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Staff: J. Buhr/ J. Del Arroz - SF
Staff Report: June 27, 2017
Hearing Date: July 13, 2017

STAFF REPORT: RECOMMENDATIONS AND FINDINGS FOR CONSENT SETTLEMENT AGREEMENT AND CEASE AND DESIST ORDER

Consent Cease and Desist Order No.: CCC-17-CD-02

Related Violation File: V-3-14-0151

Primary Party Subject to this Order: RMC Pacific Materials, LLC d/b/a CEMEX

Location: Lapis Sand Plant, Lapis Road, City of Marina, Monterey County Assessor's Parcel Numbers 203-011-019-000, 203-011-001-000, 203-011-016-000, and 203-011-020-000 and state tidelands seaward of these properties

Violation Description: Unpermitted Development, including, but not necessarily limited to: Dredging and extraction of sand, resulting in the creation of ponds; placement of floating dredges and development associated with the dredges, such as placement and installation of anchors and mooring cables, pipes, a pump station, and other facilities; grading; and changes in the intensity of use of the property.

Substantive File Documents:

1. Public documents in the files for Consent Cease and Desist Order No. CCC-17-CD-02.
2. Exhibits 1 through 25 and Appendix A of this staff report.

SUMMARY OF STAFF RECOMMENDATIONS

This action addresses a sand mining operation conducted without a Coastal Development Permit (“CDP”) by RMC Pacific Materials, LLC, doing business as CEMEX (hereinafter “CEMEX” or “Respondent”), on approximately 100 acres of a 400-acre site in the City of Marina, including the state tidelands seaward of the site (the “Property”). Staff recommends that the Commission (1) find the operation to be in violation of the Coastal Act for lack of a CDP and (2) approve Consent Cease and Desist Order No. CCC-17-CD-02 (hereinafter “Agreement” or “Consent Order”), to address the violation by requiring a number of measures, as discussed further herein. Among other things, the Agreement would require that CEMEX stop sand mining on the Property on a date certain, pursuant to a cessation plan; put a cap on the amount of sand that can be mined during this time; remove dredges, equipment associated with dredges, a pump station and other facilities from the Property pursuant to a removal plan; abstain from causing any further changes in intensity of use of the Property; undertake reclamation of the Property and protect sensitive species on site; and transfer the Property to an approved non-profit or governmental entity for conservation at a reduced price, with a deed restriction to protect the access and the habitat at the site in perpetuity.

The development at issue in this matter includes, but is not limited to: dredging and extraction of sand that results in the creation of ponds, used to remove sand; placement of floating dredges and other development associated with the dredges, such as placement and installation of anchors and mooring cables, pipes, a pump station(s), and other facilities; grading; and changes in the intensity of use of the Property (hereinafter collectively referred to as the “Unpermitted Development”). Because staff believes that the operator cannot legally conduct the current operation without a CDP, staff contends that the Unpermitted Development constitutes a violation of the Coastal Act. CEMEX disputes the violations alleged and further contends that it has a vested right to mine sand from the beach of the site in perpetuity.

Property

The Property is located in the City of Marina (“City”) and within the greater Monterey Bay area. The area to the north and south of the property primarily consists of undisturbed coastal dunes. The Property is situated between the Martin Dunes owned by the Big Sur Land Trust to the north and the Marina Dunes Preserve owned by the Monterey Regional Parks District to the south. Just north of the Martin Dunes lies the Salinas River National Wildlife Refuge and, to the south, the Marina Dunes Preserve and then a wastewater treatment plant, Marina State Beach (where a public accessway is located), and the Fort Ord Dunes State Park. Together and extending down to the northern part of the City of Monterey, this roughly 11-mile stretch of coastline is often recognized as the Monterey dune complex, which extends from 4-6 miles inland and constitutes a total area of approximately 40 square miles.

The Property consists of beach and dune habitats, including central foredune and central dune scrub, which can be further described as components of the Monterey dune complex. The coastal dunes located on the Property are important habitat for many species of native flora and fauna that are adapted to the shifting dune sands environment, such as the federally threatened Monterey spineflower, which has designated critical habitat on the property, the federally

threatened Smith's blue butterfly and the federally threatened Western snowy plover, which is present and has designated critical habitat on the Property. Therefore, areas of the Property occupied by central foredune and central dune scrub habitats or occupied by sensitive species constitute ESHA.¹

Sand Mining

CEMEX's current dredge pond mining operation extracts sand from the beach via a floating hydraulic dredge. The dredge forms a pond that captures sand and retains it in the pond, rather than it returning to the beach and ocean. The sand is pumped to the upland portion of the Property where the processing, storage, and sale of that sand occurs. The origin of the vast majority of sand extracted is from the Southern Monterey Bay Littoral Cell, which is bounded at the north by the Monterey Bay Submarine Canyon and at the south by Point Piños on the Monterey Peninsula.² The creation of the dredge pond serves as a persistent sand sink, or an area of loss within the littoral cell. Sand trapped in and removed from the dredge pond is removed from the littoral cell and therefore no longer available to build or accrete on beaches, dunes or offshore areas.

Historically, the dunes, beach and tidelands of Monterey Bay have been mined for sand since the early 1900's, including on the Property. Until the 1980's, there were six active mines, including CEMEX, removing sand from the Southern Monterey Bay Littoral Cell. The other mines were all dragline operations that removed sand directly from below the mean high tide line and within the jurisdiction of the Army Corps of Engineers ("ACOE"), which required operators to obtain authorization for their drag line operations pursuant to the Rivers and Harbors Act. Circa 1970, when these authorizations came due for renewal, the Army Corps determined that these coastal sand mines were causing erosion and stopped issuing permits for the use of drag-lines. As the required permits were no longer being issued by the ACOE, all of the coastal sand mining in Monterey Bay, other than the CEMEX operation, ceased.

Although the ACOE did not assert jurisdiction over the CEMEX operation, the impacts from the operation are very similar to those of the other operations that did cease, and those impacts are significant, both in scale - the intensity of impacts caused by the Unpermitted Development, and scope - affecting not just the property but also the coastline within the littoral cell. In addition to the impacts of the Unpermitted Development from each mining cycle, the Unpermitted Development also has cumulative impacts from the decades of beach extraction that have occurred. Furthermore, the sand that is extracted by the mining operation is permanently removed from the littoral cell, altering natural shoreline processes and the local shoreline sand supply. The effects of the Unpermitted Development include impacts on development and resources within the vicinity of the site. The Unpermitted Development has also significantly contributed to erosion within the beach and dune system, which has led to increased shoreline retreat, dune erosion, which reduces habitat, loss of beach sand, and decreased public access.

¹ For more detail on the ecological resources on the site, see Dr. Lauren Garske-Garcia's memo, "CEMEX: Ecological Resources," attached here as [Exhibit 6](#).

² For a detailed explanation of the Southern Monterey Bay Littoral Cell, please refer to the memo prepared by staff Coastal Engineer Dr. Lesley Ewing, attached here as [Exhibit 5](#).

Enforcement Activity

On March 15, 2016, via a resolution passed by the City Council, the City requested the Commission to assume primary enforcement responsibility regarding this alleged violation. Shortly thereafter, on March 17, 2016, the Executive Director of the Commission issued a Notification of Intent to Commence Cease and Desist Order, Restoration Order, and Administrative Penalties Proceedings (“NOI”). CEMEX disagrees with the allegations contained within the NOI and contends that it has a vested right to continue its operation indefinitely. Negotiations with CEMEX and discussions regarding the sand mining operation, facts and relevant legal issues began in earnest relatively shortly after the mailing of the NOI. Negotiations in this matter were particularly complex, as CEMEX has been operating the dredge pond mining operation since well prior to the passage of the Coastal Act and it involved significant historical research and involved records of a number of other regulatory agencies.

Separately, on May 16, 2017, the State Lands Commission (“SLC”) wrote a letter to Respondent, stating that the extraction of sand by the dredge pond required a lease, did not have the required lease, and that the extraction of sand from the dredge pond without compensation to the state constituted expropriation of public property in violation of the California Constitution. The SLC further alleged that the sand extraction operation was a nuisance. Then, on June 6, 2017, the City Council of the City adopted a resolution finding that the dredge pond extraction operation constitutes a public nuisance³. In the meantime, Commission enforcement staff continued negotiations with Respondent and ultimately reached the agreement proposed for your approval to resolve the alleged Coastal Act violations on the Property. Respondent executed the proposed Agreement on June 23, 2017.

