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# F8.1 – 8.4

Staff: Rob Modellmog-SF  
Staff Report: 5/30/24  
Hearing Date: 6/14/24

## **STAFF REPORT: Recommendations and Findings for Consent Cease and Desist Order No. CCC-24-CD-02, Consent Restoration Order No. CCC-24-RO-02, and Consent Administrative Penalty Nos. CCC-24-AP-02 & CCC-24-AP3-02**

**Consent Cease and Desist Order No.:** CCC-24-CD-02

**Consent Restoration Order No.:** CCC-24-RO-02

**Consent Administrative Penalty Nos.:** CCC-24-AP-02 and CCC-24-AP3-02

**Related Violation File:** V-3-18-0038

**Party Subject to these Consent Orders:** Esperanza Carmel Commercial, LLC

**Location:** The former Rocky Point Restaurant property, located at 36700 Highway One, Big Sur, Monterey County, also known as Monterey County Assessor's Parcel No. ("APN") 243-262-004 ("the Rocky Point Property"); land surrounding the Rocky Point Property on three sides which is owned by Monterey County, also known as APN 243-262-003 ("the County Property"); and an adjacent parcel at APN 243-251-025, owned by the Edward K. Hamilton and Francine F. Rabinowitz Revocable Trust ("the Adjacent Private Property"); all of which will be referred to herein collectively as "the Properties."

**Violation Description:** Unpermitted Development undertaken and/or maintained by the owner of the Rocky Point Property on the County Property, including: 1) installation of a locked gate, signs restricting public access, and cameras; 2) removal of native vegetation in two areas to facilitate use as unpermitted private parking lots, one to the north

that is approximately 4,500 square feet, and one to the southeast that is approximately 10,000 square feet, along with grading and placement of decomposed granite; 3) installation of sheds and a trash enclosure, 4) installation of lighting along the driveway; and 5) installation of fencing, mailboxes, rock walls, and other items near where the road meets Highway One.

Unpermitted Development on both the County Property and the Rocky Point Property undertaken and/or maintained by the owner of the Rocky Point Property, including: 6) posting of a guard, restrictive parking signs, and “No Trespassing” signs; and 7) installation of garden or accessory items, non-native landscaping, and an irrigation system.

Unpermitted Development on the Adjacent Private Property, County Property, and Rocky Point Property undertaken and/or maintained by the owner of the Rocky Point Property, including: 8) grading of a trail and installation of metal T-poles, rope, and wood stairs; and 9) installation of a water tank in native vegetation and clearing of native vegetation around it; and

Unpermitted Development that is solely on the Rocky Point Property and undertaken and/or maintained by the owner of that property, including: 10) installation of an outdoor patio including a fence/wall, stairs and eating areas; 11) installation of a new leach field; 12) remodeling of existing buildings; 13) an expansion of restaurant capacity from 120 to 200 diners; 14) placement of asphalt paving; 15) construction of a building to the northeast of the restaurant building; 16) installation of decks seaward of both the northern part of the restaurant and the residential unit to the north of the restaurant; and 17) placement of planters and woodchips seaward of the restaurant.

**Substantive File Documents:** Public documents in Consent Cease and Desist Order, Consent Restoration Order, and Consent Administrative Penalty File Nos. CCC-24-CD-02, CCC-24-RO-02, CCC-24-AP-02, and CCC-24-AP3-02; Exhibits 1 through 12; 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 blocked public access to a public road and scenic trails on public property, and impacted extremely rare native plants on properties overlooking the ocean in Big Sur, at and around Rocky Point Restaurant (“the Properties”). The Properties are located seaward of Highway One between Carmel and Big Sur Village. They feature stunning views of the restaurant’s namesake rocky promontories, the kelp beds and sea otters below them, and also of Bixby Bridge. While the Big Sur coastline is one of the most popular visitor attractions in California, the Properties have long provided one of the relatively few public access points in the region’s northern stretch. These Coastal Act violations took place on both public and private land, in an area where the Monterey County Local Coastal Program (“LCP”) prioritizes public access and protects natural coastal views.

The Properties have long afforded public access to picturesque scenery among unique coastal sage scrub habitat. Near the ocean, native plants such as black sage and barberry have been stunted by the wind, salt, and granite bedrock, and evolved into unique dwarf varieties only a few inches tall. In the 1950’s, Rocky Point Restaurant was built on a parcel on the oceanfront bluff (“the Rocky Point Property”), and the public began using the restaurant’s parking lot and access road right of way to reach scenic trails and fishing spots. In the 1990’s, the County of Monterey acquired the mostly undeveloped property surrounding the Rocky Point Property (“the County Property”), which included the land underlying the restaurant’s access road, and the County recorded a deed restriction to protect the natural habitat and coastal views.

In 2018, Commission enforcement staff received reports that the then-owners of the Rocky Point Property, Peter and Grace Wang, had installed a locked gate and ‘private property’ signs at the entrance to the public road on the County Property. The Wangs only unlocked the unpermitted gate during the restaurant’s limited hours of operation, and placed ‘customer parking only’ signs in the parking lot. They also hired a guard to obstruct members of the public from attempting to access the long-used parking, trails, and fishing spots on both the County Property and the Rocky Point Property. While investigating the reports about the unpermitted locked gate, Commission staff further discovered that the Wangs had undertaken numerous other violations, including the unpermitted removal of an environmentally sensitive habitat area on the County Property to create additional unpermitted private parking areas, as well as installing new lights, irrigation, and landscaping with invasive plants throughout the Properties.

Commission staff had been working with the Wangs towards a consensual resolution, but progress slowed when the pandemic hit in 2020, and the Wangs closed the restaurant and permanently locked the unpermitted gates. Later that year, Peter Wang passed away. In late 2021, Esperanza Carmel Commercial, LLC (“Respondent”) bought the Rocky Point Property. Upon purchasing the Rocky Point Property, Respondent reopened the gates and began working with Commission staff to resolve the Coastal Act violations associated with the Rocky Point Property.

Respondent has now agreed to a proposed amicable resolution that would result in the removal of the unpermitted development and restoration of the site, the provision of new, excellent public access amenities, the protection of most of the Rocky Point Property for conservation and public access, and the restoration of rare bluff habitat as additional mitigation for the other violations. The proposed agreement requires Respondent to provide very significant public amenities in lieu of cash payment of penalties. These projects include provision in perpetuity of permanent ADA compatible public restrooms, 24 public parking spaces, 8 public electric vehicle chargers, a public scenic viewing area with 10 picnic tables and 5 benches, and many new public access signs, among other amenities. Respondent has also agreed to record public access and conservation easements that would cumulatively protect more than 80% of the Rocky Point Property. Finally, as mitigation for the violations' impact to natural resources, Respondent would also undertake a restoration of the bluffs to restore the unique native dwarf plants, as well as remove invasive eucalyptus trees. The total value of this package, including the construction of restrooms and EV chargers, and the restriction of development and formalization of public access on the overwhelming majority of the Rocky Point Property, is estimated to be in excess of \$4 million, and will provide critical public amenities in an area that is seriously in need of these types of amenities.

