

The Forty-Year-Old Statute: Unintended Consequences of the Coastal Act and How They Might Be Redressed

Jesse Reiblich^{*} & Eric H. Hartge^{**}

Forty years ago, the California Legislature enacted the Coastal Act to protect the coastline and to fortify changes sought by the voter initiative that established the Coastal Commission. While overwhelmingly successful, the implementation of California's Coastal Act has produced certain unintended consequences that limit its efficacy. An apparent misapplication of a key term in the Act, abuse of permitting exemptions, and unforeseen climatic changes to the coast have fostered these undesirable outcomes. This article first describes three key unintended consequences and their presumed intended applications: use of the term "existing" in the Act, exemption of certain permitting processes permissible under the Act, and implementation of emergency coastal development permits. Next, the article investigates how these aspects of the Act have been interpreted in practice and then offers potential solutions to address these inadvertent outcomes. In the wake of a changing climate, rising seas, and increasingly devastating storms, now is the time to redress these unintended consequences to ensure the Coastal Act—and California's coastline—remain resilient.

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^{*} Fellow, Center for Ocean Solutions, Stanford University. Email: jesselr@stanford.edu. The authors would like to thank Giselle Schmitz for her research assistance and the editors of the Stanford Environmental Law Journal for their editorial guidance.

^{**} Research Development Manager, Center for Ocean Solutions, Stanford University. Email: ehartge@stanford.edu.

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I. INTRODUCTION

In 1976, the California Legislature passed the Coastal Act, reaffirming the State's 1972 voter initiative, which had established the California Coastal Commission.¹ The Act aimed to protect the natural and scenic resources of the coastline for "present and future residents of the state and nation," while balancing these protections with certain regulated development in the coastal zone.² The birth of the Commission and the passage of the Coastal Act came during a nationwide environmental movement, spurred on by environmental catastrophes and derelictions of the public trust.³ In the wake of these events, California seized the

1. See Janet Adams, *Proposition 20—A Citizens' Campaign*, 24 SYRACUSE L. REV. 1019 (1973) (giving a firsthand account of the Proposition 20 campaign, which ultimately led to the California Coastal Zone Conservation Act of 1972 and subsequently the Coastal Act).

2. CAL. PUB. RES. CODE §§ 30001, 30001.2 (West 2016).

3. Most notably, the 1969 three-million-gallon oil spill off the Santa Barbara County coast became a catalyst for significant California- and nation-wide environmental action. See Miles Corwin, *The Oil Spill Heard 'Round the Country*, L.A. TIMES, Jan. 28, 1989, http://articles.latimes.com/1989-01-28/news/mn-1162_1_oil-spill.

opportunity to lead the way in ocean and coastal zone management.⁴

In the Coastal Act's forty-year history, the law has been touted as one of the leading coastal zone management tools in the world. Enforcement of the Coastal Act has been successful in ensuring preservation of the state's coastline, while balancing the economic development interests of the state. Despite its major successes, several unintended consequences have emerged during its tenure.⁵ These range from an apparent misapplication of a key term in the law to lax policies that have been exploited and stretched beyond their intended applications. Meanwhile, rising sea levels driving increased erosion rates have exacerbated the effects of these co-opted policies, as Californians have experienced changes to the coastline over the past four decades not predicted at the inception of the Coastal Act.⁶ Due to a changing climate, rising seas, and increasingly damaging storms are expected to increase in the coming decades. These phenomena will further amplify these unanticipated effects of the Act, and will necessitate a response sooner rather than later. Gradually rising seas and eroding beaches have become calls to action—if you know your ship will soon leave the harbor for rougher seas, you should fix all minor leaks before they become larger concerns.

This article identifies three unintended consequences that have emerged during the first forty years of the Coastal Act's implementation.⁷ These consequences result from: how the key term "existing" in the Act has been construed; redevelopment policies in the Act; and emergency permitting procedures under

4. The federal Coastal Zone Management Act, which encouraged states to develop coastal management plans, was also passed in 1972. 16 U.S.C. § 1451 *et seq.* (West 2016).

5. While some initial problems were identified with the Act earlier on, this Article focuses on the issues that have been highlighted more recently. For an overview of early problems, see Catherine R. Hall, *Capturing the Spirit of the California Coastal Act in Local Coastal Programs*, 2 STAN. ENVTL. L. ANN. 61, 74-75 (1979) (explaining several "very difficult problems" with implementing the Act).

6. The most intense storms often occurred during the El Niño winters of 1982–1983, 1991–1992, 1997–1998, 2002–2003, 2009–2010, and 2015–2016. See *El Niño and La Niña Years and Intensities*, GOLDEN GATE WEATHER SERVICES, <http://ggweather.com/enso/oni.htm> (last visited Sept. 15, 2016).

7. The unifying theme of this article is the "law of unintended consequences." See Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894 (1936); see also ROBERT BURNS, TO A MOUSE, ON TURNING HER UP IN HER NEST WITH THE PLOUGH (1785), <https://www.poetryfoundation.org/poems-and-poets/poems/detail/43816> (often translated from Scottish as "The best laid schemes of mice and men/ Go often askew").

the Act. For each topic, we delineate the intended application of each section, the implementation of each section in practice, and potential solutions to ensure such missteps do not continue unchecked indefinitely. Rising sea levels leading to greater erosion and inundation from increasingly damaging storm events should prompt swift action on these issues.

II. "EXISTING" UNDER THE ACT

The equivocal nature of the term "existing structures" in section 30235 of the Coastal Act is perhaps the most controversial and impactful unintended consequence of the Act's forty-year existence. The Coastal Act states that protective structures, such as seawalls, "shall be permitted when required to serve coastal-dependent uses or to protect *existing* structures."⁸ But existing when? At least two plausible interpretations of "existing" have been posited. The Coastal Commission has sometimes interpreted "existing structures" in section 30235 to mean those structures in existence when an application for a protective structure is made to the Commission.⁹ But others argue that the legislative intent of the Coastal Act requires the Coastal Commission to interpret "existing structures" to mean those in existence when the Coastal Act went into effect on January 1, 1977.

A. *Intended Application*

The intended application of "existing" in section 30235 remains unsettled. There is a compelling argument that the Legislature intended "existing" to mean only those structures in existence when the Coastal Act went into effect. This interpretation would give "existing" a narrow meaning in the Act. Proponents of this interpretation point to the Coastal Act's legislative history, which they claim establishes that 30235 was meant to be a grandfather clause.¹⁰ For instance, they argue that when the Legislature chose to insert "existing" to modify the term "structure" in Senate Bill 1277, this decision was a conscious policy choice to allow armoring only for structures that existed when the

8. CAL. PUB. RES. CODE § 30235 (West 2016) (emphasis added).

9. See *infra* Part II.A.

10. Todd T. Cardiff, *Conflict in the California Coastal Act: Sand and Seawalls*, 38 CAL. W. L. REV. 255, 262 (2001). This interpretation is also supported by language in the "California Coastal Plan"—the policy document mandated by Proposition 20. One of its major policy recommendations was "limit[ing] the construction of shoreline structures to those necessary to protect existing buildings and public facilities, and for beach protection and restoration." Cal. Coastal Zone Conservation Comm'ns, California Coastal Plan 6 (1975), available at http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1090&context=caldocs_agencies.