Proposed Resolution

Through the proposed Agreement, Respondent has agreed to resolve its alleged financial liabilities under the Coastal Act and withdraw any claims it has to a vested right for continued mining on the Property. The Agreement serves multiple purposes, including: 1) it provides interim operating conditions necessary to limit the scope of the operation and protect coastal resources while the unpermitted development is phased out; 2) it establishes a finite date for the sand extraction operations to cease, by December 31, 2020; 3) it establishes a maximum amount of sand that may be removed during the cessation period in any given year to 240,000 tons/year (approximately 177,000 cu yards/year); 4) it requires CEMEX to undertake restoration and reclamation activities to restore the habitat values of the Property; 5) it provides an additional three year period to wind down operations on the upland portion of the property and to begin reclamation and restoration activities, and provide for a period of time for transition of employees (no additional mining of sand will occur during this period); 6) it requires CEMEX to transfer the Property, at a reduced purchase price, to a non-profit or governmental entity approved by the Commission; 7) it requires as part of any sale, a deed restriction be put in place to protect the property and limit the potential uses of the property to conservation- related

³ The City’s resolution included a finding that the mining operation constituted a public nuisance, and provided authorization to the City attorney to pursue the possibility of nuisance abatement. However, the resolution did not include formal action for abatement of the nuisance.

purposes, including but not limited to public access, conservation, low-impact passive recreation, and public education, which will improve public access and habitat on the site in the future; 8) it provides for CEMEX to withdraw its Vested Rights Claim and Statement of Defense and agree not to sue the Coastal Commission over the issuance or enforcement of this Agreement; and 9) it provides for monitoring reports and significant penalties for violations of the agreement. To implement this agreement and achieve these varied and far-reaching objectives, staff recommends that the Commission approve Consent Cease and Desist Order No. CCC-17-CD-02.

As mentioned above, the SLC and the City asserted various claims against CEMEX stemming from the sand mining operation that is the subject of this resolution. In working to reach the terms of this Agreement, Commission staff coordinated closely with both SLC and the City to ensure that the terms of this Agreement accomplish the objectives of those entities. SLC and the City are both in support of this Agreement. In fact, as part of this settlement package, SLC and the City have entered into separate agreements with CEMEX to resolve the liabilities associated with their claims against CEMEX, and to provide mutual releases, contingent on the finalization and implementation of this order in this hearing. The City of Marina approved the agreement between CEMEX and the City on June 26, 2017 and it is attached hereto as [Exhibit 2 of Appendix A](#). The SLC will bring its agreement with CEMEX to hearing before the State Lands Commission for approval in August. CEMEX has already agreed to the terms of that agreement, and a copy of that agreement, executed by CEMEX, is attached herein as [Exhibit 1 of Appendix A](#).

Commission staff has worked closely with Respondent for over a year to reach an amicable resolution to these matters, and to resolve the Coastal Act issues described herein, and staff greatly appreciates the cooperation by Respondent in reaching this Agreement. The proposed Agreement provides a defined plan for the permanent cessation of all sand extraction from the site and the restoration and long-term protection of habitat values. Commission staff believes that the obligations that this Agreement creates through an enforceable plan for the cessation of CEMEX's sand mining operation within a finite period of time and without the risks associated with other enforcement options are of great value to the public. Furthermore, the Agreement provides for the Property to be protected for conservation and public access, both core values of the Coastal Act, in perpetuity. The proposed Agreement is included as [Appendix A](#) of this staff report.

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APPENDICES

Appendix A – Cease and Desist Order No. CCC-17-CD-02

Exhibit 1 to Appendix A – State Lands Commission settlement agreement with CEMEX

Exhibit 2 to Appendix A – City of Marina mutual release with CEMEX

Exhibit 3 to Appendix A – Removal Schedule

Exhibit 4 to Appendix A – Monitoring Report

EXHIBITS

Exhibit 1	Vicinity Map
Exhibit 2	Detail Map
Exhibit 3	Photographs of Site
Exhibit 4	Photographs of Impacts from Erosion
Exhibit 5	Memorandum from Dr. Lesley Ewing
Exhibit 6	Memorandum from Dr. Lauren Garske-Garcia
Exhibit 7	Mar. 17, 2016 Notice of Intent Letter from John Ainsworth to CEMEX
Exhibit 8	Dec. 8, 2015 Letter from Layne Long, City of Marina, to Dan Carl
Exhibit 9	Mar. 16, 2016 Letter from J. Del Arroz to Layne Long, City of Marina
Exhibit 10	Jan. 14, 2016 Letter from Mike Novo, Monterey County to J. Del Arroz
Exhibit 11	Jan. 9, 2017 Letter from R. Wellington, Marina City Attorney to J. Del Arroz
Exhibit 12	May 16, 2017 Letter from Jennifer Lucchesi, State Lands Commission to CEMEX
Exhibit 13	Monterey County Use Permit for Drag Line
Exhibit 14	Minutes for 1964 and 1969 State Lands Lease for Drag Line
Exhibit 15	City of Marina CDP - Wet Plant
Exhibit 16	City of Marina CDP - Scale House

- Exhibit 17 CDP A-80-80 for Monterey County Wastewater Improvements, including Sewage Outfall
- Exhibit 18 Army Corps of Engineers Permit for Drag Line
- Exhibit 19 Letter from J. Wolfe, ACOE to G. Ginn, State Lands Commission
- Exhibit 20 City of Marina Dune Mining Agreement
- Exhibit 21 SMARA Reclamation Plan
- Exhibit 22 Beach Erosion Report by Dr. Stephen P. Leatherman, Submitted by Respondent
- Exhibit 23 City of Marina Nuisance Resolution (Without Attachments)
- Exhibit 24 Additional Technical Memos
- Exhibit 25 Letters Received from Public

I. MOTIONS AND RESOLUTIONS

Motion 1: Consent Cease and Desist Order

I move that the Commission issue Consent Cease and Desist Order No. CCC-17-CD-02 pursuant to the staff recommendation.

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

Resolution to Issue Consent Cease and Desist Order:

The Commission hereby issues Consent Cease and Desist Order No. CCC-17-CD-02, as set forth below, and adopts the findings set forth below, on the grounds that CEMEX is and has been conducting development on the property covered by the order without a Coastal Development Permit in violation of the Coastal Act, and that the requirements of the Consent Cease and Desist Order are necessary to ensure compliance with the Coastal Act.

II. JURISDICTION

Because the City of Marina (“City”) has a certified Local Coastal Program (“LCP”), the City has the option to enforce its own LCP. However, some of the development at issue began before the City’s LCP was certified, and some of the development at issue may be occurring in the area of the Commission’s retained jurisdiction, pursuant to section 30519(b) of the Coastal Act. All such development required a permit from the Commission, so the Commission has jurisdiction to take enforcement action for the failure to obtain such a permit before commencing development, pursuant to the first sentence of Section 30810(a). In addition, for the development that required a permit from the City, the Commission has jurisdiction over enforcement of that unpermitted development based on the second sentence of Section 30810(a), and in particular, Section 30810(a)(1), which enables the Commission to take enforcement action to enforce the requirements of a certified Local Coastal Program when the local government requests that the

Commission assist with or take primary responsibility for enforcement. In this case, the City requested that the Commission assume primary enforcement responsibility regarding this violation via a resolution passed by the City on March 15, 2016. Commission staff has continued to communicate with the City to keep the City apprised of the potential parameters of the pending resolution, and on June 26, 2017, the City signed an agreement with CEMEX, that is consistent with and refers to this proposed Consent Agreement ([Appendix A, Exhibit 2](#)).

III. HEARING PROCEDURES

The procedures for a hearing on a Cease and Desist Order are outlined in Section 13185 of Title 14 of the California Code of Regulations (“14 CCR”).

For a Cease and Desist Order hearing, 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 parts 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 an actual controversy exists. The Chair may then recognize other interested persons, which here shall include representatives of the State Land Commission and City of Marina, as parties of the related matters, as well as members of the public and others wishing to address this matter, after which time Staff typically responds to the testimony and to any new evidence introduced.

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 13186, incorporating by reference Section 13065. The Chair will close the public hearing after the presentations are completed. The Commissioners 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, either in the form recommended by the Executive Director, or as amended by the Commission. Passage of the motion above, per the Staff recommendation or as amended by the Commission, will result in issuance of the Cease and Desist Order.

