

CALIFORNIA COASTAL COMMISSION

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**VIA CERTIFIED MAIL AND REGULAR MAIL**

September 1, 2017

Mr. Steven Westbrook
Reservation Ranch
P.O. Box 75
Smith River, CA 95567
Certified Mail No. 7016 0340 0000 5112 5795

Subject: Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings and Notification of Intent to Record a Notice of Violation of the Coastal Act

Violation No.: V-1-16-0164

Location: Reservation Ranch, Smith River, Del Norte County, and adjacent areas, including, but not necessarily limited to, Assessor's Parcel Numbers 102-010-24, 103-010-01, 103-010-02, 103-010-10, 103-010-12, and 103-020-74.

Violation Description: Unpermitted development including, but not limited to: 1) grading; 2) placement of fill, including manure, soil, straw, construction waste, trash, cow carcasses, and other debris in and/or adjacent to wetlands, tidal sloughs, and streams; 3) construction of roads and stream crossings; 4) placement of pumps in and diversion of water from tidal sloughs and streams, including the Smith River, Tillas Slough, and Ritmer Creek; and 5) dredging of tidal sloughs and streams.

Dear Mr. Westbrook:

We are writing you in your individual capacity as well as your role as co-owner and manager of Reservation Ranch. California Coastal Commission ("Commission") staff appreciates the efforts you have made so far to work cooperatively with the Commission and other agencies, including hosting a site visit in September 2016 at the Reservation Ranch property, including inspection of parcels described by Del Norte County as APNs 102-010-24, 103-010-01, 103-010-02, 103-010-12, and 103-020-74, and property adjacent to the Ranch located at APN 103-010-10 that appears to be owned by the State Lands Commission (collectively referred to here as the "Property"), and for the phone call on August 31, 2017 between your consultant, Mr. Sam Polly of Streamline Planning Consultants, and John Del Arroz, of my staff, in which they discussed the resolution of Coastal Act violations and associated civil liabilities, and restoration of the Property. We also appreciate your recent responses to the North Coast Regional Water Quality Control Board ("Water Board").

We encourage you to continue cooperating with the Water Board and to respond fully to their requests. However, please note that the Commission's jurisdiction over Coastal Act violations is separate and distinct from the jurisdiction of other agencies to enforce their respective laws. Therefore, even if other agencies require restoration activities or the payment of penalties under their respective laws, those requirements do not affect the jurisdiction of the Commission to require the cessation of unpermitted development activities, removal of unpermitted materials, restoration of the site, and resolution of civil liabilities under the Coastal Act, among other things. While we will continue to coordinate with other agencies regarding their respective enforcement actions, ultimately, the Commission will require resolution of the Coastal Act violations on the Property through Cease and Desist and Restoration Orders, as described further below.

As noted in the Commission's November 30, 2016 letter, wetlands are an incredibly important and rare ecosystem and important habitat resources for sensitive species, such as the Coho salmon (*O. kisutch*), a species listed as threatened by the federal and state government pursuant to their respective Endangered Species Acts. Resolution of the violations on the Property affecting those wetlands is critical to avoid additional harm to this incredibly important habitat resource.

Therefore, the purpose of this letter is to notify you of my intent, as the Executive Director of the California Coastal Commission ("Commission"), to commence proceedings for issuance of a Cease and Desist Order and Restoration Order ("the Orders") to resolve the violations of the California Coastal Act that have occurred on the Property. The unpermitted development at issue on the Property includes, but is not necessarily limited to: 1) grading; 2) placement of fill, including manure, soil, straw, construction waste, trash, cow carcasses, and other debris in and/or adjacent to wetlands, tidal sloughs, and streams; 3) construction of roads and stream crossings; 4) placement of pumps in and diversion of water from tidal sloughs and streams, including the Smith River, Tillas Slough, and Ritmer Creek; and 5) dredging of tidal sloughs and streams ("Unpermitted Development"). This letter also serves to notify you of my intent to record a Notice of Violation of the California Coastal Act against your properties.

This letter is a required step in the ongoing enforcement process, designed to legally resolve the Coastal Act violations on the Property through an administrative hearing. However, please note that this letter in no way precludes our ability to resolve this matter amicably without the need of a contested hearing and potential litigation. We are open to discussing the consensual resolution of this matter through consent cease and desist orders and consent restoration orders ("Consent Orders"), which are similar to a settlement agreement, and provide you with an opportunity to resolve this matter consensually. Nonetheless, adoption of Consent Orders will still require a formal process and a Commission hearing, and the Commission's regulations provide for issuance of this formal notice letter as a first step in that process.