### **Background**

The Properties provide environmentally sensitive habitat areas for extremely rare native plants. There, on the rocky granite outcrops facing the ocean, the harsh soils and salty breezes stunted the growth of the coastal sage scrub, causing them to evolve into dwarf varieties. Native plants that normally grow around the height of a person farther inland can be measured in inches on the bluffs. These include black sage, barberry, pitcher sage, blue-eyed grass, and white fairy lantern. The diminutive plants are so unique to this area that today, many of them are sold in nurseries under the label of 'Rocky Point varieties.'

This portion of Big Sur has long been more accessible than the rest of the region. In 1870, Charles Henry Bixby constructed a road from Carmel (12 miles north of the Properties) that passed by what is now the Properties on the way to Bixby Creek, where Bixby Bridge stands today (2.5 miles south of the Properties). In contrast, the rest of Big Sur would remain largely inaccessible and sparsely populated for many more decades, until Highway One was completed in 1937.

In the 1950's, the Rocky Point Restaurant and adjacent parking lot was constructed and opened on the Rocky Point Property. An access road from Highway One was also constructed on the separate parcel surrounding the Rocky Point Property (now the County Property). The public was now able to easily access the scenic trails along the bluffs by driving down the access road and parking in the lot. Following construction of the road and parking lot, these new access amenities were not only used by the Rocky Point Property owners and their guests. The road and parking lot were also used by the general public, on a regular basis, and consistently, without having to pay a fee and without any other type of restriction or interference by the property owners. In 1956, sea otters were documented in the kelp beds offshore of the Properties. California's sea

otters had been thought extinct until a small colony was discovered in 1938 offshore of Bixby Creek, less than three miles south of the Properties. The public thus was also able to enjoy viewing some of the few sea otters remaining in California at that time.

The land surrounding the Rocky Point Property, however, remained relatively undeveloped. In 1962, two easements were recorded on what is now the County Property. The easements allowed the owner of the Rocky Point Property to use the access road and to place a sign for the restaurant relatively close to Highway One. However, the entrance sign was not placed within the sign easement, and was instead placed immediately adjacent to Highway One, where it partially obstructed coastal views from the highway, similar to how a small billboard would appear. In 1988, California voters passed Proposition 70, a bond initiative that provided funds for public lands conservation. In 1990, the County of Monterey acquired the County Property via the use of Proposition 70 funds. In 1994, the County recorded a deed restriction pursuant to the requirements of Proposition 70 that provided strong protections for the natural habitat and coastal views on the County Property that was acquired with those funds.

Over the years, the Commission conditionally approved several Coastal Development Permits to expand the capacity of the restaurant and allow for other improvements; however, the owner did not meet the conditions required to be met before the permits could be issued, and so all of the permits expired before becoming effective. In 2008, the County of Monterey approved the only CDP to ever be issued for the Rocky Point Property. The County's CDP authorized construction of a new deck and gazebo, and also authorized replacement of the sign outside of the sign easement, lights along the bluff, and water tanks on the County Property.

### **Violation History**

In 2012, the Wangs bought the Rocky Point Property and sometime after that began undertaking unpermitted development. On the County Property, they installed a new gate in 2017, without a CDP. They also installed signs warning 'private property' and 'no trespassing,' and installed cameras, even though this was publicly owned property, not private property. They also began locking the unpermitted gates at all times except for when the restaurant was open. Although a gate existed prior to the Wangs' purchase of the property, it was almost always open. However, the Wangs began regularly closing the new, unpermitted gate to align with the restaurant's limited hours and to keep the public out during all other times. Because the restaurant as managed by the Wangs did not open until almost noon, closed before sunset in summer, and was not open every day of the week, this amounted to greatly reduced public access.

In addition, the Wangs installed new, unpermitted landscaping of non-native plants along the road on the County Property, as well as irrigation for those plants. These new plantings and irrigation contributed to an existing problem of invasive plants throughout the Properties. In addition, the Wangs built a long stairway that reached all the way up a hill full of environmentally sensitive habitat, and ended on a parcel to the north ("the Adjacent Private Property").

The Wangs also cleared and graded two areas of land on the County Property, which combined were large enough to fit several dozen cars. One was designated for private parking for restaurant customers only, and one for restaurant employees only. In the unpermitted employee parking area, the Wangs also built and/or maintained numerous tanks, sheds, and other infrastructure. This unpermitted development was constructed in spite of the fact that the habitat and coastal views on the County Property are legally protected by a deed restriction, Proposition 70 itself, and a County resolution.

The Wangs also undertook numerous violations on the Rocky Point Property. They installed signs throughout the parking lot stating 'customer parking only' and undertook measures to limit public access to the trails generally. They did this even though the public had been parking there to enjoy the trails for more than sixty years, and Commission staff believe it is therefore very likely that the public acquired prescriptive rights to access the entire area. The Wangs also hired a security guard to enforce the new unpermitted signs. The guard regularly obstructed members of the public who attempted to park and/or use the trails. The Wangs also installed a new septic leach field on the bluff without a CDP, among other unpermitted development.

In 2018, Commission staff received a report that the restaurant was blocking public access with signs and guards. Upon further investigation, Commission enforcement staff discovered the many items of unpermitted development listed above. Commission staff spent multiple years attempting to resolve this matter amicably with the Wangs. However, just as Commission staff believed they were close to an agreement, the pandemic hit in 2020. The Wangs responded by closing the restaurant and permanently locking the unpermitted gate to all public access. Peter Wang died later that year, and approximately a year later, the Rocky Point Property was sold to Esperanza Carmel Commercial, LLC (Respondent). Respondent opened the gate and allowed public access shortly after acquiring the Rocky Point Property and has worked with Commission staff to reach the proposed resolution presented herein.

### **Environmental Justice**

The Properties are located between Big Sur and Carmel, in an area where much of the visitor-serving coastal development consists of very expensive restaurants and resorts. For persons from disadvantaged communities that cannot afford to patronize such establishments, the trails on the Properties provide a low-cost alternative to enjoy the coast. In addition, the lack of any parking meters or entrance fees to the parking lot also made visiting the Properties affordable. The attempted privatization of the historic public access areas on the Properties therefore had a disproportionate impact on these communities and thereby caused environmental justice impacts.

In addition, fishing is a low-cost recreational activity that is accessible to people in disadvantaged and low-income communities, and can also be a subsistence activity in those communities. It is also culturally significant for many people. Throughout the course of the violations, including when the unpermitted gates on the County Property were permanently locked, some people attempting to fish were likely deterred, but not all were. Many routinely bushwhacked through the chapparal or hopped the locked gate

to continue accessing the fishing spots on the Properties. This demonstrates the importance of fishing to many people, and the attempted blocking of this low-cost recreational opportunity thus caused environmental justice impacts as well.