Section 30821(b) states that the imposition of administrative civil penalties by the Commission is to take place at a duly noticed public hearing in compliance with the requirements of Sections 30810, 30811, or 30812. Therefore, the procedures employed for a hearing to impose administrative penalties may be the same as that for a Cease and Desist Order.

IV. FINDINGS FOR CONSENT CEASE AND DESIST ORDER NO CCC-17-CD-02 AND RESOLUTION OF CIVIL LIABILITIES⁴

A. DESCRIPTION OF COASTAL ACT VIOLATIONS, INCLUDING VIOLATIONS OF PUBLIC ACCESS POLICIES

This Consent Order is necessary to address Coastal Act violations involving unpermitted development. The items of unpermitted development here include, but are not necessarily limited to, dredging and extraction of sand, including resulting in the creation of ponds; placement of floating dredges and development associated with the dredges, such as placement and installation of anchors and mooring cables, pipes, a pump station(s), and other facilities; grading; and changes in the intensity of use of the property. The conduct of such operations, and the use and placement of such items, clearly meet the definition of development under the Coastal Act, are not exempt from the permit requirement, and the development was never authorized by any CDP. The ongoing conduct of these operations and the ongoing use and retention of these items is thereby an ongoing violation of the Coastal Act. Additionally, this unpermitted development has impacted public recreational areas in the vicinity of the property, including by erosion of bluffs areas, loss of beach area, and impeding public access⁵, including erosion at the Dunes Drive public accessway located adjacent to the property, and erosion undermining the parking lot at Marina State Beach, which thereby changes the intensity of public access to the coastal shoreline in this area. Because CEMEX retains and maintains unpermitted development that impedes public access and diminishes public recreational opportunities, CEMEX is also in violation of the public access provisions of the Coastal Act.

B. DESCRIPTION OF PROPERTY

Location:

The subject Coastal Act violation occurred on a 400-acre property that the Monterey County Assessor's Office has designated with four assessor parcel numbers (APNs 203-011-019-000 and 203-011-001-000, 203-011-016-000, and 203-011-020-000, hereinafter referred to as the "Property"), located at the northern portion of the City of Marina, and seaward of Highway 1 ([Exhibit 1](#)). The City's certified Land Use Plan and Implementation Plan designate the site as CD - Coastal Conservation and Development, which allows coastal research and educational uses; developed public access and other coastally dependent recreation uses, and coastal dependent industrial uses.

The area to the north and south of the Property primarily consists of undisturbed coastal dunes. The entire CEMEX property (~400 acres) is situated between the Martin Dunes owned by the Big Sur Land Trust to the immediate north (~128 acres with restricted access) and the Marina Dunes Preserve owned by the Monterey Regional Parks District immediately to the south (~47 acres of former sand mines undergoing restoration since 1990). Just north of the Martin Dunes

⁴These findings also hereby incorporate by reference the section "Summary of Staff Recommendations" at the beginning of this staff report ("STAFF REPORT: Recommendation and Findings for Consent Settlement Agreement and Consent Cease and Desist Order") in which these findings appear.

⁵ See Memorandum from Dr. Lesley Ewing, [Exhibit 5](#).

lies the Salinas River National Wildlife Refuge (~367 acres, established in 1973). To the south, the Marina Dunes Preserve is closely followed by a wastewater treatment plant, Marina State Beach (where a public accessway is located), and the Fort Ord Dunes State Park established in 1995 (~990 acres of former military land now undergoing restoration). Together and extending down to the northern part of the City of Monterey, this roughly 11-mile stretch of coastline is often recognized as the Monterey dune complex, which extends from 4-6 miles inland and constitutes a total area of approximately 40 square miles⁶. Agricultural development is located to the east and northeast of the Property.

Historical Uses of the Site:

Prior to the early 20th century, the site was covered by sand dunes, similar to the dunes located to the north and south of the mining operation. As discussed in the memorandum from Dr. Lauren Garske-Garcia, these dunes are important habitat, and areas of the Property, such as the central foredune and central dune scrub habitats, are rare habitat types that provide important habitat for many special-status plants and animals, and constitute ESHA ([Exhibit 6](#)).

A number of entities owned and extracted sand from the property prior to the purchase of the property by Respondent in 2005. Mining of sand first occurred on the property between 1906 and 1907⁷. By 1925, a rail line was placed through the property, and a drag-line shovel attached to a railroad car extracted sand from the dunes in the areas adjacent to the rail lines; and a beach hoist, a drag-line attached to a structure on the upper beach, extracted sand from the beach. Extraction during this time occurred with little to no processing of the sand after extraction. Aerial photography shows that by about 1956, use of the beach hoist and rail lines to extract sand from the beach had ceased.

In 1959 beach mining ceased, and circa 1960, a dredge was installed to extract dune sand via a manmade pond located approximately 1400 feet inland of the ocean. Processing of the extracted sand also began during this time period. A wet sand sorting facility (“wet plant”) was first installed on the property in 1959, and in late 1960 a sand drying and sorting facility (“dry plant”) was installed. Circa 1964, “objectionable material” was reached at the inland dredge pond, and mining at the inland dredge pond ceased⁸. At that time the inland dredge pond was about 200 feet wide by 300 feet long, with a depth of 38 feet. Circa 1965, the dredge was moved to the beach, near its current location, and its operation resulted in the creation of a new dredge pond. Since the dredge was placed on the beach, the combined mechanism of the dredge and the anthropogenic dredge pond has continued to siphon sand from the ocean washed onto the beach by winter waves, and the extraction of sand from the beach has continued.

In the early 1960s, as further described in the Permit History section below, the prior property owner submitted applications to the Army Corps of Engineers, State Lands Commission and Monterey County and secured authorizations to construct a drag-line, a claw or shovel attached

⁶ Cooper WS. 1967. Coastal Dunes of California. The Geological Society of America, Memoir 104. 147pp.

⁷ Hart, E. 1966. Mines and Mineral Resources of Monterey County. California Division of Mines and Geology.

⁸ Welday, E. E. 1972. The Southern Monterey Bay Littoral and Coastal Environment and the Impact of Sand Mining. California Division of Mines and Geology.

to a cable that extracts sand directly from the ocean, below the mean high tide line. However, this dragline was never constructed.

In the 1960s, extraction of sand from the ocean occurred in 5 other locations throughout southern Monterey Bay via use of an ocean dragline. The Army Corps of Engineers determined that these mines required authorization pursuant to the Rivers and Harbors Act, and although initially it granted such authorizations, later, when the first authorizations expired, the Army Corps determined that the coastal sand mines were causing erosion and stopped issuing permits for coastal sand mines using drag-lines. As the required permits were no longer being issued by the Army Corps, all of the mining operations in the City of Marina using a drag-line had ceased by 1986, and the last drag-line mining operation in Monterey Bay, which was occurring in Sand City, ceased by 1990⁹. However, the Army Corps of Engineers did not require the dredge pond on the Property, which does not use a drag line in the ocean and is instead located on the beach, to obtain the same permit. Therefore, dredge pond mining on the Property continued.

Circa 1983, a sewage outfall was constructed on the site by the Monterey Regional Water Pollution Control Agency pursuant to CDP A-80-80. The outfall, which is located near the center of the property, runs below the surface of the dunes, just south of the dredge pond, and out into the ocean.

Current Uses on the Property:

CEMEX, the current property owner, acquired the property in 2005, and since that time has used the property for extraction of beach sand via a floating hydraulic dredge, and the processing, storage, and sale of that sand on the upland portion of the property. The floating dredge is approximately 60 feet long by 30 feet wide, and it extracts sand to a depth of 30 feet¹⁰. A pond forms at the location of the dredge as seawater seeps into the excavated area. The dredge pond has remained in approximately the same location each year. The dredge has been replaced or substantially modified on at least 3 separate occasions, in the early to mid-1980s, in 1996, and in 2016.

The shape, height, and location of the beach near the dredge pond vary over time due to the sand extraction and erosion caused by storms. At times, such as during the summer, the dredge pond appears to be located on the upper beach, with a berm seaward of the dredge pond. At other times, such as during winter storms, the dredge pond is completely open to the ocean ([Exhibit 3](#)). The size of the dredge pond also varies according to time of year, the amount of extraction that has occurred, and the amount of sediment that has recently been carried into the pond from wave action. For example, in the middle of summer, in August 2013, the dredge pond was about 840' long and about 340' wide, and in January through March 2017 after winter storms transferred sand into the pond, the beach was filled with sand and no dredge pond existed ([Exhibit 3](#)).

