

CALIFORNIA COASTAL COMMISSION

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MEMORANDUM

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DATE: April 23, 1997

TO: California Coastal Commissioners and Interested Persons

FROM: Ralph Faust, Chief Counsel
Dorothy Dickey, Deputy Chief Counsel *DDickey*
~~John Bowers, Staff Counsel~~

SUBJECT: Commencement of Rulemaking Process for Chapter 5, Subchapters 8 and 9 of the Commission's Regulations

Staff requests Commission authorization to commence a rulemaking proceeding to adopt and amend regulations to establish and modify standards for the administration of the Commission's enforcement program. A copy of the proposed new and modified regulations is attached as Attachments A and B. (PLEASE NOTE: In Attachments A and B, proposed additions are shown by underline, and proposed deletions are shown by strikethrough.)

COMMISSION CEASE AND DESIST REGULATIONS:

The proposed amendments to the Commission's existing cease and desist order regulations (Subchapter 8) are for the following purposes:

- (1) to expand the methods by which a notice of intent to commence a cease and desist order proceeding before the Commission may be served (section 13181(a));
- (2) to correct a typographical error (section 13184);
- (3) to bring the regulations into conformity with changes to Public Resources Code § 30810 enacted by the legislature in 1993 (SB 608; sections 13187(a)(2) and (a)(3)(B)); and
- (4) to establish a clear standard for when a person who is subject to a cease and desist order may commence a proceeding for the purpose of rescinding or modifying that order (section 13188(b)).

COMMISSION PROPOSED RESTORATION ORDER REGULATIONS:

Proposed new regulations (Subchapter 9, sections 13190-13197) would establish a process for the issuance of restoration orders pursuant to Public Resources Code § 30811. They are patterned closely after the Commission's existing cease and desist order regulations.

PROCEDURE:

Staff will initiate a rulemaking process pursuant to the Administrative Procedure Act (APA) (Govt. Code, § 11340, *et seq.*) to accomplish these regulatory changes and additions. The rulemaking process takes a number of months and involves various procedural steps. These include publication of notice, preparation of various documents required under the APA that must be made available concurrently with the notice, a public comment period of at least 45 days, an additional notice and comment period if the Commission makes substantive changes from those which were originally proposed, formal adoption, preparation of documents required under the APA after adoption of regulations, review by the Office of Administrative Law (OAL), and, if approved by OAL, filing of the amended regulations with the Secretary of State. Staff recommends that the Commission authorize that this process begin.

STAFF RECOMMENDATION:

The staff recommends that the Commission adopt the following resolution:

Resolution:

The Commission hereby directs the staff to commence a process to 1) amend Chapter 5, Subchapter 8, and 2) adopt a new Chapter 5, Subchapter 9, of the California Coastal Commission's regulations.

Attachment

restord.doc

ATTACHMENT A

CALIFORNIA CODE OF REGULATIONS
TITLE 14. NATURAL RESOURCES
DIVISION 5.5. CALIFORNIA COASTAL COMMISSION
CHAPTER 5. COASTAL DEVELOPMENT PERMITS ISSUED BY COMMISSION
SUBCHAPTER 8. PROCEDURES FOR THE ISSUANCE OF COMMISSION CEASE
AND DESIST ORDERS

§ 13181. Commencement of Cease and Desist Order Proceeding Before the Commission.

(a) If the executive director believes that the results of an enforcement investigation so warrant, he or she shall commence a cease and desist order proceeding before the commission by providing any person whom he or she believes to be engaging in development activity as described in section 30810(a) of the Public Resources Code with notice of his or her intent to do so. Such notice of intent shall be given either as a provision of a cease and desist order issued pursuant to section 30809 of the Public Resources Code or by separate written communication delivered either (1) by certified mail, (2) by regular mail receipt of which is confirmed by subsequent oral communication either in person or by telephone, or (3) by hand, and shall include, at minimum, the information specified in sections 13187(a)(4), (5), and (6) together with an explanation of the basis of the executive director's belief that the specified activity meets the criteria of section 30810(a). The notice of intent shall be accompanied by a "statement of defense form" that conforms to the format attached to these regulations as Appendix A. The person(s) to whom such notice is given shall complete and return the statement of defense form to the Commission by the date specified therein, which date shall be no earlier than 20 days from transmittal of the notice of intent.