Coastal Act was enacted.¹¹ Champions of the narrow view point out that competing “developer-friendly” versions of the Act did not include “existing” as a modifier.¹² Finally, they argue that interpreting “existing” broadly in the Act gives effect to these unenacted developer-friendly bills, and that this interpretation undermines the Legislature’s intent to protect the coast by only allowing seawalls for those structures that have been grandfathered under the statute.¹³

Others argue that the Legislature intended “existing” in 30235 to mean “in existence at the time of an application to build a protective structure.” Subscribers to this interpretation point out that if section 30235 were meant to have a set date for its application, then it would have specified such a date.¹⁴ For instance, other uses of “existing” in the Act are modified with specific dates, while “existing” in 30235 is not.¹⁵

A different piece of the Coastal Act, section 30253, might hold the key to the intended, and perhaps necessary, interpretation of “existing” in section 30235. Section 30253 mandates certain requirements for new development. New development must “[a]ssure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require

11. *Id.* at 267.

12. *Id.* AB 3875 (Keene) and AB 3402 (Cullen) were “developer friendly,” *id.* at 263, Coastal Act bills that “could have resulted in the complete armoring of almost the entire California coast and would have entitled any structure in danger from erosion a seawall,” *id.* at 267.

13. *Id.* Proposition 20 went even further than the Coastal Act. It required that the regional commission find both that “the development will not have any substantial adverse environmental or ecological effect” and that the development will be consistent with certain objectives and declarations of Proposition 20. California Coastal Zone Conservation Act of 1972 (“Proposition 20”), § 27402, <https://www.coastal.ca.gov/legal/proposition-20.pdf>, *repealed by* California Coastal Act of 1976, CAL. PUB. RES. CODE § 30000 *et seq.* (West 2016).

14. Meg Caldwell & Craig Holt Segall, *No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast*, 34 *ECOLOGY L. Q.* 533, 563 (2007).

15. *Id.* (“In a recent unpublished case, which did not decide the issue due to a technicality regarding the standard of review, the Coastal Commission pointed out that ‘existing’ is used in other places within the Act’s text in ways that clearly indicate it was meant to refer to current conditions, not 1976 conditions.”). *But see* Cardiff, *supra* note 10, at 267 (“The Smith-Beilenson bill (SB 1277) inserted the word ‘existing’ into the Coastal Act in committee, because it intended to distinguish between structures built after 1976 and those structures built before 1976 that warranted protection. To interpret the language otherwise would give effect to versions of coastal act bills that were not enacted.”).

the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.”¹⁶ Essentially, this section requires that new development be built so as not to require the construction of protective devices. Between section 30253’s requirement that new development be built not to need protective structures, and section 30235’s language specifying that the Commission shall permit protective structures to protect existing structures, several inferences can be drawn about how these sections must be applied in order for them to be read together and for them to coexist in the same Coastal Act. First, section 30235 should be read as only requiring the Commission to allow protective structures for structures that existed when the Coastal Act was enacted. Second, new development is anything built after the Coastal Act went into effect. Finally, new development requires assurances that it will not require the construction of protective devices to protect it.

Accordingly, reading “existing” to mean existing at the time the Coastal Act was enacted might be the most straightforward and reasonable interpretation of the statute.¹⁷ This interpretation would also give meaning to every word in the statute, and would account for the decision to add in “existing” as a modifier late in the legislative process.¹⁸ Regardless, as a practical matter, commentators have pointed out that “both the broad and narrow readings of section 30235 can be read consistently with section 30253.”¹⁹ But even the Commission has pointed out that these sections have proved challenging to administer together.²⁰

16. CAL. PUB. RES. CODE § 30253(b) (West 2016).

17. The Commission has recognized this possible alternative interpretation in recent guidance. CAL. COASTAL COMM’N, SEA LEVEL RISE POLICY GUIDANCE 165 (2015) (“Read together, the most reasonable and straight-forward interpretation of Coastal Act Sections 30235 and 30253 is that they evince a broad legislative intent to allow shoreline protection for development that was in existence when the Coastal Act was passed, but avoid such protective structures for new development now subject to the Act.”).

18. See Cal. Ass’n of Psychology Providers v. Rank, 793 P.2d 2, 11 (Cal. 1990) (“[I]t is well settled ‘that in attempting to ascertain the legislative intention effect should be given, whenever possible, to the statute as a whole and to every word and clause thereof, leaving no part of the provision useless or deprived of meaning.’”) (citations omitted).

19. See Caldwell & Segall, *supra* note 14, at 563.

20. CAL. COASTAL COMM’N, RECAP PILOT PROJECT FINDINGS AND RECOMMENDATIONS: MONTEREY BAY REGION (1995), <http://www.coastal.ca.gov/recap/chap3.html> (“For Sections 30235 and 30253 to function symbiotically, there needs to be a cut-off date that treats pre-Coastal Act development differently than post-Coastal Act development due to different regulatory policies being in effect (i.e., pre-Coastal Act development was not subject to Section 30253 and thus may require shoreline protection

Regardless, the debate over the intended meaning of “existing” in section 30235 is expected to continue short of legislative or judicial action on the subject.

B. *In Practice*

Regardless of the Legislature’s intent when it enacted section 30235 and the rest of the Coastal Act, the Coastal Commission has at least sometimes applied “existing structures” broadly to include structures in existence when an application is made to build protective structures.²¹ The Commission has defended its varying interpretations of “existing” in the Coastal Act by explaining that there are different classes of “existing structures” under the Act—those existing before the passage of the Coastal Act, and therefore not subject to its strictures, and those that have been permitted since the passage of the Act.²² Obviously, this equivocation is problematic for several reasons. For instance, the resulting uncertainty makes it more difficult for the regulated community to anticipate how the Commission will interpret “existing” at any particular time and in any particular place. This unpredictability also undermines environmental groups’ efforts to ensure that the Commission faithfully administers the Act. Furthermore, defining “existing” to mean existing at the time of an application seems to

while post-Coastal Act development should have been constructed in such a way as to meet Section 30253 requirements for stability and not require protective devices).”).

21. CAL. COASTAL COMM’N, *supra* note 17, at 166 (“In a few instances, however, the Commission has treated structures built after 1976 as existing structures entitled to shoreline protection even if no adjacent pre-Coastal Act structure also needed protection.”); CAL. COASTAL COMM’N, *supra* note 20 (“One requirement of Section 30253(2) is that new development should be stable without the construction of protective devices to minimize hazards. However, once a new structure has been built, it is an existing structure and Section 30235 of the Coastal Act permits existing structures to use shoreline armoring to protect against shoreline erosion.”).

