

**FINAL STATEMENT OF REASONS FOR ADOPTING RULES  
TO IMPLEMENT ADMINISTRATIVE HEARINGS UNDER  
PUBLIC RESOURCES CODE SECTIONS 6224.3 AND FOLLOWING**

The California State Lands Commission (Commission) is adding Article 14 to Chapter 1 of Division 3 of Title 2 of the California Code of Regulations. The new regulations will be sections: 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, and 3016. These regulations are each necessary to implement administrative hearings and the imposition of penalties under Public Resources Code sections 6224.3, 6224.4, and 6224.5 (the “Trespass Statute”). As required by section 11346.9 of the Government Code, the Commission sets forth the reasons for the adoption of the proposed regulations below.

**INTRODUCTION**

The California Legislature adopted the Trespass Statute (Chapter 247, Statutes of 2012, effective January 1, 2013) to facilitate efficient management of public land under the Commission’s jurisdiction. In general, the Commission manages land underlying navigable rivers, lakes, streams, bays, estuaries, inlets, and straits that have not been granted to local municipalities. The Commission also manages the shoreline out to three miles offshore, as well as tidelands not granted in trust to local municipalities. Additionally, the Commission manages certain properties granted to the state by the U.S. government to support public education. Together, the Commission manages nearly four and a half million acres of land (collectively “State Lands”) throughout the state.

Current law requires Commission authorization for structures on State Lands. This requirement serves a number of important purposes including: obtaining compensation for use of State Lands, obtaining insurance and indemnity from those using State Lands, reducing the risk that owners will abandon a structure in place at the end of its economic life, and promoting parity among those using State Lands.

Prior to the Trespass Statute, the Commission’s sole remedy to address unauthorized structures was to file a civil suit in Superior Court for trespass and ejectment. Such lawsuits took years to resolve and cost the state hundreds of thousands of dollars each. Damages recovered in such suits were a tiny fraction of the costs incurred, making litigation not only burdensome, but a drain on state resources. As a result, many violations have not been addressed.

The Trespass Statute authorizes the Commission to hold administrative hearings to address unauthorized structures. Persons found to be in violation may be fined up to \$1,000 a day while a violation persists. The administrative hearings may be completed in a few months and will cost the state a fraction of what civil litigation would cost. Potential violators also benefit by having early access to the evidence against them, allowing these persons to balance the merits of the case early on. The proposed process allows potential violations to be remedied

before a penalty is imposed. Alternately, the Commission may reduce the penalties for a period of time to complete the leasing process or while a violation is remedied by removal. Finally, the Commission's decisions under the proposed process may be reviewed by the courts.

The proposed regulations were necessary to clarify and specify the hearing process. The proposed regulations specify the content of the Notice of Violation, the content of the Statement of Defense, create the timing of the briefing schedule, specify the hearing process, specify how the penalties are calculated, provide multiple options to toll or reduce penalties, provide the option for the Commission to waive penalties, and specify the content of the enforcement record.

#### **UPDATED INFORMATIVE DIGEST – GOVERNMENT CODE SECTION 11346.9(B)**

The Commission published the proposed regulations on April 24, 2015. The initial 46-day comment period closed on June 9, 2015. After the initial comment period, modifications were made to the regulations to accommodate public comment. Notice was provided for a subsequent 45-day comment period regarding the modifications to the regulations from September 4, 2015 to October 19, 2015. The Commission provided notice of another 15-day comment period regarding modifications to the regulations, along with notice of additional documents relied on from April 1, 2016 to April 16, 2016. The Initial Statement of Reasons is incorporated into this Final Statement of Reasons, subject to the modifications below.

The proposed regulations have been modified from what was originally proposed. The foci of the modifications was increasing the time a Respondent has to prepare for the enforcement hearing, clarifying the separation of functions, and providing a clearer explanation of the administrative process. The Notice of Violation and Statement of Defense forms were originally included as exhibits to the regulations. The forms are now incorporated by reference. The originally proposed regulations allowed the Commission to toll or waive penalties. These provisions were modified because they were inconsistent with PRC section 6224.3(d). The regulations now provide for reduced penalties or the ability to continue hearings under many of the same circumstances that penalties were originally tolled. The modifications in each section are addressed below.

All Sections: The "Authority Cited" and "Reference" notes have been updated for clarity and consistency. Several statutory references were moved.

#### **Section 3000 – No Changes**

Section 3001 – Several new definitions were added. The "Advisory Staff" and "Enforcement Staff" were defined. These terms are used throughout the proposed regulations. For clarity and consistency, it was important to define the Commission staff persons assigned to direct each team. The term "Day" was clarified to mean calendar day. This was important in order to avoid ambiguity when calculating deadlines. The definition also specifies that any deadline falling on a weekend or state holiday will be the next business day. The term "Mail" is defined to be the

United States Postal Service, but allows the Respondent and Commission staff to agree to use electronic means. All subparagraphs in this section were renumbered to accommodate the new definitions. The reference in subparagraph (a)(9) to the Notice of Violation has been changed from Appendix A to incorporate the form revised 3/2016. A minor grammatical change was made to currently numbered subparagraph (a)(11) to delete “that is” before the word “suspected.”

Section 3002 – This section restates existing law to assist the regulated community in understanding what conduct is prohibited. Subparagraph (a) was modified in response to comment. This paragraph clarifies that Commission leases do not typically transfer from one upland owner to another without Commission approval. This is necessary because some purchasers of waterfront property assume that the lease passes with the title to the upland property. However, some leases for business entities allow transfers under certain conditions. In response, the Commission made this subparagraph contingent on the lease prohibiting transfer, and deleted the provision stating the person must be named in the lease. The phrase “subsequent owners or assignees must be approved by the Commission, or its designee” was also inserted.

Subparagraph (b) was modified in response to comment. The sentence “Submission of an application for the use of State Lands will not, by itself, remedy a violation” was inserted. Some persons submit an application, but do not respond to any further requests for information, and do not execute a lease. Such structures continue to be unauthorized until a valid lease exists. In other cases, some structures cannot be authorized, or require modifications to come into compliance.

Subparagraph (c) was deleted in its entirety.

Section 3003 – Subparagraph (b) was modified in response to comment. The originally proposed regulations allowed Commission staff to inspect structures without notice or permission. This section was modified to restrict this authorization to licensed surveyors, who are already authorized to enter private property for survey purposes under currently existing law. Subparagraph (c) was modified to state that the Enforcement Staff rather than the Executive Officer or Assistant Executive Officer would issue the Notice of Violation. The language was altered to specify the criteria for issuing a Notice of Violation will be a suspected violation of Public Resources Code 6224.3.

Section 3004 was retitled to include the phrase “Uncontested Violation” – Subparagraph (a) was modified to provide more options for the Respondent to get copies of documents in the Enforcement File. The documents can be mailed, sent electronically, or hosted on the Commission website.

Subparagraph (b) was modified in response to comments. A Respondent must reply within 21 days of the date service of the Notice of Violation is deemed complete to dispute allegations in the Notice of Violation. The Notice of Violation will specify a hearing date not less than 45 days

from the date service is complete. The date and general location of each meeting is known in advance, but the address and start time for each Commission meetings varies. For example, the October 15, 2015 meeting was scheduled in San Diego six months before the meeting date. Staff were not able to confirm the meeting was set for 1:00 p.m. in the Port of San Diego Administration Building Board Room until a few weeks prior to the meeting. The proposed regulations provide adequate notice to Respondents to make travel plans within the Commission's scheduling and logistical limitations. As proposed, the Respondent receives notice of the date and general location of the meeting 45 days ahead of time, and the precise address and start time at least 10 days before the hearing.

Subparagraph (c) has a minor grammatical edit. The Statement of Defense form, revised 3/2016 is incorporated by reference.

Originally proposed, section 3004(d)(1) has been replaced with section 3004(d) and no longer provides for substituted personal service. Instead, this section cites to the Code of Civil Procedure sections 416.10 et seq. to specify how personal service on a Respondent that is not a natural person, such as business entities, is completed. This section also specifies that personal service is deemed complete at the time of delivery.

Originally proposed section 3004(d)(2) addressing service by mail was moved to section 3004(e). The language was modified to clarify that posting a Notice of Violation in conjunction with mailing a copy is an alternative to personal service. Some grammatical changes were made as a result of defining "Mail" in section 3001(a)(8).

Originally proposed section 3004(e) was renumbered as 3004(f). This section was deleted in its entirety.

Originally proposed section 3004(f) was renumbered as 3004(g). This section was deleted in its entirety.

Section 3005 – New language was added as subparagraph (a) which encourages Respondents to resolve violations early and emphasizes that violations can be resolved without a hearing. The originally proposed subparagraph (a) relating to stipulations in the hearing was deleted in its entirety. Subpart (c) was modified as part of the global revision to separate Enforcement and Advisory Staff. The term "Executive Officer or Assistant Executive Officer" was replaced with "Advisory Staff." The sentence was edited to improve grammar and readability.

Section 3006 was retitled "Public Notification; Change of Date or Venue" in response to public comment. Subpart (a) was modified to remove language about distribution of Commission meeting agendas. This language was unnecessary because the Bagley-Keene act already requires the Commission provide notice of its regularly scheduled meetings.

Subpart (b) was rephrased to accommodate the defined term “Mail” as provided in section 3001. The Respondent will receive 30 days’ notice of a changed hearing date. Subpart (c) increases the notice for a subsequent hearing from 10 days to 30 days. Both subparts provide that these notices must give 30-day’s notice of the general location and date of the hearing. Where circumstances prevent specifying the precise address or start time, the Respondent will be notified of these details at least 10 days before the hearing.

Subpart (d) was modified as a result of the global revision creating the Advisory and Enforcement staff. Advisory Staff are now authorized to postpone an enforcement hearing. The Respondent will receive notice of the new hearing date pursuant to subpart (b) above. Good cause for the postponement is defined.

Section 3007 – Subpart (a) was modified as a result of the global revision creating the Advisory and Enforcement staff. The ex parte prohibitions are clarified by excluding Commission staff other than the Advisory Staff. Subpart (c) now includes a reference to Government Code section 11430.40. This section provides for curing conflicts created before a person begins serving as the Presiding Officer. This section was included to expand the ex parte protections. The last sentence of subpart (d) was deleted as being unnecessary after adding subpart (d) to proposed section 3005.

Section 3009 – This section was modified in response to comment and was retitled “Procedure for Contested Matters.” This section applies where the Respondent responds within the 21 Day period from section 3004(b). The original hearing date is vacated. Subpart (b) was moved down to subpart (g) and new paragraphs were inserted.

Subpart (b) authorizes the Enforcement Staff to prepare a statement of position and send this to the Respondent and Advisory Staff. The statement of position will be a more comprehensive summary of the allegations, evidence, and law than originally provided in the Notice of Violation. The statement of position is mailed at least 30 days after the Notice of Violation to allow further investigation into the case. Enforcement Staff must submit all arguments and evidence supporting its position along with the statement of position.

Subpart (c) sets the evidentiary cutoff for Respondents. The Respondent will have 45 days from the date the Enforcement Staff mails the statement of position to complete the Statement of Defense and submit any other evidence or argument in his defense. The Enforcement Staff’s statement of position will notify the Respondent of this deadline.

Subpart (d) authorizes the Enforcement Staff to submit a response to the Respondent’s Statement of Defense. The response must be mailed to the Respondent at least 45 days prior to the hearing.

Subpart (e) requires both sides to submit all evidence and argument in their favor along with their primary brief. Evidence not timely submitted is excluded absent a showing of good cause and lack of prejudice. The time between serving the Notice of Violation and hearing is expanded

from approximately 30 days to six months or more, eliminating the need for extensive evidentiary presentations at the hearing. Rather, surprise testimony and exhibits are excluded to protect the Respondent and simplify the hearing.

Subpart (f) specifies what the evidentiary deadlines cover. Each side must submit the evidence and legal or technical arguments, identity of witnesses along with the subjects covered and the amount of time needed to present, and expert witness qualifications. Subpart (b)(5) allows the Enforcement Staff to submit further evidence if it is included with the Enforcement Staff's response and is limited in scope to responding to the Respondent's arguments or evidence. This allows Commission staff to address new topics raised by the Respondent.