....

§ 13184. Distribution of Executive Director's Recommendation.

The executive director's recommendation on a proposed cease and desist order shall be distributed to the alleged violator(s) and otherwise to the persons and in the manner provided in section 13059 of these regulations for application summaries.

§ 13187. Contents and Reporting of Cease and Desist Orders.

(a) Cease and desist orders shall be signed by the executive director and shall contain at a minimum the following:

....

- (2) if applicable, a statement that the cease and desist order is being issued ~~in response to a request therefor made by a local government (or, in the case of a cease and desist order issued by the executive director, by a port governing body)~~ pursuant to subsection (a)(1), (2), or (3) of section 30809 or 30810 ~~30809(a)(1) or 30810(a)~~ of the Public Resources Code;

....

- (3) in the case of any order issued by the executive director:

....

~~(B) if applicable, a statement that the cease and desist order is being issued pursuant to section 30809(a)(2) or (3) of the Public Resources Code;~~

~~(B)~~ (C) if applicable, notice of the executive director's intent to commence a proceeding for the issuance of a cease and desist order by the commission relating to the same activity, including notice of the date and place of the public hearing to be held as part of such a proceeding if the executive director has scheduled one;

....

§ 13188. Rescission or Modification of Cease and Desist Orders.

....

(b) The commission, after public hearing, may rescind or modify a cease and desist order that it has issued. A proceeding for such a purpose may be commenced by (1) any person to whom the cease and desist order is directed, (2) the executive director or (3) any two members of the commission. A person described in subdivision (1) of this subsection (b) may commence a proceeding for the purpose of rescinding or modifying a cease and desist order only on the ground that there has been a material change in the facts upon which the order was issued. Upon receipt of a request pursuant to this subsection (b) for rescission or modification of a cease and desist order issued by the Commission, a hearing on the request shall be held at the next regularly scheduled meeting or as soon thereafter as is practicable after notice to all persons subject to the order or whom the executive director otherwise has reason to know would be interested in the matter.

ATTACHMENT B

CALIFORNIA CODE OF REGULATIONS

TITLE 14. NATURAL RESOURCES

DIVISION 5.5. CALIFORNIA COASTAL COMMISSION

CHAPTER 5. COASTAL DEVELOPMENT PERMITS ISSUED BY
COMMISSION

SUBCHAPTER 9. PROCEDURES FOR THE ISSUANCE OF
RESTORATION ORDERS

§ 13190. Definition.

The elements of the term "continuing resource damage," as such term is used in section 30811 of the Public Resources Code, shall have the following meanings:

- (a) "Resource" means any resource which is afforded protection under the policies of Chapter 3 of the Coastal Act, including but not limited to public access, marine and other aquatic resources, environmentally sensitive wildlife habitat, and the visual quality of coastal areas.
- (b) "Damage" means any degradation or other reduction in quality, abundance, or other quantitative or qualitative characteristic of the resource as compared to the condition the resource was in before it was disturbed by unpermitted development.
- (c) "Continuing," when used to describe "resource damage," means such damage which continues to occur as of the date of issuance of the restoration order.

§ 13191. Commencement of Restoration Order Proceeding Before the Commission.

(a) If the executive director believes that the results of an enforcement investigation so warrant, he or she shall commence a restoration order proceeding before the commission by providing any person whom he or she believes to have engaged in development activity as described in section 30811 of the Public Resources Code with notice of his or her intent to do so. Such notice of intent shall be given either as a provision of a staff report prepared pursuant to sections 13057 and/or 13075 of these regulations or by separate written communication delivered either (1) by certified mail, (2) by regular mail receipt of which is confirmed by subsequent oral communication either in person or by telephone, or (3) by hand, and shall include, at minimum, the information specified in sections 13196(a), (b), and (c) together with an explanation of the basis of the executive director's belief that the specified activity meets the criteria of section 30811. The notice of intent shall be accompanied by a "statement of defense form" that conforms to the format attached as Appendix A to Subchapter 8 of these regulations. The person(s) to whom such notice is given shall complete and return the statement of defense form to the Commission by the date specified therein, which date shall be no earlier than 20 days from transmittal of the notice of intent.

