements or, ultimately, site-specific statements). Tiering can sometimes be beneficial and, in fact, “agencies are encouraged to tier their [EIS] to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review.”¹¹³ Tiering differs from segmentation in that segmentation is used to avoid performing an EIS altogether while tiering does involve performing an EIS, but may avoid analyzing the cumulative impacts by looking separately at each segment of the project.

Many different developments and agency approvals invoke problems with segmenting and tiering. Surf rider is confronted with these problems in large development projects such as the beach fill projects mentioned above. In these projects, agencies conducting or approving such fill projects attempt to avoid analyzing the cumulative effects of a large beach filling action by breaking the project down in to a few or several smaller beach dredging and filling actions. Individually these projects may not have a significant effect, but cumulatively such projects can be devastating to the surrounding environment.

¹¹¹ 128 Cal App. 4th 690 (2005).

¹¹² *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 236 (2007).

¹¹³ 40 C.F.R. Section 1508.28.

VI. Once-Through Cooling

BACKGROUND

Once-through cooling (OTC) is a serious ongoing environmental issue with power plants that contributes to degraded marine and estuarine ecosystems. According to the California Energy Commission, there are 21 existing power plants that use OTC, and these plants account for 39% of California's total generation capacity: 53% of natural gas-fired capacity and 100% of nuclear capacity. Each of these plants is permitted to withdraw 17 billion gallons of water per day. For perspective, the CEC states that if San Francisco Bay had no water flowing into it and this volume of water was removed from it daily, the Bay would be drained dry in approximately 100 days.

Water for a once-through system may be drawn from wells, lakes, streams, rivers or municipal water systems. Once-through cooling with seawater is an effective and relatively inexpensive cooling method for coastal power plants. Surfrider is primarily concerned with the withdrawal aspect of seawater for OTC systems, which kills marine organisms. The sea water used by power plants is a habitat with high biodiversity and thousands of marine organisms are injured or killed when the seawater they inhabit is drawn through intake pumps (entrainment), then passed through traveling intake screens (impingement). The organisms and debris pinned against the screens are removed and discarded while the water (and all organisms smaller than 3/8") is drawn into the power plant to absorb waste heat in order to condense steam. The organisms are also subjected to mechanical stress, pressure changes, and residual anti-fouling chemicals during entrainment. The temperature of the cooling water is increased by approximately 200°F (110°C), and finally discharged back into the environment in a location that minimizes re-entrainment of the heated water.

Plants and animals that are killed during the entrainment process include phytoplankton and zooplankton that reside entirely in the water, and the eggs and larvae of larger adult animals such as fishes, abalone, crabs, lobsters, and clams. Coastal waters subject to entrainment are also habitat for gametes, spores and seeds of many types of seaweed, sea grasses, and marsh plants. The CEC admits that data for "related animals" is unavailable because quantitative sampling and sorting is difficult, and only considering impacts to commercially fished species does not acknowledge the degradation of the ecosystems that support them. Unfortunately, only 7 of 21 coastal power plants have recent studies of entrainment impacts that meet current scientific standards, and all of these recent studies have found adverse impacts due to entrainment.

Another adverse effect of OTC is the disruption of the thermal stratification. Thermal stratification is the "naturally-occurring division of a waterbody into horizontal layers of differing densities as a result of variations in temperatures at different depths." When the thermal stratification is disrupted, it affects the balance of nutrients and oxygen in the water, which disrupts the life cycles of biological organisms.

LEGAL ISSUES

No single regulatory agency has jurisdictional authority over all 21 once-through cooling facilities in California. For example, under the Warren-Alquist Act the California Energy Commission only has jurisdiction over “new” or “modified” thermal facilities with expansions exceeding 50 MW or more. This means many once-through cooling facilities built prior to 1975 are not subject to the Energy Commission’s jurisdiction, nor are new or modified facilities which add less than 50 MW of net capacity to their site. The California Coastal Commission also has jurisdictional responsibilities for many of these once-through cooling facilities.