Subpart (g) was formerly subpart (b). This subpart now specifies that the Advisory Staff shall prepare the recommended decision and order, and now reflects the evidentiary cutoff. The proposed decision and order now specifies the enforcement meeting time and location. If logistical circumstances prevent specifying the address and start time of the enforcement hearing, the respondent is notified of the date and general location at least 30 days prior to the hearing, and the precise address and start time must be provided at least 10 days prior to the hearing.

Section 3010 was modified in response to comments. The section references the admissibility standard of Government Code 11513 rather than paraphrasing the standard.

Section 3011 was modified in response to comments. The entire Commission, rather than the Presiding Officer, now issue a decision and order.

Section 3012 was modified in response to comments. The Chairperson or Acting Chairperson will serve as the Presiding Officer. The Presiding Officer has authority to administer oaths to witnesses. References to Commission staff were changed to the Enforcement Staff in congruence with the other changes throughout the proposed regulations. Subpart (d) now refers to "matters in dispute" rather than "issues where an actual controversy exists." Subpart (e) was deleted to prevent surprise testimony. If members of the public wish to speak, they may address the Commission outside of the hearing.

The remaining subparts were renumbered as a result of deleting subpart (e). Currently proposed subpart (f) was modified to remove a reference to postponing a hearing. The standard for continuing a hearing was changed from the Commission's sole and absolute discretion to "if circumstances and fairness so dictate." A non-substantive change to this section was made after the comment period to remove the phrase "good cause." The intention was to list examples of circumstances that would justify continuing a hearing and the term "good cause" did not relate to the standard being used.

Section 3013 was modified in response to comments. Several references to the Presiding Officer now refer to the Commission to reflect the proposed single-step process where the Commission as a body will issue the decision and order. The reference to Commission Staff was changed to

Advisory Staff in subpart (b) to harmonize with the newly specified term. Subpart (c) was deleted as no longer necessary because of the above change. Newly numbered subpart (c) was modified to provide the Commission “shall” adopt a decision by majority vote instead of “may.” Subpart (d) was changed to use the newly defined term “Mail.”

Section 3014 was modified in response to comments. The term “day” is now a defined term. The formula in subpart (a) now provides a monthly penalty calculation at 160% of the normal rent. Several references were changed from “the Presiding Officer” to the “Commission” in light of the changes to section 3011. This section no longer provides for tolling or waiving of penalties because this language was inconsistent with Public Resources Code 6224.3(d). Instead, the Commission is authorized to set a reduced penalty for a set period of time to address many of the practical issues in remedying a violation. Specific reasons to reduce the penalty include staff processing times and permits required for removal.

Section 3015 was modified to exclude documents that were not prepared from the enforcement record. The section has several modifications to refer to the updated names of documents as specified elsewhere. Excluded evidence is now included in the enforcement record, along with the reasons why it was excluded.

Section 3016 was not modified.

#### Exhibit A – Notice of Violation

The Notice of Violation (NOV) was modified in response to comments. The NOV now provides a plain English explanation of the process to help Respondents understand the process. The paragraphs under the “Nature of Violation” heading were modified for clarity. Paragraph 2 specifies the basis for Commission jurisdiction, and paragraph 3 now states the basis for determining the boundary between State Land and private land. Paragraph 7 was clarified.

During the second revision, the NOV was given a revision date, minor grammatical changes were made, and the “Civil Penalty” explanation was modified to change the reference from \$360,000 to \$365,000 to make this section consistent with the regulations.

After the second revision, non-substantive changes were made to the first paragraph of the second page. During the comment period, the regulatory provisions relating to tolling or waiving penalties and the provisions relating to the Commission’s “sole and absolute discretion” were removed. The Notice of Violation was updated to remove language overlooked during the revision process that resembled the language removed from the proposed regulations. This change is not substantive because it harmonizes the explanation of the process in the notice with the noticed proposed regulatory provisions.

Section 3009(c) of the proposed regulations was changed during the second revision to remove ambiguity regarding the deadline for submission of the Statement of Defense. Specifically, this

provision was reworded to change the start of the 45-day deadline from the date the Respondent receives the Statement of Position to the date the Enforcement Staff mails the Statement of Position. After the second revision, a non-substantive change was made to the first paragraph of the second page of the Notice of Violation. This change is not substantive because it harmonizes the explanation of the process in the notice with the noticed proposed regulatory provisions.

#### Exhibit B – Statement of Defense

The Statement of Defense (SOD) was modified in response to comment. The SOD is now due 45 days after the Enforcement Staff serves its Statement of Position. The SOD now reflects the evidentiary cutoff and states that documents not timely submitted may be excluded. Several grammatical changes were made for clarity and consistency.

During the second revision, the SOD was given a revision date. No additional changes to the Initial Statement of Reasons are necessary.

Section 3009(c) of the proposed regulations was changed during the second revision to remove ambiguity regarding the deadline for submission of the Statement of Defense. Specifically, this provision was reworded to change the start of the 45-day deadline from the date the Respondent receives the Statement of Position to the date the Enforcement Staff mails the Statement of Position. After the second revision, a non-substantive change was made to the first paragraph of the second page of the Statement of Defense. This change is not substantive because it harmonizes the explanation of the process in the statement with the noticed proposed regulatory provisions.

#### **LOCAL MANDATE DETERMINATION – GOVERNMENT CODE SECTION 11346.9(a)(2)**

The proposed regulations do not impose any mandate on local agencies or school districts.

#### **ALTERNATIVES DETERMINATION – GOVERNMENT CODE SECTION 11346.9(a)(4)**

The Commission has determined that no alternatives would be more effective in carrying out the purpose for which the regulations are proposed, or would be as effective and less burdensome to affected parties than the proposed regulations, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

#### **ECONOMIC IMPACT ANALYSIS/ASSESSMENT – GOVERNMENT CODE SECTION 11346.9(a)(5)**

Existing law requires Commission Authorization for Structures on State Land. The Trespass Statute (Public Resources Code 6224.3, 6224.4, and 6224.5) provides administrative penalties

for unauthorized Structures. The California Legislature considered the economic impacts of requiring Commission Authorization, of addressing violating Structures through an administrative process, and imposing penalties of up to one thousand dollars (\$1,000) a day for unauthorized Structures when the Trespass Statute was passed. The current rulemaking specifies the process for these hearings. The Trespass Statute specifies the range of potential penalties, and the current rulemaking does not expand these penalties beyond the authorized range or create new penalties. Because the economic impact of imposing penalties up to one thousand dollars (\$1,000) per day was already considered by the Legislature, the fines within this range are not considered as an economic impact in the current rulemaking. Accordingly, the economic impact of this rulemaking is limited to a consideration of whether the proposed process creates new and significant economic impacts.

Although the current rulemaking adds additional detail and specificity, the Trespass Statute contemplates the use of a Notice of Violation, the service of the Notice of Violation, and a public hearing at a regularly noticed Commission meeting. The economic impacts of these procedures to both the Commission and the regulated community was considered by the Legislature and need not be considered again. The remainder of the proposed rulemaking specifies the content of the Notice of Violation, the content of the Statement of Defense form, the procedure for service, the briefing schedule, the hearing procedure, and the procedure for delivering the final decision. These procedural clarifications have no significant economic impacts. Because the fines are within the range specified in the Trespass Statute, and the proposed rulemaking simply interprets and makes specific the procedures contemplated by the Trespass Statute, there are no significant economic impacts created by this rulemaking.

As further support of a finding of no economic impact, the number of hearings in a given year will be extremely limited. The Trespass Statute specifies that the hearings will be before the Commission at a regularly scheduled meeting. The Commission currently meets six times a year. A typical meeting agenda includes more than 100 other items to consider. Simply put, the Commission has a limited amount of time to devote to lengthy administrative hearings. Considering the meeting time limitations and limited staff resources available to prepare a matter for hearing, Commission staff expect eighteen (18) or less hearings in a given year. The limited scope of these hearings also supports a finding of no significant statewide economic impact. Accordingly, the Commission has determined the proposed regulations have no economic impact beyond the implementing regulations.

#### **ADDENDUM REGARDING PUBLIC COMMENT**

Although no request for a public hearing was received, Commission staff initially noticed a public hearing on June 8, 2015 at the Commission's Sacramento Office. Seventeen people signed the attendance sheet, and ten public comments were received.

## **SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD OF APRIL 24, 2015 THROUGH JUNE 9, 2015**

The accompanying matrix specifies the content of each submitted comment. The following are summaries of the comments along with the Commission's responses organized by topic. Multiple similar comments are grouped together with a common response for efficiency.

### **Boundary Determination**

B1 – Boundary determinations have always fallen within the province of the Court and the Commission should not determine the boundaries of State Land.

B2 – The definition of “State Lands” should be revised to make clear that the administrative process can only be used for structures on land indisputably held in fee by the state. The authorizing statute does not authorize administrative hearings to determine title to disputed land.

B3 - The proposed regulations are ill-advised and improper because they are unnecessary. Civil courts are capable of adjudicating boundary disputes in proceedings with more safeguards and due process.

B4 - The proposed regulations are ill-advised and improper because they violate the separation of powers. An executive agency should not sit in judgment of case to which it is a party. It is unfair for an agency to issue decisions in which it is a party.

B5 – The regulations should be clear that issues of land title, boundary disputes, disputes as to Commission jurisdiction, and disputes as to the scope of public trust easements are excluded from the hearings.

B6 – The regulations should only apply to structures and encroachment on land that is clearly that of the state.

B7 – Section 3000 should include: “The procedures established by these regulations shall not apply to land title disputes, boundary disputes, disputes as to jurisdiction of the Commission, and disputes as to the scope of public trust easement.”

B8 – It is inappropriate to use a summary administrative proceeding against Respondents where there is no settled determination of state jurisdiction. The regulations should exclude enforcement where there is a dispute over the rights of the state or rights of private parties to a body of water.

F1 – Allowing the Commission to determine whether a structure is on State Land violates fairness and due process.

N6 – The Economic Impact Statement is defective because The Legislature did not intend the statute to apply to lands not indisputably under the Commission’s jurisdiction. The Legislature did not intend these impacts so these impacts are not within the scope of the statute.

- Commission Response: The proposed regulations were not modified in response to these comments. The Trespass Statute does not limit administrative actions to cases where the state indisputably holds title. To the extent these comments object to the entire process, they are outside the scope of this rulemaking.

Staff also interpreted these comments as a suggestion to limit the scope of administrative hearings to areas where a court has already adjudicated the boundary *and* the Respondent does not dispute the location of the boundary or the Commission’s jurisdiction over the land. The Commission declines to include the suggested limitation. The Legislature granted the Commission exclusive jurisdiction over State Lands, and authorized the Commission to lease these lands. (PRC § 6301). Inherent in this authority is the ability to make determinations as to the extent and boundaries of the land under the Commission’s jurisdiction. The Commission has exercised this authority for decades by examining the facts and evidence in each case and determining whether a given structure exists on State Lands and will require a lease.

The Commission will carry the burden of proof to establish that a structure is on State Land before imposing penalties. The Respondent may also have a civil court review the Commission’s decision.

The proposed limitation would require the Commission to establish there is no dispute before initiating the process that is intended to make such a determination. Including such a term in the proposed regulations would undermine the entire process.

Many state agencies conduct administrative hearings to adjudicate the rights of the regulated community. The proposed regulations comply with the Administrative Procedures Act and due process requirements. The civil courts exist as a further check on the process.

The administrative process contemplated in the Trespass Statute was designed as an alternative to lengthy and costly civil litigation. There is no basis for presuming the Legislature intended the Commission to seek a judicial determination of the boundaries of state land as a prerequisite to taking administrative action. Accordingly, it can be concluded the legislative intent supports the currently proposed regulations and that the Economic Impact Statement is not defective.

## **Definitions**

D1 – The proposed regulations should be clear that unauthorized buoys are prohibited. There is a proliferation of unauthorized buoys on Lake Tahoe and they breed disrespect for the Commission and the law in general.

