

CALIFORNIA COASTAL COMMISSION

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Staff: Rob Modellmog-SF
Staff Report: 6/30/22
Hearing Date: 7/14/22

STAFF REPORT: Recommendations and Findings for Consent Cease and Desist Order No. CCC-22-CD-02, Consent Restoration Order No. CCC-22-RO-01 and Consent Administrative Penalty No. CCC-22-AP3-01

Consent Cease and Desist Order No.: CCC-22-CD-02
Consent Restoration Order No.: CCC-22-RO-01
Consent Administrative Penalty No.: CCC-22-AP3-01
Related Violation File: V-1-16-0164

Parties Subject to this Consent Agreement:

Reservation Ranch, a general partnership and its two partners, and related parties.

Project Location:

Reservation Ranch, located at 330 Sarina Rd N., Del Norte County, California, and constituting Del Norte County Assessor's Parcel Nos. ("APNs") 103-010-01, 103-010-02, 103-010-12, 102-010-049, 102-010-050, and 103-020-74 and APN 103-010-10, 2), and certain public trust tidelands and submerged lands therein or adjacent thereto.

Unpermitted Development:

1) grading, including grading to construct roads; 2) placement of fill, including manure, soil, straw, construction waste, trash, cow carcasses, and other debris in and/or adjacent to wetlands, tidal sloughs, streams, and the Smith River; 3) placement of a road crossing directly within and on the banks of a tidal slough; 4) seasonal damming of a tidal slough for use as a freshwater irrigation pond and/or irrigation, including by placement and operation of a system of at least six

pumps within or adjacent to tidal sloughs, streams, and the Smith River; 5) removal of major vegetation including wetlands and riparian vegetation; 6) removal of downed trees on river banks; and 7) construction of levee crossings prior to the 1972 Coastal Initiative that was the predecessor to the Coastal Act but potentially partly or wholly on public trust lands.

Substantive File Documents: Public documents in Consent Cease and Desist Order, Consent Restoration Order, and Consent Administrative Penalty File Nos. CCC-22-CD-02, CCC-22-RO-01, and CCC-22-AP3-01; Exhibits 1 through 13; and Appendix A of this staff report.

CEQA Status: Categorically Exempt (Cal. Code of Regs., tit. 14, §§ 15321(a)).

SUMMARY OF STAFF RECOMMENDATION AND FINDINGS

This action addresses unpermitted development that was conducted in and around large tidal sloughs and wetlands that flow through a property near the mouth of the Smith River known as Reservation Ranch (hereinafter “the Property”). The Property occupies over 1,600 acres of land and approximately 3.5 miles of riverfront in Del Norte County, four miles from the Oregon border. The Smith River is the largest undammed river in California and is a crown jewel of the national Wild and Scenic River program.

The sloughs that flow through the Property historically played a key role in the River’s ecosystem by providing critical estuarine habitat for salmon and migrating birds. Several tribes historically hunted, fished, and otherwise made use of these natural resources since time immemorial. The Property was named after its history as part of a federal Indian Reservation during colonization of the area in the 1860’s. It remains extremely important to several tribes given its history of pre-colonial tribal use, its tragic past as a short-lived reservation during colonization, and the continuing legacy of that history and the various cultural resources associated with the Property, including any cultural resources that may be buried there.

Since the early 1900’s, the core part of the Property at issue has been owned by one family that has used its prime agricultural land for dairy cow pastures. Prior to the Coastal Initiative, levees were built around the perimeter of the Property and in some cases across the tidal sloughs. The combination of that and pre-Coastal Initiative logging severely reduced the habitat area on the Property.

In 2016, Commission enforcement staff began investigating violations, including unpermitted fill placed in tidal sloughs. This investigatory work also uncovered complex

public trust questions in some parts of the pre-Coastal Initiative levees where they crossed through sloughs (hereinafter “levee crossings”).

This case now presents the Commission with an opportunity to resolve this matter amicably, and dramatically restore and enhance both the Smith River estuary ecosystem and public access, as well as provide for land dedications. The alleged violator and owner, Reservation Ranch, (hereinafter, referred to as “the Farm”) has agreed to the proposed Consent Agreement and its requirements. Under the proposed agreement, the Farm would remove and restore areas of unpermitted fill, open 3 miles of sloughs to natural tidal flows and public access by removing three large levee crossings, and reforest the banks along 3 miles of sloughs. They would also provide three fish passages in key areas of the pre-Coastal Initiative levees. In addition to agreeing to the largest estuary restoration in Smith River history, the Farm would provide a 10+ acre public access easement on the banks of the river, and dedicate 14 acres of riverfront forest and 2 acres of oceanfront blufftop to public entities, among other benefits.

Pre-Coastal Commission History of the Property

The Property is located in the plains of the lower Smith River, which historically consisted of upland forests of redwoods and spruce, salt marsh estuary, wetlands, and tidal sloughs. The Smith River plain has been the home of California Native American tribes, including the Tolowa Dee-Ni’ Nation and Elk Valley Rancheria, who made use of the abundant natural resources since time immemorial. In 1853, gold miners arrived to the Smith River Plain and the genocide of California’s Native Americans reached this area as well.

In 1862, the Secretary of the Interior reserved much of the Smith River Plain, including the Property, for the Smith River Indian Reservation. Many members of the Tolowa Dee-Ni’ Nation and other tribes were then moved onto what is now the Property. In 1868, an act of Congress discontinued the Smith River Indian Reservation. The network of approximately 3 miles of tidal sloughs that flow through the Property is named Tillas Slough after one of the Tolowa leaders of the time. The Property remains very important to several tribes including the Tolowa Dee-Ni’ Nation and Elk Valley Rancheria, and cultural resources continue to exist there, the procedures for protection of which under the proposed agreement are described below.

In 1908, the County of Del Norte recorded a document that stated that the “dairy farm known as Reservation Ranch” was deeded from Susan and Peter Duffy to Henry Westbrook. The Westbrook family used the Property for grazing and farming on the fertile soil among the forests and tidal sloughs that snaked across it. During this time, the public was able to boat or wade to access the miles of tidal sloughs that flow through the Property. But sometime prior to June of 1964, large levees were constructed around the Property, including across the tidal sloughs. The segments of levee built across the sloughs (“levee crossings”) at issue were constructed out of train cars. The largest levee crossing is at the mouth of Tillas Slough and was built out of two train cars covered in soil and concrete pieces. It measures 408 feet in length, 44 feet in

width, and is large enough to drive cars across it. These levee crossings greatly diminished the estuary's habitat potential, as tide gates built into the crossings constricted the movement of salmon and other fish, and the lack of natural flow hurt water quality. These levee crossings also blocked all public access to the largest tidal slough network, Tillas Slough.

Because these levee crossings were built prior to the Coastal Initiative taking effect on February 1, 1973, a Coastal Development Permit ("CDP") was not required at the time of construction. However, several of these levee crossings may have been built on tidelands or submerged lands that were public trust lands, and if so, would have needed a lease from the California State Lands Commission ("SLC"). SLC has found no record of any leases for the areas at issue. If these levee crossings were built on public trust lands, and if a required lease was not obtained, they would have lacked at least some of the required authorizations on February 1, 1973. Therefore, they would not have been eligible for a vested right designation. However, even though no formal determination of their status has been made, the Farm has agreed to remove the levee crossings at issue, as is explained in more detail below.¹

Violation History

In 1969, the Farm installed a pump on the Smith River and began pumping water as part of a riparian water right. On February 1, 1973, Proposition 20 ("the Coastal Initiative") took effect, and after that time, Coastal Development Permits were required for any development (as defined under the Coastal Act) undertaken on the Property, with limited exceptions not relevant here. In the summer of 1973, the Farm installed a new pump on the river and a new system of pumps to transport water from the Smith River into the east fork of Tillas Slough. Although pumping was done prior to the Coastal Initiative, the new pumps installed in 1973 required a CDP, and none was obtained. Every summer, the Farm dammed one of the culverted levee crossings with a steel plate, and pumped freshwater into the east fork of Tillas Slough for use as an irrigation pond. Because the natural summer condition of the sloughs is saltwater (given the lower flows of the river and creeks at that time of year), this freshwater disrupted the estuarine ecosystem, and the damming also completely blocked all fish passage.

Sometime between 1988 and 1992, the Farm constructed an unpermitted road almost a mile long on the Property. The construction of this road included the unpermitted fill of approximately one quarter of a mile of tidal slough and riparian habitat south of the west fork of Tillas Slough. This unpermitted road was also constructed across the east fork of Tillas Slough. No bridge was built, and the slough was instead filled in to provide an area for the road to cross it. This resulted in the slough being funneled through another culvert installed in the fill, which further obstructed natural water flow and fish passage. In the 1990's, the Farm also constructed a low tide cattle crossing on the west fork of

¹ Because the Farm has agreed to remove them, SLC has not undertaken the long process to formally determine their status.

Tillas Slough, potentially by dumping sediment into a part of the slough that already had a natural sand bar.

Starting sometime prior to 2016, the Farm also began filling an area of Islas Slough (to the west of Tillas Slough) with cow manure and began dumping dead cows in wetlands nearby. In addition, Commission staff also discovered unpermitted junk piles in the area, as well as unpermitted removal of driftwood logs from the banks of the Smith River. Many of the logs are large redwood trees that could provide important shoreline salmon habitat if left undisturbed along the riverbanks.

The pre-Coastal Initiative levee crossings, as well as the post-Coastal Initiative violations, are negatively affecting highly important coastal resources for the Smith River. The Smith River is mostly bounded by wilderness and is one of the most pristine of the federally designated Wild and Scenic Rivers. Further, wetlands and estuaries are extremely rare and important ecosystems in California. Yet, in the Smith River estuary, an estimated 40% of the original wetland habitat has been lost due to diking and draining of wetlands. Tidal sloughs and wetlands within the Smith River estuary in particular are some of California's most critical habitats with respect to salmonid population resiliency and biodiversity, particularly coho salmon.