COASTAL COMMISSION JURISDICTION

The Clean Water Act (CWA) makes the discharge of any pollutants into the waters of the United States unlawful, unless it falls within several statutory schemes. The Environmental Protection Agency has considerable discretion to weigh and balance various factors required by the CWA to set new source performance standards for cooling water intake structures. Under the Act, the EPA must require that power plants use the best technology available (BTA) and its definition has been the subject of recent litigation.

Riverkeeper I: In Riverkeeper, Inc v. U.S. EPA, several environmental groups challenged the EPA’s determination that power plants may adopt a suite of technologies instead of closed-cycle cooling which petitioners contend is the BTA. The environmental petitioners argue that the EPA improperly rejected closed-cycle cooling as the BTA based on a cost-benefit analysis. The court concluded that the use of “best technology available” did not permit the use of cost-benefit analysis, but cost could be considered to determine benchmark technology. In addition, the court determined that the EPA must explain its conclusion that a suite of technologies other than closed-cycle cooling “approached” its performance.

Riverkeeper II: Surfrider joined the petitioning environmental groups from Riverkeeper I to ensure that the EPA determines and implements closed-cycle cooling as the BTA for power plants. While the court determined that dry cooling was the BTA, it also determined that closed-cycle cooling was a close second and was also economically feasible. The court ultimately determined that given the above, the EPA may permissibly consider cost in two ways: (1) to determine what technology can be “reasonably borne” by the industry and (2) to engage in cost-effectiveness analysis in determining BTA.

POSSIBLE ALTERNATIVES

The Clean Water Act allows the EPA to make a choice among alternatives based on more than impingement and entrainment. Therefore, In order to protect the marine environment, Surfrider must urge the EPA to use the BTA. Where a once-through cooling system would hypothetically entrain some 3.65 million organisms per year, closed-cycle cooling would entrain about 180,000, resulting from the difference in capacity: closed-cycle wet cooling systems use

96 to 98 percent less fresh water (and 70 to 96 percent less salt water) than similarly situated once-through systems.

Conversion from once-through cooling to re-circulating cooling can reduce cooling water demand by up to 95%. This cooling process recycles the water as it passes the condenser several times with the heat dissipated to the atmosphere in the cooling towers. This large reduction in water demand results in a similar reduction in entrainment and impingement impacts as well as thermal discharge levels. However, re-circulating cooling does reduce plant efficiency, and capital cost of this system has been estimated to be approximately \$10 to \$12 million over the cost of once-through cooling.

Using wastewater for a cooling tower system can eliminate impingement and entrainment impacts. Wastewater, as an alternative to seawater, may be treated appropriately and used for feedwater to a cooling tower. Given ideal conditions, treatment may be minimal, but under more difficult conditions it may require additional treatment, which can increase the cost substantially. Practicality depends on the distance to a sewage treatment facility of adequate size for the application.

Treated wastewater also may be used to directly cool a power plant, rather than a cooling tower system. Operation cost of this direct wastewater cooling is expected to be slightly greater than ocean water OTC (\$1 - 2 million dollars more per year), due to efficiency loss since wastewater is slightly warmer than ocean water.

Additional technologies, like intake screens, “fish buckets,” and “spray wash systems” can prevent organisms from entering the intake system or maximize the survival of impinged or entrained organisms, but their effectiveness varies with a host of factors that are site-specific, like water currents, the amount of debris near the intake, and the velocity of water as it enters the system. Seasonal reductions in cooling water intake during periods when sensitive species are present are another option for reducing entrainment and impingement of special status species.

The bottom line is that environmental groups like Surfrider must push the agencies regulating power plants to require uniform study protocols, agency cooperation, and ongoing research on the environmental impact of cooling technologies used in power plants.

CONTACT:

If you have questions about this Legal Handbook or would like additional information on the substantive issues contained herein, please contact:

Angela Howe: ahowe@surfrider.org, (949) 492-8170 ext. 414

GLOSSARY

Definitions

Affected parties

"Affected parties" are stakeholders who are or may be impacted by EPA decisions.