### **The Proposed Resolution**

Since Respondent bought the Rocky Point Property in late 2021, Respondent has worked with Commission staff towards an amicable resolution of the violations. Respondent is agreeing to this proposed resolution in spite of the fact that the original violations arose before their ownership. Commission staff requested that Respondent open the unpermitted gates that the Wangs had permanently locked and keep them open during the course of negotiations, and Respondent did so. However, Coastal Act violations run with the land, and many of the violations are still in place and have been maintained during their ownership. More significantly, Respondent has agreed to provide high value and high cost amenities to the public to resolve penalties for the existing violations of both the natural resource provisions of the Coastal Act (section 30821.3), as well as violations of the public access provisions of the Coastal Act (section 30821).

#### a. Natural Resources

As mitigation for the impact of the violations on natural resources, Respondent has agreed to a panoply of restorations, as well as a conservation easement, that are of immense value to this important habitat area and will result in the restoration and protection of these unique bluffs forever.

While the Properties still provide a lot of environmentally sensitive and unique habitat areas, much of the historic habitat area has shrunk over the years. Even before the violations occurred, highly invasive and flammable eucalyptus trees began growing on the County Property near Highway One sometime after the restaurant was opened in the 1950's. Today, what was once a handful of trees have spread into a large stand of dozens of mature nonnative eucalyptus trees. This presents even more of a fire danger because firefighters have historically used the parking lot on the Rocky Point Property as a staging area during large wildfires, and it would be unhelpful if these eucalyptus caught on fire and blocked their only access road to the parking lot. Respondent has agreed to remove this entire stand of invasive eucalyptus and return the area to native plants.

A prior owner obtained a CDP for placement of lights along the bluff, which the prior restaurant owner used to light up the ocean at night. Over time, scientists have learned more about the negative impacts of such artificial lighting in coastal areas, and its adverse impacts on wildlife. This night lighting negatively impacted sensitive sea otter habitat and was detrimental to the shoreline ecosystem generally. The bluff lights are also located in unsafe locations immediately on the edge of the bluffs, where they have posed a risk of falling into the ocean. Respondent has agreed to remove all of the bluff lights as a part of this resolution.

Also, because the trails used by the public have remained informal over the years, a few trails visible in the 1970's have multiplied into many smaller trails throughout the bluffs on the County Property, including in extremely sensitive areas home to the dwarf plant varieties. Respondent has therefore agreed to formalize and consolidate the trail system by constructing and maintaining low rope fences along the core historic trails, as well as signs urging the public to stay on these main trails.

Further, even before the violations occurred, highly invasive plant species such as iceplant had spread throughout much of the bluffs seaward of the restaurant, into areas that would otherwise provide important habitat. When the Wangs installed irrigation seaward of the restaurant, this exacerbated the growth of the already-existing invasives there. As part of their mitigation, Respondent has agreed to undertake restoration of these bluffs, which will require a lot of difficult work, including time-consuming hand-weeding and removal of iceplant on steep slopes that are also covered with poison oak.

Finally, to ensure that the special and sensitive bluffs are protected from development in perpetuity, Respondent has agreed to record a conservation easement across virtually the entire undeveloped bluff on the Rocky Point Property. Because the bluffs on the County Property are already protected, this would ensure that the entire shoreline of the Rocky Point Property and the County Property, much of which could provide habitat to the rare dwarf native plants, would be protected from new development forever. This one conservation easement alone would also protect over half of the Rocky Point Property from future development.

b. Public Access

In addition to the work Respondent will do to restore and protect the rare natural habitat on the Properties, Respondent has agreed to formalize public access on the Rocky Point Property and to provide and maintain a high amount of public access amenities. In Big Sur, even basic facilities such as public restrooms are few and far between, and so the value of these amenities to the public would be extremely high.

First, Respondent has agreed to a suite of changes to the access road entrance from Highway One. Currently, there is a permitted sign immediately adjacent to the highway that obstructs coastal views, similar to a small billboard. However, while the owner of the Rocky Point Property has long held a sign easement over the County Property near the highway, the current restaurant sign is located outside of the sign easement, in an area that impairs the protected coastal views. Therefore, in order to restore the coastal views from Highway One, Respondent has agreed to move the sign into the sign easement area where it will be located much farther from the highway and more out of the viewshed. Further, while the public has accessed this area for many decades, there have never been any public access signs, so many members of the public have remained unaware of the scenic coastal access opportunities that exist in this location. Thus, Respondent has agreed to install "coastal access" signs on Highway One and at the road entrance that explain that public access is allowed and that there are public access amenities available at this location. Respondent has also agreed to install



similar public access signs throughout the Rocky Point Property and the County Property, where none have ever existed.

Further, one of the historic issues with public access at this site, even before the violations, was that the public had to compete with restaurant patrons for limited parking spaces. There are currently only approximately 50 parking spaces in the lot on the Rocky Point Property, and there is not much room to provide many more spaces on the Rocky Point Property. As a part of this resolution, Respondent has agreed to provide and maintain 24 parking spaces reserved for the public in perpetuity, approximately half of the total currently available. The parking spaces include many of the spaces closest to the trails, and many of the spaces are immediately adjacent to ocean views, including disabled access parking spaces.

Another existing issue is that there are currently very few electric vehicle (“EV”) chargers available to the public in Big Sur. Because nearly all visitors reach this coastline via personal vehicle, the need for chargers will only increase as adoption of EVs increases. Respondent has agreed to provide and maintain eight (8) EV chargers within the public parking area, which will help to lessen the shortfall of EV chargers in the region.

With regards to environmental justice, one of the issues has been that in order to sit and enjoy the scenery in a relaxed setting, visitors had to pay to dine at the upscale Rocky Point Restaurant. However, Respondent has now agreed to provide a public scenic viewing area adjacent to the public parking spaces, and to provide and maintain five benches and ten picnic tables there for general public use. This would be a truly unique amenity in this stretch of coast and would allow persons who cannot afford to dine at the many expensive restaurants and resorts in the area to bring food and still enjoy the famous coastal views.

An even more scarce resource in this part of Big Sur is public restrooms. The problem is so acute that visitors to the popular Bixby Bridge sightseeing area, less than 3 miles south of the Properties, have made headlines for using the side of the road as a restroom of last resort. To help mitigate the problem, State Parks recently installed temporary (porta-potty style) restrooms at Garrapata State Park, to the north of the Properties, which is farther from Bixby Bridge. However, few stalls are available there, and demand remains very high during peak seasons. Respondent has therefore agreed to provide and maintain permanent public restrooms, including four stalls, two of which will be ADA compliant, to help relieve the extreme shortage of public restrooms in this area.

Finally, Respondent has agreed to record a deed restriction that requires the owner of the Rocky Point Property to provide all of the above-listed public access amenities to the public in perpetuity. Respondent has also agreed to record public access easements over approximately 80% of the Rocky Point Property. This would ensure that the special and memorable public access at this location, which was informal for so many decades, is finally formally protected forever.