California's remaining wetlands, including those located on the Property, are critical, vanishing habitat and support numerous resident and migrant wildlife species, including birds migrating along the Pacific flyway. The Property also provides habitat for elk and bears. Wetlands provide critical habitat (nesting sites, rearing sites, and foraging areas) for many species including anadromous fishes, such as Chinook salmon, steelhead, and coastal cutthroat trout. Chinook salmon, steelhead and coastal cutthroat trout are abundant throughout the Smith River watershed and are of great ecological and economic benefit to California and Oregon.

Coho salmon also occur in the watershed but have declined significantly in California, which has led to federal and State listing pursuant to their respective Endangered Species Acts. According to the California Department of Fish and Wildlife ("CDFW"), the California coho salmon population has declined by 70% during the last 40 years. CDFW has identified the Smith River coho salmon as a key population to maintain or improve as part of the Recovery Strategy of California Coho Salmon. The federally endangered tidewater goby has also been detected in Tillas Slough.

Enforcement History

In 2016, Commission staff learned of the unpermitted fill in Islas Slough. That same year, Commission staff visited the site and sent a Notice of Violation to the Farm. In 2017, the case was elevated to the Commission's Headquarters Enforcement Unit, which sent a Notice of Intent to Issue a Cease and Desist Order and Restoration Order. Commission staff recorded a Notice of Violation on the parcels making up the Property that same year. In 2018, Commission staff visited the site again and continued to investigate the violations but also worked to negotiate with the Farm towards a Consent Agreement.

In 2020, Commission staff discovered additional violations, including the seasonal damming of a tidal slough and removal of driftwood trees (as well as learning of some of the complex public trust questions), and on October 9, 2020, Commission staff sent an Amended Notice of Intent to Issue a Cease and Desist Order, Restoration Order, and Administrative Penalty. Shortly afterward, the Farm listed the Property for sale. Commission staff continued to work actively on this matter and negotiate with the Farm at this time, and the Farm ceased seasonally damming the tidal slough and ceased the unpermitted pumping.

In the beginning of summer 2021, Commission staff was informed that Alexandre Dairy had begun leasing the Property. Alexandre Dairy did not undertake any of the violations, but they let Commission staff know that, as the new lessee, they were interested in participating in negotiations to reach a Consent Agreement and in helping to carry out the restoration itself. The Farm then offered to meet with Commission staff every week at the same time to negotiate until a consensual agreement was reached. Since then, the Farm has in fact met with Commission staff in good faith almost every single week for the past year. This allowed for a much more efficient negotiations process and therefore saved a large amount of Commission staff time. On May 18, 2022, Commission staff visited the site again to better plan for restoration and mitigation.

Tribal Consultations

Commission staff have met over videoconference with staff and tribal councilmembers of the Tolowa Dee-Ni' Nation, a federally recognized tribe located in Smith River, many times to answer questions and receive their comments. On April 21, 2022, Commission staff participated in a requested inter-agency tribal consultation regarding the proposed enforcement action with the Tolowa Dee-Ni' Nation, along with the North Coast Regional Water Quality Control Board, the California State Lands Commission, the California Natural Resources Agency, and the California Environmental Protection Agency. The Tolowa Dee-Ni' Nation also requested that Commission staff visit them if they came to Smith River, and on May 18, 2022, Commission enforcement staff visited the Tolowa Dee-Ni' Nation at their offices to answer questions and discuss the Consent Agreement process.

The Tolowa Dee-Ni' Nation also made a number of procedural requests relating to this Consent Agreement. They requested that a cultural resources survey be done on the Property prior to any removal or restoration work. They also asked that they be allowed to comment on the proposed Restoration Plan after a Consent Agreement was approved, and also comment again on the proposed Restoration Plan after permitting agencies had commented on it. They also requested that tribal monitors be allowed onsite to monitor the work. They stated that replanting of the banks of the sloughs needs to include multi-story vegetation, including spruce trees.

The Tolowa Dee-Ni' Nation also made a number of more substantive requests relating to outcomes of the Consent Agreement. Broadly, they requested that the area be restored to the fullest extent possible, and that the Farm be held accountable to the full extent of the law, including removal of all unpermitted development and assessment of

any applicable penalties. As a general matter, they expressed their belief that both public and tribal access to the Property is one of the most important things they want to see out of this Consent Agreement. More specifically, they also requested that all or sections of the Property be transferred to the Tolowa Dee-Ni' Nation in lieu of monetary penalties. They also requested a cultural access easement onsite that is different from a public access easement.²

On June 17, 2022, Commission staff participated in a tribal consultation with the Elk Valley Rancheria, a federally recognized tribe in Crescent City. The Elk Valley Rancheria requested that tribal monitors be on site during work, and requested that after any Consent Agreement is approved, that the proposed Restoration Plan be sent to Elk Valley Rancheria for comments.

Commission staff worked to address the issues and concerns of both the Tolowa Dee-Ni' Nation and the Elk Valley Rancheria in the proposed settlement. Accordingly, for example, the proposed Consent Agreement requires that tribal monitors be allowed to be present during all ground disturbance activities on the Property in order to help identify and protect any cultural resources found during removal, restoration, or mitigation. It also provides for spruce tree planting and multi-story revegetation as part of the mitigation. In addition, it also provides the opportunity for tribes to review and comment on draft removal, restoration, and mitigation plans submitted by the Farm to Commission staff following approval of the Consent Agreement, both before and after other agencies comment. The Commission also worked with the Farm to reach an agreement that included large amounts of public access and land dedications to public entities, as is detailed below.

Environmental Justice

The Property at issue and its natural resources, as well as the waterbodies that flow through it, are very important to several California Native American tribes, as well as the general public. Since the 1860's, these tribes have been unable to freely access the Property as they once did. And after June of 1964, the date by which levees were constructed that blocked public access to Tillas Slough, both these tribes and the general public were also cut off from freely accessing these miles of waterways. These tribes care deeply about the natural resources on the Property that were potentially impacted by development on the Property, including the unpermitted fill of wetlands and sloughs.

² After an agreement was reached but before this staff report was posted, they also requested that the Commission investigate deterioration of parts of the pre-Coastal Initiative levees, and shared photos with Commission staff that showed tires in the water. They also requested that tribal monitors be paid. In addition, they requested that the dead cows, which are proposed to remain in order to protect the trees that have grown over them, be removed in order to ensure that no cultural resources were impacted during the dumping. They also made other requests that they stated would be included in a letter sent to the Commission after this staff report is posted.

In addition, the Smith River has some of the best recreational fishing of any river in the country, and fishing is a pastime and tradition shared by both tribes and the general public in Del Norte County. The unpermitted fill of tidal sloughs and wetlands by the Farm negatively impacted the water quality of the estuary and eliminated valuable habitat for salmonids.

Fishing is a low-cost coastal recreational activity that is accessible to people in disadvantaged and low income communities, and it can also be a subsistence activity in those communities. In addition, it is also a culturally significant activity for tribes. Therefore, impacts to fish habitat and populations cause an environmental justice impact to people who enjoy this low-cost coastal recreational activity.

The Proposed Resolution

The proposed Consent Agreement has six main elements. The first element is removal of unpermitted development, including excavation of unpermitted fill and restoration of those areas. The second element is removal of large levee crossings that block natural tidal flows and public access to the 3 miles of tidal sloughs and that were built prior to the Coastal Initiative, but pose public trust questions, as explained above. The third element is mitigation reforestation of the banks of three miles of tidal slough. The fourth element is installation of fish passages at three key areas of the pre-Coastal Initiative levees that will create fish habitat and improve water quality of the sloughs. The fifth element is tribal monitoring of required ground disturbance activities to help identify and protect any cultural resources uncovered, and tribal review of the removal, restoration, and mitigation plans prior to Executive Director approval. The sixth element is providing land and projects in lieu of an administrative penalty, including public access easements over more than ten acres on the banks of the river, and the dedication of fourteen acres of riverfront forest and two acres of oceanfront blufftop property to public entities, as is detailed below. These lands will include conservation easements to ensure ongoing protection of habitat.

a. Removal of Levee Crossings and Opening of Tillas Slough to Public Access and Natural Tidal Flows

The removal of the large levee crossings will provide an extraordinary benefit to the public that is separate from typical mitigation and projects in lieu of a penalty, as described in more detail below. These removals would restore natural tidal flows and public access to Tillas Slough. The outermost levee crossing on Tillas slough is built out of two train cars covered in soil and concrete pieces and measures 408 feet long and 44 feet wide. Removal of this crossing alone is considered by the Commission's Senior Ecologist, Dr. Laurie Koteen, to be by far the single most beneficial action that could be taken at the Property to restore the natural ecosystem in the three-mile long Tillas Slough tidal network. In addition, under the proposed Consent Agreement, the Farm will be removing a second levee crossing just inland of the largest levee crossing that was also built prior to the Coastal Initiative, and is 32 feet long and made of one train car. Further, the Farm also will be removing a levee crossing on Spruce Creek, a creek that

meets the Smith River to the north of Tillas Slough, within the area of the 14 acre riverfront land dedication.

Removal of these three pre-Coastal Initiative levee crossings, combined with the removal of the unpermitted road crossing just inland of the two crossings on Tillas Slough, would greatly improve the natural ecosystem in the three miles of Tillas Slough and Spruce Creek to the north. Removal would allow natural tidal flows to scour the tidal sloughs and remove unnatural amounts of silt, allow unobstructed access for all fish, and provide much more 'mixing' of water that would improve water quality. In addition, the public would now be able to boat into the three miles of waterways in Tillas Slough for the first time in approximately sixty years. The removal of these pre-Coastal Initiative levee crossings alone would dramatically restore the environmental and public access landscape at the mouth of the Smith River. The three miles of Tillas Slough that would be open to public access would also be reforested which would improve the habitat but also greatly benefit the public experience, as described below.

b. Mitigation Reforestation

In addition, the Farm would provide substantial restoration to mitigate for the unpermitted development that occurred on the Property. The Farm would revegetate and restore approximately one and a half miles along the west fork of Tillas Slough with native vegetation, which will include spruce trees and is also expected to include salt marsh. As the area of filled tidal slough due to the unpermitted road and the unpermitted manure fill is estimated at approximately half a mile, this alone would provide a slough restoration mitigation factor of 3x, not including the fish passages detailed below. This new riparian habitat would provide shady and complex shoreline habitat that threatened coho salmon and other fish use as seasonal habitat areas, and would therefore assist in the efforts to preserve salmon. It would also provide habitat for the many birds who rely on this estuary ecosystem. In addition, the Farm would install cattle fencing along both the west and east forks of Tillas Slough, a distance of over 3 miles, in order to allow natural vegetation to grow on the banks of both forks of the slough. Because the average annual rainfall in this area is approximately 73 inches, any areas no longer subject to heavy grazing within the fencing, even if they are not part of an affirmative planting project as part of this mitigation restoration, would likely be quickly filled with trees, which will provide critical riparian habitat. As an added benefit, this revegetation would also dramatically improve the public access experience for the public, who would be able to boat through newly restored riparian woods and view the wildlife there.