- Commission Response: The proposed regulations were not modified in response to this comment. The regulations prohibit all unauthorized structures on State Lands, including buoys.

D2 – Severe penalties should be imposed on businesses that install unauthorized structures on State Lands.

- Commission Response: The proposed regulations were not modified in response to this comment. The regulations impose penalties on any person or business entity that places unauthorized structures on State Lands. The proposed regulations authorize a range of penalties broad enough to include business applications.

D3 – The definition of “State Lands” should not include private land subject to the public trust easement.

- Commission Response: The proposed regulations were not modified in response to this comment. The definition of “State Lands” in proposed section 3001(a)(12) includes only land held in fee by the State of California, and thus does not include private land subject to the public trust easement.

D4 – Several definitions are unclear, particularly for members of the public that are contacted by the Commission for the first time via the Notice of Violation.

- Commission Response: The Notice of Violation and Statement of Defense forms have been revised in response to comment to expand significantly on the nature of the violation and the required procedures. Respondents may contact the Commission staff persons listed on the Notice of Violation if they are unclear about the definitions. Further modification of the regulations is not necessary.

D5 – In section 3001(a)(3) “Current” should be currently valid and unexpired.

- Commission Response: The language in section 3001(a)(4) has been updated accordingly.

D6 – In section 3002(a) the phrase “unless otherwise exempted” should include an explanation of what exemptions apply.

- Commission Response: The proposed regulations were not modified in response to this comment. The phrase “unless otherwise exempted” was included to harmonize these regulations with existing law. Numerous exemptions exist, including those in the Public

Resources Code, the Streets and Highways Code, and the Public Utilities Code. A detailed explanation of possible exemptions and the circumstances under which they may apply would be lengthy, complex, and would make the regulations more difficult to read.

D7 – In section 3002(a) the regulations specify that the person seeking to maintain structures on State Lands must be named in the authorization. This phrase should be clarified to state that assignments of authorizations must be approved by the Commission in order to avoid persons believing a lease to a prior owner is sufficient.

- Commission Response: This section was modified in response to comment. Some Commission authorizations allow for transfer under certain circumstances. Other authorizations may be transferred by operation of law, such as through bankruptcy or dissolution. The intent of this section was to put subsequent purchasers of adjacent upland property on notice that they did not automatically assume a lease issued to the prior upland owners simply by virtue of taking title to the upland property. The language of section 3002(a) has been clarified to more accurately convey this prohibition.

D8 – Section 3002(c) states that the Commission retains discretion whether to approve or deny a lease application. The purpose of this provision should be stated in the regulations, or otherwise clarified so Respondents understand the conditions under which a new lease or assignment may be denied.

- Commission Response: This subparagraph has been deleted.

D9 – The regulations should specify that the hearings are informal hearings under the Administrative Procedures Act.

- Commission Response: The proposed regulations were not modified in response to this comment. Formal administrative hearings may only be presided over by an Administrative Law Judge from the Office of Administrative Law. The proposed hearings must, therefore, be informal. The Public Resources Code section 6224.4(d) cites to the general provisions of the Administrative Procedures Act, rather than the formal hearing provisions.

D10 – Section 3010 specifies the standard for admissibility of evidence. This should be rephrased to read “Relevant evidence may be admissible regardless of any common law or statutory rule prohibiting such evidence in civil actions.”

Pro33 – The level of fines or potential loss of a person’s home makes it important to use the stringent standards of evidence required in civil courts to protect against improper evidence.

- Commission Response: The regulations have been revised in response to comments. The modified regulations now adopt Government Code 11513, which states the default rule for admissibility of evidence in informal administrative hearings.

D11 – The Notice of Violation states that the “Commission may impose a penalty if you fail to respond or appear at the hearing.” This implies that the penalty is imposed for the failure to appear. The NOV should clarify that the Commission may issue an order if the Respondent fails to appear, and this order may include a penalty.

- Commission Response: The Notice of Violation (NOV) has been revised in response to comments. The modified NOV now provides additional detail on the procedural requirements, along with a clearer warning about the consequences of failing to respond to address this possible ambiguity.

D12 – The proposed regulations exceed the scope of the statute by including buoys within the meaning of “Structure.”

D13 – The definition of “Structure” is too broad. “Any human construction” can include almost anything including a teddy bear, garden hose, spigot, pipe, dock cleat, Christmas decorations, signs, pylons, pilings, or fences.

D14 – The broad definition of “Structure” has no limits, or specificity of how the rules could be applied. This gives the Commission unreasonable and capricious authority to start prosecution.

D15 – The proposed regulations have no guidance as to what structures may be violations. There is no explanation of or connection between the purposes for which State Lands may be leased and the types of structures allowed. The proposed rules have no context or concept of justice.

- Commission Response: The proposed regulations were not modified in response to these comments. The Commission manages a wide variety of lands throughout the state, with a broad scope of activities occurring on them. It was necessary, therefore, to broadly define “structure.” Public Resources code 6224.3(g) states “a structure or facility shall include, but is not limited to, buildings, boat houses, docks, piers, revetments, fill, pilings, pipelines, groins, jetties, seawalls, breakwaters, and bulkheads.” The definition set forth in proposed section 3001(a)(13) fits within the common definition of “structure or facility.”

The prohibitions against unauthorized structures on State Lands are preexisting in statute (Public Resources Code sections 6302 (1941) and 6303.1 (1965)), as well as in common law (*Dana v. Jackson Street Wharf Company* (1866)). The proposed rulemaking reflects existing law. The Commission’s determinations may be reviewed by a court as provided by PRC § 6224.4(e).

D16 – The proposed regulations should exempt structures in Lake Tahoe. The Tahoe Regional Planning Agency (TRPA) has been in regulatory paralysis since the 1980s. Lake Tahoe

residents cannot get a lease because the Commission will not issue a lease without TRPA approval. This creates an unfair “Catch-22.”

D17 – As an alternative to exempting structures in Lake Tahoe from the scope of the regulations, the Commission could write leases without all other regulatory approvals.

- Commission Response: The proposed regulations were not modified in response to these comments. The proposed regulations only address Commission authorization and do not provide penalties for failing to get permits from local permitting agencies. The Commission has been issuing leases where structures comply with local regulations, do not unduly impair public trust resources, and are in the best interests of the state. There is no need to exempt structures in Lake Tahoe.

### **Ex Parte Communications**

E1 – The Commissioners are public officials. Members of the public should be able to contact them any time they want about any issue they want. The proposed regulations should not prohibit ex parte communications during the pendency of the administrative action.

- Commission Response: The proposed regulations were not modified in response to this comment. The Commissioners serve as decision makers in a quasi-adjudicative administrative hearing. The Administrative Procedures Act prohibits ex parte contacts. The proposed regulations restate existing law to notify Respondents.

E2 – The proposed regulations do not adequately implement the ex parte requirements necessary to comply with due process requirements and other Constitutional protections.

- Commission Response: This comment fails to state how the proposed regulations are deficient. The proposed regulations have been revised to enhance separation of functions between the Advisory Staff and Enforcement Staff. The proposed regulations comply with due process and other Constitutional protections and adequately implement the required ex parte procedures.

E3 – The ex parte procedures of the State Water Resources Control Board (SWRCB) should be incorporated into the proposed regulations. This comment includes a two page cover letter and a twenty page question and answer document from SWRCB’s Chief Counsel discussing the SWRCB’s ex parte obligations under the Administrative Procedures Act.

- Commission Response: The SWRCB is a separate agency, with separate statutory authorization for administrative hearings, and separate statutory requirements. The twenty page question and answer document discussing the SWRCB’s ex parte obligations are irrelevant to the current rulemaking. The comment fails to specify how or why the Commission should adopt SWRCB’s practices. The proposed regulations have been

revised to enhance separation of functions between the Advisory Staff and Enforcement Staff.

E4 – The proposed regulations do not adequately identify what staff members are on the “Prosecutorial Team” and which ones are on the “Advisory Team.” The NOV should specify these considerations.

- Commission Response: The proposed regulations were not modified in response to this comment. The proposed regulations specify the head of the Advisory and Enforcement Staff. (Section 3001.) Staff assigned to each team must comply with the rules set forth in the proposed regulations. It is unnecessary to specify in regulations which staff members will be assigned to each team.

E5 – The proposed regulations do not expressly prohibit ex parte communications between the Executive Officer (EO) or Assistant Executive Officer (AEO) and the Commissioners. The regulations should be amended to state this expressly because the EO and AEO decide whether to issue the notice of violation.

- Commission Response: The regulations have been revised in response to comment. Under the revised regulations, the EO is the head of the Advisory Staff. The EO will not be involved in the investigation and does not issue the Notice of Violation. The Advisory Staff are technical and legal advisors to the Commissioners and may discuss a pending enforcement matter with them without violating ex parte rules. Under the revised regulations, the head of the Enforcement Team issues the Notice of Violation. Under the revised regulations, the AEO is neither Enforcement nor Advisory Staff. The prohibitions on ex parte communications will apply to the AEO if the AEO is designated to serve a function in the hearing process.

E6 – The proposed regulations should not allow for ex parte communications between the “Prosecution Team” and the Commissioners to be remedied.

- Commission Response: The proposed regulations were not modified in response to this comment. The regulations conform to existing requirements under the Administrative Procedures Act.

### **Fairness/Due Process**

F2 – Allowing the Commission to impose fines violates fairness and due process.

- Commission Response: The proposed regulations were not modified in response to this comment. The authority to impose fines is as specified in the Trespass Statute. This comment does not relate to the proposed rulemaking.

F3 – Persons should be able to appeal fines imposed by the Commission to a party other than the Commission.

- Commission Response: The proposed regulations were not modified in response to this comment. The Commission’s determinations may be reviewed by a court as provided by PRC § 6224.4(e).

F4 – The Commission should not be able to impose fines on persons currently in litigation with the Commission over encroachments.

- Commission Response: The proposed regulations were not modified in response to this comment. The Commission’s remedies under the Trespass Statute are in addition to and not in lieu of other penalties or sanctions provided by law. (PRC § 6224.3(i)).

F5 – There should be a clear understanding of the timeframes involved in the hearing. The NOV should clearly convey that a hearing may occur quickly.

- Commission Response: The proposed regulations have been modified in response to this comment. The revised NOV provides a detailed explanation of the procedure in plain language to help guide a Respondent through the process. The procedure has been modified in response to comment to provide more time to prepare for a hearing.

F6 – Larger, more valuable structures such as homes should not be demolished as the result of an informal administrative hearing. The financial repercussions are too great for an informal process.

- Commission Response: The proposed regulations were not modified in response to this comment. The proposed administrative process will result in fines for unauthorized structures. The Respondent can bring the structure into compliance with existing law, or remove it. The Commission will need a court order to enforce a removal order if the Respondent does not comply. The Trespass Statute does not limit the value of structures which may be addressed.

F7 – The Trespass Statute allows for personal service, or registered mail plus posting a NOV on the structure. All other options provided for in the regulations should be removed as they are not authorized under the statute, violate due process, and violate Constitutional Protections.

Pro50 – No law authorizes the Commission to implement service of the Notice of Violation by leaving a copy with the person denying access. This violates CCP § 416, is illegal, and unfair.

- Commission Response: The proposed regulations have been amended in response to this comment. The revised regulations provide for personal service, or registered mail plus posting a NOV on the structure.

F8 – Proposed section 3008 (Conduct of Persons at Hearing) should be eliminated because it violates due process and other Constitutional Protections. Authority to enforce decorum at the hearing can be found elsewhere.

- Commission Response: The proposed regulations were not modified in response to this comment. The Administrative Procedures Act and due process principles only require that a Respondent have an opportunity for a hearing. If the Respondent cannot maintain decorum at the hearing, they may be excluded. It is important that a Respondent is put on notice prior to the hearing that standards of conduct apply even in this informal setting. Because these rules apply to all in attendance, the proposed section 3008 also benefits the Respondent by ensuring that the Respondent has an opportunity to present his or her case, and the record is clear.