Background

As you were informed in our November 2016 letter, the California Coastal Act was enacted in 1976 to provide long-term protection of California's 1,271-mile coastline through

implementation of a comprehensive planning and regulatory program that would manage conservation and development of coastal resources. The Coastal Act created the Commission to apply and enforce Coastal Act policies through its permit, enforcement, and other land use planning programs. These Coastal Act policies seek to provide maximum public access to the coastal zone, and to protect and restore scenic landscapes and coastal views, natural landforms, and sensitive habitats (such as wetland and riparian habitats), among other things.

Violation History

On September 21, 2016, you and employees of your business and staff from the Commission, the Water Board, and the California Department of Fish and Wildlife ("CDFW") participated in a site inspection of the Property. During said inspection, Commission staff noted what appear to be multiple violations of the Coastal Act including wetland fill, deposition of construction (and other) materials, disposal of cow carcasses, etc. (more fully described in this letter).

On November 2016, Commission staff sent you a letter formally notifying you of violations of the Coastal Act on the Property.

On December 13, 2016, you called Commission staff to discuss what is expected of you moving forward. Staff advised you to not place any more material, in the cow dump, sloughs, and construction waste pile and to not remove any of it until receiving further instruction. You were also informed that Commission staff is coordinating with the Water Board and other agencies regarding resolution of this matter.

Commission enforcement staff participated on calls organized by the Water Board with your client's consultant, SHN Consulting on April 19, June 12, and July 24, 2017, and we understand that you have begun to work with the Water Board to perform investigations regarding the extent of the violations. We urge you to continue working cooperatively with the Water Board to address their concerns. However, please note that additional information may be required by the Commission staff to address Coastal Act concerns.

Violations of the Coastal Act

Pursuant to Coastal Act Section 30600(a), any person wishing to perform or undertake development in the Coastal Zone must obtain a coastal development permit ("CDP") in addition to any other permit required by law. The Coastal Act defines development in Section 30106, which states (in relevant part):

"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 any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land ...; change in the intensity of use of water, or of access thereto...

My staff has confirmed that activities constituting development were undertaken within the coastal zone, subsequent to the enactment of the California Coastal Act, within the area of the

Commission's retained permit jurisdiction, and without the required CDP. The development that occurred on the Property requires authorization pursuant to the Coastal Act, but no such authorization has been obtained. The development includes, but is not necessarily limited to: 1) grading; 2) placement of fill, including manure, soil, straw, construction waste, trash, cow carcasses, and other debris in and/or adjacent to wetlands, tidal sloughs, and streams; 3) construction of roads and stream crossings; 4) placement of pumps in and diversion of water from tidal sloughs and streams, including the Smith River, Tillas Slough, and Ritner Creek; and 5) dredging of tidal sloughs and streams. These activities that occurred on the Property clearly constitute development as defined in Section 30106 of the Coastal Act that requires a CDP. Since no CDP was obtained to authorize the development, it therefore constitutes violations of the Coastal Act.

Along with being unpermitted, the above-referenced activities raise significant substantive issues in that they have continuing natural resource impacts that are inconsistent with Chapter 3 of the Coastal Act, including impacts to wetlands and "environmentally sensitive habitat areas" ("ESHA") resulting in ongoing loss of function of those areas and their ability to support native species of plants and animals.

Coastal Resources and Impacts of the Unpermitted Development

Impacts to Wetlands and Environmentally Sensitive Habitat

Wetlands and estuaries are extremely rare and important ecosystems in California. In the Smith River estuary, an estimated 40% of the original wetland habitat has been lost due to diking and draining of wetlands¹. The riparian zone surrounding Tillas and Islas Sloughs is extensively diked and has been used as private rangeland since the mid-1800s, and land-use practices today have converted previous tidal flat habitat into lily bulb fields and cattle grazing pastures. The few remaining wetland areas are also important for their capacity to buffer adjacent development from the impacts of sea level rise.