The Farm would also provide fish passages in three areas of the pre-Coastal Initiative levees where Tillas Slough and Islas Slough were connected at some points in the past, and one fish passage where Islas Slough periodically connected to the river. In order to effectuate the fish passages, the Farm would install large culverts in the levees for the threatened coho salmon and other species to use. These fish passages would allow fish to more naturally access these water bodies and help create fish habitat. This would also improve water quality and natural tidal scour in both Tillas Slough and Islas Slough.

c. Cultural Resources

Sensitive cultural resources exist on site, and the proposed Consent Agreement includes a Cultural Resources Survey and Cultural Materials Plan. In addition, the agreement allows for tribal monitors onsite to monitor ground disturbance activities and help better identify and protect cultural resources. Further, the tribes would have the opportunity to review and provide comments on the Farm's proposed restoration plans, mitigation plans, and removal plans. Also, under the Proposed Consent Agreement, the tribes would be able to access areas of the Property where any removal, restoration or mitigation work will occur, as is explained below.

- d. 10+ Acre Riverfront Public Access Easement, 14 Acre Riverfront Forest Land Dedication, and 2 Acre Oceanfront Blufftop Land Dedication

In lieu of a financial penalty, the Farm would provide a 10+ acre riverfront public access easement, dedicate 14 acres of riverfront forest property, and dedicate 2 acres of oceanfront blufftop land, both to public entities. The public access easement would cover banks of the river and sand bar at the mouth of Tillas Slough. Because the sand bar is larger during certain seasons, the easement area and adjacent publicly accessible non-submerged area may expand to be almost twice as large during some parts of the year. This easement would be accessible by boat and provide excellent views of the beach, the ocean, the river, and the slough. It would also serve as a natural resting point for people visiting the sloughs. It is expected that both this easement and access to the three miles of Tillas Slough would provide great birdwatching and other wildlife watching activities, as well as good fishing. Because the easement would only be accessible by boat, it is not expected to cause negative impacts from overuse, such as adverse impacts to wildlife or cultural resources.

In addition, the Farm would dedicate 14 acres of riverfront forest land to a public entity. This forest is full of native trees and wetlands, and includes the mouth of two creeks. The forest is an important endpoint of a wooded wildlife corridor that extends from the river mouth to the mountains, and is the home of many elk and bears. It is located at the very northwestern portion of Reservation Ranch, and is just to the south of Xaa-wan'-k'wvt (Howonquet Village, formerly Ship Ashore Resort) to the north. This land dedication would include a conservation easement for habitat conservation.

Further, the Farm would dedicate to a public entity 2 acres of oceanfront land that the Farm owns approximately 2 miles from the Property. This land is located on a bluff overlooking the ocean just to the south of the popular Kamph Memorial Park and public campground, and includes woods and native plants. This land is directly adjacent to stairs to the beach and has unobstructed views of the beach, the ocean, and the coastline north to Oregon, which is two miles away. This land could be used for public access or expansion of the existing campground. This land would include a conservation easement for habitat conservation as well.

Conclusion

The Smith River is nationally renowned for being pristine and surrounded by wilderness throughout nearly its entire length. The lower Smith River once played a key part in the

larger ecosystem of the river and supported large populations of salmon, elk, and migratory birds. Tribes and the general public were once freely able to access coastal resources in these areas. However, the important habitat and public access potential of the lower Smith River has long been severely impacted by pre-Coastal Act levee construction and logging. The Unpermitted Development further impacted the habitat of the tidal sloughs via fill and seasonal damming. However, the Commission now has the opportunity to authorize a dramatic restoration of this area. Under the proposed Consent Agreement, the Farm would remove the unpermitted fill, and would also open three miles of tidal slough to natural tidal flows and public access. Further, the Farm has also agreed to provide mitigation by reforesting the three miles of tidal slough banks, which will radically improve the habitat and public access experience there. The Farm would also provide fish passages in key locations of the Pre-Coastal Initiative levees that would provide new habitat for threatened coho salmon and tidewater goby, and help to improve water quality in the sloughs.

In addition to agreeing to the largest estuary restoration in Smith River history, the Farm has also agreed to provide ten acres of public access in a natural resting place on the banks of the river near the mouth of Tillas Slough. Further, the Farm would provide 14 acres of riverfront forest in a key wildlife corridor to a public entity. And finally, the Farm would provide 2 acres of oceanfront blufftop land for habitat conservation and public recreation. This agreement is thus a historic opportunity to dramatically improve the ecosystem and public access at the mouth of one of the most pristine rivers in the country, and to provide land dedications to public entities.

Commission staff is appreciative of the cooperation of the Farm and their commitment to reaching an amicable resolution that would be a transformational benefit for both the environment and the public. Staff therefore recommends that the Commission **APPROVE** Consent Cease and Desist Order No. CCC-22-CD-02, Consent Restoration Order No. CCC-22-RO-01, and Consent Administrative Penalty CCC-22-AP3-01.

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APPENDIX A – Proposed Consent Cease and Desist Order No. CCC-22-CD-02,
Consent Restoration Order No. CCC-22-RO-01, and Consent Administrative Penalty
No. CC-22-AP3-01

EXHIBITS

- Exhibit 1 Region Maps
- Exhibit 2 Property Photos
- Exhibit 3 Photos of Levee Crossings to be Removed
- Exhibit 4 Photos of Unpermitted Development
- Exhibit 5 Proposed Public Access Map
- Exhibit 6 Proposed Mitigation Map
- Exhibit 7 Proposed Fish Passages Map
- Exhibit 8 Photos of Proposed Areas of Public Access and Mitigation
- Exhibit 9 Photos of Proposed 10+ Acre Riverfront Public Access Easement
- Exhibit 10 Photos of Proposed 14 Acre Riverfront Forest Dedication
- Exhibit 11 Photos of Proposed Oceanfront Blufftop Land Dedication
- Exhibit 12 September 1, 2017 Notice of Intent
- Exhibit 13 Notice of Violation Recorded October 28, 2017

I. MOTIONS AND RESOLUTION

Motion 1: Consent Cease and Desist Order

I move that the Commission **issue** Consent Cease and Desist Order No. CCC-22-CD-02 to Reservation Ranch pursuant to the staff recommendation.

Staff Recommendation of Approval:

Staff recommends a **YES** vote. Passage of this motion will result in adoption of the resolution immediately below and issuance of the Consent Cease and Desist Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

Resolution to Approve the Consent Cease and Desist Order:

The Commission hereby issues Consent Cease and Desist Order No. CCC-22-CD-02, as set forth in Appendix A, and adopts the findings set forth below on the ground that development has occurred without the requisite Coastal Development Permit, in violation of the Coastal Act, and that the requirements of the Consent Cease and Desist Order are necessary to ensure compliance with the Coastal Act.

Motion 2: Consent Restoration Order

I move that the Commission **issue** Consent Restoration Order No. CCC-22-RO-01 to Reservation Ranch pursuant to the staff recommendation.

Staff Recommendation of Approval:

Staff recommends a **YES** vote. Passage of this motion will result in adoption of the resolution immediately below and issuance of the Consent Restoration Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

Resolution to Issue Consent Restoration Order:

The Commission hereby issues Consent Restoration Order No. CCC-22-RO-01, as set forth below, and adopts the findings set forth below on the grounds that 1) development has occurred on the Property without a coastal development permit, 2) the development is inconsistent with the Del Norte County LCP and the Coastal Act, and 3) the development is causing continuing resource damage.

Motion 3: Consent Administrative Civil Penalty Action:

I move that the Commission find that the various actions and failures to act described in the associated findings are in violation of various provisions of the Coastal Act, including, but not necessarily limited to, provisions protecting

wetlands and other habitat, and that the Commission impose an administrative civil penalty pursuant to the staff recommendation.

Staff Recommendation of Approval:

Staff recommends a **YES** vote on the foregoing motion. Passage of this motion will result in adoption of the resolution immediately below and the issuance of the Consent Administrative Penalty. The motion passes only by an affirmative vote of a majority of Commissioners present.

Resolution to Issue Consent Administrative Civil Penalty Action:

The Commission hereby assesses an administrative civil penalty by adopting Consent Administrative Penalty No. CCC-22-AP3-01, as set forth in Appendix A, and adopts the findings set forth below on the grounds that activities and failures to act have occurred on the Property owned by Reservation Ranch in violation of various provisions of the Coastal Act, including, but not limited to, provisions protecting wetlands and other habitat.

II. HEARING PROCEDURES

The procedures for a hearing on a Cease and Desist Order and Restoration Order pursuant to Section 30810 and 30811 are outlined in the Commission's regulations at California Code of Regulations, Title 14 ("14 CCR") Section 13185 and Section 13195. The requisite procedure for imposition of administrative penalties pursuant to Section 30821.3 of the Coastal Act (Pub. Resources Code, Div. 20) are set forth in Section 30821.3(b), which specify that penalties shall be imposed by majority vote of all Commissioners present in the context of a public hearing in compliance with the requirements of Section 30810, 30811, or 30812. Therefore, the procedures employed for a hearing to impose administrative penalties may be the same as those used for a Cease and Desist Order and Restoration Order hearing.