22. CAL. COASTAL COMM’N, STAFF REPORT ADDENDUM FOR W17A CDP APPLICATION NUMBER 3-09-052 (NEAL SEA CAVE) 8 (2010), <https://documents.coastal.ca.gov/reports/2010/7/W17a-7-2010.pdf> (“One class of ‘existing structures’ refers to those structures in place prior to the effective date of the Coastal Act. Coastal zone development approved and constructed prior to the time the Coastal Act went into effect was not subject to Coastal Act and/or LCP requirements. . . . A second class of existing structures refers to those structures that have been permitted since the effective date of the Coastal Act.”). The Report also echoes previous Commission explications about its wavering interpretations of the term “existing.” *Id.* (“The Commission, though, has, in some cases, interpreted ‘existing’ to mean structures existing at the time the armoring proposal is being considered, whether these structures were originally constructed before or after the Coastal Act, and has not limited consideration of armoring only to those structures constructed prior to the Coastal Act.”).

run counter to the coastal protection aims of the Act. Specifically, critics have argued that “[t]his weaker interpretation of the Coastal Act has worked against the policy objective of limiting the approval of new shoreline structures.”²³

Allowing new development—i.e. built after the Coastal Act went into effect—has had its own unintended consequences. For instance, a developer might seek a coastal development permit (CDP) to build on a coastal property by citing conservatively predicted erosion rates on that parcel of land, thus making the new development meet the strictures of section 30253. But then, after the property is developed, the landowner might apply for a seawall to protect the new development, arguing it is in harm’s way based on more harrowing erosion estimates commissioned by different consultants. This piecemeal approach to attaining a seawall has been successful on occasion, but it flies directly in the face of the policy and intent of the Coastal Act, and circumvents the intended application of sections 30235 and 30253.²⁴

Over the last several years the Commission has sought to avoid situations that undermine the Act’s purpose by requiring “no future armoring” conditions in permits it issues.²⁵ This forward-looking approach seeks to avoid the possibility that landowners can remain and seek protection of their property regardless of eroding shorelines and rising seas. It also disincentivizes repeatedly rebuilding and renovating coastal structures, a practice that ignores the anticipated effects of disappearing shorelines and sea level rise on properties in the coastal zone.

Furthermore, the Commission usually couples “no future armoring” conditions with other limitations, such as setbacks and assumption of risk conditions, in order to find new development consistent with the requirements of section 30253.²⁶ Finally, deed restrictions documenting these conditions on the affected coastal properties put prospective owners on notice about the properties’

23. Charles Lester, *An Overview of California’s Coastal Hazards Policy*, in *LIVING WITH THE CHANGING COAST* 138, 148 (Gary Griggs et al. eds., 2005).

24. *Id.* at 146-47.

25. Caldwell & Segall, *supra* note 14, at 564 (“The Commission has attempted to avoid this possibility by placing ‘no future armoring’ conditions in all recent permits.”); CAL. COASTAL COMM’N, *supra* note 17, at 166 (explaining that the Commission has, “over the last 15-20 years, generally required that applicants proposing new development in hazardous shoreline locations waive any rights under section 30235 (or related LCP policies) to build shoreline protection for the proposed new development.”).

26. CAL. COASTAL COMM’N, *supra* note 17, at 166.

precariousness.²⁷ These requirements reflect a pragmatic attempt by the Commission to deliver on the Coastal Act's policy objectives in the face of growing pressures to permit people to protect their homes from rising seas and looming Pacific storm events.

There is also a practical reason why this issue remains unsettled. After the Coastal Act was passed, any new development was probably subjected to scrutiny under section 30253—the section on new development. But only years after this new development was completed was protecting it considered. Hindsight being twenty-twenty, critics can clearly see that new development that was allowed under section 30253 probably should not have been allowed to proceed in the first place.

C. Solutions

1. Interpret “existing” narrowly.

The most straightforward, and perhaps simplest, option would be for the Commission to start interpreting “existing” in section 30235 narrowly. As explained, even the Commission has noted that this interpretation is the most reasonable and straightforward interpretation of reading sections 30235 and 30253 together.²⁸ Regardless, to date the Commission has not interpreted “existing” narrowly to reject a CDP, at least not explicitly. One factor weighing in favor of interpreting section 30235's “existing” narrowly is section 30007.5 of the Coastal Act. This section sets forth the Coastal Act's stance regarding resolution of policy conflicts.²⁹ Specifically, it requires that “conflicts be resolved in a manner which on balance is the most protective of significant coastal resources.”³⁰ The policy conflict in this instance is whether “existing” should be interpreted narrowly or broadly within the confines of sections 30235 and 30253. Scholars have argued that resolving this conflict in favor of the narrow interpretation would be most protective of significant coastal resources.³¹ Such an

27. Megan M. Herzog & Sean B. Hecht, *Combatting Sea Level Rise in Southern California: How Local Governments can Seize Adaptation Opportunities While Minimizing Legal Risk*, 19 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 463, 494 (2013).

28. See *supra* note 17.

29. CAL. PUB. RES. CODE § 30007.5 (West 2016).

30. *Id.*

31. Cardiff, *supra* note 10, at 269 (“The only way to bring [sections 30235 and 30253] out of conflict is to interpret ‘existing structures’ as those structures already existing at the time of the Coastal Act.”); see also Caldwell & Segall, *supra* note 14, at 561-62

interpretation would also follow in line with other states that have faced similar issues.³²

There would likely be drawbacks to the Commission reinterpreting “existing” in the Coastal Act *sua sponte*. First, this reinterpretation would likely be challenged in court. The court would undoubtedly afford some degree of deference to the Commission’s interpretation of the statute. But the court could find that the Commission’s reinterpretation is a “vacillating” position, and therefore not entitled to deference.³³ Regardless, if challenged, the court will interpret the statute as a question of law subject to its own independent judgment review.³⁴ The court will ultimately determine and effectuate the Legislature’s intent of “existing” in the statute.³⁵ Accordingly, this strategy is risky, but at worst, the court will determine that “existing” should be interpreted in the broader sense, which is the status quo. Likewise, even if the Commission’s narrow reinterpretation were upheld by the courts, the problem regarding “existing” will likely continue, particularly in cases where a structure existed when the Coastal Act went into effect but which has since been upgraded, remodeled or rebuilt.³⁶

2. *Legislation and rulemaking.*

The Legislature could solve the problem by amending the Coastal Act to define “existing.” For example, “existing” could be defined as prior to the date the Coastal Act went into effect. Even declaring some later date as the cutoff for “existing” under the Act

(“Section 30007.5 can be read as embodying the underlying public trust doctrine that must guide all coastal decisions: it restates in statutory terms the basic state obligation to safeguard the public’s resources against, among other threats, erosion by private parties.”).

32. Cardiff, *supra* note 10, at 270-72 (discussing North Carolina and Oregon).

33. Yamaha Corp. of Am. v. State Bd. of Equalization, 960 P.2d 1031, 1037 (Cal. 1998) (citation omitted) (“[a] vacillating position . . . is entitled to no deference.”).

34. Cal. Bldg. Indus. Ass’n v. Bay Area Air Quality Mgmt. Dist., 362 P.3d 792, 797 (Cal. 2015) (“[W]e independently construe the statute.”).