(b) The executive director may at his or her discretion extend the time limit for submittal of the statement of defense form imposed by any notice of intent issued pursuant to subsection (a) of this section upon receipt within the time limit of a written request for such extension and a written demonstration of good cause. The extension shall be valid

only to those specific items or matters that the executive director identifies to the requesting party as being exempt from the submittal deadline and shall be valid only for such additional time as the executive director allows.

§ 13192. Distribution of Notice of Hearings on Proposed Restoration Order.

At least ten (10) days prior to a hearing on a proposed restoration order, the executive director shall mail by regular mail a written notice of the date, time, and place of the initial hearing to all alleged violators at their last known address and to all members of the public who have requested in writing that they receive such notice, provided that no notice need be mailed to the alleged violator if the alleged violator has already received notice of the hearing in a staff report prepared by the executive director.

§ 13193. Contents of an Executive Director's Recommendation on Proposed Restoration Order.

(a) The executive director shall prepare a recommendation on a proposed restoration order.

(b) The executive director's recommendation shall be in writing and shall include, at minimum:

(1) a copy of any statement of defense form completed and returned to the Commission by the alleged violator(s) pursuant to section 13191;

(2) a brief summary of (A) any background to the alleged violation, (B) the allegations made

by staff in its violation investigation, (C) a list of all allegations either admitted or not contested by the alleged violator(s), (D) all defenses and mitigating factors raised by the alleged violator(s), and (E) any rebuttal evidence raised by the staff to matters raised in the alleged violator's assertion of any defense or mitigating factor with references to supporting documents;

(3) a summary and analysis of all unresolved issues;

(4) the proposed text of any restoration order that the executive director recommends that the commission issue.

§ 13194. Distribution of Executive Director's Recommendation.

The executive director's recommendation on a proposed restoration order shall be distributed to the alleged violator(s) and otherwise to the persons and in the manner provided in section 13059 of these regulations for application summaries.

§ 13195. Procedure for Hearing on Proposed Restoration Order.

A hearing on a proposed restoration order shall proceed in the manner and in accordance with the rules of evidence specified in sections 13185 and 13186 of these regulations.

§ 13196. Contents and Reporting of Restoration Orders.

Restoration orders shall be signed by the executive director and shall contain at a minimum the following:

- (a) the names of the person or persons who have undertaken the activity that is the subject of the order;
- (b) identification of the property where the activity has been undertaken;
- (c) a description of the activity;
- (d) the effective date of the order;
- (e) any terms, conditions, or other provisions authorized by section 30811 of the Public Resources Code. Any term or condition that the commission may impose which requires removal of any development or material shall be for the purpose of restoring the property affected by the violation to the condition it was in before the violation occurred;
- (f) written findings that (A) explain the decision to issue the order and (B) provide the factual and legal basis for the issuance of the order;

(g) a statement of the obligation of the person(s) subject to the order to conform strictly to its terms and the consequences specified in section 30821.6 of the Public Resources Code of the failure to do so.

§ 13197. Rescission or Modification of Restoration Orders.

The commission, after public hearing, may rescind or modify a restoration order that it has issued. A proceeding for such a purpose may be commenced by (a) any person to whom the restoration order is directed, (b) the executive director or (c) any two members of the commission. A person described in subsection (a) may commence a proceeding for the purpose of rescinding or modifying a restoration order only on the ground that there has been a material change in the facts upon which the order was issued. Upon receipt of a request pursuant to this section for rescission or modification of a restoration order, a hearing on the request shall be held at the next regularly scheduled meeting or as soon thereafter as is practicable after notice to all persons subject to the order or whom the executive director otherwise has reason to know would be interested in the matter.