In conclusion, Respondent has agreed to a package of conservation measures and public access amenities that will protect and enhance a truly unique part of the coast that has been neglected for far too long. The value of this resolution package to the public is extremely high, as over 80% of the expensive real estate on the Rocky Point Property will be protected by a combination of conservation and public access easements. In addition, the construction of EV chargers and permanent public restrooms in this remote area represents significant value to the public. Therefore, Commission staff estimates the total value of this proposed agreement to be well in excess of \$4 million.

Commission staff is appreciative of the cooperation of Respondent and their dedication to reaching a proposed resolution that would provide excellent benefits for both the environment and the public. Staff therefore recommends that the Commission **APPROVE** Consent Cease and Desist Order No. CCC-24-CD-02, Consent Restoration Order No. CCC-24-RO-02, and Consent Administrative Penalties CCC-24-AP-02 and CCC-24-AP3-02.

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**APPENDIX A** – Proposed Consent Cease and Desist Order No. CCC-24-CD-02, Consent Restoration Order No. CCC-24-RO-02, and Consent Administrative Penalty Nos. CC-24-AP-02 & CCC-24-AP3-02

## EXHIBITS

|            |  |
|------------|--|
| Exhibit 1  | Region Map   |
| Exhibit 2  | Properties Overview  |
| Exhibit 3  | Photos of Views from the Properties  |
| Exhibit 4  | Photos of Unpermitted Development  |
| Exhibit 5  | Map of Proposed Conservation Easement Area   |
| Exhibit 6  | Map of Proposed Mitigation Area of Restoration   |
| Exhibit 7  | Map of Proposed Mitigation Invasive Eucalyptus Removal   |
| Exhibit 8  | Map of Proposed Public Access Easements  |
| Exhibit 9  | Map of Proposed Public Access Trail Improvement  |
| Exhibit 10 | Photos of Proposed Public Viewing Area   |
| Exhibit 11 | Amended Notice of Intent to Commence Cease and Desist Order, Restoration Order, and Administrative Penalty Proceedings, dated November 8, 2022 |
| Exhibit 12 | Notice of Violation recorded June 9, 2021  |

## **I. MOTIONS AND RESOLUTION**

### **Motion 1: Consent Cease and Desist Order**

I move that the Commission **issue** Consent Cease and Desist Order No. CCC-24-CD-02 to Esperanza Carmel Commercial, LLC 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-24-CD-02, as set forth in Appendix A, and adopts the findings set forth below on the ground that development has occurred on the Properties without the requisite Coastal Development Permit, in violation of the Coastal Act and the Monterey County LCP, 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-24-RO-02 to Esperanza Carmel Commercial, LLC 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-24-RO-02, as set forth below, and adopts the findings set forth below on the grounds that 1) development has occurred on the Properties without a coastal development permit, 2) the development is inconsistent with the Monterey 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 the public access

provisions of the Coastal Act, 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-24-AP-02, 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 Properties, including property owned by Esperanza Carmel Commercial, LLC, in violation of the public access provisions of the Coastal Act.

**Motion 4: 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 environmentally sensitive habitat areas, 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-24-AP3-02, 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 Properties, including property owned by Esperanza Carmel Commercial, LLC, in violation of various provisions of the Coastal Act, including, but not limited to, provisions protecting environmentally sensitive habitat area.

## 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 Sections 30821 and 30821.3 of the Coastal Act (Pub. Resources Code, Div. 20) are set forth in Sections 30821(b) and 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.<sup>1</sup>

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 issue the Cease and Desist Order and Restoration Order and impose Administrative Penalties, 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

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<sup>1</sup> Note that there are currently in use virtual hearing procedures, available at <https://documents.coastal.ca.gov/assets/virtual-hearing/VIRTUAL-HEARING-PROCEDURES.pdf>.

Desist Order and Consent Restoration Order, and imposition of the Consent Administrative Penalties.

### **III. FINDINGS FOR CONSENT CEASE AND DESIST ORDER CCC-24-CD-02, CONSENT RESTORATION ORDER CCC-24-RO-02, AND CONSENT ADMINISTRATIVE PENALTY NOS. CCC-24-AP-02 & CCC-24-AP3-02<sup>2</sup>**

#### **A. Description of the Property**

##### **1. Property Location**

The Properties are located seaward of Highway One between Carmel and Big Sur Village. They feature stunning views of the restaurant's namesake rocky promontories, the kelp beds and sea otters below them, and also of Bixby Bridge. While the Big Sur coastline is one of the most popular visitor attractions in California, the Properties have long provided one of the relatively few public access points in the region's northern stretch. These Coastal Act violations took place on both public and private land, in an area where the Monterey County Local Coastal Program prioritizes public access and protects natural coastal views.

##### **2. Background History**

The Properties provide environmentally sensitive habitat areas for extremely rare native plants. There, on the rocky granite outcrops facing the ocean, the harsh soils and salty breezes stunted the growth of the coastal sage scrub, causing them to evolve into dwarf varieties. Native plants that normally grow around the height of a person farther inland can be measured in inches on the bluffs. These include black sage, barberry, pitcher sage, blue-eyed grass, and white fairy lantern. The diminutive plants are so unique to this area that today, many of them are sold in nurseries under the label of 'Rocky Point varieties.'

This portion of Big Sur has long been more accessible than the rest of the region. In 1870, Charles Henry Bixby constructed a road from Carmel (12 miles north of the Properties) that passed by what is now the Properties on the way to Bixby Creek, where Bixby Bridge stands today (2.5 miles south of the Properties). In contrast, the rest of Big Sur would remain largely inaccessible and sparsely populated for many more decades, until Highway One was completed in 1937.

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<sup>2</sup> These findings also hereby incorporate by reference the Summary at the beginning of the May 30, 2024 staff report ("Staff Report: Recommendations and Findings for Consent Cease and Desist Order No. CCC-24-CD-02, Consent Restoration CCC-24-RO-02, and Consent Administrative Penalty Nos. CCC-24-AP-02 & CCC-24-AP3-02") in which these findings appear, which section is entitled, "Summary of Staff Recommendation and Findings."

In the 1950's, the Rocky Point Restaurant and adjacent parking lot was constructed and opened on the Rocky Point Property. An access road from Highway One was also constructed on the separate parcel surrounding the Rocky Point Property (now the County Property). The public was now able to easily access the scenic trails along the bluffs by driving down the access road and parking in the lot. Following construction of the road and parking lot, these new access amenities were not only used by the Rocky Point Property owners and their guests. The road and parking lot were also used by the general public, on a regular basis, and consistently, without having to pay a fee and without any other type of restriction or interference by the property owners. In 1956, sea otters were documented in the kelp beds offshore of the Properties. California's sea otters had been thought extinct until a small colony was discovered in 1938 offshore of Bixby Creek, less than three miles south of the Properties. The public thus was also able to enjoy viewing some of the few sea otters remaining in California at that time.