F9 – Having The Executive Officer (EO) or Assistant Executive Officer (AEO) draft the recommended decision and order gives the EO and AEO both prosecutorial and judicial functions in violation of due process and Constitutional protections. If The EO or AEO produce a brief it should be clarified as a position paper.

- Commission Response: The proposed regulations have been modified in response to this comment. The revised regulations separate the EO from investigative functions. The EO will draft the proposed order for the Commission’s consideration. The position paper will be drafted by Enforcement Staff.

F10 – The proposed regulations are ill-advised and improper because an administrative process which denies the respondent formal discovery, the right to subpoena witnesses, adequate time to prepare, and does not require testimony under oath violates due process and property rights.

- Commission Response: The proposed regulations were modified to allow Respondents more time to prepare. Proposed section 3012 (b) allows the Presiding Officer to administer oaths to witnesses. The time to prepare for a hearing was also increased significantly. The proposed regulations comply with the Administrative Procedures Act and due process principles.

F11 – The proposed regulations are ill-advised and improper because the statute provides for attorney’s fees for the Commission but not for Respondents.

- Commission Response: The proposed regulations were not modified in response to this comment. This comment addresses the Trespass Statute rather than the proposed regulations.

F12 – The due process protections should be given more attention to ensure the hearings are not biased or do not deprive the Respondent of a fair and impartial hearing. Special care is necessary

when regulating bodies preside over adjudications of their own regulations with the authority to impose fines.

- Commission Response: The proposed regulations were not modified in response to this comment. The comment fails to suggest a better way to implement the Trespass Statute. The proposed administrative process complies with the procedural protections of the Administrative Procedures Act and due process principles. The Commission's determinations may be reviewed by a court as provided by PRC § 6224.4(e).

F13 – There is no provision for a meaningful separation of prosecutors and decision makers.

- Commission Response: The proposed regulations have been revised to create a more distinct and clear separation of functions between Enforcement Staff and decision makers. As revised, the proposed regulations comply with the Administrative Procedures Act and due process requirements.

F14 – Use of independent hearing officers rather than Commission members should be considered.

- Commission Response: The proposed regulations were not modified in response to this comment. The Trespass Statute requires a Commissioner to serve as the Presiding Officer. (PRC § 6224.4(d)).

F15 – The proposed regulations create an illegal extrajudicial system, answerable only to the CSLC that is devoid of proper representation and due process.

- Commission Response: The proposed regulations were not modified in response to this comment. The comment objects to the hearings created by the Trespass Statute, and thus is not directed at this rulemaking. The comment fails to identify a preferable alternative to implement the Trespass Statute. The proposed process complies with the Administrative Procedures Act and due process requirements..

### **Hearing Topics**

H1 – The hearings should consider whether the water is suitable for navigation, harm to public access or public trust use, and how the harm will be mitigated. No lease should be issued if the harms are not properly mitigated. Sample mitigation may be signs or alternate routes.

- Commission Response: The proposed regulations were not modified in response to this comment. Harm to public access is among the factors specified in PRC 6224.3(c). Each hearing, and the considerations involved in any potential penalty, will vary according to the facts at hand. The “catch all” provision of PRC 6224.3(c)(6) is broad enough to capture concerns about public trust uses, susceptibility to navigation, and whether harms are mitigated.

## **Inconsistencies**

I1 – Section 3014 states that the monthly penalty is 1/12<sup>th</sup> of 130% the normal market rent for properties over \$365,000 in value. The NOV states that the penalty may be up to 160% the market rate. These need to be consistent with each other and PRC § 6224.3.

- Commission Response: The regulations and Notice of Violation have been modified in response to comment, harmonizing the calculation with PRC § 6224.3.

I2 – PRC § 6108 authorizes the Commission to make reasonable and proper rules. The proposed regulations are not reasonable or proper. Thus, PRC § 6108 does not authorize the regulations.

- Commission Response: The proposed regulations were not modified in response to this comment. The proposed regulations are authorized by PRC § 6224.5, comply with the Trespass Statute, comply with the Administrative Procedures Act, and comply with due process principles.

I3 – The proposed text of section 3014 violates PRC § 6224.3 because the proposed text shows no limits on the penalty the Commission may impose.

- Commission Response: The proposed regulations were not modified in response to this comment. The proposed regulations allow the Commission to impose a penalty that is either up to \$1,000 per day, or an amount that is not more than 160% of the fair market rental of the property in compliance with PRC § 6224.3(b). These alternative methods of calculating the appropriate penalty are necessary to address both high and low value properties. For large industrial facilities where rent exceeds \$365,000 per year, a penalty of \$1,000 a day would represent a discount. Where rent is set at the regulatory minimum of \$125 annually (2 CCR 2003(b)(6)), the 160% formula would yield a fine of roughly \$0.55 per day. In either scenario, the fines would be ineffective and inappropriate. Accordingly, both statutory formulas were developed in the regulations to allow appropriate penalties to be imposed for both large industrial or commercial facilities and smaller facilities.

Section 6224.3(d) of the Trespass Statute authorizes penalties from the first day following the Commission's order until the violation is remedied. The proposed regulations comply with the Trespass Statute.

I4 – PRC § 6302.1(d) states that the Commission should be compensated through appropriate action in the courts of this state.

- Commission Response: The proposed regulations were not modified in response to this comment. Section 6302.1 of the Public Resources Code pertains to abandoned vessels on state waterways. The Abandoned Vessel program is a statutory scheme designed to allow the Commission to remove abandoned vessels and marine debris from state waterways.

Proposed section 3000 specifically states that these regulations have no application to the Abandoned Vessel program under PRC § 6302.1.

I5 – The Initial Statement of Reasons states that only persons who maintain structures on state-owned land without authorization are affected. In the case of joint ownership or control of a pier, how will parties be treated where one of the joint-owners seeks to comply and the other party refuses?

- Commission Response: Each case is different, and will depend on the facts at hand. If one owner seeks to comply and the other refuses, the Commission could issue authorization to the complying owner or impose penalties only on the non-conforming party. Further options may be explored.

### **Regulation Notice/Regulatory Process Issues**

N1 – Some property owners who have been, or are currently dealing with the Commission did not directly receive notice of the proposed regulatory action. These property owners should have been directly notified. The Commission did not make a sufficient effort to contact members of the public potentially affected by this rulemaking.

N13 – There was a lack of adequate notice of the regulatory action.

N14 – Additional efforts should be made to notify persons who may potentially be impacted.

N16 – Everyone who lives on a waterway should receive notice of the rulemaking.

N17 – The Commission should contact every town, county, or city where it has made claims to lands, and have these towns, counties, and cities create a database of all properties within their jurisdictions where building permits have been conditioned on Commission authorization. The Commission should mail notice of the rulemaking to all persons on the resulting list.

- Commission Response: In compliance with the Administrative Procedures Act, the Commission: 1) published the Notice of Proposed Rulemaking in the California Regulatory Notice Register; 2) posted a notice and link to all relevant documents on the home page of the Commission's website; 3) emailed a copy of the Notice of Proposed Rulemaking to all 656 email addresses in the distribution list for the Commission's public meeting agendas; and 4) mailed physical copies of the Notice of Proposed Rulemaking to 4,988 addresses in the Commission's leasing database. The Commission's Executive Officer also announced that staff were preparing the regulations at the February 20, 2015 public meeting of the Commission. The Commission hosted a public comment hearing despite no request to do so. The Commission complied with the Administrative Procedures Act.

N2 – The comment period should be left open for 90 days so that all affected property owners in the state can be notified and have time to submit comments.

N7 – The initial comment period should be extended by 60 days.

N12 – The comment period should be extended.

- Commission Response: The Administrative Procedures Act requires the initial comment period to be at least 45 days. The initial comment period was left open for 46 days to allow for submission of written comments after the public hearing. The Commission held an optional public hearing despite not having any requests to do so. The Commission modified the proposed regulations in response to comment and put the revised draft out for a second 45-day comment period. A third comment period ran from April 1 – 16, 2016. The Commission has complied with the Administrative Procedures Act.

N3 – The proposed regulations do not comply with Gov. Code 11349.1, including (1) Necessity, (2) Authority, (3) Clarity, (4) Consistency, and (5) Non-duplication

- Commission Response: The proposed regulations were not modified in response to this comment. The comment fails to describe what part of the regulations do not comply or how the regulations do not comply with the Administrative Procedures Act. The proposed regulations comply with Gov. Code 11349.1.

N4 – The Economic Impact Statement is defective because it states the regulations have no economic impact beyond the Statute. The proposed regulations include a presumptive penalty of \$500 per day. The statute had no defined number, so the regulations have an economic impact. The Legislature did not intend these impacts so these impacts are not within the scope of the statute.

N18 – The Economic Impact Statement is defective because it states that the proposed regulations have no economic impact. The total impact per individual may be \$30,000, with one million target individuals. There will be a 4% reduction in property values. The total impact is more than \$30 billion.

- Commission Response: The Economic Impact Statement has been expanded to improve clarity, and is not defective. The Trespass Statute set a range of authorized penalties. The proposed regulations define how this penalty is calculated without extending the penalty beyond the authorized range. The proposed regulations do not create new or additional burdens, and thus there is no economic impact. The Economic Impact Statement is not required to reconsider economic impacts already contemplated in the authorizing statute.

N5 - The Economic Impact Statement is defective because the proposed regulations have no protections for persons who may have their homes demolished or destroyed when seawalls are

demolished. The Legislature did not intend these impacts so these impacts are not within the scope of the statute.

- Commission Response: The proposed regulations were not modified in response to this comment. The Economic Impact Statement is not defective. Existing law prohibits unauthorized structures on State Lands. The Trespass Statute provides penalties for these unauthorized structures. The proposed regulations are the procedure through which the Trespass Statute is implemented. The regulations do not provide for demolition of structures. One alternative to removing structures is for the Respondent to bring them under lease, as provided in the proposed regulations, and required by law.

N8 – The mailing of the Notice of Proposed Action did not include the proposed text of the regulations.

N9 – The Notice of Proposed Action did not provide the precise path to the text of the regulations, but only provided the path to the home page for the Commission.

N10 – The Commission’s failure to provide the proposed text is counter to the spirit of transparency in government, suggests subterfuge by the CSLC, suggests an effort to hide the proposed rules, and suggests disregard and disrespect for the authority of other institutions, entities, and the People.

- Commission Response: The Commission complied with Government Code 11346.4. The Commission is not required to mail the complete text of the regulations. The proposed text of the regulations was made available online the day before the proposed regulations were published. A link was maintained on the home page of the Commission’s website to direct any interested party to the regulations page where the complete regulatory text has been available.

The Notice of Proposed Rulemaking provided instructions on how to obtain the complete text of the proposed regulations. Moreover, complete contact information was provided for interested persons to obtain copies of the regulations via mail, internet, fax, or in person. Any person who was interested in obtaining the text could call, fax, write, or email the contact person at any point.

N11 – There is no explanation of how the authorities cited in Section 3000 of the proposed regulations support or grant the authority for the proposed regulations.

- Commission Response: The proposed regulations were not modified in response to this comment. Proposed section 3000 cites to PRC § 6224.5(d) which authorizes the Commission to promulgate regulations to implement the authority granted under the Trespass Statute.

N15 – The Commission should host a question and answer meeting with members of the public in order to explain the regulations, give examples of how the regulations will work, and discuss whether and how the regulations will impact members of the public.

- Commission Response: Explanations about the rulemaking are provided in the Notice of Proposed Rulemaking and the Final Statement of Reasons. The Commission has complied with the Administrative Procedures Act.

### **Penalty Provisions**

P1 – Offer a stronger amnesty program

- Commission Response: The proposed regulations were not modified in response to this comment. PRC § 6224.5 allows a person to “self-report” and work with the Commission to remedy a violation without fear of incurring penalties. The Respondent is free at any time to submit an application for a lease which would obviate the need for a hearing. Proposed section 3014(e) allows the Commission to set a reduced penalty for a period to allow the Respondent to submit an application or obtain approvals to remove or modify the violating structure. It is unclear what further amnesty provisions would be consistent with the Trespass Statute.

P2 – The proposed regulations are inconsistent with the statute, which provides the Commission with authority to set penalties within specified boundaries and requires that specified factors be considered.