35. Wilcox v. Birtwhistle, 987 P.2d 727, 729 (Cal. 1999) (citation omitted) (“When construing a statute, we must ascertain the intent of the Legislature so as to effectuate the purpose of the law.”).

36. Cardiff, *supra* note 10, at 278 (“[T]he controversy over ‘existing’ will continue. For example, does the small beach house that existed at the time of the Coastal Act deserve protection as an ‘existing structure’ after it has been ‘remodeled’ into a mansion? How much of the original structure must be remodeled before a structure is considered ‘new development’?”)

would provide more certainty for landowners and the Commission than the dubious “existing” currently allows. Defining “existing” would likewise provide more protection than leaving it undefined.³⁷

There are drawbacks to pursuing a legislative fix to this issue. First, legislation amending the Coastal Act to be less protective of homes on the coast is not likely to be popular.³⁸ Because of this kneejerk unpopularity, it would likewise be challenging to find a sponsor for legislation amending the Coastal Act in this way.³⁹ Furthermore, this legislation would likely be targeted by special interests representing developers and private property advocates.⁴⁰ Finally, all of the recent attempts to amend the Coastal Act in this way have failed to become law.⁴¹ Nonetheless, coastal advocates still view this as a worthwhile solution to this persisting unintended consequence.⁴²

Instead of deferring to the Legislature to define “existing” in the Coastal Act, the Commission could instead adopt rulemaking defining that term.⁴³ In addition to perhaps being more politically palatable than legislation, this option is also potentially less risky than simply deciding to interpret “existing” in a way that runs counter to the Commission’s past interpretation. For instance, rulemaking would proceed pursuant to notice and comment under California’s Administrative Procedure Act.⁴⁴ This would provide this policy adjustment with transparency and due process for affected parties. Of course, this process has drawbacks of its own. For instance, this process could be lengthy and fraught with the same lobbying and special interests that might mar the legislative process.

37. Lester, *supra* note 23, at 160.

38. Cardiff, *supra* note 10, at 277 (“The coastal landowners’ mantra, ‘save our homes,’ clearly carries huge emotional and political appeal.”).

39. *Id.* at 275-77 (explaining the various challenges to amending the Coastal Act).

40. One such advocate is the Pacific Legal Foundation.

41. Tricia Lee, *She Sells Seawalls Down by the Seashore*, 5 SAN DIEGO J. CLIMATE & ENERGY L. 209, 219-21 (2014) (discussing various recent legislative fixes that have failed).

42. *Id.* at 229.

43. Rulemaking is a formalized version of the solution explained above, wherein the CCC changes its interpretation of “existing” under the Act. *See* Caldwell & Segall, *supra* note 14, at 560 (“The Coastal Commission has not issued a formal rulemaking based on section 30235 but has instead acted on the assumption that the section does grant all threatened coastal structures a qualified privilege to armor—as if, in other words, ‘existing’ structures means structures standing at the time of application.”).

44. CAL. GOV’T CODE § 11340 *et seq.* (West 2016).

3. *Local Coastal Program updates.*

Another possibility for addressing this unintended consequence of the Coastal Act is through local coastal program (LCP) updates. The Coastal Commission has pointed out that local governments can effectively render this issue moot by setting their own dates for “existing” under section 30235.⁴⁵ Marin County, for example, specifies that existing structures are those “constructed before adoption of the LCP.”⁴⁶ Other local governments could amend their LCPs similarly. This option would provide clarity regarding what “existing” means in that particular city or county. A drawback to this approach would be that there could be many different definitions of “existing” up and down California’s coastline. Likewise, it is unlikely that all the local governments on the coast would pursue this strategy, thus creating a further policy inconsistency regarding “existing” structures on the coast.

4. *Litigation.*

Finally, activist litigation could be initiated against the Commission to address this issue. To date, the issue has never been judicially resolved. Accordingly, litigants could sue to attain a judicial determination of the meaning of “existing” in section 30235. This strategy would be preferable if a suitable case arose with a favorable fact pattern. That fact pattern would include: “a primary structure built after 1976, clearly in danger from erosion; no previous shoreline armoring; a design that adequately mitigates adverse impacts; and approval from the Coastal Commission.”⁴⁷ The primary drawback to this option would be the time lost waiting for an optimal test case to crop up. Likewise, this option could be very costly, especially since it could possibly be appealed

45. CAL. COASTAL COMM’N, *supra* note 17, at 166 (“LCP updates are an opportunity to clarify how the distinction between existing and new development will be applied in specific areas . . .”).

46. MARIN CTY., LOCAL COASTAL PROGRAM UNIT 1—AMENDED 42 (2010), http://www.marincounty.org/~media/files/departments/cd/planning/local-coastal/lcp_lup_unit_i_amended_bookmarks.pdf (“The following policy from Section 30235 of the Coastal Act is incorporated into the County LCP: Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline process shall be permitted when required to serve coastal-dependent uses or to protect existing structures (constructed before adoption of the LCP), or public beaches in danger from erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply.”).

47. Cardiff, *supra* note 10, at 279-80.

all the way to the California Supreme Court.

III. COASTAL DEVELOPMENT PERMIT EXEMPTIONS

Other unintended consequences of the Coastal Act stem from two of section 30610's coastal development permit exemptions. For instance, section 30610(d)'s repair and maintenance exception allows certain rebuilding and redevelopment to proceed without the otherwise-required coastal development permits for these activities. Likewise, section 30610(g) permits the replacement of any structure destroyed by a disaster without a coastal development permit, provided certain conditions are met. These conditions include that the structure be rebuilt in the same location it existed prior to being destroyed, and that the rebuilt structure not be substantially larger than the original.

Rising seas and eroding beaches highlight the unintended consequences of these exceptions. Particularly, these exceptions incentivize rebuilding and renovating in precarious locations despite the possible alternatives of rebuilding upland of the destroyed structure, or rebuilding in more resilient ways. Instead, coastal dwellers are incentivized to rebuild in the exact same spot as their destroyed home under these policies, and to continuously repair and maintain an existing structure, rather than rebuilding upland, rebuilding higher, or migrating inland.

A. *Intended Application*

Typically, coastal landowners must comply with certain permitting requirements to perform any development in the coastal zone.⁴⁸ "Development" is broadly defined in the Act to include "construction, reconstruction, demolition, or alteration of the size of any structure."⁴⁹ So, for example, a homeowner must obtain a coastal development permit (CDP) in order to build a home or a seawall in the coastal zone, but also to renovate.⁵⁰ The Coastal Act provides certain exemptions from these requirements.⁵¹ Section 30610(d) exempts the repair and

48. CAL. PUB. RES. CODE § 30600 (West 2016).

49. CAL. PUB. RES. CODE § 30106 (West 2016).

50. CAL. PUB. RES. CODE § 30103 (West 2016) (Coastal zone; map; purpose).

51. See generally Corey E. Taylor, *Dolan v. California Coastal Commission? An Analysis of the Effects of Dolan v. City of Tigard on One of California's Largest Natural Resource Protectors*, 2 HASTINGS W.-NW. J. ENVT'L. L. & POL'Y 255, 267 (1995) ("Certain developments are exempted from designation as 'new developments' and therefore do not require

maintenance of structures from coastal development permit requirements, while section 30610(g) allows the replacement of structures destroyed by a disaster.