California's remaining wetlands, including those located on the Property, are critical, vanishing habitat and support numerous resident and migrant wildlife species, including birds migrating along the Pacific flyway. Wetlands provide critical habitat (nesting sites, rearing sites, and foraging areas) for many species including anadromous fishes, such as Chinook salmon (*Oncorhynchus tshawytscha*), steelhead (*O. mykiss*) and coastal cutthroat trout (*O. clarki clarki*). Wetlands within the Smith River estuary, in particular, are some of California's most critical habitats with respect to salmonid population resiliency and biodiversity. Chinook salmon, steelhead and coastal cutthroat trout are abundant throughout the Smith River watershed and are of great ecological and economic benefit to California and Oregon. Coho salmon (*O. kisutch*) also occur in the watershed but have declined significantly in California, which has led to federal and State listing pursuant to their respective Endangered Species Acts. According to CDFW, the California coho salmon population has declined by 70% during the last 40 years. CDFW has identified the Smith River coho salmon as a key population to maintain or improve as part of the

¹ Quifiones, R. M., and Mulligan, T.J. "Habitat use by juvenile salmonids in the Smith River estuary, California." Transactions of the American Fisheries Society 134.5 (2005): 1147-1158.

Recovery Strategy of California Coho Salmon. The federally listed-tidewater goby (*Eucyclogobius newberryi*) has also been detected in Tillas Slough.

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

In addition to their benefits to habitat, wetlands also help to protect adjacent development from flooding, by absorbing water and reducing the impact of storm surges, reducing the maximum height of floods by storing and slowing floodwaters, and retaining sediment and reducing erosion. These benefits are all the more important when considering the expected impacts of sea level rise. Sea level rise is expected to result in an increased frequency, duration, and height of flooding and erosion of areas adjacent to the coastline. Protection of wetlands is therefore critical to ensuring that adjacent development, such as the agricultural fields and roads on the Property, are protected.

The unpermitted grading, fill and placement of materials in wetlands and in areas adjacent to wetlands is inconsistent with several resource protection policies of the Coastal Act. It has the effect of, amongst other things, impacting water quality, removing wetland vegetation, eliminating the wetland completely, and removing the biological productivity of the wetland and disrupting the habitat values of ESHA, inconsistent with both Coastal Act Sections 30231 (protection of biological productivity and water quality) and 30240(a) (protection of ESHA from significant disruption). The unpermitted development at issue encroaches into ESHA and is adjacent to ESHA and does not meet Section 30240(b) (siting of development adjacent to ESHA). The unpermitted diversion of water from streams has the potential to affect composition of coastal waters, impacting biological productivity, and cause impacts to fauna due to entrainment, inconsistent with Coastal Act Section 30231. Thus, in addition to being unpermitted and inconsistent with this provision of the Coastal Act, the development is also continuing to impact the ESHA on the Property.

Cease and Desist Order

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

(a) If the commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person or governmental agency to cease and desist.

The activities described above clearly constitute “development” within the definition of the Coastal Act Section 30106, occurred within the coastal zone, are within the area of the Commission’s retained permit jurisdiction, and are not otherwise exempt from Coastal Act permitting requirements. No CDP was issued to authorize the unpermitted development. Therefore, the criterion for issuance of a cease and desist order pursuant to Section 30810(a) of the Coastal Act has been satisfied.

Section 30810(b) of the Coastal Act also states that a Cease and Desist Order may be subject to such terms and conditions as the Commission may determine are necessary to ensure compliance with the Coastal Act, including removal of any unpermitted development. The proposed Cease and Desist Order will therefore direct you to, among other potential actions: 1) remove unpermitted items of development; 2) cease and desist from maintaining any development on the Property not authorized pursuant to the Coastal Act; 3) cease and desist from engaging in any further development on the Property unless authorized pursuant to the Coastal Act; and 4) take measures necessary to ensure compliance with the Coastal Act, including the removal of the unpermitted development from the Property and the restoration of the site to its original condition.

The procedures for the issuance of these Cease and Desist Orders are described in Sections 13180 through 13188 of the Commission’s regulations, which are codified in Title 14 of the California Code of Regulations.

Restoration Order

The Commission’s authority to issue Restoration Orders is set forth in Section 30811 of the Coastal Act, which states, in 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 the development has occurred without a coastal development permit from the commission..., the development is inconsistent with this division, and the development is causing continuing resource damage.