⁹ Coastal Regional Sediment Management Plan for Southern Monterey Bay. 2008. Association of Monterey Bay Area Governments.

¹⁰ RMC Lonestar Lapis Sand Plant Reclamation Plan Environmental Impact Report. January 1992. State Mining and Geology Board.

The floating dredge moves around the pond via the use of cables connected to a number of anchors placed on the sandy beach surrounding the dredge pond. Bulldozers and other mechanized equipment are used to vary the location of the anchors, and also used to recreate the dredge pond when the dredge pond is filled in with sediment ([Exhibit 3](#)).

The dredge in the dredge pond extracts a mixture of sand and water, and pumps it inland towards the wet plant, which washes the sand with well water, and separates sand by grain size. After use by the wet plant, the water used to wash the sand is sent back towards the beach via an open channel to two settling ponds located on the upper beach. There, the fine sediments exit from the water and the water is allowed to seep into the sand to reach the ocean.

Sand from the wet plant is transported via bulldozer for further processing or for placement in stockpiles on the property. Sand that meets the needed grain size requirements is sent to the dry plant, which dries the sand by heating it, further separates it into specific categories according to grain size, mixes those categories to reach the desired mix of sand, and packages it for sale. Sand that does not meet needed grain size requirements at that time is placed in sand stockpiles, located to the north and south of the wet plant. Respondent has stated that sand in the stockpiles may be used, from time to time, at a later time, when specific grain sizes are needed. Sand is also sold at the site by truckload for use as fill. The amount of the sand stored in these stockpiles is unclear, as reporting of these amounts, as required under the City of Marina LCP, has not occurred since 1992; however the total volume of sand in stockpiles appears to have grown over time.

Sand Extracted From the Property:

Although historical records state that sand extraction on the property began in 1906, there is limited information available regarding the type and amount of sand that was extracted from the property in this very early period. Historical records, such as reports from the State Mineralogist, provide some indication of the volume of sand that was extracted from the Property historically.

A valuation report that was provided to the prior property owner provides the most detailed information for this early period. The report states that extraction of sand for the period between 1923 and 1927 averaged at 124,000 tons annually (including both dune and beach sand), with a minimum of 89,000 tons in 1923 and a maximum of 150,000 tons in 1925¹¹. In 1960, the prior property owner started reporting the total amount of sand produced from the site (including sand mined from the beach after 1965 and including dune sands until about 1990) to the US Bureau of Mines, and later, to the California Division of Mines and Reclamation. These figures show that yearly production amounts increased from the tens of thousands of tons in 1960 to a few hundred thousand tons of dune and beach sands yearly by 1977, when the Coastal Act took effect.

Additional reporting requirements have been added over the years, resulting in a much more detailed accounting of the total amount of sand extracted from the beach. Starting in 1986, the

¹¹ It should be noted that various reports to various agencies and entities over the years have used different units of measurement to refer to the amount of sand extracted from the facility. For clarity and to allow meaningful comparison, we have converted all to tons/year and used just one unit in the discussion herein.

amount of sand processed by the wet plant was first reported to the Monterey Bay Air Pollution Control District, and these reports provide a record of all of the sand that is extracted from the beach dredge pond.

Respondent has asserted that there have been differences in methods of reporting extraction volumes over time, due in part to change in ownership. However, in general, the available information shows that the amount of sand removed from the site was very low in the 1960s; it increased towards the early 1970s, and peaked at about 1990. This peak in mining amounts may be due, in part, to the cessation of mining at other locations in Monterey Bay by 1990, as noted in the section regarding historical uses, above.

Based on reporting to the Monterey Bay Air Pollution Control District, the volume of sand extracted from the beach has averaged about 293,000 tons per year for the period between 1986 and 2015.

As discussed above, around the time of the effective date of Proposition 20 (February 1, 1973), or the Coastal Act (January 1, 1977), sand was extracted from both the dunes and the beach, and the amount extracted was reported as ‘total production’ amounts that likely included a significant portion of dune sands. Based on all of the available evidence, the amount of sand extracted from the beach prior to Proposition 20 and the Coastal Act is significantly lower than the amount of sand extracted from the beach today.

Permit History:

No CDP has been issued that authorizes the mining of beach sand on the property. In addition to not having a CDP under the Coastal Act¹² for the overall operation, CEMEX does not have authorization for extraction of sand from the California State Lands Commission, Monterey County, or the City of Marina, under any of their authorities either.

A) State Lands Commission:

In 1963, the prior property owner applied for a lease to extract sand from the ocean through a dragline attached to a buoy. As part of the process for application for a lease, the State Lands Commission notified other agencies of the pending lease application, including Monterey County and the Army Corps of Engineers. As described below, those agencies required additional approvals from the prior property owner, and the State Lands Commission required those approvals to be obtained before bringing the lease application to hearing.

On May 28, 1964, the State Lands Commission approved a Mineral Extraction Lease for 5 years, allowing a minimum extraction of 25,000 cubic yards (~18,500 tons) and a maximum extraction of 80,000 cubic yards (~59,250 tons), from a 10 acre area below the Mean High Tide Line (MHTL). The lease did not address or approve removal of beach sands (meaning sand from above the MHTL), and was revocable if the removal of sand was found to be adversely affecting the adjacent shoreline. No dragline was constructed on the property, and there is no evidence

¹² See Section E below for fuller discussion of Coastal Act and this property.

that dredging of sands directly from the ocean occurred. Instead, as described above, the landowner constructed a dredge pond and installed a dredge on the beach in 1965.

On August 28, 1969, the State Lands Commission approved an extension of the state lands lease for an additional 5 years, contingent on the property owner obtaining approval of a permit by the Army Corps of Engineers. As the ACOE did not approve a permit, the lease for an ocean dragline was never extended, and the State Lands Lease ended in 1969. However, the dredge continued operating and removing sand from the beach and ocean without the required State Lands lease.

On May 16, 2017, the State Lands Commission wrote a letter to Respondent, stating that the extraction of sand by the dredge pond required a lease and did not have the required lease, and that the extraction of sand from the dredge pond without compensation to the state constituted expropriation of public property in violation of the California Constitution. ([Exhibit 12](#))

B) Army Corps of Engineers:

In April 10, 1964, the Army Corps of Engineers granted Department of the Army Permit 64-18 to the prior property owner for the extraction of “a maximum limit of 100,000 tons of sand per year from a 2,200 foot long area along the shoreline not extending further than 200 feet seaward of the ordinary high water mark.” The text of the application and the map provided along with the ACOE permit shows that the proposed mining was intended to occur in the ocean, seaward of the mean high tide line ([Exhibit 18](#)). When the prior property owner applied to extend the Department of the Army Permit, as required for the extension of the State Lands Lease, due to objections raised by other agencies about the potential effects of sand mining on coastal erosion, the Army Corps of Engineers did not approve the permit ([Exhibit 19](#)). Therefore the prior property owner did not receive the required Department of the Army permit.

In 2010, after concerns were raised by members of the public, the Army Corps of Engineers investigated the property owner regarding allegations of an ongoing practice of pushing sand into the dredge pond with mechanized equipment. The Army Corps of Engineers issued an independent determination that the dredge pond was subject to Section 404 of the Clean Water Act, which prohibits placement of fill, but was above the Ordinary High Water Mark and not subject to the Rivers and Harbors Act. Therefore, the Army Corps of Engineers required, and the property owner agreed, to cease usage of mechanized equipment to push sand into the dredge pond.

C) Monterey County:

Monterey County Zoning Ordinance 911, which was approved in 1955, did not provide a zoning designation for the Property, and therefore pursuant to Section 30 a.(3), removal of minerals or natural materials, including building and construction materials, could not occur unless a Use Permit was obtained. In response to receiving notification regarding the prior property owner’s lease application for a dragline on the property, Monterey County required the prior property owner to obtain a Use Permit for the dragline. In October 1963 Monterey County issued Use Permit 1118 for the “removal of natural materials from the tideland area in the Lapis area”, to

authorize the proposed dragline. On October 5, 1964, the permit was renewed ([Exhibit 13](#)). However, no dragline was constructed.

In 1965, the prior property owner placed the dredge on the beach and began extracting sand from the beach and ocean through the beach dredge pond. However, the prior property owner did not obtain a Use Permit for the use of the dredge pond. In response to an inquiry from Commission enforcement staff, Monterey County planning staff reviewed all available records, and found that no Use Permit was obtained to authorize the placement of the dredge pond on the property, found that such a permit was required by the Zoning Ordinance, and therefore, found that the dredge pond cannot be considered a legal nonconforming use, and does not have the required legal authorization. Therefore, the prior property owner did not have all necessary permits from the County at the effective date of Proposition 20, February 1, 1973 ([Exhibit 10](#)).