These sections were intended to be common sense exemptions to the Coastal Act's coastal development permitting requirements. These exemptions were presumably based on fairness and intended to protect people—and their investments—from rare storm events and from other unforeseeable disasters. Furthermore, the maintenance and repair exception was intended to allow maintenance and repair of existing structures under the plain meanings of these terms because they were unlikely to cause environmental damage to the coast. In fact, subsequent regulations set forth certain “extraordinary methods of repair and maintenance” that nonetheless require CDPs because of their risky nature.⁵²

The CDP exception allowing rebuilding in the same place was probably similarly based on fairness and common sense. Good public policy would be unlikely to punish a homeowner whose house has been destroyed by a disaster by making the homeowner go through the CDP process to rebuild.⁵³ Regardless, these disasters were probably also not intended to facilitate rebuilding repetitive loss structures.⁵⁴ Instead, policymakers probably

permits.”).

52. CAL. CODE REGS. tit. 14, § 13252(a) (2016) (“For purposes of Public Resources Code Section 30610(d), the following extraordinary methods of repair and maintenance shall require a coastal development permit because they involve a risk of substantial adverse environmental impact . . .”).

53. For an example of public blowback for what were perceived as onerous conditions required for rebuilding of homes destroyed by disaster, see Jared Orsi, *Restoring the Common to the Goose: Citizen Activism and the Protection of the California Coastline*, 78 S. CAL. Q. 257, 274 (1996) (“Perhaps the biggest public relations disaster, however, came later that year, after the Malibu-Agura fire destroyed several ocean-front homes. In the aftermath of the blaze, commission staffers announced that fire victims might be required to grant public beach access as a condition for receiving permits to rebuild their homes.”).

54. As defined by Congress:

[T]he term “repetitive loss structure” means a structure covered by a contract for flood insurance that—

(A) has incurred flood-related damage on 2 occasions, in which the cost of repair, on the average, equaled or exceeded 25 percent of the value of the structure at the time of each such flood event; and

(B) at the time of the second incidence of flood-related damage, the contract for flood insurance contains increased cost of compliance coverage.

42 U.S.C. § 4121(a)(7) (West 2016).

expected rebuilding only in the wake of hundred-year storms or other similarly rare disasters. Accordingly, rising seas and increasingly devastating storms have probably caused this exception to be utilized more than the Coastal Act's framers would have predicted. Furthermore, as pointed out in the previous section, these exceptions were probably only supposed to be in place for structures existing when the Coastal Act went into effect.⁵⁵

B. *In Practice*

Regardless of the presumably common-sense, fairness-based intentions behind these exceptions, both have been stretched beyond their intended applications. Specifically, these exceptions work to promote repeated maintenance and repair of imperiled structures in the coastal zone, and incentivize rebuilding houses and structures in vulnerable locations. Commentators have pointed out that the "repair and maintenance" exemption has provided a loophole to allow rebuilding protective structures even when they have been found to run counter to other provisions of the Act.⁵⁶

Furthermore, the repair and maintenance loophole has been used to justify projects that do more than just repair or maintain protective structures.⁵⁷ For instance, the "repair and maintenance" exception has been used to replace seventy-five percent of a wharf.⁵⁸ In cases like these, the repair and maintenance exception has essentially been hijacked to achieve unpermitted

55. See *supra* Part II.

56. Jenni Khuu, *A Loophole to Repair: "Repair and Maintenance" as a Way Around the Coastal Act's Prohibition Against Seawalls*, 58 HASTINGS L.J. 1297, 1300 (2007) ("The Commission found the Proposal inconsistent with both sections, but nevertheless approved it.").

57. *Id.* at 1316 ("[T]he Commission broadly interprets the words [repair and maintenance] to include not just its previous state, but also an improved and expanded one.").

58. *Union Oil Co. v. S. Coast Reg'l Comm'n*, 154 Cal. Rptr. 550, 552 (Cal. Ct. App. 1979) ("Although the reconstruction will replace seventy-five percent of existing wharf structure, it would appear that the new facility including those portions retained from the original facilities will be functionally the same as the original." Thus, by its own admission the proposed work would "not result in an addition to, or enlargement or expansion of, the object of such repair . . ." Under the circumstances the Commission's ruling was "clearly erroneous" and it was not error to conclude that no Commission permit was required for this activity.").

redevelopment.⁵⁹ Unpermitted redevelopment in increasingly hazardous areas runs counter to both the Coastal Act's general provisions and emerging science on coastal protection and recent guidance on the issue from the Coastal Commission.⁶⁰

Section 30610(g) incentivizes rebuilding in dangerous locations over promoting retreat or otherwise more resilient options.⁶¹ That section achieves this dubious result by allowing rebuilding without a CDP only if certain requirements are met, including rebuilding in the same spot and rebuilding to a similarly sized building footprint. These exceptions have operated to incentivize rebuilding in the same area rather than in more resilient upland locations. This incentivized rebuilding along the coast also contributes to all of the recognized drawbacks to building hard structures on the coastline, including increasing erosion or beaches etc.

Furthermore, the lax redevelopment policies of coastal towns and counties have compounded this problem. As former Executive Director of the Commission Charles Lester explained, "aging structures do not really die so much as metamorphose into 'new and improved' structures in the same place."⁶² Another problem is that this section gives landowners license to rebuild in what may be public trust lands. As trustees of public lands, the state has a range of duties, including protecting these lands for the public at large. Public trust lands include beaches. Rising seas can make previously private lands into public beaches. When this happens, the state has the duty to manage these public beaches in the public's best interest. Allowing the rebuilding of structures on public lands abdicates this duty.

59. While *Union Oil* appears to undermine the Coastal Act, courts have been reluctant to allow any new development under section 30610. See *Whaler's Vill. Club v. Cal. Coastal Comm'n*, 173 Cal. App. 3d 240, 253 (Cal. Ct. App. 1985) (explaining that the maintenance and repair exception does not apply when something is not repaired, and instead new construction is added).

60. See CAL. COASTAL COMM'N, *supra* note 17, at 165.

61. MOLLY MELIUS & MARGARET R. CALDWELL, MANAGING COASTAL ARMORING AND CLIMATE CHANGE ADAPTATION IN THE 21ST CENTURY 27 (2015), <http://law.stanford.edu/wp-content/uploads/2015/07/CalCoastArmor-FULL-REPORT-6.17.15.pdf> ("Perversely, if the property owner attempts to site the replacement structure further back from an eroding bluff or higher above the flood elevation than the destroyed structure, the replacement will not be exempt and the owner will need a coastal development permit.").

62. Lester, *supra* note 23, at 148.

C. Solutions

1. *Legislative fixes.*

As seas rise and storms strengthen, section 30610's exceptions will likely be used to permit the rebuilding of more structures. Accordingly, policymakers should consider what options are available to disincentivize rebuilding in vulnerable areas. One option is to close the loophole by amending section 30610. This option is likely to be hampered by the same pitfalls discussed above.⁶³ Regardless, this option might be more likely for these sections of the Coastal Act than for those previously discussed.⁶⁴ Accordingly, it is an option worth considering.