The land surrounding the Rocky Point Property, however, remained relatively undeveloped. On May 23, 1962, two easements were recorded (Reel 59, pages 21 - 24) on private property adjacent to the Rocky Point Property, which is now the County Property. The easements allowed the owner of the Rocky Point Property to use the access road and to place a sign for the restaurant relatively close to Highway One. However, the entrance sign was not placed within the sign easement, and was instead placed immediately adjacent to Highway One, where it partially obstructed coastal views from the highway, similar to how a small billboard would appear. In 1988, California voters passed Proposition 70, a bond initiative that provided funds for public lands conservation. In 1990, the County of Monterey acquired the County Property via Proposition 70 funds. On July 19, 1994, the County recorded a deed restriction (Document No. 94-51479) pursuant to the legal requirements of Proposition 70, as well as the requirements of County Resolution No. 87-151 (passed March 17, 1987). The deed restriction provides legal protections for the natural habitat and coastal views on the County Property.

Over the years, the Commission conditionally approved several Coastal Development Permits to expand the capacity of the restaurant and allow for other improvements (CDP Nos. 3-84-155 and A-3-MCO-91-089); however, the applicants did not meet the conditions required to be met before the permits could be issued, and so all of the permits expired before becoming effective. In 2008, the County of Monterey approved the only CDP to ever be issued for the Rocky Point Property, CDP No. PLN050296 (County Resolution No. 07039). The County's CDP authorized construction of a new deck and gazebo, and also authorized replacement of the sign outside of the sign easement, lights along the bluff, and water tanks on the County Property.

### **3. Violation History**

In 2012, the Wangs bought the Rocky Point Property and sometime after that began undertaking unpermitted development. On the County Property, they obtained County authorization to install a new gate on the County Property in 2017. No CDP was obtained for the new gate. They also installed an unpermitted gate, signs warning 'private property' and 'no trespassing,' and cameras. They also began locking the



unpermitted gates at all times except for when the restaurant was open. Although a gate existed prior to the Wangs' purchase of the property, it was almost always open. However, the Wangs began regularly closing the new, unpermitted gate to align with the restaurant's limited hours and to keep the public out during all other times. Because the restaurant as managed by the Wangs did not open until almost noon, closed before sunset in summer, and was not open every day of the week, this amounted to greatly reduced public access.

In addition, the Wangs installed new, unpermitted landscaping of non-native plants along the road on the County Property, as well as irrigation for those plants. These new plantings and irrigation contributed to an existing problem of invasive plants throughout the Properties. In addition, the Wangs built a long stairway that reached all the way up a hill full of environmentally sensitive habitat, and ended on a parcel to the north ("the Adjacent Private Property").

The Wangs also cleared and graded two areas of land on the County Property, which combined were large enough to fit several dozen cars. One was designated for private parking for restaurant customers only, and one for restaurant employees only. In the unpermitted employee parking area, the Wangs also built and/or maintained numerous tanks, sheds, and other infrastructure. This unpermitted development was constructed in spite of the fact that the habitat and coastal views on the County Property are legally protected by a deed restriction, Proposition 70 itself, and a County resolution.

The Wangs also undertook numerous violations on the Rocky Point Property. They installed signs throughout the parking lot stating 'customer parking only' and undertook measures to limit public access to the trails generally. They did this even though the public had been parking there to enjoy the trails for over sixty years, and Commission staff believe it is therefore very likely that the public acquired prescriptive rights to access the entire area. The Wangs also hired a guard to enforce the new unpermitted signs. The guard regularly obstructed members of the public who attempted to park and/or use the trails. The Wangs also installed a new septic leach field on the bluff without a CDP, among other unpermitted development.

In 2018, Commission staff received a report that the restaurant was blocking public access with signs and guards. Upon further investigation, Commission enforcement staff discovered the many items of unpermitted development listed above. Commission staff spent multiple years attempting to resolve this matter amicably with the Wangs. However, progress slowed when the pandemic hit in 2020. The Wangs then closed the restaurant and permanently locking the unpermitted gate to all public access. Peter Wang died later that year, and approximately a year later, the Rocky Point Property was sold to Esperanza Carmel Commercial, LLC (Respondent). Respondent opened the gate and allowed public access shortly after acquiring the Rocky Point Property and has worked with Commission staff to reach the proposed resolution presented herein.

## **B. Statutory Provisions**

### **1. Basis for Issuing Consent Cease and Desist Order**

The Commission's authority to issue Cease and Desist Orders is set forth in Section 30810(a) of the Coastal Act, which states, in part:

If the commission, after public hearing, determines that any person ... has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person ... to cease and desist. The order may also be issued to enforce any requirements of a certified local coastal program...under any of the following circumstances.

- (1) The local government ... requests the Commission to assist with, or assume primary responsibility for, issuing a cease and desist order.
- (2) The commission requests and the local government ... declines to act, or does not take action in a timely manner, regarding an alleged violation which could cause significant damage to coastal resources.

On May 25, 2018, Commission staff formally requested that Monterey County enforce its LCP by pursuing enforcement action to resolve the violations discussed above, and offered to assist in any enforcement activities. On January 31, 2019, Monterey County requested that the Commission assume primary enforcement responsibility in this case.

### **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 Respondent undertook or maintained development that requires a CDP from the Commission where Respondent did not secure one.

In this case, it is uncontroverted that Respondent does not have a CDP for the development at issue here. The subsequent step is demonstrating that Respondent 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 states 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, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits... ; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes...

As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.

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, including, but not limited to, subdivision of land pursuant to the Subdivision Map Act and any other division of land, including lot splits, 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, including any facility of any private, public, or municipal utility, and the removal or logging of major vegetation. As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.

The Monterey County Coastal Implementation Plan of the LCP, in the Regulations for Development in the Big Sur Coast Land Use Plan, defines development as follows:

Development means, on land, in or under water:

1. placement or erection of any solid material or structure, including but not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and ' electrical power transmission and distribution line;
2. discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste;
3. grading, removing, dredging, mining, or extraction of any materials, including excavation and filling which requires a grading permit pursuant to Chapter 16.08 or which materially alters the natural landform;
4. change in the density or intensity of use of land, including but not limited to:
  - a) subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code);
  - b) lot line adjustments;
  - c) any other division of land, including lot splits; and,
  - d) conditional certificates of compliance pursuant to the Subdivision Map Act;
5. change in the intensity of use of water, or of access thereto;
6. expansion or construction of water wells, surface water diversions, or septic systems, except for replacement thereof;
7. construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility;
8. removal or harvesting of major vegetation including land clearing pursuant to Chapter 16.12 and removal of natural vegetation specified in the applicable ordinances as requiring a coastal development permit. "Development" shall not include removal or harvesting of major vegetation for agricultural purposes, except in North County as per Section 20.144.080.A, kelp harvesting, timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Zberg-Nejedly Forest Practice Act of 1973 (commencing with Section 45111);
9. any project within 750 feet of a known archaeological resource, as per sections 20.144.110.A, 20.145,120.A, 20.146.090.A, and 20.147-080.A;
10. any project on a parcel in the Big Sur Coast Land Use Plan area with an historical site, as per Section 20.146.110.A;

11. tree removal, as per sections 20.144.050, 20.145.060.A, 20.146.060.A, and 20.147.050.A; and,
12. granting of transferable density credits pertaining to a lot in the critical viewshed of Big Sur pursuant to Chapter 20.156.