D) City of Marina:

On November 13, 1975, the City of Marina was incorporated and, upon incorporation, adopted the 1974 version of Monterey County Zoning Ordinance 911, which was in effect at that time. However, there is no evidence that the City considered whether the ongoing operation was in compliance with that ordinance at the time of incorporation, or at any time in the following several decades. In response to an inquiry from Commission enforcement staff, on January 9, 2017, the Marina City attorney wrote a letter stating that, since 1975, the City has had ordinances in place that required a discretionary permit for the sort of dredge pond operation on the site, but that no such permit has been issued, and thus, if the dredge operation was not already a legal non-conforming use at the time of incorporation, it did not have the required legal approvals to continue operating ([Exhibit 11](#)). The prior property owner did not apply for, or receive, the discretionary permit that was required to extract sand using the dredge. Therefore, the prior property owner did not have all necessary permits at the effective date of the Coastal Act, January 1, 1977.

On August 8, 1988, the City of Marina approved CDP 3-MAR-88-006 to demolish the wet plant and construct a new wet plant a short distance away, which resulted in a slight reduction in capacity of the wet plant ([Exhibit 15](#)). The prior property owner only applied for authorization to replace the wet plant, and the CDP did not provide authorization for the overall use of the property, or use or operation of the dredge, dredge pond or any other structures or operations on the property. The CDP was not appealed and became final, and the demolition and reconstruction of the wet plant occurred in 1989.

The City CDP also required that the prior property owner enter into an agreement to protect dunes on the Property. On April 11, 1989, the City of Marina and the prior property owner agreed to a Dune Mining Agreement, requiring cessation of mining of dunes on the property, to protect endangered species, including the endangered Smith's Blue Butterfly. The Dune Mining Agreement resulted in the cessation of mining of dune sands on the property around 1990, and reduced the area of inland dunes on the property that were used for the mining operation.

On July 14, 1997, the City of Marina approved CDP 3-MAR-97-001, for a 186 sq. ft. single story addition to an existing scale house building located near the entrance road.

On June 6, 2017, the City Council of the City of Marina adopted a resolution finding that the dredge pond extraction operation constitutes a public nuisance ([Exhibit 23](#)).

E) Coastal Commission:

As described above, the prior property owner did not obtain all of the necessary permits prior to the effective date of Proposition 20 or the Coastal Act. The operation lacked the necessary authorizations from the County, the City, and the State Lands Commission. In addition, the operation has been declared a public nuisance. As a result, CEMEX cannot claim a vested right for the Unpermitted Development, and moreover, the Commission has not found there was a vested right under the applicable regulations nor determined otherwise that a permit was not required. Therefore, the Unpermitted Development required a Coastal Development Permit. No Coastal Development Permit was issued by the Coastal Zone Conservation Commission, the precursor agency to the Coastal Commission, to authorize the extraction of sand using the dredge pond. Therefore, the prior property owner did not obtain all necessary permits prior to January 1, 1977, the effective date of the Coastal Act, either.

In 1980, the Commission approved CDP A-80-80, which authorized a number of wastewater improvements in the region, including a sewage outfall on the Property that runs below the dunes and out to the ocean. This outfall, which is located just south of the dredge pond, was constructed in 1983.

In November 2014, the Commission approved California American Water's proposal to construct, operate, and decommission a test slant well and associated monitoring wells and other infrastructure near the shoreline on the Property. As a result, a test well was installed on the property, about 550 feet from the ocean. In October 2015, that CDP was amended to change one special condition regarding groundwater monitoring.

In February 2016, coastal erosion caused exposure of a portion of the sewage outfall and breakage of a discharge pipe associated with the Cal-Am test well. As a result, the Commission approved Emergency Coastal Development Permit CDP G-9-16-0031 to authorize the placement of temporary sheet piles to protect the outfall, and approved amendment CDP 9-14-1735-A2 to the Cal-Am test well permit to authorize replacement of the discharge pipe and modification of a special condition regarding exposure of structures.

F) Surface Mining and Reclamation Act:

Pursuant to the California Surface Mining and Reclamation Act (Cal. Pub. Res. Code §§ 2710 *et seq.*), to assure that adverse environmental impacts are minimized and mined lands are reclaimed to a usable condition, surface mine operators must obtain approval of a Reclamation Plan, a document which provides a plan for returning the land to a usable condition which is readily adaptable for alternative land use. On June 15, 1992, the State Mining and Geology Board approved the Reclamation Plan for the Property ([Exhibit 21](#)). The approved Reclamation Plan requires the removal of equipment and structures associated with mining from the property,

returning the site to level grade, removing invasive species, and performing revegetation of the site.

Enforcement History:

There have been allegations and reports made to a variety of agencies regarding alleged unpermitted development occurring on the Property associated with the extraction of sand from the beach and the placement of fill. Due to the extensive history of operations on the property, the age of and difficulty of locating potential records on operations, and the multiple agencies with jurisdiction over the property and a myriad of reporting information types, the extensive investigation conducted by Commission enforcement staff of the sand mining operation to determine whether unpermitted development was occurring in violation of the Coastal Act took a significant amount of staff time and perseverance. These investigations included countless letters, calls, and meetings with the property owner and other agencies and document review of materials at numerous agencies, and multiple site visits to determine the relevant facts regarding the details of the sand mining operation and the relevant legal requirements under the Coastal Act and other Federal, State, and local laws.

Based on the information collected, on March 17, 2016, the Executive Director issued a Notification of Intent to Commence Cease and Desist Order, Restoration Order, and Administrative Penalties Proceedings ([Exhibit 7](#)). Negotiations and discussions regarding the sand mining operation and relevant legal case law continued. In April 2017, those negotiations intensified, and Commission enforcement staff worked closely with Respondent over the following months to reach an amicable resolution of the alleged Coastal Act violations on the property. The Respondent signed the proposed Consent Agreement on June 24, 2017.

C. BASIS FOR ISSUANCE OF A CEASE AND DESIST ORDER

1. Statutory Provisions

The statutory authority for issuance of this Consent Order is provided in Coastal Act Section 30810, which states, in relevant 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 order may also be issued to enforce any requirements of a certified local coastal program or port master plan, or any requirements of this division which are subject to the jurisdiction of the certified program or plan, under any of the following circumstances:

- (1) The local government or port governing body requests the commission to assist with, or assume primary responsibility for, issuing a cease and desist order.....*

(b) The cease and desist order may be subject to such terms and conditions as the commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material or the setting of a schedule within which steps shall be taken to obtain a permit pursuant to this division.

2. Application to Facts

This section sets forth the basis for the issuance of the proposed Consent Order by providing substantial evidence that existing development meets all of the required grounds listed in Coastal Act Section 30810 for the Commission to issue a Cease and Desist Order.

Development has Occurred Without a Coastal Development Permit

The Property is located in the City of Marina, within the Coastal Zone. 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 coastal development permit. “Development” is defined broadly by Section 30106 of the Coastal Act as follows, 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 the use of land...; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure...

Development is defined in the City of Marina Implementation Plan as follows:

Development: Shall mean, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredge materials or waste; grading, removing, dredging, mining or extraction of any materials; change in the density or intensity or use of land including subdivision and any other division of land except where division occurs as a result of purchase by a public agency for public recreational use; change in the intensity of use of water, or access thereto; construction, reconstruction, demolition, or alteration of the size of any structure; and the removal or harvesting of major vegetation other than for agricultural purposes or kelp harvesting.

Development has occurred and continues to occur without a CDP on the Property. The activities that constitute unpermitted development in this case include, but are not necessarily limited to: dredging and extraction of sand, including resulting in the creation of ponds; placement of floating dredges and development associated with the dredges, such as placement and installation of anchors and mooring cables, pipes, a pump station(s), and other facilities; grading; and changes in the intensity of use of the property. Changes in intensity of use of the property

include those associated with the implementation of the dredge pond sand mining operation, and the intensification of extraction operations on the site over time. These are all activities that constitute development as defined in Section 30106 of the Coastal Act and the City of Marina certified Implementation Plan, occurred without any coastal development permit, and occurred on the Property, which is within the Coastal Zone.