For a Cease and Desist Order and Restoration Order hearing and an Administrative Penalty action, the Chair shall announce the matter and request that all parties or their representatives present at the hearing identify themselves for the record, indicate what matters are already part of the record, and announce the rules of the proceeding, including time limits for presentations. The Chair shall also announce the right of any speaker to propose to the Commission, before the close of the hearing, any question(s) for any Commissioner, at his or her discretion, to ask of any other party. Staff shall then present the report and recommendation to the Commission, after which the alleged violator(s) or their representative(s) may present their position(s) with particular attention to those areas where actual controversy exists. The Chair may then recognize other interested persons, after which the chair may allow the alleged violators to use

any reserved rebuttal time to respond to comments from interested persons and may then allow staff to respond to the testimony and to any new evidence introduced.³

The Commission will receive, consider, and evaluate evidence in accordance with the same standards it uses in its other quasi-judicial proceedings, as specified in 14 CCR Section 13185 and Section 13195, incorporating by reference Section 13065. The Chair will close the public hearing after the presentations are completed. The Commission may ask questions to any speaker at any time during the hearing or deliberations, including, if any Commissioner so chooses, any questions proposed by any speaker in the manner noted above.

Finally, the Commission shall determine, by a majority vote of those present and voting, whether to impose administrative penalties. The Commission shall also determine, by a majority vote of those present and voting, whether to issue the Cease and Desist Order and Restoration Order and impose an Administrative Penalty, either in the form recommended by staff, or as amended by the Commission. Passage of the motions above, per the staff recommendation, or as amended by the Commission, will result in the issuance of the Consent Cease and Desist Order and Consent Restoration Order, and imposition of a Consent Administrative Penalty.

III. FINDINGS FOR CONSENT CEASE AND DESIST ORDER CCC-22-CD-02, CONSENT RESTORATION ORDER CCC-22- RO-01, AND CONSENT ADMINISTRATIVE PENALTY NO. CCC-22-AP3-01⁴

A. Description of the Property

1. Property Location

The Property is located in Del Norte County, just to the west of the town of Smith River, CA. The Property is four miles from the Oregon border to the north, and approximately 13 miles from Crescent City to the south. The Property is bordered by the Smith River on both its west and south sides, for a total of approximately 3.5 miles of riverfront land. Across the river from the Property to the west, a sand spit of tall dunes separates the river from the sea. The southern portion of the dunes is held by the State of California as Tolowa Dunes State Park, and the northern part of the sand spit is held by the Tolowa Dee-Ni' Nation, who bought it from the Farm. To the northwest of the Property,

³ Note that there are currently in use virtual hearing procedures, available at <https://documents.coastal.ca.gov/assets/virtual-hearing/VIRTUAL-HEARING-PROCEDURES.pdf>.

⁴ These findings also hereby incorporate by reference the Summary at the beginning of the 6/30/2022 staff report ("Staff Report: Recommendations and Findings for Consent Cease and Desist Order No. CCC-22-CD-02, Consent Restoration CCC-22-RO-01, and Consent Administrative Penalty No. CCC-22-AP3-01") in which these findings appear, which section is entitled, "Summary of Staff Recommendations and Findings."

the village of Xaa-wan'-k'wvt (Howonquet) occupies the site of the former Ship Ashore Resort, which the Farm sold to the Tolowa Dee-Ni' Nation in 2016. Across the river to the southwest is Tolowa Dunes State Park. Parts of the Property extend north near Highway 101, and the east edge ends close to the town of Smith River.

2. Pre-Coastal Commission History

The Property is located in the plains of the lower Smith River, which historically consisted of upland forests of redwoods and spruce, salt marsh estuary, wetlands, and tidal sloughs. The Smith River plain was historically a floodplain and the river used to periodically change course, including by flowing onto the Property. This region provided important habitat for large populations of coho salmon and steelhead, as well as elk and geese. The Smith River plain has been the home since time immemorial of California Native American tribes including the Tolowa Dee-Ni' Nation and Elk Valley Rancheria, who made use of the abundant natural resources available in this area. In 1862, the Secretary of the Interior reserved much of the Smith River Plain, including the area of the Property, for the Smith River Indian Reservation. Many members of the Tolowa Dee-Ni' Nation were then moved onto what is now the Property. In 1868, an act of Congress discontinued the Smith River Indian Reservation. The network of approximately 3 miles of tidal sloughs that flow through the Property was named Tillas Slough after one of the Tolowa leaders of the time. The Property remains very important to several tribes including the Tolowa Dee-Ni' Nation and Elk Valley Rancheria, and cultural resources continue to exist there, the procedures for protection of which are described below.

In 1908, the County of Del Norte recorded a document that stated that the 'dairy farm known as Reservation Ranch' was deeded from Susan and Peter Duffy to Henry Westbrook. Ever since, the same family has owned the core part of the Property at issue. During the past century, grazing and farming took place on the fertile soil among the forests and tidal sloughs that snaked across the Property. During this time, the public was able to use boats to access the miles of tidal sloughs that flow through the Property. But sometime between 1958 and June of 1964, large levees were constructed around the Property, including across the tidal sloughs. The levee crossings at issue were built out of train cars, and the largest levee crossing was built out of two train cars covered in soil and concrete pieces and measures 408 feet long and 44 feet wide. This greatly diminished the estuary's habitat potential, as tide gates built into the crossings constricted the movement of salmon and other fish, and the lack of natural flow hurt water quality. These levee crossings also blocked all public access to the largest tidal slough network, Tillas Slough.

Because these levee crossings were built prior to the Coastal Initiative taking effect on February 1, 1973, a Coastal Development Permit ("CDP") was not required at the time of construction. However, several of these levee crossings may have been built on tidelands or submerged lands that were public trust lands, and if so, they would have needed a lease from the California State Lands Commission ("SLC"). Commission enforcement staff have coordinated closely with SLC, and SLC has found no record of any leases for the areas at issue. If these levee crossings were built on public trust

lands, and if a lease was not obtained, they would have lacked at least some of the required authorizations on February 1, 1973. Therefore, they would not have been eligible for a vested right designation. However, even though no formal determination of their status has been made, the Farm has agreed to remove the levee crossings at issue.

3. Violation History

In 1969, the Farm installed a pump on the Smith River and began pumping water as part of a riparian water right. On February 1, 1973, Proposition 20 (“the Coastal Initiative”) took effect and created a Coastal Development Permit requirement on the areas of the Property at issue. In the summer of 1973, the Farm installed a new pump on the river and a new system of pumps to transport water from the Smith River into the east fork of Tillas Slough. Although some pumping was apparently done prior to the Coastal Initiative, the new pumps installed in 1973 required a CDP and none was obtained. Every summer, the Farm dammed one of the culverted levee crossings with a steel plate, and pumped freshwater into the east fork of Tillas Slough. Because the natural summer condition of the sloughs is saltwater given the low flows of the river and creeks at that time, this freshwater disrupted the estuarine ecosystem. This effectively replaced nearly one and a half miles of tidal slough habitat with a freshwater irrigation pond every summer. This seasonal storage of freshwater blocked all fish passage and resulted in poor water quality, the spread of invasive reed canary grass, and oxygen depletion resulting in fish kills.

Sometime between 1988 and 1992, the Farm constructed an unpermitted road almost a mile long on the Property. This road included the unpermitted fill of one quarter of a mile of tidal slough and riparian habitat south of the west fork of Tillas Slough. This eliminated valuable habitat area for birds and fish. This unpermitted road was also constructed across the east fork of Tillas Slough. This road construction included another culverted crossing of the slough, which further obstructed water flow and fish passage, resulting in further degraded water quality and habitat.

In the 1990’s, the Farm also constructed a low tide cattle crossing on the west fork of Tillas Slough, likely by dumping gravel into a shallow part of the slough. Part of it has since been washed away, but some obstruction remains.

Starting sometime prior to 2016, the Farm began filling Islas Slough (to the west of Tillas Slough) with cow manure and began dumping dead cows in wetlands nearby. The area of filled slough appeared to be multiple acres. The unpermitted fill replaced wetland and tidal slough habitat, and likely negatively impacted the water quality of the rest of the slough. The number of dead cows dumped in the wetlands nearby appears to be in the dozens. In addition, Commission staff also discovered unpermitted junk piles in the area, as well as unpermitted removal of driftwood logs from the banks of the Smith River. Many of the logs were large redwood trees that could provide important shoreline salmon habitat if left undisturbed.

4. Enforcement History

In 2016, Commission staff learned of the unpermitted fill in Islas Slough. That same year, Commission staff visited the site and sent a Notice of Violation to the Farm. In 2017, the case was elevated to the Commission's Headquarters Enforcement Unit, which sent a Notice of Intent to Issue a Cease and Desist Order and Restoration Order. Commission staff recorded a Notice of Violation on the parcels making up the Property that same year. In 2018, Commission staff visited the site again and continued to investigate the violations but also worked to negotiate with the Farm with the goal of reaching a Consent Agreement.

In 2020, Commission staff discovered additional violations and complex public trust issues, and on October 9, 2020, Commission staff sent an Amended Notice of Intent to Issue a Cease and Desist Order, Restoration Order, and Administrative Penalty. Shortly afterward, the Farm listed the Property for sale. Commission staff continued to work actively on this matter and negotiate with the Farm at this time. On April 21, 2021, the North Coast Regional Water Quality Control Board issued a Cleanup and Abatement Order to the Farm, instructing them to remove the unpermitted cow manure fill and junk piles. The Cleanup and Abatement Order also required the Farm to study the current ability of fish to pass through the culverted levee crossings at issue in this matter.⁵ In June of 2021, both Commission staff and the National Marine Fisheries Service instructed the Farm not to seasonally place the unpermitted pump into the Smith River, as its fish screen was inadequate. The Farm obliged and no unpermitted seasonal pumping or damming has taken place since.

In the beginning of summer 2021, Commission staff was informed that Alexandre Dairy had begun leasing the Property. Even though Alexandre Dairy had not undertaken any of the violations, they explained that they were interested in participating in negotiations to reach a Consent Agreement and in helping to carry out the restoration itself. Then, the Farm offered to meet with Commission staff every week at the same time to negotiate until a consensual agreement was reached. Since then, the Farm has in fact met with Commission staff in good faith almost every single week for the past year, which allowed for a more efficient negotiations process and was essential to reaching this proposed agreement. On May 18, 2022, Commission staff visited the site again to better assess and plan for restoration and mitigation.