Pursuant to Section 13191 of the Commission’s regulations, I have determined that the activities specified in this letter meet the criteria of Section 30811 of the Coastal Act, based on the following:

- 1) “Development,” as that term is defined by section 30106 of the Coastal Act, has occurred without a CDP from the Commission.
- 2) This unpermitted development is inconsistent with the resource protection policies of the Coastal Act including, but not necessarily limited to:
 - a. Coastal Act Section 30230 (protection of marine resources).
 - b. Coastal Act Section 30231 (maintenance of biological productivity and water quality).
 - c. Coastal Act Section 30233 (limitations of fill of wetlands).
 - d. Coastal Act Section 30240 (protection of environmentally sensitive habitat areas).

- 3) The unpermitted development remains in place and therefore continues to cause resource damage, which is defined by Section 13190 of the Commission's regulations as: "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." The unpermitted development continues to exist, and therefore, it continues to cause damage to resources and prevent the Coastal Act resources that were displaced from re-establishing, and it continues to cause degradation and reduction in quality of surrounding resources as compared to their condition before the unpermitted development occurred.

For the reasons stated above, I am therefore issuing this "Notice of Intent" letter to commence proceedings for a Restoration Order before the Commission in order to compel the restoration of the Property. The procedures for the issuance of Restoration Orders are described in Sections 13190 through 13197 of the Commission's regulations, which are codified in Title 14 of the California Code of Regulations.

Response Procedure

In accordance with Sections 13181(a) and 13191(a) of the Commission's Regulations, you have the opportunity to respond to the Commission staff's allegations as set forth in this notice of intent to commence Cease and Desist Order and Restoration Order proceedings by completing the enclosed Statement of Defense (SOD) form. The completed SOD form, including documents and issues that you would like the Commission to consider, must be returned to the Commission's San Francisco office, directed to the attention of John Del Arroz, no later than September 21, 2017. However, should this matter be resolved via a Consent Order, a statement of defense form would not be necessary.

Notification of Intent to Record a Notice of Violation of the Coastal Act

The Coastal Act contains a provision for recording a notice against real property, indicating the existence of a Coastal Act violation on the property. One reason why such notice is important is so that potential purchasers of a property are made aware that a violation of the Coastal Act has occurred on the property. In our letter dated November 30, 2016, in accordance with Coastal Act Section 30812(g), we notified you of the potential for the recordation of a Notice of Violation against your properties.

The Executive Director of the Commission may record a Notice of Violation against the title to your properties pursuant to Section 30812, after providing notice and the opportunity for a hearing. Section 30812 provides, in part:

(a) Whenever the executive director of the commission has determined, based on substantial evidence, that real property has been developed in violation of this division, the executive director may cause a notification of intention to record a notice of violation to be mailed...to the owner of the real property at issue...

(b)... The notification shall state that if, within 20 days of mailing of the notification, the owner of the real property at issue fails to inform the executive director of the owner's objection to recording the notice of violation, the executive director shall record the notice of violation in the office of each county recorder where all or part of the property is located.

(c) If the owner submits a timely objection to the proposed filing of the notice of violation, a public hearing shall be held . . . at which the owner may present evidence to the commission why the notice of violation should not be recorded. . . .

(d) If, after the commission has completed its hearing and the owner has been given the opportunity to present evidence, the commission finds that, based on substantial evidence, a violation has occurred, the executive director shall record the notice of violation...

In many instances of cooperation, property owners have agreed to stipulate to the recordation of a Notice of Violation while working with the Commission to resolve the violations through mutual agreement. Should you choose to object to the recording of a Notice of Violation and wish to present evidence to the Coastal Commission at a public hearing on the issue of whether a violation has occurred, you must specifically object, in writing, within 20 calendar days of the postmarked mailing of this notification. The objection should be sent to the attention of John Del Arroz at the Commission's headquarters office (the address is provided above in the letterhead), and received no later than September 21, 2017. Please include the evidence you wish to present to the Commission in your written response and identify any issues you would like us to consider. If recorded as provided for under Section 30812(b), the Notice of Violation will become part of the chain of title of the properties against which it is recorded and will be subject to review by potential buyers. This notice is intended to put other parties on notice of the status of the properties and to avoid unnecessary confusion. Pursuant to the provisions of Section 30812 (f), the Notice of Violation will be rescinded once the violations are resolved.