Notwithstanding the requirement in section 30600(a) that anyone undertaking development in the Coastal Zone obtain a CDP, the Coastal Act does provide a series of exemptions for certain types of development and development in certain circumstances. However, no exemptions from the Coastal Act's and the LCP's permit requirements apply for the development at issue here.

The permitting exemption that was at the heart of the controversy is the one provided by Coastal Act Section 30608, for situations where one “has obtained a vested right in a development prior to the effective date of [the Coastal Act].” However, neither CEMEX nor its predecessors in interest ever sought, much less received confirmation of, a vested rights claim pursuant to Section 30608 of the Coastal Act and Sections 13200 to 13202 of Title 14 of the California Code of Regulations.¹³ Moreover, it appears that a vested rights claim could not be approved for the unpermitted development, as the development listed above did not receive all necessary authorizations as of the relevant date under Proposition 20 (November 8, 1972) or the Coastal Act (January 1, 1977). *See Billings v. California Coastal Commission* (1980), 103 Cal.App.3d 729, 736. As discussed further in the Permit History section above, at least four such authorizations have been identified: 1) the failure to secure the issuance of a Use Permit from Monterey County prior to the creation and commencement of use of the main dredge pond in 1965; 2) the failure to secure the required Use Permit from the City of Marina after incorporation of the City of Marina in November 1975; 3) the failure to secure the required lease from the California State Lands Commission (“SLC”) for the removal of state minerals by the dredge pond sand mining operation; and 4) the failure by CEMEX to have obtained a CDP from the Coastal Zone Conservation Commission prior to 1977. In addition, the City of Marina recently declared the operation to be a nuisance, and the State Lands Commission staff's letter also raised the possibility that the operation may be a nuisance, and that it may be appropriating Public Trust resources. The California Supreme Court has also concluded that the State's ongoing Public Trust oversight “precludes anyone from acquiring a vested right to harm the public trust”¹⁴ Therefore, the development required a CDP and none was obtained, and, as such, undertaking this development constitutes a violation of the Coastal Act and the LCP.

The activities undertaken by CEMEX clearly constitute “development” as that term is defined in both the Coastal Act (Section 30106) and the LCP and are not otherwise exempt from Coastal Act and LCP permitting requirements. No CDP was issued to authorize the subject unpermitted development. Therefore, development occurred that required a permit from the Commission without one having been obtained and that violated the City's LCP, satisfying both of the criteria of Section 30810(a) of the Coastal Act.

¹³ CEMEX filed a Claim of Vested Rights (“VRC”) on May 14, 2017. As an element of consideration for the consent agreement being presented herein to the Commission for approval, CEMEX has agreed to withdraw the VRC and to not pursue any such claim in the future.

¹⁴ National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 436, 452.

Along with being unpermitted, the Unpermitted Development on the Property also raises significant substantive issues in that it has continuing natural resource impacts that are inconsistent with Chapter 3 of the Coastal Act, including impacts to the shoreline sand supply, to environmentally sensitive habitat areas (“ESHA”), and to public access. As it is only necessary to find that development has been undertaken without a required permit or in violation of a previously issued permit in order for the Commission to issue a Cease and Desist Order, the following Sections provide additional information in support of the issuance of the Consent Order.

3. The Unpermitted Development is not Consistent with the Coastal Act

The Coastal Act includes policies to protect, maintain, enhance and restore the quality of coastal resources within the coastal environment. As described below, the Unpermitted Development is inconsistent with multiple resource protection policies of the Coastal Act, including, but not necessarily limited to: Section 30210 (public access), Section 30233 (dredging), Section 30240 (environmentally sensitive habitat areas), Section 30251 (scenic and visual qualities), and Section 30253 (hazards/geologic stability), as well as corresponding policies of the certified City of Marina LCP.

A) Shoreline Processes/Hazards/Geologic Stability

Section 30233 of the Coastal Act, in relevant part, states:

- (a) The diking, filling, or dredging of open coastal waters, ... shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:*
 - (5) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.*

Section 30253 of the Coastal Act, in relevant part, states:

- New development shall do all of the following:*
 - (a) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.*
 - (b) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.*

Policy 8 of the City’s Certified Land Use Plan states:

- To prohibit further degradation of the beach environment and conserve its unique qualities.*

Policy 22 of the City's Certified Land Use Plan states:

To discourage new development except for a boat harbor along the Coast which would require seawall, rip rap or other protective structure or regular dredging for maintenance.

Policy 38 of the City's Certified Land Use Plan states:

To regulate development in order to minimize the risks to life and property in the Coastal Zone.

As discussed in the memorandum by Dr. Lesley Ewing ([Exhibit 5](#))¹⁵, sand is an important resource that has value for all portions of a shoreline within a littoral cell. A littoral cell is a section of the coast that has barriers (such as headlands or canyons) that divide the coast into smaller definable areas - for which a sand budget can be developed to track sources (inputs), sinks (losses) and transport of sand. The Property is located in the Southern Monterey Bay littoral cell, which extends from the Monterey Bay Submarine Canyon, near Moss Landing, to Point Piños, on the Monterey Peninsula.

1. Sand Supply and Transport

Sand transport in a littoral cell occurs via natural mechanisms, such as river flows that carry sand from inland areas to the nearshore; waves and currents that erode sand from the dunes and that carry sand through coastal water; and aeolian forces or wind that can carry sand along the dry beach and from the dry sand to inland areas such as sand dunes. Beaches are temporary storage areas for sand, and expand and contract due to seasonal and inter-annual wave action. Seasonal changes to beaches are not limited to the visible beach; much of the sand carried off the dry beach in the transition from summer to winter and during the winter is deposited in nearshore sand bars and this sand is returned to the dry beach during the summer and the winter to summer transition.

When the amount of sand transported towards a beach exceeds the amount of sand transported away from the beach, the beach tends to grow or accrete, and when the opposite is true, beaches tend to erode. Ensuring that sand is able to travel from rivers and streams to the coast, and that sand transport along the coast is not captured by development is critical to ensuring the protection of the benefits that beaches provide. Beaches provide important habitat, recreational, and public access opportunities. Beaches also serve to absorb wave energy and protect adjacent dune habitat and adjacent development from erosion. These benefits are even more important when viewed in the context of expected future sea level rise, which will result in increased wave action, reduction in the width of beaches throughout the state, and increased risk of damage to development located adjacent to beaches or on coastal bluffs.

¹⁵ The issues in this section are discussed at more length in this memo by Dr. Ewing, attached as [Exhibit 5](#).

2. Human Influence on Sand Supply

However, humans can also alter these natural mechanisms, as has occurred here as a result of the Unpermitted Development. The unpermitted extraction of sand results in the creation of a pond on the Property, from which sand is extracted via a dredge. The dredge pond serves as a persistent sand sink, or an area of loss, within the littoral cell. Sand trapped in and removed from the pond is removed from the littoral cell for commercial sale and is no longer available for normal, natural processes, or to build or accrete other beaches, dunes or offshore areas

The impacts from the unpermitted mining operation are significant, both in scale – the intensity of impacts caused by the Unpermitted Development, and geographical scope – affecting not just the property but also the coastline within the littoral cell. The volume of sand that is removed per year by the unpermitted mining vastly exceeds the yearly volume of sand being added to the Central SMB sub-cell from the Salinas River¹⁶, one of the main contributors of sediment to the littoral cell, and is comparable in scale to the reduction of the littoral cell’s sand supply resulting from all upstream dam construction on the Salinas River¹⁷, one of the factors identified as a potential cause for erosion within the cell¹⁸.

The sand mining dragline operations at Sand City provide useful examples of the changes that can be expected from the cessation of mining. The long-term erosion that the Unpermitted Development caused cannot be reversed, but once CEMEX stops dredging the pond, erosion and dune retreat should be much lower due to the increased volume of sand that will stay in the system.

3. Potential Impacts from Sand Loss

In addition to the incremental impacts of the Unpermitted Development from each mining cycle, the Unpermitted Development also has cumulative impacts from the decades of beach extraction that have already occurred. Cumulatively, the amount of sand mined by CEMEX from 1986 to 2013 (more than 6.5 million cubic yards) is more than six times the amount of beach loss during the 1997-98 El Niño (approximately 1 million cubic yards¹⁹), an event that was only most recently paralleled by the winters of 1982-83 and 2015-16²⁰. Furthermore, unlike the sand affected by El Niño, some of which can return from the offshore to the beach, the sand that is extracted by the unpermitted mining operation is permanently removed from the littoral cell, and none of that sand will be available to build or accrete other beaches or dunes. Thus, the unpermitted removal of sand by the dredge has a significant impact on the loss of sand from the littoral cell and erosion of the shoreline, inconsistent with Coastal Act Section 30253, which prohibits new development that causes or contributes significantly to erosion. The unpermitted

¹⁶ Memorandum from Dr. Lesley Ewing, [Exhibit 5](#).