P3 – The proposed regulations restrict the Commission’s discretion by specifying a penalty that would apply and is therefore inconsistent with the statute.

- Commission Response: The proposed regulations were not modified in response to these comments. Proposed section 3014, subparts (a) and (b) contemplate penalties within the ranges specified in PRC § 6224.3(b), thus addressing the “specified boundaries”. Proposed section 3014(c) requires the presiding officer to consider the factors in PRC § 6224.3(c) before setting the penalty. The factors in PRC § 6224.3(c) modify the base penalty specified in proposed section 3014, subparts (a) and (b).

P4 – The proposed regulations do not require the Commission to consider the factors in the statute. Only the Presiding Officer is required to consider the factors.

- Commission Response: The proposed regulations have been modified to state that the Commission shall consider the factors specified in PRC § 6224.3(c). (Proposed section 3014(c)).

P5 – The proposed regulations require the Presiding Officer to set the penalty rather than the Commission.

- Commission Response: The proposed regulations have been modified to state that the Commission shall impose the penalty. (Proposed section 3014).

P6 – The proposed regulations require that the penalty be imposed from the first day after the decision becomes final. This violates due process, the Constitution, and requires a respondent to violate state and federal law.

P7 – The Commission should be required to give a Respondent a reasonable time to remove a structure, otherwise the Respondent will have to remove the structure before the Commission's decision.

P8 – Removing structures may require many permits, particularly in waterways. The proposed regulations should specify that in any case which an authorization is required, the Respondent shall have reasonable time to obtain the permits.

P9 – The regulations should specify that any penalty *shall* be tolled for [any of the reasons mentioned in comment P6, P7, or P8].

- Commission Response: The proposed regulations were not modified in response to these comments. PRC § 6224.3(d) requires penalties to be imposed the first day after the decision becomes final until the violation is remedied. The proposed regulations provide for reduced penalties for a period of time to give the Commission flexibility to address each situation.

Removal is not always required. Many structures can be brought under lease. Others can be modified to reduce impacts. In other instances, non-conforming structures may be authorized for the duration of the structure's expected life-span, with prohibitions on rebuilding. Although the Commission cannot guarantee that every structure now existing will qualify for a lease in its current condition, there may be other solutions rather than outright removal. In the event removal is required, the Respondent could apply for a short-term or conditional lease to complete environmental review or permitting. A Respondent is not forced to violate state or federal law, and there is no due process violation.

P10 – The regulations should not limit tolling to four months unless the regulations (1) specify the time limit only applies if no other approvals are required for removal or leasing, (2) impose an appropriate time limit on Commission staff processing an application, and (3) provide for extended tolling if staff do not meet the processing deadline.

Pro9 – The regulations should allow more tolling of a penalty for more than 4 months while the applicant submits an application. The application process can be delayed because of complex negotiations, the number of parties involved, disputes over the boundary, or other reasons unrelated to dilatory tactics.

- Commission Response: The proposed regulations have been modified. The regulations no longer allow tolling as it is inconsistent with PRC 6224.3(d).

P11 – The proposed regulations should end penalties when the Respondent provides notification that the structure is removed. There should not be penalties while waiting for staff to verify removal.

- Commission Response: The proposed section 3014(g) has been modified in response to comment. The penalties terminate when the violation is remedied.

P12 – The proposed regulations authorize the Commission to waive penalties after the violation is remedied. Nothing in the statute prohibits the Commission from waiving a penalty before it is assessed. For example, a fixed penalty applies unless the offending structure is removed within 6 months. Nothing authorizes the proposed regulations to restrict the Commission’s discretion.

- Commission Response: The proposed regulations have been modified. The regulations no longer allow waving penalties as it is inconsistent with PRC 6224.3(d). A fixed penalty is also inconsistent with PRC 6224.3.

P13 – The proposed regulations are ill-advised and improper because the fines are excessive and extreme. The fines are so large as to force respondents to settle their case regardless of merit, denying the respondent the opportunity of a fair hearing.

- Commission Response: The proposed regulations were not modified in response to this comment. The fines are consistent with PRC § 6224.3. The penalties were set at a level intended to incentivize compliance with the proposed regulations. A Respondent may apply for a lease conditional on the Commission’s formal determination that a lease is required. Doing so would allow the Respondent to comply with the Commission’s requirements while seeking review through the administrative hearing. Proposed section 3014 requires the Commission to consider the factors in 6224.3(c). The Commission may set the penalty to a reduced amount while staff process and application or the Respondent removes violating structures. The proposed regulations do not deny the opportunity for a fair hearing.

P14 - The proposed regulations are ill-advised and improper because they fail to toll the penalty while a landowner seeks review in Court. This creates economic coercion to prevent respondents from seeking due process.

P15 – Penalties should not be assessed for periods prior to the date of the decision following the opportunity for hearing.

- Commission Response: The proposed regulations were not modified in response to these comments. PRC 6224.3(d) requires the penalty to be imposed from the day the decision

is final until the violation is remedied. A Respondent may apply for a lease to bring his or her structures into compliance while seeking review in court.

P16 – The proposed penalties are not proportionate to the violation. This violates ethics, justice, and proportionality.

- Commission Response: The proposed regulations were not modified in response to this comment. The proposed penalties comply with PRC § 6224.3. The base penalty is specified in section 3014 is modified by the factors in PRC § 6224.3(c). These factors include consideration of the size of the structure, the violator’s culpability, the environmental harm, the impairment of public access, or any other factor relevant to a fair and just result. Ethics, justice and proportionality are considered.

P17 – It is unclear how and by whom the funds will be used. If the CSLC enforcement branch is using the penalties, there may be a conflict of interest.

- Commission Response: The proposed regulations were not modified in response to this comment. In the event penalties are imposed and collected by the Commission, the funds are deposited in the General Fund.

### **Procedural Provisions**

Pro1 – The regulations should include a 6-month informal discussion period before serving a Notice of Violation. It is intimidating that a first contact would occur via the Notice of Violation.

- Commission Response: The proposed regulations were not modified in response to this comment. The Commission will continue to attempt to resolve violations informally in order to conserve staff resources. A mandatory prerequisite period of informal negotiations is not desirable where a violation is causing harm to the environment or to the public health and safety; and would not be beneficial where staff have already spent months or years working to resolve a violation informally.

Pro2 – Section 3003(b) allowing Commission staff access through private property to investigate a suspected violation implicates the 4<sup>th</sup> Amendment to the U.S. Constitution in that it is an unreasonable search of private property without adequate justification. These provisions should be limited to protect the property and privacy of private persons. The regulations should be amended to include: 1) when access through the uplands is necessary; 2) some investigation of and relation between ownership of the structures and the accessed uplands; 3) a clear definition of who may obtain access; 4) the specific basis for when access is required; and 5) notice requirements and time limitations.

Pro48 – The proposed regulations should include advance notice to inspect and survey improvements. Add “After reasonable advance notice” to section 3003(b).

- Commission Response: The proposed regulations have been modified in response to comment. Section 3003 was revised to allow a licensed surveyor access to private property per Civil Code § 846.5. If it is practical to provide notice, the surveyors shall do so, but entry is not contingent on the provision of notice as provided in Civil Code § 846.5. References to staff other than surveyors entering the property, and any reference to investigations other than surveys were removed. The proposed regulations comply with current law.

Pro3 – The NOV should cite to the specific section in the regulations discussing the penalties, particularly including the provisions that reduce/toll/waive penalties.

- Commission Response: The proposed regulations have been modified in response to comment. The Notice of Violation now provides more explanation of the administrative process. The Notice of Violation states that a Respondent may reduce or eliminate penalties by promptly bringing a structure under lease. The Notice of Violation will include the governing regulations. If the Respondent is unclear on the process or his options, Commission staff contact information is provided in the Notice of Violation.

Pro4 – Documents relied on by the Commission in the Notice of Violation should be provided along with the notice, rather than made available on 5 days’ notice at the Commission’s office. The short time frame of the hearings makes this a burden on the Respondent.

Pro6 – The procedures should allow more time to prepare for the hearing. The proposed regulations should require service of the Notice of Violation at least 60 days prior to the hearing.

Pro7 - The procedures should allow more time to prepare for the hearing. The proposed regulations should allow 30 days to submit the Statement of Defense.

Pro8 - The procedures should allow more time to prepare for the hearing. The proposed regulations should require mailing the proposed written decision at least 20 days before the hearing.

Pro23 – A respondent should be given 15 days to obtain documents from Commission staff, plus one day for every day of delay past the 5-day turnaround specified in the proposed regulation.

Pro24 – A Respondent should be given 60 days to obtain an expert witness in cases where expert testimony is appropriate.

Pro25 – Combines Pro7, Pro19, Pro23, Pro4, and Pro24: Respondent should have 60 days to respond, 60 days to obtain an expert witness, 15 days to obtain documents, plus extra time if staff fails to provide documents within 5 days.

Pro28 – The proposed regulations allow the “Prosecution Team’s” brief to be filed 10 days prior to the hearing. The respondent should be given at least 28 days to respond. Commission staff

should have 14 days before the hearing to review the briefs. The Prosecution Team's brief should be served no later than 42 days prior to the hearing, plus 5 days if served by mail.

Pro52 – The timelines should be extended.

- Commission Response: The proposed regulations have been revised in response to comment. The Enforcement Staff's Statement of Position must be served at least 30 days after the Notice of Violation. The Respondent has 45 days from service of the Statement of Position to submit their Statement of Defense. This gives the Respondent a minimum of 75 days from service of the Notice of Violation to prepare the Statement of Defense. Once all documents are submitted, the Advisory Staff must serve the Recommended Decision and Order at least 30 days prior to the Enforcement Hearing.

The minimum time from service of the Notice of Violation to a hearing on a contested matter would be 105 days. Actual hearing schedules may be longer because: 1) Commission staff may not serve the Statement of Position on the first day allowed; 2) Commission staff may file a response to the Respondent's Statement of Defense, which could delay the Advisory Staff from completing the proposed decision; 3) The Advisory Staff may not have the Recommended Decision and Order completed the same day the Respondent's Statement of Defense is submitted; 4) If documents are not provided electronically, physical mail will delay the schedule; and 5) the Commission meeting may not be scheduled on the first day the hearing is allowed.

Copies of documents will be made available a number of different ways, and it is anticipated the entire enforcement file will be available on the Commission's website. With the longer briefing schedule and the option for electronic delivery of documents, it is unnecessary to provide the documents with the Notice of Violation.

Pro5 – The date the Statement of Defense is due should be set forth in the Notice of Violation.

- Commission Response: The proposed regulations have been revised in response to comment. Revised section 3009(c) specifies that the Statement of Defense is due 45 days after the Enforcement Staff serve their Statement of Position paper. The Statement of Position is served at least 30 days after the Notice of Violation, but may take more time to prepare. As this date is variable, it is impossible to specify when the Respondent's Statement of Defense is due in the Notice of Violation. Commission staff have incorporated this suggestion by including the due date of the Statement of Defense in the Enforcement Team's Statement of Position paper.

Pro10 – The Commission should supply property owners with more information on the enforcement process so that they will be more likely to participate.

Pro51 – The Commission should supply more information to Respondents, including what information they need to have, what it means, and what the Commission is going to do with it.

- Commission Response: The Commission has modified the proposed regulations in response to comment. The Notice of Violation provides more information on the hearing and a better explanation of what is involved. The Notice of Violation will discuss the nature of the violation. The Statement of Defense form includes guidance for Respondents to prepare their case. Respondents may contact Commission Enforcement Staff to get more information.

Pro11 – There should be a 4-month amnesty period for new upland property owners to apply for a lease for structures on State Lands. Transfer of title does not occur until the close of escrow. Staff typically advises new owners to wait until they obtain title to the uplands to apply for a lease or assignment. Weather conditions or other factors may delay submission of a complete application.

Pro20 – The proposed regulations should be modified so that a new owner of property who has applied for an assignment is not in violation.