A prior owner, the Wangs, undertook most of the unpermitted development at issue. However, violations and their liabilities run with the land, and while Respondent did not maintain all of the unpermitted development undertaken by the Wangs, Respondent did continue to maintain unpermitted development such as the unpermitted gates.

Under the Coastal Act's definition of development, Unpermitted Development undertaken and/or maintained by the owner of the Rocky Point Property on the County Property, including: 1) installation of a locked gate, signs restricting public access, and cameras; 2) removal of native vegetation in two areas to facilitate use as unpermitted private parking lots, one to the north that is approximately 4,500 square feet, and one to the southeast that is approximately 10,000 square feet, along with grading and placement of decomposed granite, 3) installation of sheds and a trash enclosure, 4) installation of lighting along the driveway, and 5) installation of fencing, mailboxes, rock walls, and other items near where the road meets Highway One; Unpermitted Development on both the County Property and the Rocky Point Property undertaken and/or maintained by the owner of the Rocky Point Property, including 6) posting of a guard, restrictive parking signs, and "No Trespassing" signs; and 7) installation of garden or accessory items, non-native landscaping, and an irrigation system; Unpermitted Development on the Adjacent Private Property, County Property, and Rocky Point Property undertaken and/or maintained by the owner of the Rocky Point Property, including: 8) grading of a trail and installation of metal T-poles, rope, and wood stairs; and 9) installation of a water tank in native vegetation and clearing of native vegetation around it; and Unpermitted Development that is solely on the Rocky Point Property and undertaken and/or maintained by the owner of that property, including 10) installation of an outdoor patio including a fence/wall, stairs and eating areas; 11) installation of a new leach field; 12) remodeling of existing buildings, 13) an expansion of restaurant capacity from 120 to 200 diners, 14) placement of asphalt paving, 15) construction of a building to the northeast of the restaurant building, 16) installation of decks seaward of both the northern part of the restaurant and the residential unit to the north of the restaurant, and 17) placement of planters and woodchips seaward of the restaurant.

All of the above activities fall clearly within the Coastal Act definition of development and, therefore, required Respondent 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.

## **B. The Development at Issue is Inconsistent with the Coastal Act**

The unpermitted development described herein is inconsistent with several resource protection policies enumerated under the Coastal Act, including Coastal Act Section 30240 (environmentally sensitive habitat areas or ESHA), Section 30251 (scenic and visual qualities), and Sections 30210 and 30212 (public access).

In addition, the unpermitted development raises concerns with respect to several other Monterey County LCP policies. The Monterey County Big Sur Land Use Plan Section 3.2.1 designates this area as a critical viewshed, where all development is prohibited in the area visible from Highway One in order to preserve the “Big Sur coast’s outstanding beauty and its great benefit to the people of the State and Nation.”

The Big Sur Land Use Plan Section 6.1.5(A)(2) also designates Rocky Point as a shoreline access priority area.

The Properties provide environmentally sensitive habitat area for extremely rare native plants. There, on the rocky granite outcrops facing the ocean, the harsh soils and salty breezes stunted the growth of the coastal sage scrub, causing them to evolve into dwarf varieties. Native plants that normally grow around the height of a person farther inland can be measured in inches on the bluffs. These include black sage, barberry, pitcher sage, blue-eyed grass, and white fairy lantern.

In addition, the coastal views in this area are largely natural and include scenic views of offshore rocks and kelp beds and sea otters below the bluffs. In addition, a partial view of Bixby Bridge, a popular visitor sightseeing destination, is also visible from the Properties.

This location also has a long history of public access, and the public has been actively using the road and parking lot, and trails on the Properties since the road and parking lot was first built in the 1950’s. The area of the Properties is one of the relatively few public access areas available on the northern stretch of the Big Sur coastline.

The unpermitted development caused significant negative impacts to the above-listed coastal resources. With regards to public access, the unpermitted locked gates, signs restricting public access, and posting of a guard all blocked or deterred public access to the public road on the County Property and the public trails on the County Property, as well as the parking area on the Rocky Point Property that has been historically used by the public. In addition, the unpermitted locked gates were synced with the restaurant’s limited hours and, which resulted in blocked access to the area on the two days a week the restaurant was closed, as well as in the morning and evening hours on the other days of the week before and after the restaurant opened and closed. Nonetheless, some people still bushwacked around the unpermitted gate, or jumped over it, in order to go fishing, which further demonstrates the importance of public access in this area.

In addition, the unpermitted development caused significant negative impacts to environmentally sensitive habitat area. The area of the bluffs provides habitat for rare

dwarf varieties of native coastal sage scrub, but a large area was cleared to build a septic system leach field. In addition, other areas of environmentally sensitive habitat area on the County Property were cleared for use as private parking areas. This involved removal of the native vegetation and grading of the area.

Further, the unpermitted development also impacted protected scenic coastal views. The largely natural coastal views of the Properties from Highway One were negatively impacted by the installation of unpermitted fencing and signs near Highway One, as well as the unpermitted grading of the County Property. In addition, the views from the Properties were also affected by the unpermitted grading of the County Property.

### **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 environmentally sensitive habitat areas, scenic coastal views, and public access.

The damage caused by the unpermitted development includes degradation of environmentally sensitive habitat area, impairing of scenic coastal views, and blockage of public access.

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 Properties. As described above, the unpermitted development results in impacts to coastal resources. The grading of environmentally sensitive habitat areas can continue to impact coastal resources by preventing native

plants from returning and stimulating growth of invasive weedy species. The unpermitted gates and other development also continue to make the area appear as if it may be private, when in fact the unpermitted gates are on a public road.

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. Environmental Justice**

The following discussion does not address any required element of Sections 30810, 30811, 30821, 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 public access easements and improvement of the existing trail network.

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 Properties are located between Big Sur and Carmel, in an area where much of the visitor-serving coastal development consists of very expensive restaurants and resorts. For persons from disadvantaged communities that cannot afford to patronize such



establishments, the trails and fishing on the Properties provide a low-cost alternative to enjoy the coast that may be the only way they can enjoy this part of the coast. In addition, the lack of any parking meters or entrance fees to the parking lot also made visiting the Properties affordable. The attempted privatization of the historic public access areas on the Properties therefore had a disproportionate impact on these communities and thereby caused environmental justice impacts.

In addition, fishing is a low-cost recreational activity that is accessible to people in disadvantaged and low-income communities, and can also be a subsistence activity in those communities. It is also culturally significant for many people. Throughout the course of the violations, including when the unpermitted gates on the County Property were permanently locked, some people attempting to fish were likely deterred, but not all were. Many routinely bushwhacked through the chapparal or hopped the locked gate to continue accessing the fishing spots on the Properties. This demonstrates the importance of fishing to many people, and the attempted blocking of this low-cost recreational opportunity thus caused environmental justice impacts as well.