One way to amend the maintenance and repair exception would be to put a monetary cap on the cost of these activities on properties that would otherwise require CDPs. Coincidentally, the Coastal Act's predecessor, the California Coastal Zone Conservation Act of 1972, included caps on repair and maintenance costs.⁶⁵ Similarly, the rebuilding exemption can be amended in two key ways. First, it could be amended to allow rebuilding without a CDP in additional circumstances—for example, when the replacement structure is either raised or set back some distance from the beach. Second, the exemption could include a financial incentive to employ one of these alternatives instead of rebuilding in the same exact spot. These amendments would facilitate retreat, and allow managed retreat and accommodation strategies to proceed where they are implemented.

2. *Reduce financial incentives to rebuilding in hazardous areas.*

In addition to the need for a legislative solution, the existing financial incentives to rebuilding in hazardous areas must be removed. CDP exemptions are one such undesirable financial incentive: as they are currently structured, the path of least resistance is to rebuild in the wake of a disaster. Similarly, the exemptions incentivize renovation under the maintenance and

63. See *supra* Part II.

64. Presumably, a legislative fix for these exemptions would apply to fewer properties. Furthermore, it would not affect the potential ability to protect one's home—a need which will likely increase with rising seas.

65. Neil E. Franklin, *Saving the Coast: The California Coastal Zone Conservation Act of 1972*, 4 GOLDEN GATE L. REV. 307, 320-21 (1974).

repair exception over the option to demolish a structure and move it upland, which requires a CDP. Accordingly, these incentives rewarding poor behavior should be replaced with incentives that reward smarter decision making, such as retreating instead of rebuilding. Other financial drivers and incentives should also be adjusted, such as current insurance policies that do not reflect the actual risks of building and rebuilding in hazardous zones.⁶⁶ Finally, increased mitigation should be required for rebuilding or renovating homes that cause damage to the coastline.

3. *Local Coastal Program updates.*

Any comprehensive solution to this problem also needs to confront the local government rebuilding policies that allow existing structures to rebuild in place. At the local level, changes should be made to prompt threatened landowners to retreat rather than hunker down and armor. Amendments to local coastal programs can address these unintended consequences head on by imposing additional requirements for rebuilding or improving structures.⁶⁷ Additional requirements might include requiring moveable structures, requiring the removal of structures after their economic lives have played out.⁶⁸ Additionally, overlay zones could be implemented to impose further restrictions on building in hazardous areas.⁶⁹ These zones would probably include grandfathering provisions, but nonconforming uses could be phased out over time.⁷⁰ Finally, local governments should be innovative and willing to use their broad swath of police powers to

66. Specifically, the National Flood Insurance Policy is ripe for amending. *See generally* Sean B. Hecht, *Insurance*, in *THE LAW OF ADAPTATION TO CLIMATE CHANGE* 511 (Michael B. Gerrard & Katrina Fischer Kuh eds., 2012).

67. LCPs must conform with the Coastal Act, but they can be more restrictive than the Act. *See Yost v. Thomas*, 685 P.2d 1152, 1159 (Cal. Ct. App. 1984) (“Under the act, local governments, therefore, have discretion to zone one piece of land to fit any of the acceptable uses under the policies of the act, but they also have the discretion to be more restrictive than the act. The Coastal Act sets minimum standards and policies with which local governments within the coastal zone must comply; it does not mandate the action to be taken by a local government in implementing local land use controls.”).

68. Lester, *supra* note 23, at 160.

69. CECILY TALBERT BARCLAY & MATTHEW S. GRAY, *CALIFORNIA LAND USE & PLANNING LAW* 587 (2016) (explaining that an overlay zone is an additional zoning classification that can be added to any other existing zoning restrictions for the overlay area.).

70. *Id.* at 60 (citations omitted) (“[A]s a general rule, a new zoning ordinance may not operate constitutionally to compel immediate discontinuance of an otherwise lawfully established use or business.”).

pioneer solutions to these increasingly pressing problems.

IV. EMERGENCY PERMITTING ISSUED TO PROTECT AGAINST NON-EMERGENCIES

For coastal management decisions that are inherently short term and require rapid response, the Coastal Act provides for the issuance of Emergency Coastal Development Permits (Emergency Permits, or EPs).⁷¹ By including emergency permitting language in the Act, its framers were clearly mindful of situations where these permits would be necessary.⁷² However, policymakers likely could not have foreseen the extent to which these permits have been used for non-emergencies or the difficulty that would sometimes arise in removing the permitted emergency structures.⁷³

A. *Intended Application*

The Coastal Act includes provisions for long-term planning through LCPs as well as mid-term planning through CDPs. Both LCPs and CDPs address coastal development decisions within a timeline that provides for structured oversight and review. For urgent, temporary issues that involve impending, unforeseen events, the Coastal Act provides an exemption to standard permitting processes through an emergency permitting application process. This approach is meant to provide an “immediate action . . . to protect life or public property from imminent danger,” or, more specifically, protection from “natural disaster, serious accident, or . . . other cases of an emergency.”⁷⁴

By providing an expedited path for development of a protective structure, the critical leverage point of emergency permitting is the definition of what constitutes an “emergency.” As defined in the California Code of Regulations, “emergency” refers to: “a sudden unexpected occurrence demanding immediate action to prevent or mitigate loss or damage to life, health,

71. Emergency Coastal Development Permits are also referred to as “Emergency Waivers.” CAL. PUB. RES. CODE § 30611 (West 2016).

72. For example, periods of extreme storm events such as El Niño winters bring about an increase in new or expanded permit activity. Lester, *supra* note 23, at 150.

73. The California Coastal Zone Conservation Act of 1972 (“Proposition 20”), the precursor to the California Coastal Act, included limitations on dollar amounts used towards emergency repairs or improvements as well as other developments. *See supra* note 13.

74. *Id.*

property, or essential public services.”⁷⁵ After the emergency has subsided, the protective structure should be removed unless the applicant reapplies for an additional CDP.⁷⁶ However, this reapplication does not always occur and the Commission has not always had the resources to enforce removal of the emergency structures.⁷⁷ Leaving a temporary “emergency” structure on the coastline clearly undermines the aims of Coastal Act.⁷⁸ “Emergency” is typically defined in LCPs and additional terms for the granting of these temporary permits are also often found in LCPs.⁷⁹ Through this approach, the Coastal Act outlines the steps for permitting an emergency structure that will provide *immediate, temporary* defense of coastal property.

Sound public policy should promote emergency protection only in the event of actual emergencies. This approach to protecting properties from damaging events and the legal implementation mechanisms for permitting emergency structures hinges on the foreseeability of an emergency, the near-term urgency of an event, and the temporary nature of the protective

75. CAL. CODE REGS. tit. 14, § 13009. *See also* CAL. COASTAL COMM’N, QUESTIONS AND ANSWERS ON EL NIÑO 5, https://www.coastal.ca.gov/climate/extreme-weather/el-nino/Questions_and_Answers_on_EL_Nino_2015_Final.pdf (“[A] perceived threat from potentially extraordinary storms is not generally considered an emergency under the Coastal Act.”).