Alternative Dispute Resolution

"Alternative (means of) Dispute Resolution" is "any procedure that is used to resolve issues in controversy, including but not limited to conciliation, facilitation, mediation, fact finding, minitrials, arbitration, use of ombuds or any combination thereof." 5 U.S.C. 571(3) These ADR techniques involve a neutral third party, a person who assists others in designing and conducting a process for reaching agreement, if possible.

The neutral third party has no stake in the substantive outcome of the process. Depending on the circumstances of a particular dispute, neutral third parties may be Agency employees or may come from outside EPA. Typically, all aspects of ADR are voluntary, including the decision to participate, the type of process used, and the content of any final agreement.

Beach Nourishment or Beach Renourishment

A mechanical process by which tons of sand are transported to diminishing beaches, or gathered from the sea floor by pumping, in an effort to replace sand lost to erosion. It is costly and not a permanent fix. The addition of sand does not stop the beach from eroding again.

Public Nuisance – in California “an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstruct the free passage or use...of any navigable...bay, stream, canal or basin, or any public park, square, street or highway.”¹¹⁴

(Can be used to bolster the argument against coastal armoring.)

Consensus Building

"Consensus Building" is a process in which people agree to work together to resolve common problems in a relatively informal, cooperative manner. It is a technique that can be used to bring together representatives from different stakeholder groups early in a decision-making process. A neutral third party helps the people design and implement their own strategy for developing group solutions to the problems.

Convening

"Convening" (also called conflict assessment) involves the use of a neutral third party to help assess the causes of the conflict, to identify the persons or entities that would be affected by the

¹¹⁴ Cal. Civ. Code § 3479 (West 2006).

outcome of the conflict, and to help these parties consider the best way (for example, mediation, consensus-building or a lawsuit) for them to deal with the conflict. The convener may also help get the parties ready for participation in a dispute resolution process by providing education to the parties on what the selected process will be like.

Facilitation

"Facilitation" is a process used to help a group of people or parties have constructive discussions about complex, or potentially controversial issues. The facilitator provides assistance by helping the parties set ground rules for these discussions, promoting effective communication, eliciting creative options, and keeping the group focused and on track. Facilitation can be used even where parties have not yet agreed to attempt to resolve a conflict.

Fair treatment

"Fair treatment" as defined on EPA's Environmental Justice Website , means that no group of people, including a racial, ethnic or a socioeconomic group, should bear a disproportionate share of the negative environmental consequences from industrial, municipal and commercial operations or the execution of federal, state, local and tribal programs and policies.

Marine Managed Area

The Marine Managed Areas Improvement Act created a new Marine Managed Areas (MMA) classification system in California. The new system mandates that all MMAs fall within one of the following six classifications: (1) State Marine Reserves, (2) State Marine Parks, (3) State Marine Conservation Areas, (4) Cultural Preservation Areas, (5) Recreational Management Areas, and (6) Water Quality Control Areas. Each classification is characterized by the purpose for which an area is to be managed, and the scope of protection that may/must be afforded to areas within each classification.

Marine Protected Areas (MPAs) constitute a subset of MMAs.

State Marine Reserves, State Marine Parks, and State Marine Conservation Areas are considered Marine Protected Areas because they are designated primarily to protect or conserve marine life or habitat.

Meaningful involvement

"Meaningful involvement," according to the EPA, means that:

- potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health
- the public's contribution can influence the regulatory agency's decision
- the concerns of all participants involved will be considered in the decision-making process
- the decision makers seek out and facilitate the involvement of those potentially affected

Mediation

"Mediation" is a process in which a neutral third party (the mediator) helps disputants reach a mutually satisfying settlement of their differences. Mediation is voluntary, informal and confidential. The mediator helps the disputants to communicate clearly, to listen carefully and to consider creative ways to reach resolution. The mediator makes no judgments about the people or the conflict, and issues no decision. Any agreement that is reached must satisfy all the disputants.

Stakeholders

"Stakeholders" are individuals or representatives from organizations or interest groups that have a strong interest in the Agency's work and policies.

State Marine Conservation Areas (Conservation Areas)

Conservation areas can be designated solely to protect or conserve marine life or habitat, but can also be designated to protect unique geological features or to provide for sustainable harvests of living resources. Within a conservation area, any resource may be taken, harmed, or possessed for recreational or commercial purposes unless the managing or designating agency determines that such action would "compromise" the protection of a species, habitat, or geological feature of special interest.