⁵ The North Coast Regional Water Quality Control Board's Cleanup and Abatement Order cannot be complied with until the Farm obtains Coastal Act authorization for the required activities. The removal of the unpermitted manure fill and unpermitted junk piles is also required by this proposed Consent Agreement, and therefore this Consent Agreement provides that authorization. The culverted levee crossings studied for fish passage will be removed entirely under the Consent Agreement, which will result in natural, unobstructed fish passage.

B. Statutory Provisions

1. Basis For Issuing Consent Cease and Desist Order

The statutory authority for issuance of this Cease and Desist Order is provided in Coastal Act Section 30810, which states, in relevant part:

- (a) [I]f the commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit . . . the commission may issue an order directing that person or governmental agency to cease and desist . . .
- (b) The cease and desist order may be subject to such terms and conditions as the commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material or the setting of a schedule within which steps shall be taken to obtain a permit pursuant to this division.

2. Basis for Issuing Consent Restoration Order

The statutory authority for issuance of this Restoration Order is provided in Section 30811 of the Coastal Act, which states, in relevant part:

In addition to any other authority to order restoration, the commission... may, after a public hearing, order restoration of a site if it finds that [a] the development has occurred without a coastal development permit from the commission, local government, or port governing body, [b] the development is inconsistent with this division, and [c] the development is causing continuing resource damage.

Factual Support for Statutory Elements

The following paragraphs set forth the basis for the issuance of the Consent Cease and Desist and Consent Restoration Orders by providing substantial evidence that the development meets all of the required grounds listed in Section 30810 and 30811 for the Commission to issue a Cease and Desist and Restoration Order.

A. Development has occurred Without a Coastal Development Permit

The statutory provision requires the Commission to demonstrate that the Farm undertook an activity that requires a CDP from the commission where the Farm did not secure one.

In this case, it is uncontroverted that the Farm does not have a CDP for the development at issue here. The subsequent step is demonstrating that the Farm took

an action requiring a CDP. Section 30600(a) of the Coastal Act states that, in addition to obtaining any other permit required by law, any person wishing to perform or undertake any development in the Coastal Zone must obtain a CDP. "Development" is broadly defined by Coastal Act Section 30106 and is incorporated into the Del Norte LCP at Title 21, Chapter 4, Section 195 of the Del Norte County Code, in relevant part as follows:

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land...; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure...; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).

In addition, the definition of development in the Coastal Initiative, which was effective from 1973 to 1977, was almost identical, and stated:

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land...; change in the intensity of use of water, ecology related thereto, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure...; and the removal or harvesting of major vegetation...

Under the Coastal Act's definition of development, the Farm performed the following acts of "development": 1) grading, including grading to construct roads; 2) placement of fill, including manure, soil, straw, construction waste, trash, cow carcasses, and other debris in and/or adjacent to wetlands, tidal sloughs, streams, and the Smith River; 3) placement of a road crossing directly within and on the banks of a tidal slough; 4) seasonal damming of a tidal slough for use as a freshwater irrigation pond and/or irrigation, including by placement and operation of a system of at least six pumps within or adjacent to tidal sloughs, streams, and the Smith River; 5) removal of major vegetation including wetlands and riparian vegetation; 6) removal of downed trees on river banks; and 7) construction of levee crossings prior to the 1972 Coastal Initiative that was the predecessor to the Coastal Act but potentially partly or wholly on public trust lands.

All of the above activities fall clearly within the Coastal Act definition of development and, therefore, required the Farm to secure a CDP to authorize the development. None of this development, however, received any such Coastal Act authorization. Therefore, all of these items and activities constituted unpermitted development, and pursuant to Section 30810, this development constituted an activity that required a permit from the

commission without securing the permit. Thus, this triggered the independent criterion in section 30810(a), therefore authorizing the Commission's issuance of this Cease and Desist Order.

The Commission continues to have the primary and independent authority to enforce the Coastal Act within the Commission's retained permit jurisdiction, which here extends to include the area from the Smith River to the tidal sloughs, wholly encompassing all tidal sloughs at issue that flow through the Property. Therefore, all of the violations are fully within the Commission's authority to independently enforce.⁶

B. Development Inconsistent with the Coastal Act

The unpermitted development described herein raises a number of concerns with respect to resource protection policies enumerated under the Coastal Act, including Coastal Act Section 30230 and LCP General Policy V.A. (protecting marine resources); Coastal Act Section 30231 and LCP General Policy VI.A. (protecting biological productivity and water quality); Coastal Act Section 30233 and LCP General Policy VI.A. (limiting fill of wetlands); Section 30236 and LCP General Policy VI.A. (limiting channelizations, dams, and flood control projects); and Coastal Act Section 30240 and LCP General Policy VI.A. (protecting environmentally sensitive terrestrial habitat areas).

In addition, the unpermitted development raises concerns with respect to several other Del Norte County LCP policies, including LCP General Policy VI.B. (designating tidal area of the Smith River as excellent habitat area, and protecting natural functions, wildlife, and limiting development there); LCP General Policy VI.C (protecting water quality and biological productivity); LCP Specific Area Policy and Recommendation VII.C.4 (protecting estuaries); LCP Specific Area Policy and Recommendation VII.D (protecting wetlands); LCP Specific Area Policy and Recommendation VII.E (protecting riparian vegetation); and LCP Policies and Implementation Section D.3. (limiting development in flood hazard areas).

The Smith River is mostly bounded by wilderness and is one of the most pristine of the federally designated Wild and Scenic Rivers in the country. Further, wetlands and estuaries are extremely rare and important ecosystems in California. Yet, in the Smith River estuary, an estimated 40% of the original wetland habitat has been lost due to diking and draining of wetlands. Tidal sloughs and wetlands within the Smith River estuary in particular are some of California's most critical habitats with respect to salmonid population resiliency and biodiversity, particularly coho salmon.

⁶ Staff also coordinated with the County, including its Planning Director, early on, especially before it was clear that all the violations were in our permit and direct enforcement jurisdiction.

California's remaining wetlands, including those located on the Property, are critical, vanishing habitat and support numerous resident and migrant wildlife species, including birds migrating along the Pacific flyway. The Property also provides habitat for elk and bears. Wetlands provide critical habitat (nesting sites, rearing sites, and foraging areas) for many species including anadromous fishes, such as Chinook salmon, steelhead, and coastal cutthroat trout. Chinook salmon, steelhead and coastal cutthroat trout are abundant throughout the Smith River watershed and are of great ecological and economic benefit to California and Oregon.

Coho salmon also occur in the watershed but have declined significantly in California, which has led to federal and State listing pursuant to their respective Endangered Species Acts. According to the California Department of Fish and Wildlife ("CDFW"), the California coho salmon population has declined by 70% during the last 40 years. CDFW has identified the Smith River coho salmon as a key population to maintain or improve as part of the Recovery Strategy of California Coho Salmon. The federally listed-tidewater goby has also been detected in Tillas Slough.

In addition to the importance of the estuary to salmonids and other fish species, it also provides habitat for sensitive plants, such as the Lyngbye's Sedge (*Carex lyngbyei*), which was identified on the Property. While more common in Oregon and Washington, in California it is documented almost exclusively between Del Norte and Marin Counties, and in this area it is the dominant emergent vegetation along both banks of Tillas and Islas Sloughs. The California Natural Diversity Database has determined that the Lyngbye's Sedge is vulnerable, at moderate risk of extinction in California; and, the California Native Plant Society has determined that it is moderately threatened in California.

The seasonal damming of one of the culverted levee crossings with a steel plate and pumping of freshwater into the east fork of Tillas Slough, was one of the biggest impacts of the Unpermitted Development. Because the natural summer condition of the sloughs is saltwater, given the low flows of the river and creeks at that time, this freshwater disrupted the estuarine ecosystem. This effectively replaced nearly one and a half miles of tidal slough habitat with a freshwater irrigation pond every summer. This was done in order to provide a source of water for irrigating the fields in the drier summers. This seasonal storage of freshwater blocked all fish passage and resulted in poor water quality, the spread of invasive reed canary grass, and oxygen depletion resulting in fish kills. In addition, the pumping itself was done by a pump installed on the Smith River without an adequate fish screen. This meant that large amounts of tiny fish and fish eggs were being sucked into the pump every day that it ran in the summer, which alone had adverse impacts on the fish. This system of pumping and damming was therefore inconsistent with Coastal Act Section 30230 and LCP General Policy V.A. (protecting marine resources); Coastal Act Section 30231 and LCP General Policy VI.A. (protecting biological productivity and water quality); Section 30236 and LCP General Policy VI.A. (limiting channelizations, dams, and flood control projects).

The unpermitted road and road crossing resulted in fill of sloughs and removal of riparian trees and ESHA. Portions of the road were built alongside the slough, within

ESHA buffers, which likely caused erosion of sediment into the slough, impacting turbidity and water quality. The road is therefore inconsistent with Coastal Act Section 30231 and LCP General Policy VI.A. (protecting biological productivity and water quality); Coastal Act Section 30233 and LCP General Policy VI.A. (limiting fill of wetlands); and Coastal Act Section 30240 and LCP General Policy VI.A. (protecting environmentally sensitive terrestrial habitat areas).

The unpermitted placement of manure used as fill into Islas Slough replaced slough habitat. The manure itself also negatively impacted water quality in the slough. In addition, while the low tide cattle crossing was created with a much smaller amount of fill, and that fill was gravel or sediment, not manure, it still filled in important slough habitat. Therefore, the manure fill and cattle crossing fill are therefore inconsistent with Coastal Act Section 30231 and LCP General Policy VI.A. (protecting biological productivity and water quality) and Coastal Act Section 30233 and LCP General Policy VI.A. (limiting fill of wetlands).