- Commission Response: The proposed regulations were not modified in response to these comments. The resolution of violations in the ordinary course of business continues to be more efficient than the proposed administrative process. New property owners are encouraged to contact Commission staff early in the purchasing process. In many cases, lease authorizations can be contingent on the close of escrow and providing the necessary documents. In other cases, the application process can begin early, and be completed after the close of escrow. The resulting authorization can be backdated to the appropriate date. Finally, the longer briefing schedule of the revised regulations gives new property owners assurances that there will not be penalties imposed before they can complete the leasing process.

Pro12 – It is impractical to post a Notice of Violation on a mooring buoy.

Pro13 – The regulations should account for part-time or seasonal occupancy of the property. Posting a NOV on structures during the “off-season” is not reasonable.

- Commission Response: The proposed regulations were not modified in response to this comment. Pursuant to PRC § 6224.4 (b), the Notice of Violation may be served personally. If a Notice of Violation is posted on a buoy, or a structure that is only used seasonally, another copy will also be mailed to the Respondent pursuant to proposed section 3004(e).

Pro14 - The regulations should account for multiple owners of the property.

Pro15 - The regulations should account for multiple owners and/or users of the structures. Noticing should consider all of the owners or users of a structure so they are all aware of the pending action.

- Commission Response: The proposed regulations were not modified in response to this comment. The Commission cannot fine a person or entity not served with a Notice of Violation. It is unlikely the Commission can discover private use agreements before initiating a proceeding. Unlike the structure's owners, use right holders could not remedy the violation. The Commission's orders can account for uncommon ownership issues. For example, fines can be imposed only on the owners that refuse to come under lease. Individual circumstances may vary, and the proposed regulations have sufficient flexibility to address each case as it arises.

Pro16 – Property tax bills may be sent to banks or accountants rather than the owner of the property. The regulations should account for this issue in mailing.

- Commission Response: The proposed regulations have been modified to increase the amount of time to respond to the Notice of Violation to 21 days, plus 10 days if service is by mail.

Pro17 – Regarding section 3006: Notice of hearing should be made at least 30 days prior to the hearing, by certified mail in order to ensure adequate notice.

Pro49 – The recommended enforcement order should be mailed to Respondents 30 days prior to the hearing.

- Commission Response: The proposed regulations have been modified in response to public comments. The Notice of Violation is served a minimum of 45 days prior to the hearing. If the Respondent contests the allegations, this hearing date is vacated and the longer briefing schedule applies. In such cases, the hearing date will be specified in the Enforcement Staff's recommended decision which is served at least 30 days prior to the hearing.

Pro18 – An enforcement hearing should be scheduled in either the north or south of the state to coincide with the location of the suspected violation.

- Commission Response: The proposed regulations were not modified in response to this comment. Enforcement Hearings must be scheduled as a regular calendar item at a properly noticed Commission meeting. (PRC § 6224.4(d)). The Commission currently meets approximately six times each year. Each of these meetings may have more than 100 other items for the Commission's consideration and may involve properties throughout the state. Relocating meetings to accommodate a single Respondent may

impose a burden on a large number of applicants, lessees, interested parties, and members of the public.

If future budgetary considerations prohibit travel, the Commission would be unable to hold remote hearings. Including the suggested provision would prevent enforcement in large areas of the state.

Pro19 – A continuance or postponement should be allowed for good cause at the request of the Respondent. Good cause may include hiring an attorney, researching a case, or preparing for the hearing.

- Commission Response: Proposed section 3012(g) allows the Commission to postpone or continue an Enforcement Hearing for good cause. The briefing schedule has been modified in response to comment to provide more time for Respondents to prepare for a hearing.

Pro21 – The provision allowing for Staff to post the Notice of Violation on a single structure when multiple structures are believed to be in common ownership is not consistent with the Trespass Statute or Constitutional Protections. A person must receive notice of the hearing.

- Commission Response: The proposed regulations now require personal service or posting a Notice on all structures in combination with mailing a copy.

Pro 22 – Service by registered mail should be considered complete on the 10<sup>th</sup> day after mailing per CCP 415.20.

Pro29 – If service is by mail, the Respondent should be given 5 extra days.

- Commission Response: The Code of Civil Procedure does not apply to Administrative Hearings. Proposed section 3004(e) was modified. Service by mail is deemed complete 10 days after mailing.

Pro26 – Section 3005 should be revised to clarify that Commission staff can also stipulate to facts.

- Commission Response: Proposed section 3005(a) relating to stipulations has been deleted in its entirety.

Pro27 – Section 3005 should be revised to allow the Executive Officer to terminate a proceeding if there is evidence of non-liability. The word “clear” should be stricken.

- Commission Response: The proposed regulations were not modified in response to this comment. The Advisory Staff may dismiss an action if there is clear evidence the Respondent is not liable. In cases where matters are not clear, the Commission is the appointed trier of fact.

Pro30 – A proposed order should only be drafted by the “Advisory Team” who are the only ones authorized to act in a judicial function.

Pro32 - Having the “Prosecution Team” prepare findings of fact will make the hearings lose public credibility because the outcome of the proceeding is a foregone conclusion.

- Commission Response: The proposed regulations have been revised in response to public comment. The Advisory Team prepares the proposed order. (Proposed section 3009(g)).

Pro31 – A proposed order, including findings of fact, should not be prepared before evidence is presented at the hearing. Court tentative rulings are not presented before the trial.

- Commission Response: The proposed regulations have been modified in response to comments. See response to Pro 4, Pro 6, Pro 7, Pro 8, Pro 23, Pro 24, Pro 25, and Pro 28 above discussing the increased time for a Respondent to prepare a Statement of Defense.

The proposed regulations require evidence to be submitted prior to the hearing. This will prevent the Respondent from being subject to surprise testimony. The Advisory Team will have time to review and analyze all the evidence prior to issuing the recommended decision. In the event new and critical information is admitted at the hearing, the Commission can continue the hearing, modify the recommended decision, or order a new one to be drafted.

Pro34 – The proposed regulations allow for a default when a Respondent fails to appear at a hearing. Section 3011 should allow a default to be reconsidered for good cause, and should require reconsideration if the Respondent did not receive actual notice because of the number of alternative methods of service provided for in the regulations.

- Commission Response: The proposed regulations have been modified to reduce the number of alternative methods of service. (See response to F7 for more information). The proposed regulations have also been modified to provide the Respondent with more time on contested matters. The failure to does not constitute a default or admission of guilt. The Commission must still meet its burden of proof. The Commission may, but need not issue an order if a Respondent does not appear.

Pro35 – The proposed regulations should specifically allow for cross-examination of any factual issue which is legitimately in dispute.

Pro36 – The Respondent should not be required to describe what they hope to elicit by cross-examination in the Statement of Defense. This information is protected by the Attorney work product doctrine. Cross-examination elicits truth by surprise, and giving advance notice will give the witness time to concoct false stories.

- Commission Response: The proposed regulations were not modified in response to this comment. The proposed process minimizes the length and complexity of the Enforcement Hearings by focusing on the submitted documents and evidence. Extensive and unrestricted cross-examination would prolong the hearings and increase the complexity. Cross-examination is limited to persons who provided evidence under the penalty of perjury, and whose testimony is relied on by Commission staff as being probative of the Respondent's liability. This restricts cross-examination to legally relevant topics and witnesses.

The Respondent must explain in advance why the cross-examination is necessary. This allows the Presiding Officer to determine whether such cross-examination will provide valuable information, or whether cross-examination is necessary to achieve a just result. Requesting this information is not a violation of the attorney-client privilege. The proposed regulations reflect the practices of other state agencies and are consistent with law.

Pro37 – The proposed regulations should specify that any time limits imposed must be reasonable considering the gravity of the issues to the Respondent and must not deprive the Respondent of an opportunity to counter the claims of the “Prosecution Team.”

- Commission Response: The proposed regulations were not modified in response to this comment. Proposed section 3012(b) allows the Commission to set time limits for the presentation of each party. The time limits will be based on the complexity of the issues and the amount of evidence at issue.

Pro38 – Non-parties should be allowed to speak only to the extent compatible with due process, the Constitutional, and the Evidence Code.

- Commission Response: The proposed regulations do not allow non-parties to speak during the hearing.

Pro39 – The regulations should specify that once the hearing is closed, no one may speak to the Commissioners, including the Executive Officer and Assistant Executive Officer.

- Commission Response: The proposed regulations were not modified in response to this comment. Members of the Advisory Staff provide legal and technical advice to the Commissioners to assist in their decision. Existing law prohibits ex parte communications until the decision is final.

Pro40 – There is no authority for a two-step process where the Presiding Officer decides all issues and the Commission votes to adopt the decision. The statute requires the Commission to impose penalties, not a single person.

Pro41 – There is no authority for the proposition that the other Commissioners must announce their reasons if they do not ratify the decision of the Presiding Officer.

- Commission Response: The proposed regulations have been modified in response to comment. The current proposed section 3013 requires all three Commissioners to issue the decision and adopt the decision.

Pro42 – If the Commission directs staff to prepare an order, the regulations should specify that the Advisory Team will prepare the decision. If the Prosecution Team prepares the decision, the Respondent should be given the opportunity to review and comment on the decision.

- Commission Response: The proposed regulations have been modified in response to comment. The proposed section 3013 now specifies the Advisory Team will prepare a written decision on terms dictated by the Commission.

Pro43 – The proposed regulations state that the deadline to appeal starts when the Commission’s decision is final. The regulations should specify that the deadline begins when the final documents have been prepared and approved by the Commission.

- Commission Response: The proposed regulations were not modified in response to this comment. Proposed section 3013 allows the Commission to adopt the proposed decision, which will not require preparation of additional documents. The Commission may also direct the Advisory team to modify the proposed decision and deliver it to the Respondent in person at the hearing. Finally, the Commission may continue a hearing if significant new evidence must be included in the decision, or if significant modifications are necessary. (See proposed section 3012(g)).

Pro44 – The proposed regulations should include the Statement of Defense form in the administrative record even if it was not timely submitted.

- Commission Response: The proposed regulations were modified in response to comment. Proposed section 3015(d) includes all submitted evidence that was excluded from the record, along with reasons why such evidence was excluded. This would include a Statement of Defense form not submitted in a timely manner.

Pro45 – The proposed regulations do not provide for CEQA review. CEQA may apply when a structure has been in place for a sufficient time. The unusual circumstances exception may apply even if there is an exemption that would otherwise apply.

- Commission Response: The proposed regulations were not modified in response to this comment. It is premature to conduct CEQA review at the time of the Commission’s decision. If the Commission determines a structure is on State Lands and imposes a fine, it is still undetermined whether the Respondent will elect to remove a structure or bring it under lease. Even if the Respondent elects to remove a structure, it is unknown how the

Respondent will conduct the work until the Respondent submits a removal plan. Without the removal plan, Commission staff cannot determine what possible impacts may occur. The Commission may issue a short-term lease in order to conduct CEQA work and monitor the removal. The Commission will comply with the requirements of CEQA at a time when there is more certainty as to what action will be taken by the Commission and the Respondent and whether an impact may occur.

Pro46 – The proposed regulations do not provide for review for consistency with other laws. Commission staff should be required to consider and inform the Commissioners what other requirements apply, and consider what secondary effects and unintended consequences including economic, social and recreational consequences are likely from the decision.

- Commission Response: The proposed regulations were not modified in response to this comment. The proposed regulations provide a procedure for administrative hearings to determine whether a structure is on State Lands, whether it is authorized, and what penalty should apply. Violations may be remedied by removing the unauthorized structure from State Lands, or by bringing the structure under lease. Assuming a Respondent applies for a lease, the Commission may at that time consider the impacts of denying a lease among other factors when determining whether to grant or deny a lease.

Pro47 – Informal hearings are inappropriate where private residences are built on State Lands, or are protected by seawalls built on State Lands, or where penalties in the five and six figures may be imposed. Informal hearings in these contexts violate Constitutional protections.

- Commission Response: The proposed regulations were not modified in response to this comment. The proposed regulations are consistent with the Trespass Statute, which authorizes informal hearings and the range of penalties. Many violations can be resolved by bringing the structures under lease as required by existing law. Penalties will only reach the five and six figure range if the Respondent fails to take any action to bring their structure into compliance with the law. The proposed regulations are consistent with the Constitution and the Trespass Statute.