¹⁷ Memorandum from Dr. Lesley Ewing, [Exhibit 5](#).

¹⁸ (PWA) Philip Williams & Associates with Thornton, E., Dugan, J. and Griggs, G. (2008) Coastal regional sediment management plan for Southern Monterey Bay, Prepared for Association of Monterey Bay Area Governments.

¹⁹ Thornton, E. B. et al. (2006). Sand mining impacts on long-term dune erosion in southern Monterey Bay. *Marine Geology*, 229(1), 45-58.

²⁰ Barnard, P.L. et al. (2017). Extreme oceanographic forcing and coastal response due to the 2015–2016 El Niño. *Nature Communications*, 8.

development is not the least environmentally damaging alternative, and these impacts have not been mitigated, inconsistent with Coastal Act Section 30233, which also prohibits dredging of open coastal waters in ESHA.

The effects of the Unpermitted Development include impacts on development and resources beyond the boundaries of the site. The Unpermitted Development has contributed to erosion within the beach and dune system and shoreline retreat and dune erosion within the littoral cell²¹. These impacts of the Unpermitted Development, similar to the impacts created by seawalls and revetments, are not limited to the physical displacement of access created at the physical location of the mine or seawall; this type of development could and does have the consequence of affecting public access to the beach, including through erosion and resulting beach loss, regardless of whether or not the development itself blocks access.

The loss of sand from the littoral cell due to the Unpermitted Development contributed to erosion, which recently led to the undermining of the sewage outfall on the Property, inconsistent with Coastal Act Section 30253. Although the potential risks associated with a breach in the sewage outfall were averted through repairs performed pursuant to an emergency coastal development permit, this erosion could have led to leaks or other impacts which would have caused significant impacts to beach and ocean habitat, inconsistent with Policy 8 of the City's certified LUP.

The Unpermitted Development and loss of sand from the littoral cell also contributes to erosion that can cause potentially significant impacts to development in the vicinity of the Property. The coastal dunes serve to buffer existing development in the vicinity of the property, including a wastewater treatment plant and Highway 1, from the impacts of waves and storms. If the Unpermitted Development were to continue, erosion of these coastal dunes would continue to occur. The Unpermitted Development has also been a contributing factor in recent impacts to development near the Property, including erosion at the Dunes Drive public accessway located adjacent to the property, and erosion undermining the parking lot at Marina State Beach ([Exhibit 4](#)). Thus, the Unpermitted Development has increased risks to property, inconsistent with Coastal Act Section 30253 and Policy 38 of the City's certified Land Use Plan.

B) Environmentally Sensitive Habitat Areas

The Unpermitted Development is inconsistent with Coastal Act Section 30240, which requires the protection of Environmentally Sensitive Habitat Areas ("ESHA"). Section 30240 states, in part:

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas.

²¹ Memorandum from Dr. Lesley Ewing, [Exhibit 5](#).

Coastal Act Section 30107.5 defines ESHA as:

‘Environmentally sensitive area’ means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.

Policy 26 of the City’s Certified Land Use Plan states:

To regulate development in areas adjacent to recognized rare and endangered species or their habitats so that they will not threaten continuation of the species or its habitat.

The Property consists of beach and dune habitats that are physically and biologically linked and can be further described as components of the Monterey dune complex. Dune-backed beaches account for roughly a quarter of California’s shoreline, but together, beach-dune complexes constitute only 2-3% of the State’s landmass²², making them one of the rarest landscapes. Where they do occur, coastal dunes are characterized by a number of topographical features and rapidly-transitioning vegetation zones as they reach inland. Across each of these areas, a variety of habitats and uniquely-adapted biological communities occur, each associated with microclimate conditions that are driven by an array of dynamic physical processes including winds, waves, tides, sand supply and moisture retention. Biological adaptations by plants include specialized root systems to tap into deep-residing water stores, micronutrient absorption from aerosol inputs such as fog and sea spray, succulent leaves to dilute naturally-high salt accumulation, hairs to trap sand, low growth habits to accommodate wind, and unique dispersal mechanisms such as floating seeds²³. Similarly, beach and dune-associated animals have adapted to tolerate extreme conditions through mechanisms such as camouflage and counter-shading, timing reproductive seasons to parallel host plants, and living beneath the sand surface.

The coastal dunes located on the Property are important habitat for many species of native plants that are adapted to the shifting dune sands, including “special status” plants that have been observed on the site, including the federally-threatened Monterey spineflower, which has designated critical habitat on the property and the CNPS-listed coast wallflower, among others. Native dune plants also provide important habitat for many native animal species, including the federally-threatened Smith’s blue butterfly which has suitable habitat on the Property and provides foraging and nesting grounds for shore bird species such as the federally-threatened Western snowy plover, which is present and for which there is designated critical habitat on the Property. The dredge pond area is a known habitat area for the Western Snowy plover. Therefore, areas of the property occupied by central foredune and central dune scrub habitats or occupied by sensitive species constitute ESHA²⁴.

²² Pickart A.J., Barbour, M.G. 2007. Beach and Dune. Pp. 155-179. In: Terrestrial Vegetation of California (Third Edition). MG Barbour, T Keeler-Wolf, AA Schoenherr, Eds. University of California Press. Berkeley.

²³ Pickart AJ, JO Sawyer. 1998. Ecology and Restoration of Northern California Coastal Dunes. The California Native Plant Society. Sacramento, California. 152 pp.

²⁴ Memorandum from Dr. Lauren Garske-Garcia, [Exhibit 6](#).

However, the presence of unpermitted extraction of sand on the beach and the physical elements of unpermitted development have reduced beach and dune habitat used by sensitive species in this location. Instead of the unique dune system that is located adjacent to and throughout this area, part of the dunes are displaced by an artificial dredge pond, along with roads, settling ponds, buildings and associated development. Use of mechanized equipment, including the floating dredge, causes noise and disturbance that further impacts ESHA here and in the dunes surrounding the dredge pond, which are also ESHA, and the dune areas occupied by the dredge pond which are also ESHA, albeit disturbed ESHA, inconsistent with Section 30240 and Policy 25 of the LUP. When unpermitted development has altered the current situation, in order to fairly evaluate the impacts of proposed development, the Commission compares the proposed condition to the condition that *would exist now were the unpermitted development not to have occurred*. *LT-WR, L.L.C. v. California Coastal Comm'n* (2007) 152 Cal.App.4th 770, 797 (“to enable the Commission to protect coastal resources, and to avoid condoning unpermitted development, the Commission properly reviewed the application as though the unpermitted development had not occurred”). Stated differently, unpermitted development does not form the baseline from which impacts are assessed.

The unpermitted development at issue is located in and adjacent to the dune habitat, and is also not consistent with Section 30240(b), which requires that development in areas adjacent to ESHA be “sited and designed to prevent impacts which would significantly degrade those areas,” and be “compatible with the continuance of those habitat and recreation areas,” and Policy 26 of the LUP, which has similar requirements.

Furthermore, as noted above in the discussion of sand loss, the Unpermitted Development has and continues to impact areas adjacent to the mining operation by substantially increasing the rate of erosion, which ultimately leads to a reduction of beach and dune habitat as it is eroded away to supplant the loss of sand resultant to the mining operation.²⁵

Therefore, the Unpermitted Development has resulted in impacts to ESHA and has significantly disrupted habitat values on the site, inconsistent with Coastal Act Section 30240 regarding the protection of sensitive habitat.

C) Public Access/Environmental Justice

Coastal Act Section 30210 states:

In carrying out the requirement 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.

²⁵ Memorandum from Dr. Lauren Garske-Garcia and Memorandum from Dr. Lesley Ewing.

Coastal Act Section 30213 states:

Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred.

Coastal Act Section 30221 states:

Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.

Policy 1 of the City of Marina's Certified Land Use Plan states that it is the "policy of the City of Marina":

To [e]nsure access to and along the beach, consistent with the recreational needs and environmental sensitivity of Marina's Coastal area.