The unpermitted placement of junk and dumping of dead cows was done in wetlands that provide important habitat. However, while this unpermitted development was more visually noticeable than some of the other unpermitted development, it was not the most impactful. The area occupied by the junk is a relatively small area compared to the other unpermitted development. It is likely that the cows have mostly decomposed by now, and therefore, the Commission's ecologist Dr. Laurie Koteen has recommended that, from an ecological standpoint, they should remain under the new trees that have grown in the area and not be removed, especially since this would further disturb the vegetation. However, both the junk and dead cows are still unpermitted development inconsistent with Coastal Act Section 30233 and LCP General Policy VI.A. (limiting fill of wetlands) and Coastal Act Section 30240 and LCP General Policy VI.A. (protecting environmentally sensitive terrestrial habitat areas).

The long-term unpermitted actions of removing large driftwood trees has caused large impacts over time. Naturally, large trees including redwoods would wash up on the banks of the river and then get lodged along the shoreline, creating snags and uneven banks to create important habitat for salmon. The removal of these trees caused the banks of the river, at least in the southwest corner of the Property, to be much more straight and even, and therefore provide less natural fish habitat. This major vegetation removal therefore was inconsistent with Coastal Act Section 30230 and LCP General Policy V.A. (protecting marine resources) and Coastal Act Section 30231 and LCP General Policy VI.A. (protecting biological productivity and water quality).

Finally, the pre-Coastal Initiative levee crossings had by far the largest impact on coastal resources. The levee crossings radically altered the 3 miles of Tillas Slough by severely constricting water flow for decades. Although there are culverts in the crossings, their small size means that water flows very fast through them when the tide is rising or dropping. This makes it very difficult for fish to enter the sloughs or exit the sloughs freely, as depending on the tide, they could get sucked into the sloughs or be unable to exit the sloughs and go back into the river. In addition, this causes major water quality problems, as much less water is able to mix into or out of the sloughs. The

water quality at the ends of the sloughs is therefore often poor. In addition, the lack of natural tidal flows means that there is much less water to naturally scour the banks and bottom of the slough. This means the sloughs are likely shallower and have more silt and sediment in them since the levee crossings were installed nearly sixty years ago. This likely creates warmer water that impacts fish habitat, as salmonids need colder water. Further, the lack of natural tidal flows means that less saltwater reaches the ends of the slough. This is evidenced by the large amounts of invasive reed canary grass growing towards the inland ends of Tillas Slough, which prefers a more freshwater environment. The pre-Coastal Initiative levee crossings, if they were built on public trust lands without a lease, would now be inconsistent with Coastal Act Section 30230 and LCP General Policy V.A. (protecting marine resources); Coastal Act Section 30231 and LCP General Policy VI.A. (protecting biological productivity and water quality); Coastal Act Section 30233 and LCP General Policy VI.A. (limiting fill of wetlands); Section 30236 and LCP General Policy VI.A. (limiting channelizations, dams, and flood control projects) and Coastal Act Section 30240 and LCP General Policy VI.A. (protecting environmentally sensitive terrestrial habitat areas).

C. Continuing Resource Damage

The Unpermitted Development is causing ‘continuing resource damage’, as those terms are defined by 14 CCR Section 13190.

14 CCR Section 13190(a) defines the term ‘resource’ as it is used in Section 30811 of the Coastal Act as follows:

‘Resource’ means any resource that 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.

The term ‘damage’ in the context of Restoration Order proceedings is defined in 14 CCR Section 13190(b) as follows:

‘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.

In this case, the damage was to habitat and ecosystem functions provided by the impacted tidal slough, wetland, and riparian areas, the biological productivity and water quality of coastal waterways; and the integrity of existing waterways and shoreline processes. The damage caused by the Unpermitted Development includes, among other things, the degradation and fill of wetlands and tidal sloughs, including ESHA, the degradation of water quality and biological productivity; and the alteration of waterways and shoreline processes.

The term ‘continuing’ is defined by 14 CCR Section 13190(c) as follows:

‘Continuing’, when used to describe ‘resource damage’, means such damage, which continues to occur as of the date of issuance of the Restoration Order.

As of this time, the Unpermitted Development that is the subject of these proceedings and the results thereof remain on the Property. As described above, the Unpermitted Development results in impacts to coastal resources. The fill of wetlands, tidal sloughs, and riparian areas can continue to impact coastal resources, both by removing important habitat area as well as continuing to prevent native ecosystems from existing or functioning, and also introducing sedimentary pollution into waterways.

As described above, the Unpermitted Development is causing damage to resources protected by the Coastal Act that continue to occur as of the date of this proceeding, and therefore damage to resources is ‘continuing’ for purposes of Section 30811 of the Coastal Act. The damage caused by the unpermitted development, which is described in the above paragraphs, satisfies the regulatory definition of ‘continuing resource damage.’ Thus, the third and final criterion for issuance of a Restoration Order is therefore satisfied.

D. Tribal Consultations

In 2020, new Commission staff were assigned this case, and they were informed that the Tolowa Dee-Ni’ Nation, a federally recognized tribe in Smith River, was interested in this area. Therefore, shortly after the Amended Notice of Intent was sent in October of 2020, Commission staff met with the Tolowa Dee-Ni’ Nation over videoconference to discuss the violations on the Property and the Cease and Desist Order, Restoration Order, and Administrative Penalty process. This began a series of periodic videoconferences and phone calls with Tolowa Dee-Ni’ staff and councilmembers to answer questions and receive comments with regards to the Consent Agreement process. The Tolowa Dee-Ni’ Nation also sent letters to Commission staff with requests as well.

Commission staff have met over videoconference with staff and tribal councilmembers of the Tolowa Dee-Ni’ Nation, a federally recognized tribe located in Smith River, many times to answer questions and receive their comments. On April 21, 2022, Commission staff participated in a requested inter-agency tribal consultation regarding the proposed Consent Agreement with the Tolowa Dee-Ni’ Nation, along with the North Coast Regional Water Quality Control Board and California State Lands Commission, the California Natural Resources Agency, and the California Environmental Protection Agency. The Tolowa Dee-Ni’ Nation also requested that Commission staff visit them if they came to Smith River, and on May 18, 2022, Commission enforcement staff visited the Tolowa Dee-Ni’ Nation at their offices to answer questions and discuss the Consent Agreement process.

The Tolowa Dee-Ni’ Nation also made a number of procedural requests relating to this Consent Agreement. They requested that a cultural resources survey be done on the Property prior to any removal or restoration work. They also asked that they be allowed to comment on the proposed Restoration Plan after a Consent Agreement was

approved, and also comment again on the proposed Restoration Plan after permitting agencies had commented on it. They also requested that tribal monitors be allowed onsite to monitor the work. They stated that replanting of the banks of the sloughs needs to include multi-story vegetation, including spruce trees.

The Tolowa Dee-Ni' Nation also made a number of more substantive requests relating to outcomes of the Consent Agreement. Broadly, they requested that the area be restored to the fullest extent possible, and that the Farm be held accountable to the full extent of the law, including removal of all unpermitted development and assessment of any applicable penalties. As a general matter, they expressed their belief that both public and tribal access to the Property is one of the most important things they want to see out of this Consent Agreement. More specifically, they also requested that all or sections of the Property be transferred to the Tolowa Dee-Ni' Nation in lieu of monetary penalties. They also requested a cultural access easement onsite that is different from a public access easement.⁷

In addition, Commission staff queried the Native American Heritage Commission for a list of interested tribes and sent letters offering to consult with the tribes on the list. The Elk Valley Rancheria, a federally recognized tribe in Crescent City was the only contacted tribe that requested a consultation. On June 17, 2022, Commission staff participated in a tribal consultation with the Elk Valley Rancheria, a federally recognized tribe with offices in Crescent City. The Elk Valley Rancheria requested that tribal monitors be on site during work, and requested that after any Consent Agreement is approved, that the proposed Restoration Plan be sent to Elk Valley Rancheria for comments.

Commission staff worked to address the issues and concerns of both the Tolowa Dee-Ni' Nation and the Elk Valley Rancheria in the proposed settlement. Accordingly, for example, the proposed Consent Agreement requires that tribal monitors be allowed to be present during all ground disturbance activities on the Property in order to help identify and protect any cultural resources found during removal, restoration, or mitigation. It also provides for spruce tree planting and multi-story revegetation as part of the mitigation. In addition, it also provides the opportunity for tribes to review and comment on draft removal, restoration, and mitigation plans submitted by the Farm to Commission staff following approval of the Consent Agreement, both before and after other agencies comment. The Commission also worked with the Farm to reach an

⁷ After an agreement was reached but before this staff report was posted, they also requested that the Commission investigate deterioration of parts of the pre-Coastal Initiative levees, and shared photos with Commission staff that showed tires in the water. They also requested that tribal monitors be paid. In addition, they requested that the dead cows, which are proposed to remain in order to protect the trees that have grown over them, be removed in order to ensure that no cultural resources were impacted during the dumping. They also made other requests that they stated would be included in a letter sent to the Commission after this staff report is posted.

agreement that included large amounts of public access and land dedications to public entities, as is detailed below.

E. Environmental Justice

The following discussion does not address any required element of Sections 30810, 30811, or 30821.3 of the Coastal Act, and the findings in this section are therefore not essential to the Commission's ability to issue a cease and desist order, restoration order or administrative penalty. This explication is, however, important for context, and for understanding the totality of impacts associated with the violations, and for noting that this proposed resolution would benefit the public by enhancing public access to this area and providing land dedications to the public.

Public Resources Code Section 30210 states:

In carrying out the requirements of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Additionally, Section 30013 provides:

The Legislature further finds and declares that in order to advance the principles of environmental justice and equality, subdivision (a) of Section 11135 of the Government Code and subdivision (e) of Section 65040.12 of the Government Code apply to the commission and all public agencies implementing the provisions of this division.

Section 30107.3 defines Environmental Justice as:

... the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.

The Property at issue and its natural resources, as well as the waterbodies that flow through it, are very important to several California Native American tribes, as well as the general public. Since the 1860's, these tribes have been unable to freely access the Property as they once did, and the general public has been able to use them for various purposes as well. And after June of 1964, the date by which levees were constructed that blocked public access to Tillas Slough, both these tribes and the general public were also cut off from freely accessing these miles of waterways. These tribes care deeply about the natural resources on the Property that were potentially impacted by development on the Property, including the unpermitted fill of wetlands and sloughs.