76. For example, a Coastal Commission staff report on removal of existing armoring notes a twenty-year design life for the armored structure as a special condition. *See* CAL. COASTAL COMM’N, F12B, STAFF REPORT: CDP APPLICATION HEARING 24 (2013), <https://documents.coastal.ca.gov/reports/2013/6/F12b-6-2013.pdf>; *see also* CAL. COASTAL COMM’N, *supra* note 75, at 5 (“In all cases, emergency coastal permits only authorize development temporarily, and anything that is intended to be kept for the longer term requires a follow up regular coastal permit.”).

77. The emergency structure noted above was never permanently authorized. CAL. COASTAL COMM’N, *supra* note 76, at 17.

78. *See, e.g.*, CAL. PUB. RES. CODE § 30253 (West 2016).

79. Local laws implementing LCPs in Del Mar, Huntington, Manhattan Beach, Redondo Beach, Santa Cruz, and Pacifica all include emergency permitting language. *See* MANHATTAN BEACH, CAL., LOCAL COASTAL IMPLEMENTATION PROGRAM § A.96.190 (1991), <http://www.ci.manhattan-beach.ca.us/city-officials/community-development/planning-zoning/coastal-permit-procedures#a19>; PACIFICA, CAL., CODE § 9-4.4307 (1994), https://www.municode.com/library/ca/pacifica/codes/code_of_ordinances?nodeId=TIT9PLZO_CH4ZO_ART43COZOCODI_S9-4.4307EMCODEPE; HUNTINGTON BEACH, CAL., ZONING CODE § 245.07 (2001), http://www.huntingtonbeachca.gov/files/users/city_clerk/chp245.pdf; DEL MAR, CAL., CODE § 30.75.220 (2003), <http://www.delmar.ca.us/DocumentCenter/Home/View/500>; REDONDO BEACH, CAL., CODE § 10-5.2228 (2013), http://www.qcode.us/codes/redondobeach/view.php?topic=10-5-10-10_5_2228; SANTA CRUZ, CAL., CODE § 13.20.090 (2016), <http://www.codepublishing.com/CA/SantaCruzCounty/html/SantaCruzCounty13/SantaCruzCounty1320.html#13.20.090>.

structure.

B. *In Practice*

While the inclusion of a pathway for emergency protection in the Coastal Act is premised on sound public policy and protection of people and property, there are notable examples when EPs were not used as intended under the Act. The most prominent examples revolve around decisions to grant or implement an emergency structure and delays or outright failures to remove protective structures.⁸⁰

The Coastal Act reserves EPs for “immediate action by a person or public agency . . . required to protect life and public property from *imminent* danger”⁸¹ In many cases, after the imminent danger has dissipated, removal of these structures can be very difficult—practically and politically. For example, in Del Mar, California, a private coastal homeowner installed a shoreline protection device and received an emergency permit to do so. Over two years of iterative discussions with the Coastal Commission, the decision to remove the structure made its way to the California Court of Appeals. The court agreed with the Commission that the homeowners have no “vested right” to keep or maintain protective structures beyond 150 days.⁸² Yet recent visits to properties along the case site in Del Mar indicate that many built protective structures remain.

A similar event regarding the approval of an emergency permit that led to complications in following years is the Cambria Community Services District’s (CCSD) approach to addressing water supply issues.⁸³ San Luis Obispo County approved an Emergency Permit in May of 2014 to allow the CCSD to construct and operate a “Cambria Emergency Water Supply Project” during and after a declared “Water Supply Emergency.” The “emergency” in this case was due to the historic drought declarations. This approval included a standard requirement that

80. “Hard Armoring” protective structures include “engineered structures such as seawalls, revetments, and bulkheads that defend against coastal hazards like wave impacts, erosion, and flooding.” See CAL. COASTAL COMM’N, *supra* note 17, at 123.

81. CAL. PUB. RES. CODE § 30611 (West 2016) (emphasis added).

82. *Barrie v. Cal. Coastal Comm’n*, 241 Cal. Rptr. 477, 481-82 (Cal. Ct. App. 1987).

83. See Letter from John Ainsworth, Acting Exec. Dir., California Coastal Commission, to James Bergman, Director, San Luis Obispo Department of Planning and Building (May 16, 2016), <https://www.scribd.com/doc/313510461/Letter-to-SLO-Cnty-Re-ECDP-May-2016>.

the CCSD reapply for a regular CDP after 30 days. Over the next couple of years, while the CCSD applied for and received extensions, the “emergency” project shifted to a water supply source that looked more permanent, and less like a temporary stand-in for emergency needs.⁸⁴ This example illustrates the potential for local planning groups to request and implement strategies under an extremely broad definition of “emergency” while then maintaining the strategy when the “emergency” has passed.

For local, city, or county planning agency staff, the decision to support an emergency permit often depends on the detailed language of their jurisdiction’s LCP. In jurisdictions that do not include detailed language outlining specific requirements under which circumstances emergency structures should be allowed, those planners find themselves making crucial, time-sensitive, difficult decisions right before impending emergencies. These high-pressure situations can lead to selecting the easiest or least expensive option—which in some cases means adding armored structures to the coastline.⁸⁵ Furthermore, shorter timelines provide limited opportunities for investigating alternative strategies that could also prevent damages to people or coastal property. Additionally, a ninety-day timeline requirement for requesting a CDP which would allow the emergency protective structure to stay is often not enough time for sufficient environmental and geologic review.

The Commission still routinely receives requests to make the temporary permanent. Once these emergency structures are in place, it is often difficult to remove them from a physical, financial, or political standpoint. Physically, these structures are in locations inherently exposed to high wave action and can often increase erosion to neighboring properties. Financially, the placement and removal can cost several hundred thousand dollars, depending on the size and style. Politically, the removal of structures intended to protect people and property from dangerous high-energy storm events can be extremely unpalatable. Additionally, most of these initial removal decisions are being made at the local level, which makes their implementation by capacity- and resource-limited local agencies more difficult.

84. *See id.*

85. Lester, *supra* note 23, at 152.

Some coastal property owners who wish to maintain their protective structures have taken steps to circumvent the requirement to remove the structure. For instance, groups of coastal property owners have coordinated to form a “Geologic Hazard Abatement District” (GHAD), which decreases the requirements to maintain a structure.⁸⁶ Specifically, environmental monitoring compliance requirements from the California Environmental Quality Act (CEQA) are not necessary for GHAD projects as emergency projects are exempt from CEQA review.⁸⁷ Broad Beach in the city of Malibu is a prime example of this approach.⁸⁸ Property owners along Broad Beach requested to keep their emergency structure, arguing that it is an “improvement” and therefore does not require CEQA review. By avoiding environmental review, the property owners also avoid investigating possible alternatives to hard armoring—specifically, alternatives that may have fewer environmental drawbacks. While the unification of a neighborhood into a GHAD decreases the chances for a “patchwork” of protective structures, it also increases the footprint of any potential community protection structure.