## **Relevance**

R1 – Several letters include comments that are not relevant to the proposed rulemaking. The Commission is not required to respond to these comments because the comments are entirely outside the scope of the proposed rulemaking. These comments have been marked “R1” on the letters and in the comment index.

R2 – Large portions of the of the proposed regulations are unnecessary or unauthorized because they are not authorized by statute, conflicts with the statute, restricts discretion conferred on the Commission by statute, or otherwise impose requirements that go far beyond the statute. The proposed regulations repeatedly subject respondents to unfair and harsh treatment. Much of the

proposal lacks clarity. The proposal is not consistent with other laws, the statute, laws governing administrative procedure, Constitutional protections, the service requirements of the Code of Civil Procedure, the California Environmental Quality Act, and other federal, state, and local permitting statutes and ordinances.

R3 – The proposed regulations are ill-advised and improper because they are outside of the Commission’s proper jurisdiction.

R4 – The proposed notice provisions and hearing process do not comply with the California or United States Constitution.

R5 – There are processes under California law that have not been adhered to.

- Commission Response: The proposed regulations were not modified in response to these comments. Commission staff was unable to determine whether the comments related to the proposed rulemaking or the Trespass Statute. Commission staff was unable to determine what portion of the proposed regulations the comments refer to or how the proposal does not comply with the broadly cited law. The proposed regulations are consistent with existing law.

R6 – There is no building code for docks.

- Commission Response: The proposed regulations were not modified in response to this comment. The content of building codes, ordinances, and standards varies greatly by jurisdiction and is beyond the scope of the proposed rulemaking.

R7 – Maritime Law supersedes California law, and confers rights on dock owners.

- Commission Response: The proposed regulations were not modified in response to this comment. The interplay of federal, maritime, and state law is beyond the scope of this rulemaking. California law requires waterfront property owners to get authorization for structures on State Land. (Public Resources Code sections 6302 (1941) and 6303.1 (1965); *Dana v. Jackson Street Wharf Company* (1866)). The Commission is unaware of any principle in maritime law that supersedes this well-established law.

### **Typographical/Formatting/Errors**

T1 – Too much use of the bold capitalized text makes the Notice of Violation appear threatening. It should be revised to seem less threatening.

- Commission Response: The Notice of Violation has been modified in response to comment. The typeset is optimized to have a strong visual impact because the Notice may be posted on piers or other structures and it is important for the Respondent to see

the Notice. Visual emphasis was placed on certain portions of the Notice to maximize the likelihood a Respondent will read the Notice and not discard it.

### **Redline Edits of Regulations**

In her June 8<sup>th</sup> letter, Dana Dean included redline edits to the entire set of regulations as originally proposed. Some sections were revised, making the suggested edits irrelevant, but each section will be addressed. The comments are copied and pasted below with responses following each segment.

| (3) "Commission Authorization" means a ~~current-~~ currently valid and unexpired, written and executed lease, permit, right of way, easement, or other valid permission to occupy State Lands issued by the Commission, or otherwise provided by law.

- Commission Response: This suggestion has been incorporated into the revised proposed Section 3001.

### **§ 3002. Prohibited Conduct**

| (a) Unless otherwise exempted such as by [INCLUDE SPECIFIC LIST OF EXEMPTIONS], all Structures on State Lands require Commission Authorization. The person or entity seeking to maintain Structures on State Lands must be named in the Commission Authorization. Commission Authorization does not automatically pass to the new owner when real property is sold as the Commission shall approve the assignment of any agreement establishing Commission Authorization before such use of State Lands by the new owner may be deemed authorized.

| (c) The Commission retains discretion to approve or deny applications submitted for the use of State Lands. Submission of an application for use of State Lands does not on its own automatically remedy any alleged suspected violation of Section 6224.3 of the Public Resources Code.

- Commission Response: The proposed regulations were not modified in response to this comment. See response to D6 above.

Section 3002 has been modified to include information about assignments. Section 3002(c) has been modified to substantially incorporate Ms. Dean's comment.

**§ 3003. Investigation, and Discovery, and Informal Discussion**

(a) Commission staff may investigate a suspected violation of Section 6224.3 of the Public Resources Code.

(b) Commission staff may inspect and survey the land and/or Structures in question. Prior to conducting any inspection and/or survey to investigate a suspected violation of Section 6224.3 of the Public Resources Code, Commission staff shall provide thirty (30)-day written notice to Respondent of such inspection and/or survey. Commission staff shall obtain written consent for such inspection and/or survey and thereafter schedule such inspection and/or survey with Respondent. The Respondent shall not deny reasonable access for Commission staff to conduct an inspection and/or survey.

(c) Prior to issuing a Notice of Violation, Commission staff shall contact Respondent to initiate and conduct informal discussion and resolution of any suspected violation of Section 6224.3 of the Public Resources Code. No Notice of Violation shall be issued until Respondent and Commission staff have engaged in informal discussion and resolution for at least six months after initial contact by Commission staff.

(d) If no resolution is thereafter obtained and/or facts are still warranted within six months from this initial contact by Commission staff, the Executive Officer or Assistant Executive Officer may issue a Notice of Violation, if the facts so warrant in their judgment.

- Commission Response: The proposed regulations were not modified in response to these comments. See response to PRO48.

The suggested requirement of a six-month informal contact period was not accepted. See response to PRO1 above.

### **§ 3004. Notice of Violation Procedure**

(a) The Notice of Violation shall describe the alleged violation, shall reference the documents on which Commission staff relies to provide a prima facie case, and shall ~~give notice that the documents may be inspected at the Commission's Sacramento office. The Respondent may submit a written request be accompanied by for copies of any or all documents relied on by staff, which shall be provided within five (5) business days of the request and upon payment of the copying costs.~~

(b) The Notice of Violation shall include notice of the date, time, and location of the enforcement hearing. The Notice of Violation shall also state that the enforcement hearing is an informal administrative hearing held pursuant to Section 6224.4 of the Public Resources Code and conducted in accordance with Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code, including Article 10 (commencing with Section 11445.10) of that chapter. The Notice of Violation shall also be accompanied by copies of Sections 6224.3 to 6224.5 of the Public Resources Code; Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code; and Sections 3000 to 3016 of Title 2, California Code of Regulations, Division 3, Chapter 1 Article 14: Administrative Hearings.

(c) The Notice of Violation shall be accompanied by a Statement of Defense form that substantially conforms to content set out in Appendix B.

(d) The Notice of Violation shall be served not less than sixty (60) days before the date scheduled for the enforcement hearing. The Notice of Violation may be served by personal service or, in lieu of personal service, by registered mail and by posting the Notice of Violation on the Structure in question.

- Commission Response: (subpart a) See response to PRO4 above.

(subpart b) The Notice of Violation has been modified to state that the hearing is an informal administrative hearing. The remaining code citations suggested were not incorporated into the proposed regulations because they appear elsewhere, decrease readability, and do not provide additional clarity.

The proposed regulations were not modified to require a copy of the Trespass Statute and the Government Code chapter 4.5 to be included with the Notice of Violation. The Notice of Violation will state the authority relied on. If the Respondent is unable to obtain these public laws through other resources, the Commission can provide, upon request, a copy as part of the enforcement file. The Commission declines to include the suggested reference because the proposed language decreases the readability of the section.

(subsection d) The proposed regulations have been modified in response to comment. The Notice of Violation will be served more than 60 days before the hearing. See response to Comments Pro4, Pro6, Pro7, Pro8, Pro23, Pro24, Pro25, and Pro28 above.

### **Proposed Section 3006**

(c) At least ~~ten~~twenty (~~10~~20) days prior to the enforcement hearing, the Executive Officer or Assistant Executive Officer shall mail by regular United States mail the recommended enforcement order to the Respondent, the Presiding Officer, and other members of the Commission.

- Commission Response: The proposed regulations have been modified in response to comment. Proposed section 3009(h) provides that the proposed written decision will be mailed to Respondents at least 30 days prior to the hearing.

### **§ 3010. Admissibility of Evidence**

(a) Relevant evidence shall be admitted ~~if it is the sort of evidence responsible persons are accustomed to rely on in the conduct of serious affairs,~~ regardless of any common law or statutory rule prohibiting such evidence in civil actions.

~~(b) The Presiding Officer may exclude unduly repetitious or irrelevant evidence.~~

- Commission Response: The suggested edits were not incorporated into the revised text. See response to PRO33.

### **Proposed Section 3014**

~~decision and order. The maximum duration the penalty may be tolled shall be determined by the Presiding Officer based on the circumstances of the case. If a civil penalty is tolled under this subparagraph, then the following conditions will apply:~~

~~(1) The Respondent must diligently work toward completion of the application process and execute a Commission Authorization.~~

~~(2) The penalty may not be tolled more than four (4) months unless the Executive Officer or Assistant Executive Officer find circumstances dictating that a longer period is appropriate. Such circumstances include unforeseen complexities in the lease, environmental review, significant delays caused by Commission staff, or unavoidable circumstances. A penalty authorized by this Article will authorize the Executive Officer or Assistant Executive Officer to make such findings, provided the Commission subsequently ratifies these findings.~~

~~(3) If a penalty has been tolled, and the Respondent fails to diligently complete the application process, or does not execute a valid Commission Authorization for the Structures specified in the decision and order within the four (4) month period, or any extensions thereto, the penalty will resume as if it had not been tolled, including any penalties that would have accrued during the tolling period.~~

(f) A penalty under this Article may be tolled for a reasonable time for the Respondent to remove all Structures from State Land. The maximum duration the penalty may be tolled shall be determined by the Presiding Officer based on the circumstances of the case. ~~If the Respondent fails to diligently pursue removal, or fails to remove the~~

~~Structures in the allotted period, the penalty will resume as if it had not been tolled, including any penalties that would have accrued during the tolling period.~~

- Commission Response: The proposed edits were not incorporated into the revised text. See response to P10 and PRO9 above.

### **Proposed Edits to the Notice of Violation**

In her June 8<sup>th</sup> letter, Dana Dean included redline edits to the Notice of Violation. The majority of the Notice of Violation has been extensively modified, partially in response to public comments. Many of the suggested edits are, therefore, irrelevant. Each section is discussed below.

~~FAILURE TO RESPOND—RESPONSE TO THIS NOTICE OF VIOLATION IS REQUIRED. FAILURE TO APPEAR AT AN ENFORCEMENT HEARING PURSUANT TO THIS NOTICE OF VIOLATION MAY RESULT IN A SUBSTANTIAL CIVIL PENALTY AND/OR AN INJUNCTION BEING ISSUED AGAINST YOU WITHOUT YOUR HAVING AN OPPORTUNITY TO CONTEST THE CHARGES OR TO INTRODUCE EVIDENCE IN YOUR DEFENSE.~~

- Commission Response: This section has been entirely replaced in the proposed Notice of Violation. The edits are Ms. Dean’s suggestions to accompany comment D11. The Commission incorporates its response to comment D11.

The California State Lands Commission (Commission) is issuing this Notice of Violation (Notice), along with the enclosed Statement of Defense form because Commission staff believes you may be responsible for or involved with maintaining a structure on land owned by the state and under Commission jurisdiction without appropriate authorization in violation of California Public Resources Code § 6224.3. This Notice contains a brief summary of the evidence that staff currently relies on. The evidence this Notice refers to is attached for your review~~available at the Commission’s Sacramento office. You can arrange to review these materials at the Commission’s Sacramento office, have copies made at your expense, or both by contacting \_\_\_\_\_ of Commission staff at 916-574-1900.~~ This Notice is intended to inform you of the nature of the possible violation so that you can fill out the enclosed Statement of Defense form and otherwise be prepared for the Commission enforcement proceedings.

- Commission Response: This section has been entirely replaced in the proposed Notice of Violation. The edits are Ms. Dean’s suggestions to accompany comment Pro4. The Commission incorporates its response to comment Pro4.