### **3. Basis for Issuing Consent Administrative Civil Penalties**

#### **Statutory Provision**

The statutory authority for imposition of administrative penalties for violations of the public access provisions of the Coastal Act is provided for in the Coastal Act in Public Resources Code Sections 30821<sup>3</sup>, 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 the public access provisions of this division 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.

In addition, the statutory authority for imposition of administrative penalties for violations of the non-access provisions of the Coastal Act is provided for in the Coastal Act in Public Resources Code Section 30821.3, 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

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<sup>3</sup> 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.

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.

Through the proposed settlement, Respondent has agreed to resolve its financial liabilities under all of these sections of the Coastal Act via the commitments made in the Consent Orders.

## **Application to Facts**

### **a. Exceptions to Section 30821 and 30821.3 Liability Do Not Apply**

Under sections 30821(h) and 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 a public access violation within 30 days of receiving written notification from the Commission regarding the violation, or by correcting a non-access violation within 60 days of receiving written notification from the Commission regarding the violation.

This provisions of Section 30821(h) and 30821.3(h) are 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. For 30821(h) to apply, 1) the

violation must be remedied consistent with the Coastal Act within 30 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. In addition, restoring public access would require full removal of the gate, cameras, fencing, and all signs, which would require a CDP and has not been done. Therefore, none of the violations at issue were cured pursuant to the above sections.

In addition, Sections 30821(f) and 30821.3(f) of the Coastal Act have similar provisions which each state:

(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.

Sections 30821(f) and 30821.3(f) are also inapplicable in this case. As discussed above and below, the unpermitted development at issue includes large areas of removal of environmentally sensitive habitat areas, as well as grading and paving with decomposed granite. Further, the unpermitted development also includes the total blockage of public access to a County road, County trails, and a parking area with evidence of prescriptive rights. None of this unpermitted development was unintentional or minor, and it caused significant harm, not de minimis harm.

#### **b. Penalty Amount**

Pursuant to Sections 30821 and 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 Wangs bought the Rocky Point Property in 2012 and began installing signs restricting public access that same year. Section 30821 which provides for the administrative assessment of penalties for public access violations became effective in 2014. In addition, the Wangs installed the unpermitted gate on the County Property in 2017. While most of the unpermitted signs have since been taken down, the unpermitted gate still remains, and has therefore remained for the full five year penalty

period under Section 30821. Respondent purchased the Rocky Point Property in late 2021 and the unpermitted gate still remains, and the violations and associated liabilities also run with the land when it is purchased.

Coastal Act Section 30821.3 which provides for the assessment of penalties for other violations aside from public access did not take effect until January 1, 2022, which was after Respondent bought the Rocky Point Property. The violations aside from public access, which include clearance of ESHA for use as and construction of private parking areas, sheds, water tanks, and other unpermitted development was undertaken by the Wangs, prior to Respondent's ownership and prior to Section 30821.3 taking effect. Most of the unpermitted development was undertaken in the years immediately following the Wangs' purchase of the Rocky Point Property in 2012, i.e., between 2012 and 2019. Respondent bought the Rocky Point Property with full notice of the violations, and with notice that violations and associated liabilities run with the land. In addition, the unpermitted clearance of environmentally sensitive habitat area on the County Property, the placement of asphalt parking areas, sheds, and other unpermitted development has persisted since then and remain on the Properties. Thus, although the violations have persisted for approximately a decade, the penalties for violations of the Section 30821.3 penalties have not yet accrued for the full five years.

Because Respondent has agreed to amicably resolve this matter, and to provide a package of public access amenities and public access easements, as well as mitigation in the form of additional restoration, and a conservation easement, all in lieu of a monetary 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 Penalties.

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. Under Sections 30821(c) and 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." Commission staff has separately analyzed the factors under both Sections 30821 and 30821.3, as is discussed below, beginning with Section 30821 (public access violations).

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.

### Public Access Violations

Applying the factors of Section 30820(c)(1), the violation at hand should warrant the imposition of substantial civil liability; public access violations have persisted on the Properties for many years and the unpermitted gate, signs restricting public access, and guard have all meant that the public road and public trails, and the parking lot with evidence of prescriptive rights on the Rocky Point Property, have all been blocked or impaired for many years. Therefore, the above factor weighs in favor of a high penalty.

With regards to 30820(c)(2), the public access violations can be remedied going forward. The unpermitted gate can be removed, and most of the unpermitted signs, as well as the unpermitted guard, have already been removed. However, the many years of public access that were impacted are lost, cannot be recovered, and caused a very significant impact. Even today, most people are unaware that the gates have been reopened. 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 is one of relatively few public access points on the northern stretch of the Big Sur coastline. The trails here provide access to popular trails with scenic views, and to popular fishing spots. Therefore, this factor warrants a high 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 was spent attempting to negotiate with the Wangs, who no longer own the Rocky Point Property. Moreover, since Respondent bought the Rocky Point Property, Respondent has worked with Commission enforcement staff to reach an amicable resolution. Therefore, this factor warrants a moderate to 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 were initially undertaken by the Wangs, but were maintained by Respondent over several years. However, Respondent did open the

unpermitted gates after buying the Rocky Point Property, and did not maintain all of the unpermitted development. However, the Wangs' violations still run with the land, and the Wangs did undertake their violations in pursuit of economic profit, and blocked public access in order to privatize the Rocky Point Property and County Property for exclusive use by paying guests. Considering all of the facts, this factor warrants a moderate penalty.

Aggregating these factors, the Commission has determined that the violations warrant a high penalty for violations of the public access provisions of the Coastal Act. The Wangs brazenly installed unpermitted gates and signs restricting public access on the County Property, and then hired a guard to keep the public from parking on the Rocky Point Property where there is evidence of prescriptive rights. These violations ran with the land, and although Respondent agreed to open the gates, the gates are still there, and many of the signs restricting public access were not removed, which continued to cause impacts to public access, as many people assumed that the area was still closed to public access.

However, Respondent has now agreed to a package of public access protections, improvements, and amenities in lieu of a monetary penalty that will contribute the majority of the over \$4 million in total value of the entire amicable resolution. These amenities include Respondent's agreement to construct and maintain 8 electric vehicle chargers for public use in an area where few public chargers exist, and Respondent's agreement to construct and maintain four public restroom stalls, including two ADA stalls, in a part of the coast with many visitors but very few public restrooms. In addition, Respondent has agreed to provide a public viewing area with ten tables and five benches to the public, so that persons who cannot afford to dine at the restaurant can still bring a meal and enjoy the views. Further, Respondent has agreed to install many public access signs and designate approximately half of the current public parking spaces (24) as reserved for the public. Finally, Respondent has also agreed to record public access easements over 80% of the Rocky Point Property to ensure that this special and important public access is protected forever.

Next, the Commission has analyzed the penalty factors for the natural resource violations covered by Section 30821.3.

### Natural Resource Violations

Applying the factors of Section 30820(c)(1), the natural resource violations at hand should warrant the imposition of significant civil liability; as the violations included removal of environmentally sensitive habitat area and construction of fencing, grading, and paving in the critical viewshed protection area. However, the area of environmentally sensitive habitat area impacted was relatively smaller. Therefore, the above factor weighs in favor of a moderate penalty.