In addition, the Smith River has some of the best recreational fishing of any river in the country, and fishing is a pastime and tradition shared by both tribes and the general public in Del Norte County. The unpermitted fill of tidal sloughs and wetlands by the

Farm negatively impacted the water quality of the estuary and eliminated valuable habitat for salmonids. This negatively impacted the local fisheries and therefore negatively impacted valuable coastal fish and fishing resources used by the public and tribes.

Fishing is a low-cost activity that can also be a subsistence activity, and it is also a culturally significant activity for tribes. Therefore, impacts to fish habitat and populations cause an environmental justice impact to people who enjoy this low-cost recreational activity.

Proposed Public Access and Land Dedications

The removal of the large levee crossings would provide public access to three miles of Tillas Slough that the public and tribes have been unable to freely access for nearly sixty years. This dramatic expansion of public access in the Smith River estuary will provide many new opportunities for fishing and wildlife viewing. Once Tillas Slough is forested and fish passages are installed in key areas of the pre-Coastal Initiative levees, the fishing opportunities will also improve even more. Boating or wading through a tidal slough that has forests on its banks will be a special and unique experience in this region and in California.

In addition, the Farm would provide a 10+ acre public access easement at the mouth of Tillas Slough that would help facilitate boat access in this area. The public access easement would cover banks of the river and the sand bar at the mouth of Tillas Slough, which is approximately 10 acres. But because the sand bar is larger at low tide and during certain seasons, the easement may expand to be almost twice as large at some times. This easement would be accessible by boat and provide excellent views of the beach, the ocean, the river, and the slough. It would also serve as a natural resting point for people visiting the sloughs. It is expected that both this easement and access to the three miles of Tillas Slough would provide great birdwatching and other wildlife watching activities, as well as good fishing. Because the easement would only be accessible by boat, it is not expected to cause negative impacts from overuse, such as impacts to wildlife or cultural resources.

In addition, the Farm would dedicate 14 acres of riverfront forest to a public entity. This forest is full of native trees and wetlands and includes the mouth of two creeks. The forest is an important endpoint of a wooded wildlife corridor that extends from the river mouth to the mountains and is the home of many elk and bears. It is located at the very northwestern portion of Reservation Ranch and is just to the south of Xaa-wan'-k'wvt (Howonquet Village, formerly Ship Ashore Resort) to the north. This land dedication would include a conservation easement for habitat conservation.

Further, the Farm would dedicate to a public entity 2 acres of oceanfront land that the Farm owns approximately 2 miles from the Property. This land is located on a bluff overlooking the ocean just to the south of the popular Kamph Memorial Park and public campground, and includes woods and native plants. This land is directly adjacent to stairs to the beach and has unobstructed views of the beach, the ocean, and the

coastline north to Oregon, which is two miles away. This land could be used for public access or expansion of the existing campground. This land would include a conservation easement for habitat conservation as well.

3. Basis for Issuing Consent Administrative Civil Penalty Action

Statutory Provision

The statutory authority for imposition of administrative penalties for violations of non-access provisions of the Coastal Act is provided in the Coastal Act in Public Resources Code Section 30821.3,⁸ which states, in relevant part:

(a) In addition to any other penalties imposed pursuant to this division, a person, including a landowner, who is in violation of any provision of this division other than public access, including, but not limited to, damage to archaeological and wetlands resources and damage to environmentally sensitive habitat areas, is subject to an administrative civil penalty that may be imposed by the commission in an amount not to exceed 75 percent of the amount of the maximum penalty authorized pursuant to subdivision (b) of Section 30820 for each violation. The administrative civil penalty may be assessed for each day the violation persists, but for no more than five years.

Also, sections 30820 and 30822 create potential civil liability for violations of the Coastal Act more generally. Section 30820(b) also provides for daily penalties, as follows:

Any person who performs or undertakes development that is in violation of [the Coastal Act] or that is inconsistent with any coastal development permit previously issued by the commission . . . , when the person intentionally and knowingly performs or undertakes the development in violation of this division or inconsistent with any previously issued coastal development permit, may, in addition to any other penalties, be civilly liable . . . in an amount which shall not be less than one thousand dollars (\$1,000), nor more than fifteen thousand dollars (\$15,000), per day for each day in which the violation persists.

Section 30822 states:

Where a person has intentionally and knowingly violated any provision of this division or any order issued pursuant to this division, the commission may maintain an action, in addition to Section 30803 or 30805, for exemplary damages and may recover an award, the size of which is left to the discretion of the court. In exercising its discretion, the court shall consider the amount of liability necessary to deter further violations.

⁸ All section references in this section, III.C, are to the California Public Resources Code, and as such, to the Coastal Act, unless otherwise indicated.

Through the proposed settlement, the Farm has agreed to resolve its financial liabilities under all of these sections of the Coastal Act.

Application to Facts

a. Exceptions to Section 30821.3 Liability Do Not Apply

Under section 30821.3(h) of the Coastal Act, in certain circumstances, a party who is in violation of the public access provisions of the Coastal Act can nevertheless avoid imposition of administrative penalties by correcting the public access violation within 60 days of receiving written notification from the Commission regarding the violation.

This provision of Section 30821.3(h) is inapplicable to the matter at hand. For 30821.3(h) to apply, there are three requirements, all of which must be satisfied: 1) the violation must be remedied consistent with the Coastal Act within 60 days of receiving notice, 2) the violation must not be a violation of a permit condition, and 3) the party must be able to remedy the violation without performing additional development that would require Coastal Act authorization.

Restoring the habitat areas impacted by the violations in this matter would require major restoration, which would require a Coastal Development Permit. Therefore, none of the violations at issue could be cured pursuant to the above sections.

In addition, Section 30821.3(f) of the Coastal Act states:

(f) In enacting this section, it is the intent of the Legislature to ensure that unintentional, minor violations of this division that only cause de minimis harm will not lead to the imposition of administrative penalties if the violator has acted expeditiously to correct the violation.

Section 30821.3(f) is also inapplicable in this case. As discussed above and below, the unpermitted development at issue includes large areas of fill that caused substantial harm to tidal slough, wetland, and riparian habitat areas. In addition, this substantial harm occurred via intentional efforts to place fill. Therefore, the unpermitted development is not unintentional or minor, and did not cause de minimis harm.

b. Penalty Amount

Pursuant to Section 30821.3(a) of the Coastal Act, the Commission may impose penalties in “an amount not to exceed 75 percent of the amount of the maximum penalty authorized pursuant to subdivision (b) of Section 30820 for each violation.” Section 30820(b) authorizes civil penalties that “shall not be less than one thousand dollars (\$1,000), [and] not more than fifteen thousand dollars (\$15,000), per day for each day in which each violation persists.” Therefore, the Commission may authorize penalties in a range up to \$11,250 per day for each violation. Both Section 30821(a) and Section

30821.3(a) set forth the time for which the penalty may be collected by specifying that the “administrative civil penalty may be assessed for each day the violation persists, but for no more than five years.”

In this case, the unpermitted pumps on the Property date to the summer of 1973, just after the Coastal Initiative took effect in February 1, 1973. In addition, the unpermitted road that filled part of Tillas Slough dates back to the 1980's. These and other violations were extant during the entire statutory period of six months during which administrative penalties may apply, however, Coastal Act Section 30821.3 did not take effect until January 1, 2022, at which point the Farm was well into active negotiations with Commission staff. Therefore, administrative penalties for the impacts to habitat have not accrued for the full five years. In addition, because the Farm has agreed to amicably resolve this matter, and to provide a public access easement and two land dedications in lieu of a penalty as detailed above, Commission staff recommends that the Commission approve the proposed resolution contained in the proposed Consent Cease and Desist Order, Consent Restoration Order and Consent Administrative Penalty.

As discussed immediately below, Commission staff thoroughly analyzed the factors enumerated by the Coastal Act in crafting the proposed Consent Administrative Civil Penalty calculation for the Commission's approval, and the Commission concurs with staff's analysis. Under Section 30821.3(c), in determining the amount of administrative penalty to impose, “the commission shall take into account the factors set forth in subdivision (c) of Section 30820.”

Section 30820(c) states:

In determining the amount of civil liability, the following factors shall be considered:

- (1) The nature, circumstance, extent, and gravity of the violation.
- (2) Whether the violation is susceptible to restoration or other remedial measures.
- (3) The sensitivity of the resource affected by the violation.
- (4) The cost to the state of bringing the action.
- (5) With respect to the violator, any voluntary restoration or remedial measures undertaken, any prior history of violations, the degree of culpability, economic profits, if any, resulting from, or expected to result as a consequence of, the violation, and such other matters as justice may require.

Applying the factors of Section 30820(c)(1), the violation at hand should warrant the imposition of substantial civil liability; violations have persisted on the Property for many

years and the violations have meant that large areas of tidal slough, wetland, and riparian habitat has been filled in and negatively impacted or eliminated altogether. Therefore, the above factor weighs in favor of a high penalty.

With regards to 30820(c)(2), the violation can be remedied going forward. The unpermitted fill can be removed. In addition, in many places, the habitat of the tidal sloughs, wetlands, and riparian areas that were filled were already significantly degraded due to pre-Coastal Initiative levee construction and pre-Coastal Initiative logging. The areas of unpermitted fill can be restored to provide better habitat than existed immediately prior to the unpermitted development, and the mitigation plan in the Consent Agreement would require large amounts of additional restoration. However, even though this habitat was already somewhat degraded prior to the unpermitted development, there are decades of habitat losses that can never be recovered. Therefore, a moderate penalty is warranted under this factor.

Section 30820(c)(3) requires consideration of the resource affected by the violation in the assessment of the penalty amount. The resource affected by the violation, the marine and estuarine habitat on the Smith River, is an important resource. The Smith River is the largest undammed river in the state, and one of the most pristine of the federally designated Wild and Scenic Rivers. The unpermitted development negatively impacted large areas of habitat at the mouth of the Smith River. However, as stated above, much of this habitat was not pristine prior to the unpermitted development, but was partially degraded by pre-Coastal Initiative levee construction and pre-Coastal Initiative logging. Therefore, this factor warrants a moderate penalty.