Broad Beach is an example of a local community coming together to meet its collective needs. Yet this approach involves a serious drawback: decreased environmental review. Similarly, EPs routinely stretch the definition of foreseeable events to get approval for emergency protective structures that otherwise would not be permitted. These trends are troubling, particularly in an era of climate impact modeling, eroding beaches, and rising seas. So too is the trend of emergency structures increasingly becoming permanent fixtures on the coastline, intensifying erosion, and otherwise disrupting the geologic processes along California’s

86. A Geologic Hazard Abatement District is an independent, state-level public agency that oversees geologic hazard prevention, mitigation, abatement and control. *See* CAL. ASS’N OF GEOLOGIC HAZARD ABATEMENT DISTS., WHAT IS A GHAD?, http://ghad.hpsdev.com/index.php?option=com_content&view=article&id=112&Itemid=717. GHADs can be created through formal resolution by a local legislative body or through a landowner petition submitted to a clerk of a local agency. *See* CAL. ASS’N OF GEOLOGIC HAZARD ABATEMENT DISTS., GENERAL OUTLINE OF GHAD FORMATION PROCESS (2011), <http://ghad.hpsdev.com/iframe/General%20Outline%20of%20GHAD%20Formation%20Process.pdf>.

87. CAL. PUB. RES. CODE § 21080(b)(4).

88. Broad Beach in Malibu is one example of over thirty-five GHADs throughout California. Most GHADs are in the San Francisco Bay Area, Monterey Bay Area, and in parts of southern California. *See* CAL. ASS’N OF GEOLOGIC HAZARD ABATEMENT DISTS., CALIFORNIA GHADS, <http://ghad.hpsdev.com/iframe/California-GHADs-Map.pdf>.

beaches.

Emergency permitting may be more applicable and proper in coastal settings that involve high-value, critical coastal dependent structures.⁸⁹ Such structures include municipal infrastructure, crucial transportation corridors, and other structures dependent on proximity to the ocean. Another key area for emergency permits includes high value private property that is in immediate danger. These structures are most often in vulnerable flood zone areas and are most likely to pursue protective armoring. Regardless of the type of structure, all major interests for coastal development or natural resource conservation would benefit from a clear distinction on the definition of what constitutes an “unforeseen emergency” in an era of increasingly damaging episodic events.

C. *Solutions*

1. *Update Local Coastal Programs.*

As with determining a clear definition of “existing” in the Act and clarifying the exemptions under CDPs, the update process for LCPs can be a straightforward path to restrict the use of EPs for only urgent, unforeseen emergencies. The inherent “local” aspect of LCPs ensures that updates can account for impacts to important jurisdictions, such as Marine Protected Areas or National Marine Sanctuaries, as well as vulnerable locations such as environmentally sensitive habitat areas or critical access points. In addition, locally relevant analyses such as regional sediment supply and erosion rate studies from the proximate littoral cell can be helpful in determining how “unforeseen” these emergencies truly are.⁹⁰ With increasingly accurate projections of current and future coastal hazards, coastal property owners and coastal managers have more information available to anticipate potentially damaging events. Planning processes that include projections for impending hazards will be less likely to necessitate emergency permitting requests.

LCP modifications to address emergency permitting concerns can take several forms. One prevailing policy concern is to ensure

89. “Coastal-dependent development or use” is any development or use that requires a site on, or adjacent to, the sea to be able to function at all. CAL. PUB. RES. CODE § 30101 (West 2016).

90. Note the extensive Regional Sediment Plans recently completed or underway throughout California. CAL. COASTAL SEDIMENT MGMT. WORKGROUP, COASTAL REGIONAL SEDIMENT MANAGEMENT PLANS, <http://www.dbw.ca.gov/csmw/crsmp.aspx> (last visited Oct. 31, 2016).

that property owners that develop in high hazard areas assume current and future risks. An updated LCP could require these assurances be included as terms in the EP itself. Some local governments already exceed the strictures of the Act by including language in their LCP to better anticipate the “unexpected.”⁹¹ In addition, as noted in the Guidance, local governments can encourage or require property owners to save funds for modification, relocation, or removal of threatened property.⁹² In the same way that hazard overlay zones can be a means to restrict CDP requirements, these zones can also identify locations where additional requirements should be required for EPs. Furthermore, maintaining an online database—even at a local level—of CDP and EP applications can provide an effective means to better enforce removal of emergency structures.

2. *Improve removal process.*

In the event that an emergency structure is approved and built, local jurisdictions could improve the requirements for removing such structures in more enforceable ways. The removal process can proceed in a number of ways. For example, before an EP application is approved, the local jurisdiction could ensure that the “easiest to remove” structure is used during emergency conditions.⁹³ This requirement would improve the likelihood that natural alternatives to built infrastructure—such as beach nourishment, dune restoration, and wetland restoration—are strongly considered for their protective services. Likewise, in the event that armoring structures must be permitted, they should only allow easier to remove techniques such as sandbag walls or “rip-rap”—loose boulder rock barriers.⁹⁴

In addition to ensuring that easily removable structures are prioritized, the Commission can also more stringently enforce the removal timelines of these structures through appellate decisions. The local jurisdiction can also require that applicants who have received an EP remove the temporary, emergency structure before

91. The City of Santa Cruz includes LCP language requiring a comprehensive shoreline management plan that includes best available science regarding coastal hazards. Lester, *supra* note 23, at 151.

92. CAL. COASTAL COMM’N, *supra* note 17, at 132.

93. See CAL. COASTAL COMM’N, *supra* note 75, at 5 (“[E]asily removable sand bags might be more appropriate in an emergency context than would be a concrete wall.”).

94. See Herzog & Hecht, *supra* note 27, at 472 n.40.

considering a longer-term structure. This improvement can be initiated in a straightforward fashion using rigorous notifications throughout the EP approval process.⁹⁵

V. CONCLUSION

The unintended consequences identified in this article result from misapplication of the Act and exploitation of its lax policies. They have been exacerbated by unforeseen or unexpected changes to the coastline. In the wake of rising seas and increasingly powerful and destructive storms, the time is ripe to address these shortcomings in the Act. Several permissible pathways are available for addressing these problems, from changes to the Act itself to updates to local coastal programs. For instance, the Act could be amended to identify what “existing” means. Likewise, the loopholes that have been identified in the Act could be closed through the legislative process. But because past attempts to amend the Act have failed, Commission regulations or local government updates to local coastal programs might be more politically palatable and viable and might represent better long-term policy remedies. Regardless, one thing is clear: now is the time to act. What currently may seem like small weaknesses in the Act will become increasingly critical with impending rising sea levels.

95. An additional component that may dissuade coastal property owners from applying to keep emergency structures is for the Commission to impose mitigation fees that account for the adverse impact to coastal treasures beyond recreation, such as habitat provision and erosion protection. *See* *Ocean Harbor House Homeowners Ass’n v. Cal. Coastal Comm’n*, 77 Cal. Rptr. 3d 432, 436 (Cal. Ct. App. 2008) (describing a proposed mitigation fee).