With regards to 30820(c)(2), the natural resource violations can be remedied going forward. The unpermitted decomposed granite can be removed, and in many places the

native plants are already starting to grow back. However, the violations also disturbed the ground, leading to increased weed and invasive plant growth that will be difficult to entirely eradicate. 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 is an area that is habitat for extremely rare, dwarf varieties of native plant species, and so is very sensitive. In addition, the Properties are within the Big Sur Land Use Plan critical viewshed protection area, and so are very sensitive from the standpoint of scenic coastal views. Therefore, this factor warrants a high 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 was spent attempting to negotiate with the Wangs, who then sold the Rocky Point Property. Since Respondent bought the Rocky Point Property, they have worked with Commission staff towards an amicable resolution. Therefore, this factor warrants a moderate to 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. The Wangs undertook the grading of environmentally sensitive habitat area in order to expand their business and create private parking areas, and did so in pursuit of economic profit. These violations run with the land, and so Respondent bought the Rocky Point Property with these same liabilities. However, Respondent has not maintained all of the violations. Therefore, in consideration of all of the facts, this factor warrants a low to moderate penalty.

Considering all of the factors, while these violations were initially undertaken by the Wangs, they were done so in pursuit of economic profit and privatization of public land, and those violations run with the land and were acquired by Respondent with notice of the outstanding violations. While Respondent has not maintained most of the violations, these violations are still causing impacts to the habitat and Respondent must resolve them.

Respondent has thus agreed to undertake restoration of the areas impacted by the violations, but moreover, in order to address the penalties, Respondent has also agreed to do additional resource restoration and improvement work to support the ecosystem here, and to record a conservation easement in lieu of an administrative penalty for the natural resource violations, which is incredibly valuable given the high property value of the Rocky Point Property. The conservation easement would cover over half of the Rocky Point Property and ensure that the habitat for extremely rare dwarf varieties of native plants is protected forever.

In sum, Commission staff believes that the proposed public access amenities and easements, and the proposed conservation easement and mitigation involving restoration, provide excellent value to the public that is of greater value than what Respondent might have otherwise provided via monetary penalties. Because the Properties are in an LCP shoreline priority access area, but in a part of Big Sur with relatively few public access amenities, the value of the many proposed public access amenities and public access easements that would be provided by Respondent is very great. In addition, the Properties are in an LCP critical viewshed area and host extremely rare native dwarf plants, and so it is extra important to protect and restore as much of the Properties as possible, including through the conservation easement and mitigation that Respondent would provide as part of the agreement. Moreover, even if the Properties were not so unique and sensitive, the monetary value of the proposed benefits alone would be very great. Building public restrooms and EV chargers in a remote area such as this is more expensive than in an urban area. In addition, the real estate value of the Properties is high, and Respondent has agreed to restrict development on over 80% of the Rocky Point Property. The monetary value of public access easements and conservation easements over such a property is of similarly high value. Commission staff thus believes that the total value of the proposed agreement is well in excess of \$4 million.

Therefore, staff recommends that the Commission issue the Consent Administrative Penalties CCC-24-AP-02 and CCC-24-AP3-02 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 Monterey County LCP and Chapter 3 of the Coastal Act.

Failure to 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 and revegetation projects mandated by the Consent Agreement include the restoration and the restoration of ESHA, scenic coastal views, and public access; therefore, the activities required and authorized by the Consent Orders are consistent with Sections 30240 (environmentally sensitive habitat areas or ESHA), Section 30251 (scenic and visual qualities), and Sections 30210 and 30212 (public access). Further, by restoring native vegetation, implementation of the Consent Agreement will increase the size of ESHA on the Properties. Implementation of the Consent Agreement will improve scenic coastal views and public access as well, by removing unpermitted signs and restoring areas of unpermitted grading.



## D. California Environmental Quality Act

The Commission finds that issuance of these Consent Orders, to compel the removal of the Unpermitted Development and the restoration of the Property, among other things, as well as the implementation of these Consent Orders, 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 and to improve public access.

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 Properties that are the subject of these Consent Orders are located on oceanfront bluffs in Big Sur, Monterey County.
2. The Wangs bought the Properties and undertook many activities that were development under the Coastal Act and Monterey County LCP and required Coastal Act review and approval but failed to obtain CDPs and therefore constituted violations. These violations included impacts to both public access and natural coastal resources such as ESHA and scenic coastal views.
3. Esperanza Carmel Commercial, LLC bought the Rocky Point Property with knowledge of the violations and liabilities, and has continued to maintain and/or has not removed most of the unpermitted development.
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 Respondent and occurred without a CDP and is inconsistent with the Monterey County LCP, including but not limited to: Unpermitted Development undertaken and/or maintained by the owner of the Rocky Point Property on the County Property, including: 1) installation of a locked gate, signs restricting public access, and cameras; 2) removal of native vegetation in two areas to facilitate use as unpermitted private parking lots, one to the north that is approximately 4,500 square feet, and one to the southeast that is approximately 10,000 square feet, along with grading and placement of decomposed granite, 3) installation of sheds and a trash enclosure, 4) installation of lighting along the driveway, and 5) installation of fencing, mailboxes, rock walls, and other items near where the road meets Highway One; Unpermitted Development on both the County Property and the Rocky Point Property undertaken and/or maintained by the owner of the Rocky Point Property, including 6) posting of a guard, restrictive parking signs, and "No Trespassing" signs; and 7) installation of garden or accessory items, non-native landscaping, and an irrigation system; Unpermitted Development on the Adjacent Private Property, County Property, and Rocky Point Property undertaken and/or maintained by the owner of the Rocky Point Property, including: 8) grading of a trail and installation of metal T-poles, rope, and wood stairs; and 9) installation of a water tank in native vegetation and clearing of native vegetation around it; and Unpermitted Development that is solely on the Rocky Point Property and undertaken and/or maintained by the owner of that property, including 10) installation of an outdoor patio including a fence/wall, stairs and eating areas; 11)

installation of a new leach field; 12) remodeling of existing buildings, 13) an expansion of restaurant capacity from 120 to 200 diners, 14) placement of asphalt paving, 15) construction of a building to the northeast of the restaurant building, 16) installation of decks seaward of both the northern part of the restaurant and the residential unit to the north of the restaurant, and 17) placement of planters and woodchips seaward of the restaurant.

6. All of the unpermitted development is located within the Coastal Zone. The unpermitted development is within the Monterey County LCP area and is in violation of the LCP. 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 Sections 30821 and 30821.3 of the Coastal Act. The criteria for imposition of administrative civil penalties pursuant to Sections 30821 and 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 these Consent Orders, including Section 13187 of the Commission's regulations, have been met.
9. The work to be performed under these Consent Orders, 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. Respondent has agreed to assume the obligations of these Consent Orders, which settles all Coastal Act violations related to the specific violations described in #5, above.
11. As called for in Sections 30821(c) and 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 penalties agreed to in this settlement are an appropriate amount when considering those factors.