State Marine Cultural Preservation Area

In a Cultural Preservation Area it is unlawful to damage, take, or possess any cultural marine resource. The managing agency is authorized to preserve cultural objects, or sites of historical, archaeological, or scientific interest. Some examples might include shipwrecks or sites of special cultural significance to local tribes.

State Marine Parks (Parks)

An MMA is a Park if it is managed primarily to protect or conserve marine life or habitat, but also to provide opportunities for "spiritual, scientific, educational, or recreational" uses. In a marine park, it is unlawful to take, harm, or possess resources for commercial uses. Additionally, the managing or designating agency may restrict any use that would compromise the protection of a species of interest. All other uses are allowed unless otherwise restricted, and public use of the area is encouraged.

State Marine Recreational Management Area

A Recreational Area is designated to provide, limit, or restrict recreational opportunities to meet other than local needs. This would prohibit any activities that would compromise the recreational value for which the area is designated.

State Marine Reserves (Reserves)

An MMA is a Reserve if it is managed solely to protect or conserve marine life or habitat and to maintain the area, to the extent practicable, in an undisturbed and unpolluted state. A reserve provides the most extensive protection of resources. It is unlawful to take, harm, or possess any resource in a reserve unless (1) you are permitted to do so, and (2) you do so for research, monitoring, or restoration purposes. To the extent feasible, the area shall be open to the public

for managed enjoyment and study, but some activities may be restricted to protect marine resources.

Timely information

"Timely information" means distributing information sufficiently far in advance so that the interested public has enough time to review relevant material, decide whether to become involved, and make plans for that involvement. Timely applies to the availability of background information on particular issues, as well as notice of public meetings, public comment periods or other critical involvement activities.

Total Maximum Daily Loads (TMDLs)

TMDLs are documents that describe a specific water quality attainment strategy for a water body and related impairment identified on the 303(d) list. TMDLs may include more than one water body and more than one pollutant. The TMDL defines specific measurable features that describe attainment of the relevant water quality standards. TMDLs include a description of the total allowable level of the pollutant(s) in question and allocation of allowable loads to individual sources or groups of sources of the pollutant(s) of concern.

(<http://www.surfrider.org/srui.aspx?uiq=a-z/tmdl>)

Water Quality Protection Areas: These areas will be designated to protect marine species or biological communities from undesirable alterations of natural water quality. Point source waste and thermal discharges shall be prohibited or limited by special conditions and non-point discharges shall be controlled to the extent practicable. The authority from the existing precursor to this designation, Areas of Special Biological Significance (ASBS), has been exercised to also prohibit unnatural and detrimental sediment deposits.

Useful Websites

California Environmental Resources Evaluation System: <http://ceres.ca.gov/>
Nonpoint Source Pollution Control Program (NPS): <http://www.swrcb.ca.gov/nps/>
State and Federal Water Laws: http://www.swrcb.ca.gov/water_laws/
Storm Water Pollution Prevention Program: <http://www.sannet.gov/stormwater/>
LUPIN: Environmental Assessment Documents: <http://ceres.ca.gov/planning/ead/index.html>
Environmental Protection Agency: <http://www.epa.gov/>
EPA Watershed Webcasts: <http://www.epa.gov/watershedwebcasts/>
Waterkeeper Alliance: <http://www.waterkeeper.org/>

List of Common Acronyms

A

AB Assembly Bill
ACOE Army Corp of Engineers
AF acre foot
AG Attorney General
ALJ Administrative Law Judge
ARB Air Resources Board (CARB California Air Resources Board)
ASBS Areas of Special Biological Significance
AWQC Areas of Water Quality Concern

B

BAT Best Available Technology
BC Building Code
BCP Budget Change Proposal
BDO Board, Department or Office w/in Cal/EPA
BLM Bureau of Land Management
BMPs Best Management Practices
BOD Biological Oxygen Demand
BPTCP Bay Protection and Toxic Cleanup Program
BTU British Thermal Unit