THE COMMISSION MAY IMPOSE AN ADMINISTRATIVE PENALTY OF UP TO \$1,000.00 PER DAY OR UP TO to 10.83% of the annual rent, which represents one twelfth (1/12) of one hundred thirty percent (130%) of the normal rent, rounded down ~~160% OF THE MARKET RENT RATE ON PROPERTIES WHERE ANNUAL RENT WOULD EXCEED \$365,000.~~ THE PENALTY MAY BE IMPOSED AT THE CONCLUSION OF THIS HEARING EVEN IF YOU FAIL TO APPEAR.

submitting proof of restoring state land to Commission staff, or by bringing all structures under lease. (Section 3014(c)-(f) of the attached regulations.) In addition, penalties may be tolled during the time the Commission staff is processing your application for a lease, permit, or other Commission authorization. (Section 3014(e) of the attached regulations) The Commission reserves discretion whether to authorize any proposed use of state land. 3

- Commission Response: The Notice of Violation has been extensively modified. The edits in this section accompany Ms. Dean's comment II. The Commission incorporates its response to comment II. The Notice of Violation includes an thorough explanation of the process, including information on how to reduce or eliminate penalties. The intent of these provision is to open an early dialog and provide the Respondent with information relating to their individual case.

#### Enforcement Hearing

Your matter will be presented to the Commission as an informal administrative hearing on the date set forth below pursuant to the regulations governing Commission enforcement hearings as attached to this Notice. The start time of your hearing may vary. You should be present at the meeting start time below, and you should set aside the entire day.

Failure to timely submit the enclosed Statement of Defense form thirty (30) days before the enforcement hearing, along with any supporting documents may impair your ability to present argument to mitigate liability for, or the amount of, any civil penalty to the Commission at the date and time set forth below. ~~The Commission may impose a penalty if you fail to respond or appear at the hearing. (Public Resources Code, § 6224.4(d))~~

- Commission Response: The proposed hearing process and Notice of Violation have been extensively modified in response to public comment. The suggested language referencing the Commission regulations is unnecessary and the Commission declines to include this language. The modified proposed regulations require the Respondent to submit the Statement of Defense form within 45 days of the Commission Enforcement Staff's Statement of Position paper. The suggested language specifying the deadline to submit the Statement of Defense Form is no longer relevant. The edit removing the statement that the Commission may impose a penalty if the Respondent fails to appear is declined. This is an important warning for the Respondent to receive.

#### **Proposed Edits to the Statement of Defense Form**

In her June 8<sup>th</sup> letter, Dana Dean included redline edits to the Statement of Defense form. Each section is discussed below.

This form requires you to respond at least twenty (20)-days prior to the date of your hearing to the alleged facts contained in the Notice, to raise any defenses that you believe apply, to request any cross-examination that you believe necessary, and to inform Commission staff of all facts that you believe may exonerate you of any legal responsibility for the possible violation or may mitigate any civil penalties imposed. Commission staff will prepare a ~~prosed~~-proposed written decision which analyzes the law and facts of this matter and recommends a penalty and/or order for the Commission's consideration. The proposed written decision will be sent to you and the Commission twenty (20) days prior to the hearing. Failure to complete and return this form at least twenty (20) days prior to your hearing date may mean that any proposed decision and penalty order presented to the Commission will not include any statements in your defense.

- Commission Response: The modified proposed regulations require the Respondent to submit the Statement of Defense form within 45 days of the Commission Enforcement Staff's Statement of Position paper. The suggested language specifying the deadline to submit the Statement of Defense Form is no longer relevant. The grammatical correction from "prosed" to "proposed" is correct, but that sentence is no longer in the proposed Statement of Defense.

1. If you admit any of the facts or allegations contained in the Notice of Violation, list each specific fact or allegation that you admit, with reference to the specific paragraph number of the Notice of Violation in which such fact or allegation is contained. (For example, if Paragraph 1 of the Notice of Violation states that you are the owner of the subject property, state that you admit the fact that you are the owner of the subject property.)~~Facts or allegations contained in the Notice of Violation that you admit with specific reference to the paragraph number in the Notice of Violation.~~

2. If you deny any of the facts or allegations contained in the Notice of Violation, list each specific fact or allegation that you deny, with reference to the specific paragraph number of the Notice of Violation in which such fact or allegation is contained.~~Facts or allegations contained in the Notice of Violation that you deny with specific reference to paragraph number in the Notice of Violation.~~

3. If you have no personal knowledge of the facts or allegations contained in the Notice of Violation, list each specific fact or allegation about which you have no personal knowledge, with reference to the specific paragraph number of the Notice of Violation in which such fact or allegation is contained.~~Facts or allegations contained in the Notice of Violation of which you have no personal knowledge with specific reference to the paragraph number in the Notice of Violation.~~

4. Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to role in and/or involvement with the possible violation. Be as specific as you can. If you know of any documents, photographs, maps, letters, or other evidence that you believe are relevant, please identify it by name, date, type, and any other identifying information and provide the original or a copy if you can.

- Commission Response: The proposed edits suggest a number of grammatical changes. The Commission declines the edits.

## **SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE SUBSEQUENT COMMENT PERIOD OF SEPTEMBER 4, 2015 TO OCTOBER 19, 2015.**

The Commission received four separate comment letters during the subsequent comment period. Each comment addresses unique aspects of the rulemaking and will be set out separately below, rather than grouped and responded to as above.

On September 6, 2015, Francis Coats submitted a comment letter via electronic mail. The letter commented on the Commission's draft strategic plan.

- Commission Response: The proposed regulations were not modified in response to this comment. This letter is not related to the proposed rulemaking.

On September 12, 2015, Francis Coats submitted a comment letter via electronic mail. The letter asked why the proposed regulations do not provide for penalties on structures located between high and low water, or on waterways subject to the public trust easement but not owned in fee by the state.

- Commission Response: The proposed regulations were not modified in response to this comment. Public Resources Code § 6224.3(a) provides for penalties only where land is under the Commission's jurisdiction and held in fee by the state. This comment letter addresses areas where the state holds an easement rather than fee title.

On October 16, 2015 Anthony Helton submitted a comment on behalf of Craig Page. The letter states that several provisions of the proposed regulations coningle advisory and prosecutorial functions. In sections 3003 and 3004, Commission staff prepare the Notice of Violation. The regulations do not define whether this is Advisory Staff or Enforcement Staff. In section 3006(b) Advisory Staff may dismiss an individual or terminating an action. In section 3006(b) Respondents are advised to contact Enforcement Staff to determine whether a violation can be resolved without a hearing. The letter also questions whether the Advisory Staff will receive the Statement of Defense form prior to drafting the proposed decision and order.

- Commission response: The proposed regulations were not modified in response to this comment. Adequate separation of functions already exists in the proposed regulations. Proposed section 3003(b) states that Enforcement Staff issue the Notice of Violation.

Section 3005(b) allows the Advisory Staff to dismiss a case when there is clear evidence the Respondent is not liable. This section allows the Advisory Staff to terminate an action when it is apparent it should not go forward. For example, if the Respondent can clearly demonstrate that the structure is authorized by the Commission, or that the

Respondent has nothing to do with the structure, the Advisory Team can dismiss the case. This prevents both sides from spending considerable time and effort completing the briefing and preparing for the hearing when there is no need to do so. This is not a violation of the separation of functions. (Gov. Code § 11425.30(b)(2)).

Section 3005(d) encourages a Respondent to contact the Enforcement Staff to determine whether a case can be resolved without a hearing. The purpose of this provision is to encourage early resolution of the case. If a Respondent is willing to submit an application or remove a structure, there is no reason a hearing should go forward, and no reason to impose a penalty. As with section 3005(b), section 3005(d) is designed to terminate a proceeding where there is no utility in going forward.

Proposed section 3009(g) states that the Advisory Team “shall review the timely submitted evidence and argument and prepare a recommended decision and order.” The Advisory Team must also include a copy of all timely submitted evidence and argument in the recommended decision and order. These provisions ensure the Advisory Team will consider the Statement of Defense form if timely submitted.

On October 19, 2015, Gregg Lien submitted a comment letter. This letter reiterated comments D16 and D17, stating that persons in Lake Tahoe are unable to obtain permits from local permitting agencies and should be exempt from the administrative process. In addition, the letter states that leases at the end of a “grace period” may be unfairly subject to administrative action.

- Commission response: The proposed regulations were not modified in response to this comment. The Commission incorporates its responses to D16 and D17 above. The Commission issues leases for structures in Lake Tahoe that comply with local regulations and public trust needs. These leases require owners to obtain a permit from the Lake Tahoe Regional Planning Agency (TRPA) within two years of the date a final shore zone ordinance is adopted. In other words, the two-year time limit will not start until TRPA adopts an ordinance. Not all structures qualify for a lease and the Commission retains discretion to determine whether a structure complies with local regulations and public trust needs.

### **Public Comment Period – April 1, 2016 – April 16, 2016**

On April 14, 2016, Gregg Lien submitted a comment via email. This letter incorporates all of Mr. Lien’s prior comments, as well as those of John Briscoe and the Tahoe Lakefront Owners Association. The Commission incorporates all of its prior responses to each of these prior comments.

Mr. Lien objects to the standard for issuing a Notice of Violation. Proposed section 3003(c) states staff “may issue a Notice of Violation for a suspected violation...”

- Commission response: The proposed regulations were not modified in response to this comment. No fines or penalties are imposed until after an extended briefing process and public hearing. Commission staff carry the burden of proof at this hearing.

Mr. Lien objects to the requirement in section 3005(c) that the Advisory Staff find clear evidence that a Respondent is not liable for a violation before dismissing the action.

- Commission response: The Commission incorporates its response to PRO27 above.

Mr. Lien asks for additional protections for the public, and assurances the administrative hearings will not be used where there is a good faith dispute over the authority of the Commission.

- Commission response: The proposed regulations were not modified in response to this comment. The Commission incorporates its response to B2, B3, B5, B6, B7, and B8, collectively addressed above.

John Briscoe submitted a comment via email on April 15, 2016. This letter incorporates Mr. Briscoe’s prior comments, those previously submitted by his firm, and the comments previously submitted by Mr. Lien. The Commission incorporates all of its prior responses to each of these prior comments.

Mr. Briscoe objects to the use of administrative hearings to determine whether structures are trespassing on state land. Mr. Briscoe also objects to the use of administrative hearings because landowners will always lose in the hearings and judicial review under CCP 1094.5 is not sufficient to protect landowners rights.

- Commission response: The proposed regulations were not modified in response to this comment. The Trespass Statute created the administrative hearings and specified the appeal process. The current rulemaking interprets and makes specific the process for these hearings. To the extent this comment objects to the entire process, or objects to details required by the Trespass Statute, it is outside the scope of this rulemaking. To the extent this comment is a suggestion to limit the hearings to cases where the boundaries of state land have already been adjudicated, the Commission incorporates its response to B1, B2, B3, B4, B5, B6, B7, B8, and F1, collectively addressed above.

Mr. Briscoe questions the origin of the Trespass Statute and asks that all records of the Commission’s lobbying the Legislature to “direct” the Commission to do this rulemaking be included in the rulemaking file.

- Commission response: The Commission declines to include the requested documents in this rulemaking. The public policy decisions leading to the adoption of the Trespass Statute are beyond the scope of this rulemaking. Public Resources Code section 6224.5(d) authorizes this rulemaking.

Mr. Briscoe implies that the Statement of Economic Impact is deficient because adjudication of contested title to land will require longer hearings. Mr. Briscoe implies the Statement is deficient because it fails to consider the economic impacts of a longer hearing.

- Commission response: The Statement of Economic Impact is not deficient. The impacts of holding the administrative hearings was contemplated when the Legislature approved the Trespass Statute. Whether the Commission holds one longer hearing or several shorter ones is irrelevant to the economic impact of this rulemaking.

Mr. Briscoe objects to the 15-day comment period as being insufficient and in violation of Government Code section 11346.5.

- Commission response: Government Code 11346.5 applies to a notice of purposed rulemaking at the initiation of a rulemaking action. The Commission complied with these requirements. The most recent modifications are marked in double underline and double strikeout as stated at the top of the text of the proposed regulations. The Commission has complied with 1 CCR 44, which specifies the process for making a modified text available for public comment.

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