Section 30820(c)(4) takes into account the costs to the state of bringing this action. In this case, Commission staff has spent a large amount of staff time on this matter relative to our other cases. However, much of this staff time has been spent on investigations related to the complex violation history and large size and unique habitat of the Property. But the Farm's dedication to reaching an amicable resolution, evidenced by their commitment to meeting weekly with Commission staff to work towards a Consent Agreement, has saved a large amount of Commission staff time. Given the complex violation history and large size of the Property, had the Farm chosen to delay the negotiations process or to litigate this matter, Commission staff very likely would have spent many years of extra staff time to resolve this. Therefore, this factor warrants a low penalty.

Finally, Section 30820(c)(5), requires evaluation of the entity that undertook and/or maintained the unpermitted development and whether the violator has any prior history of violations, the degree of culpability, economic profits, if any, resulting from, or expected to result as a consequence of, the violation, and such other matters as justice may require. These violations started at least as far back as 1973, and more violations were added in the decades thereafter. While the Farm did not directly profit from the violations in the sense that they did not sell the area of unpermitted development or charge admission to it, they did use these areas as part of the grazing operations. Therefore, the violations were done for economic benefit, albeit a relatively small one.

However, many of the violations were likely done under the direction of Henry 'Hank' Westbrook, who ran the farm during the time of the pre-Coastal Initiative levee construction and also during the time of development of the older violations, and who is now deceased. Thus, many of the violations were undertaken long ago by a prior generation that has not owned or managed the Property for many years. Nonetheless, while the current generation of owners of the Property may not have participated in some of the older violations, or greatly profited from the violations, they did undertake new violations as well. Therefore, a moderate penalty is warranted for this factor.

In spite of this, the Farm remained dedicated to reaching an amicable resolution that provides major benefits to the public. The Farm has been much more committed to working cooperatively than many other violators, which has saved Commission staff a large amount of staff time and resources. In addition, although the ability to fine for administrative penalties for loss of habitat area did not take effect until January 1, 2022, during which the Farm was in the middle of negotiations with Commission staff, the Farm has still agreed to provide major public benefits in lieu of a penalty.

Aggregating these factors, Commission staff concludes that a moderate penalty is justified here. Staff recommends that the Commission exercise its prosecutorial discretion and adopt staff's recommendation that the Farm provide a public access easement and two significant land dedications in lieu of a penalty here. The Property is large and its natural resources are very important to the public and tribes, and so the Farm has a unique ability to provide public access and land dedications that many properties do not. Because Del Norte County has some of, if not the most affordable real estate on the California coast, and because nearly all of the Property is zoned agricultural, any monetary valuation of the public access easement and land dedications will tend to be low compared to the rest of the state. In contrast to southern California, where a handful of feet of a public access easement in Malibu can represent millions of dollars worth of residential-zoned real estate, the public benefits here are farther down the monetary scale, but represent very significant public benefits in terms of the physical area and very high habitat resource value.

The land dedication of two acres of beachfront land zoned residential is the most valuable. If not for this dedication, this land could end up fenced off with a house built on it instead of being preserved and dedicated to the public. The riverfront land dedication of forested area is 14 acres and is harder to value because much of it is likely ESHA and wetlands, however, it provides great recreational value and the conservation value of the land for habitat protection in the wooded wildlife corridor from the mountains to the river's mouth is very significant. Ensuring that this area is protected long term is therefore very important. The public access easement is on land that is not zoned residential, but has a major value to the public as it will help people to access Tillas Slough via boat and wading. Combined, the over 26 acres of easements and land dedications here provide a level of public benefits that far outweighs the relatively low cost of Del Norte County real estate.

Therefore, staff recommends that the Commission issue the Consent Administrative Penalty CC-22-AP3-01 attached as **Appendix A** of this staff report.

C. Consent Agreement is Consistent with Chapter 3 of the Coastal Act

The proposed Consent Agreement, attached to this staff report as Appendix A, is consistent with the resource protection policies found in the Del Norte County LCP and Chapter 3 of the Coastal Act.

Failure to excavate and revegetate areas impacted by unpermitted development has the potential to and in many cases has already lead to invasion of non-native plant species, thus decreasing biological diversity and productivity of the various impacted habitat-types, inconsistent with the resource protection policies of the Coastal Act. The fundamental objectives of the various restorative excavation and revegetation projects mandated by the Consent Agreement include the protection of cultural resources, restoration and improvement of water quality, biological productivity, shoreline processes, and ESHA; therefore, the activities required and authorized by the Consent Orders are consistent with Sections 30230, 30231, 30233, 30236, and 30240. Further, by restoring native vegetation, implementation of the Consent Agreement will increase the size of ESHA on the Ranch and restore riparian ecosystem functions. Implementation of the Consent Agreement will improve water quality and biological resources by removing non-native vegetation and physical development, thereby allowing for greater biological diversity and increased ecosystem resource cycling.

D. California Environmental Quality Act

The Commission finds that issuance of this Consent Agreement, to compel the removal of the Unpermitted Development and the restoration of the Property, among other things, as well as the implementation of this Consent Agreement, are exempt from the requirements of the California Environmental Quality Act of 1970 (CEQA), Cal. Pub. Res. Code §§ 21000 *et seq.*, for the following reasons. First, the CEQA statute provides for the identification of “classes of projects that have been determined not to have a significant effect on the environment and that shall be exempt from [CEQA].” *Id.* at § 21084. The CEQA Guidelines (which, like the Commission’s regulations, are codified in 14 CCR) provide the list of such projects, which are known as “categorical exemptions,” in Article 19 (14 CCR §§ 15300 *et seq.*). Because the Commission’s process, as demonstrated above, involves ensuring that the environment is protected throughout the process, multiple exemptions apply here: (1) the one covering actions to assure the restoration or enhancement of natural resources where the regulatory process involves procedures for protection of the environment (14 CCR § 15307); (2) the one covering actions to assure the restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment (14 CCR § 15308); and (3) the one covering enforcement actions by regulatory agencies (14 CCR § 15321).

Secondly, although the CEQA Guidelines provide for exceptions to the application of these categorical exemptions (14 CCR § 15300.2), the Commission finds that none of those exceptions applies here. Section 15300.2(c), in particular, states that:

A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

CEQA defines the phrase “significant effect on the environment” (in Section 21068) to mean “a substantial, or potentially substantial, adverse change in the environment.” These Consent Agreements are designed to protect and enhance the environment, and they contain provisions to ensure, and to allow the Executive Director to ensure, that they are implemented in a manner that will protect the environment. Thus, this action will not have any significant effect on the environment, within the meaning of CEQA, and the exception to the categorical exemptions listed in 14 CCR section 15300.2(c) does not apply. An independent but equally sufficient reason why that exception in section 15300.2(c) does not apply is that this case does not involve any “unusual circumstances” within the meaning of that section, in that it has no significant feature that would distinguish it from other activities in the exempt classes listed above. This case is a typical Commission enforcement action to protect and restore the environment and natural resources.

In sum, given the nature of this matter as an enforcement action that will ensure the environment is protected throughout the process, and since there is no reasonable possibility that it will result in any significant adverse change in the environment, it is categorically exempt from CEQA.

IV. SUMMARY OF FINDINGS OF FACT

1. The Property that is the subject of this Consent Agreement is over 1,600 acres near the mouth of the Smith River, in Del Norte County, CA.
2. Prior to the Coastal Initiative, large levee crossings were installed across tidal sloughs that flow through the Property. Parts of them or all of them may be on public trust lands.
3. Reservation Ranch is the violator and property owner.
4. Coastal Act Section 30810 authorizes the Commission to issue a cease and desist order when the Commission determines that any person has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the Commission without securing a permit, or (2) is inconsistent with a permit previously issued by the Commission. Coastal Act Section 30811 authorizes the Commission to issue a restoration order when the Commission determines that any person has undertaken 1) development without a permit, and 2) that development is causing continuing resource damage.

5. Unpermitted Development as defined above has been undertaken by the Farm and occurred without a CDP and is inconsistent with the Del Norte County LCP, including but not limited to: 1) grading, including grading to construct roads; 2) placement of fill, including manure, soil, straw, construction waste, trash, cow carcasses, and other debris in and/or adjacent to wetlands, tidal sloughs, streams, and the Smith River; 3) placement of a road crossing directly within and on the banks of a tidal slough; 4) seasonal damming of a tidal slough for use as a freshwater irrigation pond and/or irrigation, including by placement and operation of a system of at least six pumps within or adjacent to tidal sloughs, streams, and the Smith River; 5) removal of major vegetation including wetlands and riparian vegetation; 6) removal of downed trees on river banks; and 7) construction of levee crossings prior to the 1972 Coastal Initiative that was the predecessor to the Coastal Act but potentially partly or wholly on public trust lands.
6. All of the unpermitted development is located within the Coastal Zone. The unpermitted development is within the permit jurisdiction of the Commission. The unpermitted development undertaken before 1977 is located within the Coastal Zone as defined by the Coastal Initiative.
7. The statutory authority for imposition of administrative penalties is provided in Section 30821.3 of the Coastal Act. The criteria for imposition of administrative civil penalties pursuant to Section 30821.3 of the Coastal Act have been met in this case. Sections 30820 and 30822 of the Coastal Act create potential civil liability for violations of the Coastal Act more generally.
8. The parties agree that all jurisdictional and procedural requirements for issuance of and enforcement of this Consent Agreement, including Section 13187 of the Commission's regulations, have been met.
9. The work to be performed under this Consent Agreement, if completed in compliance with the Consent Agreement and the plan(s) required therein, will be consistent with Chapter 3 of the Coastal Act.
10. The Farm has agreed to assume the obligations of this Consent Agreement, which settles all Coastal Act violations related to the specific violations described in #5, above.
11. As called for in Section 30821.3(c), the Commission has considered and taken into account the factors in Section 30820(c) in determining the amount of administrative civil penalty to impose. The penalty agreed to in this settlement is an appropriate amount when considering those factors.