C

CAA Clean Air Act
CalTrans CA Department of Transportation
CAO Cleanup and abatement order
CCA California Coastal Act
CCC California Coastal Commission
CCMP California Coastal Management Program
CCR California Code of Regulations
CDO Cease and Desist Order
CDP Coastal Development Permit
CDPR Department of Pesticide Regulation
CEC California Energy Commission
CEQA California Environmental Quality Act
CERCLA Comprehensive Environmental Response, Compensation and Liability Act
CFR Code of Federal Regulations
cfs cubic feet per second
CIP Capital Improvement Plan
CIWMB CA Integrated Waste Management Board
CrCA Critical Coastal Area
CSO Combined Sewer Overflow
CUCRFCA California Urban Creeks Restoration & Flood Control Act
CVAP Clean Vessel Act Program
CWA Clean Water Act
CZARA Coastal Zone Act Reauthorization Amendments of 1990
CZMA Coastal Zone Management Act

D

DBW Department of Boating and Waterways
DEQ Department of Environmental Quality
DFA Department of Food and Agriculture
DFG Department of Fish and Game
DGS Department of General Services
DHS Department of Health Services
DMR Discharge Monitoring Report
DO Dissolved Oxygen
DOC Department of Commerce
DoD Department of Defense
DPR Department of Pesticide Regulation
DTSC Department of Toxic Substances Control
DWQ Division of Water Quality
DWR Department of Water Resources
DWR Division of Water Rights

E

EBEP Enclosed Bays and Estuaries Plan
EIA Economic Impact Assessment
EIR Environmental Impact Report

EIS Environmental Impact Study
EJ Environmental Justice
EPA US Environmental Protection Agency
ESA Endangered Species Act
ET Evapotranspiration

F

FEA Federal Energy Administration
FERC Federal Energy Regulatory Commission
FGC Fish and Game Code
FIFRA Federal Insecticide, Fungicide and Rodenticide Act
FPPA Federal Pollution Prevention Act

G

GIS Geographic Information System
GP General Plan
gpd gallons per day
gpm gallons per minute
GWPS Groundwater Protection Standard

H

HAZMAT Hazardous Material
HC Housing Code
HFC Hydrofluorocarbon
Hg Mercury
HNC Harbors and Navigation Code
HSC Health and Safety Code
HWCA Hazardous Waste Control Act

I

IID Imperial Irrigation District
IS Initial Study
ISWP Inland Surface Waters Plan
IWMA Integrated Waste Management Act

J

JPA Joint Powers Authorities

L

LAO Legislative Analyst's Office
LCP Local Coastal Program
LEA local enforcement agency
LEED Leadership in Energy and Environmental Design
LIA Local Implementing Agency
LID Low Impact Development
LIT Legal Issues Team
LTMP Long Term Monitoring Program
LTMS Long-Term Management Strategy
LUFT Leaking Underground Fuel Tank

M

Mcl maximum contaminant level
MCP Municipal Compliance Plan
mdl maximum daily load
MEP maximum extent practicable
mg/l milligrams per liter
mgd million gallons per day
MM/PA Marine Managed/Protected Area
MMP Mandatory Minimum Penalty
MOA Memorandum of Agreement
MOU Memorandum of Understanding

MS4s Municipal Separate Storm Sewer Systems
MSW Municipal solid waste
MSWP Municipal Storm Water Permit
MTBE Methyl Tertiary Butyl Ether
MURP Model Urban Runoff Program
MWD Metropolitan Water District

N

NCP National Oil and Hazardous Substances
Contingency Plan
NEP National Estuary Program
NEPA National Environmental Policy Act
NMFS National Marine Fisheries Service
NMS National Marine Sanctuary
NOAA National Oceanic and Atmospheric
Administration
NOI Notice of Intent
NPDES National Pollutant Discharge Elimination System
NPL National Priorities List
NPS Nonpoint Source
NRDC Natural Resource Defense Council
NTR National Toxics Rule