Civil Liability and Exemplary Damages

The Coastal Act includes a number of penalty provisions that may be applicable. Section 30820(a)(1) provides for civil liability to be imposed on any person who performs or undertakes development without a CDP and/or that is inconsistent with any CDP previously issued by the Commission in an amount that shall not exceed \$30,000 and shall not be less than \$500 for each instance of development that is in violation of the Coastal Act. Section 30820(b) provides that additional civil liability may be imposed on any person who performs or undertakes development without a CDP and/or that is inconsistent with any CDP previously issued by the Commission when the person intentionally and knowingly performs or undertakes such development. Civil liability under Section 30820(b) shall be imposed in an amount not less than \$1,000 per day and not more than \$15,000 per day, for each violation and for each day in which each violation persists. Section 30821.6 also provides that a violation of a Cease and Desist Order or Restoration Order issued by the Commission can result in civil liabilities of up to \$6,000 for each day in which the violation persists. Lastly, Section 30822 provides for additional exemplary

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damages for intentional and knowing violations of the Coastal Act or a Commission Cease and Desist Order or Restoration Order.

Resolution

As discussed above, this notice letter does not preclude the parties from still reaching a cooperative resolution. We remain willing to resolve this matter amicably and without the need for a contested hearing and would like to work with you to achieve that end. The Consent Order process provides an opportunity to resolve these issues through mutual agreement. While requiring compliance with the Coastal Act, Consent Orders give you additional input into the process and timing of the removal of the unpermitted development and could potentially allow you to negotiate a penalty amount with the Commission staff to resolve your civil liability. Consent Orders would provide for a permanent resolution of this matter and thereby resolve the complete violation without any further formal legal action.

If you are interested in discussing the possibility of agreeing to Consent Orders, please contact John Del Arroz, Statewide Enforcement Analyst, no later than September 8, 2017 at (415) 904-5220 or at the address of the Commission's San Francisco office on the letterhead above. Again, should we settle this matter, you do not need to expend the time and resources to fill out and return the SOD form mentioned above in this letter.

Sincerely,



John Ainsworth
Executive Director

cc:

Lisa Haage, Chief of Enforcement
Alex Helperin, Senior Staff Counsel
Aaron McLendon, Deputy Chief of Enforcement
John Del Arroz, Statewide Enforcement Analyst
Brendan Thompson, North Coast Regional Water Quality Control Board
Michael Van Hattem, California Department of Fish and Wildlife
Kasey Sirkin, Army Corps of Engineers
Rebecca Glyn, U.S. Environmental Protection Agency

Enclosures:

Statement of Defense Form for Cease and Desist and Restoration Orders

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
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**STATEMENT OF DEFENSE FORM**

DEPENDING ON THE OUTCOME OF FURTHER DISCUSSIONS THAT OCCUR WITH THE COMMISSION ENFORCEMENT STAFF AFTER YOU HAVE COMPLETED AND RETURNED THIS FORM, (FURTHER) ADMINISTRATIVE OR LEGAL ENFORCEMENT PROCEEDINGS MAY NEVERTHELESS BE INITIATED AGAINST YOU. IF THAT OCCURS, ANY STATEMENTS THAT YOU MAKE ON THIS FORM WILL BECOME PART OF THE ENFORCEMENT RECORD AND MAY BE USED AGAINST YOU.

YOU MAY WISH TO CONSULT WITH OR RETAIN AN ATTORNEY BEFORE YOU COMPLETE THIS FORM OR OTHERWISE CONTACT THE COMMISSION ENFORCEMENT STAFF.

This form is accompanied by a notice of intent to initiate cease and desist order and restoration order proceedings before the commission. This document indicates that you are or may be responsible for or in some way involved in either a violation of the commission's laws or a commission permit. The document summarizes what the (possible) violation involves, who is or may be responsible for it, where and when it (may have) occurred, and other pertinent information concerning the (possible) violation.

This form requires you to respond to the (alleged) facts contained in the document, to raise any affirmative defenses that you believe apply, and to inform the staff of all facts that you believe may exonerate you of any legal responsibility for the (possible) violation or may mitigate your responsibility. This form also requires you to enclose with the completed statement of defense form copies of all written documents, such as letters, photographs, maps, drawings, etc. and written declarations under penalty of perjury that you want the commission to consider as part of this enforcement hearing.

You should complete the form (please use additional pages if necessary) and return it **no later than September 21, 2017** to the Commission's enforcement staff at the following address:

**John Del Arroz
California Coastal Commission
45 Fremont St. Suite 2000
San Francisco, CA 94105**

If you have any questions, please contact **John Del Arroz** at **(415) 904-5220**.