O

OAL Office of Administrative Law
OCC Office of Chief Counsel
ODW Office of Drinking Water
OEHHA Office of Environmental Health Hazard Assessment
OES Office of Emergency Services
ONRW Outstanding Natural Resource Waters
OPA Federal Oil Pollution Act of 1990
OPA Office of Public Affairs
OPR Governor's Office of Planning and Research
OSC On-Scene Coordinator
OSPR Office of Oil Spill Prevention & Response
OSPRA Oil Spill Prevention and Response Act

P

PCB Polychlorinated Biphenyls
PCE Perchloroethylene
PCWQCA Porter Cologne Water Quality Control Act
PIRG Public Interest Research Group
POTW Publicly Owned Treatment Work
Ppb/m parts per billion/million
PPP Pollution prevention plans
PRC Public Resources Code
Prop. 65 California Safe Drinking Water and Toxic Enforcement Act
PRP Potentially Responsible Party
PUC Public Utilities Commission
PY Personnel Year

Q

QA/QC Quality Assurance/Quality Control

R

R&HA Rivers and Harbors Act
RA Resources Agency
RCD Resource Conservation District
RCRA Resource Conservation and Recovery Act
RFP Request for Proposal

ROWD Report of Waste Discharge
RWQCB Regional Water Quality Control Board

S

SAA Streambed Alteration Agreements
SANDAG San Diego Area Governments
SAP State Assistance Program
SARA Superfund Amendments and Reauthorization Act of 1986
SB Senate Bill
SCAG Southern CA Association of Governments
SCC State Coastal Conservancy
SCCWRP Southern CA Coastal Water Research Project
SDWA Safe Drinking Water Act
SF Surfrider Foundation
SFHQ Surfrider Foundation Headquarters
SEP Supplemental Environmental Project
SIP Statewide Implementation Policy
SLC State Lands Commission
SMW State Mussel Watch
SNC Significant Noncompliance
SOC Synthetic Organic Chemical
SRF State Revolving Fund
SWAMP Surface Water Ambient Monitoring Program
SWDP Storm Water Discharge Program
SWIM System for Water Information Management
SWMP Storm Water Management Plan
SWP State Water Project
SWPPP Storm Water Pollution Prevention Program
SWQTF Stormwater Quality Task Force
SWRCB State Water Resources Control Board
SYP Sustained Yield Plan

T

TAC Technical Advisory Committee
TBT Tributyltin
TCA Transportation Corridor Agencies
TCE Trichloroethylene
TDR Transferable Development Rights
TDS Total Dissolved Solids
TMDL Total Maximum Daily Load
TQM Total Quality Management
TSCA Toxic Substances Control Act
TSS Total Suspended Solids
TTLC Total Threshold Limit Concentration

U

ug/l Micrograms per liter
URMP Urban Runoff Management Program
USACE United States Army Corps of Engineers
USBR United States Bureau of Reclamation
USC United States Code
USCG U.S. Coast Guard
USCOE U.S. Corps of Engineers
USDA United States Department of Agriculture
USDI United States Department of Interior
USEPA U. S. Environmental Protection Agency
USFS United States Forestry Service
USFWS U.S. Fish and Wildlife Service

USGS United States Geological Survey
UST Underground Storage Tanks
USTCF Underground Storage Tank Cleanup Fund

V

VOC Volatile Organic Compound

W

WC Water Code
WCL Wildlife Conservation Law of 1947
WDIS Waste Discharger Information System
WDR Waste discharge requirements
WIN Water Information Network
WLA Waste Load Allocation
WMU Waste management unit
WQA Water Quality Assessment
WQS Water Quality Standards
WWTP Wastewater Treatment Plant

Legal Handbook Appendix

Surfrider Foundation NEW LEGAL MATTER FORM

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT ATTORNEY CLIENT COMMUNICATIONS

TO:
FROM:
DATE:
RE:

[Need a minimum of two weeks for board consideration. Litigating attorney must fill out the form with the chapter and coordinate with Litigation Manager for assistance, if needed.]

SUMMARY

ATTORNEY(S)

PARTIES

Defendants:

Plaintiffs:

Possible Intervenors:

Compliance with litigation procedures: (see below)

LITIGATION POLICY REQUIREMENTS

Article X Litigation of the Policy and Procedure manual requires chapters to meet the following requirements:

- a. Identify legal representation and any expert witnesses.
- b. Have one-half of anticipated funds needed to fund the lawsuit.

- c. Provide two qualified volunteer legal opinions of the potential outcomes of the lawsuit.
- d. Provide all existing and obtainable documents.

DESCRIPTION OF THE CASE

- a. Chapter history on the issue and reason for litigation
- b. Facts and legal claims
- c. Likelihood of success
- d. Risks of winning/ risks of losing

CHAPTER CAMPAIGN STRATEGY

[Description of how the litigation fits into the Chapter's broader work, campaign and Surfrider's Mission]

POLITICAL IMPLICATIONS

MEDIA PLAN

ESTIMATED COSTS, FINANCIAL AGREEMENTS AND RETAINER AGREEMENT

[Chapter must be current with financial reporting requirements]

STRATEGIC PLAN CONNECTION

RECOMMENDATION

[made by staff & legal issues committee]

CONTACT

Angela Howe, Legal Manager
ahowe@surfrider.org

ACTION

Step by Step Process for Legal Action Approval

For Legal Assistance Contact: Angela Howe, Legal Manager (949) 492-8170 x414

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	Step 1	Step 2	Step 3	Step 4	Step 5
Notice Letters	Send draft of the letter from attorney to Legal Manager.	Legal Manager will consult with attorney who wrote it.	Legal Manager will consult Legal Committee	Upon recommendation from Legal Manager and Legal Committee issue will be brought to the board for approval.	Legal Manager will convey approval or disapproval to chapter
Lawsuits	Have the attorney handling the matter prepare a new matter form and send it to the Legal Manager.	Legal Manager will review the new matter form and consult with the attorney handling the matter.	Legal Manager will consult Legal Committee	Upon recommendation from Legal Manager and Legal Committee issue will be brought to the board for approval.	Legal Manager will convey approval or disapproval to chapter
Settlements	Contact the Legal Manager when serious settlement negotiations begin. Prepare a short memo describing the original goals of the suit, the proposed settlement, how the settlement would or would not achieve the original goals and why the settlement is recommended. Send memo and supporting documents to Legal Manager.	Legal Manager will review the settlement documents and consult with the attorney handling the matter.	Legal Manager will consult Legal Committee.	Upon recommendation from Legal Manager and Legal Committee issue will be brought to the board for approval.	Legal Manager will convey approval or disapproval to chapter
Amicus Briefs	Contact the Legal Manager to discuss the proposed amicus brief. Send draft brief or a memo	Legal Manager will review the brief or memo and consult with the attorney handling the	Legal Manager will consult Legal Committee.	Upon recommendation from Legal Manager and Legal Committee issue will be brought to the board for	Legal Manager will convey approval or disapproval to chapter

	describing the importance of participation and points to be made in the brief to Legal Manager.	matter.		approval.	
Retainer Agreements	Contact Legal Manager to review and discuss proposed attorney retainer agreement, financial terms, Chapter campaign plan and budget, etc	Legal Manager will consult with attorney or law firm representative	Legal Manager will consult Legal Committee if necessary		Legal Manager will offer recommendations on terms and approval
Funding Outside Legal Action	Contact the Legal Manager to discuss proposed funding of a non-Surfrider Foundation driven legal action.	Legal Manager will review the funding proposal and consult with the attorney handling the matter.	Legal Manager will consult Legal Committee if necessary		Legal Manager will offer recommendation based on analysis
Formal Administrative Actions	Formal administrative proceedings (e.g. with Administrative Law Judge presiding) require approval. Prepare a new matter form and send it to the Legal Manager.	Legal Manager will review the new matter form and consult with the attorney handling the matter.	Legal Manager will consult Legal Committee	Recommendation from Legal Manager and Legal Committee will be issued. If controversial or costly, will be brought to the board for approval.	Legal Manager will convey approval or disapproval to chapter

* NOTE: Participation in NEPA comment proceedings and Coastal Commission hearings do NOT require national approval.

Special Thanks To:

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