Promoting public recreational opportunities and public access to the beach are major cornerstones of the Coastal Act. That all of the public should enjoy full and equal access to and recreational opportunities at coastal areas, regardless of protected class status, is an important concept for environmental justice precepts in California. *See, e.g., Pub. Res. Code § 30013.* Statewide, public access and coastal recreation continue to be threatened by private development, illegal encroachments, and other restrictions on beach or coastal access. These burdens of restricted access are disproportionately borne by low-income and minority communities, while coastal property owners often benefit from the privatization of the public spaces of beaches, coastal areas, and public easements. Securing open public access for all citizens provides low-cost, outdoor recreation that can improve the overall quality of life of all the public, including minority communities.

Ensuring that free public access to the coast is maintained and that no new adverse impacts occur, especially by ensuring those accessways already acquired by the State for public recreation remain available, will cumulatively ensure that public access is protected and reduce environmental injustice concerns.

Here, in the areas near the Property, public access to the sandy beach located seaward of the Property is available via the Dunes Drive accessway, located adjacent to the property at the south, and at the Marina State Beach accessway, located about one half mile south of the Property. Beach access in the area is free, easily accessible to anyone traveling nearby on Highway 1, popular, and offers access to pristine beaches and primarily undisturbed coastal dunes. Marina State Beach is frequently used for hang-gliding, radio-controlled gliders, kites, and picnicking and beaches to the north and south are frequently used by people for walking along the beach and for fishing.

The Unpermitted Development has impacted public access throughout the area. As discussed in Section C.3.A above, the Unpermitted Development has contributed to erosion of the dune and

beach system. This erosion has impacted the popular public accessways in the vicinity of the Property. The Dunes Drive accessway provides a direct path through the dunes adjacent to the southern boundary of the Property, to the top of the dunes and to a concrete view platform, and down to the beach ([Exhibit 4](#)). However, due in part to the Unpermitted Development, in March and April 2016 the concrete view platform was undermined by erosion and was removed, and the path down the dunes was eroded away, instead leaving a steep cliff that prevented public access. ([Exhibit 4](#)). Although the path down to the beach has been effectively reestablished due to continuing erosion of the dunes and softening of the slope, the public access that was lost during the time that the beach access path was inaccessible cannot be recovered.

Access at the Marina State Beach parking lot, located at Reservation Road, has also been impacted by beach and dune erosion. In April 2016, a portion of the public beach parking lot was undermined ([Exhibit 4](#)). If the Unpermitted Development were to continue, it would be expected that it would contribute to additional erosion and additional negative impacts to public access.

These impacts of the Unpermitted Development, similar to the impacts created by seawalls and revetments, are not limited to the physical displacement of access created at the physical location of the mine or seawall; this type of development could and does have the consequence of affecting public access to the beach, including through erosion and resulting beach loss in areas adjacent to the physical location of the mine or seawall, regardless of whether or not the development itself blocks access. These are but a few examples of how any development that contributes to erosion or loss of sand from the beach can and does have adverse impacts on public access and recreation and is therefore inconsistent with the public access policies of the Coastal Act.

The Unpermitted Development also causes periodic interruption to access along the shoreline. During winter storms, a channel forms between the dredge pond and the ocean, forming a barrier to continued movement along the shoreline ([Exhibit 3](#)). With repeated wave action, the channel widens, the sand berm between the dredge pond and the ocean is eliminated and the dredge pond is open to the ocean ([Exhibit 3](#)), preventing the public from being able to access the shore below the mean high tide line and from continuing to beaches located to the north of the dredge pond.

Therefore, the Unpermitted Development has negatively impacted public access to and along the beach, inconsistent with Coastal Act Sections 30210, 30213, and 30221, and Policy 1 of the City's certified Land Use Plan.

D) Scenic and Visual Qualities

Section 30251 of the Coastal Act, in relevant part, states:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas.

The recreational opportunities in Monterey Bay encourage millions of people each year to visit the beaches in the area. Many visitors walk along the beach to the north from the public access provided at Marina State Beach or at the access provided through the property owned and managed by the Monterey Peninsula Regional Parks District at the end of Dunes Drive. The Property is a highly scenic area that offers expansive views of Monterey Bay, including the beach and dune habitat. The dredge pond and associated development alters the natural beach and dune landforms on the Property in a manner that is not compatible with the character of the surrounding area. The Unpermitted Development impacts the defining visual characteristics of the area – the undisturbed natural beach and dune environment. Therefore, the Unpermitted Development is inconsistent with Section 30251 of the Coastal Act.

1. Unpermitted Development is Causing Continuing Resource Damage

The Unpermitted Development is causing “continuing resource damage,” as defined in 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 sensitive habitats, shoreline stability, accessways and recreational opportunities, and scenic coastal views of the Property are afforded protection under Coastal Act Sections 30210, 30213, 30221, 30233, 30240, 30251, and 30253, and are therefore “resources” as defined in Section 13190 (a) of the Commission’s regulations.

The term “damage” in the context of Restoration Order proceedings is defined in Section 14 CCR 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.

The term “continuing” is defined by 14 CCR Section 13190(c) of the Commission’s regulations 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.

In this case, the resource damages caused by the Unpermitted Development includes the reduction in quality and abundance of beach and dune habitat within Monterey Bay, which is ESHA, an increase in erosion and geological instability on the Property and adjacent area and corresponding impacts to public access, loss of access and recreational areas, and the alteration of natural landforms and placement of sand dredging equipment, which is not visually compatible with the character of surrounding areas. As of this time, that Unpermitted Development and the results thereof remain on the Property. This removal of native habitat continues to impact the coastal resources by displacing the native ecosystem and preventing it from functioning, thereby disrupting the biological productivity of that ecosystem. Without removing unpermitted development and restoring the impacted areas, the foregoing impacts are continuing. The persistence of these impacts constitutes “continuing” resource damage, as defined in Section 13190(c) of the Commission’s regulations. Under Section 30810 (b) the Commission may order the removal of any such development as necessary to ensure compliance with the Coastal Act.

2. Consent Orders are Consistent with Chapter 3 of the Coastal Act and the City’s Certified Local Coastal Program

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 or material. The proposed Consent Order, attached to this staff report as [Appendix A](#), is consistent with the resource protection policies found in Chapter 3 of the Coastal Act and the City’s certified Local Coastal Program. The Consent Order requires and authorizes Respondent to, and Respondent has agreed to, among other things, resolve its alleged financial liabilities under the Coastal Act and withdraw any claims it has to a vested right for continued mining on the Property. The Agreement serves multiple purposes, including: 1) it provides interim operating conditions necessary to limit the scope of the operation and protect coastal resources while the unpermitted development is phased out; 2) it establishes a finite date for the sand extraction operations to cease, by December 31, 2020; 3) it establishes a maximum amount of sand that may be removed during the cessation period in any given year to 240,000 tons/year (approximately 177,000 cu yards/year); 4) it requires CEMEX to undertake restoration and reclamation activities to restore the habitat values of the Property; 5) it provides an additional three year period to wind down operations on the upland portion of the property and to begin reclamation and restoration activities, and provide for a period of time for transition of employees (no additional mining of sand will occur during this period); 6) it requires CEMEX to transfer the Property, at a reduced purchase price, to a non-profit or governmental entity approved by the Commission; and 7) it requires as part of any sale, a deed restriction be put in place to protect the property and limit the potential uses of the property to conservation-related purposes, including but not limited to

public access, conservation, low-impact passive recreation, and public education, which will improve public access and habitat on the site in the future.

The cessation of the Unpermitted Development will help reduce erosion rates and landform alteration and protect public access and environmentally sensitive habitat.

Therefore, the Consent Orders are consistent with the Chapter 3 policies of the Coastal Act, and their issuance is consistent with Coastal Act Section 30810(b).

D. BASIS FOR RESOLUTION OF CIVIL LIABILITIES

1. Statutory Provisions

The statutory authority for the unilateral imposition of administrative penalties is provided in Section 30821 of the Coastal Act, 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, 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.

As noted above, the erosion caused in part by the Unpermitted Development has impacted the popular public accessways in the vicinity of the Property, caused shoreline erosion and loss of sand supply, and impeded access along the coast, and has therefore resulted in significant impacts to public access. Therefore, as discussed above, the Unpermitted Development is inconsistent with the public access provisions of the Coastal Act. Therefore, pursuant to Section 30820 and 30821 of the Coastal Act, the Respondent is subject to penalties for violation of the public access provisions of the Coastal Act.

Through the proposed settlement, Respondent has agreed to resolve the issue of their alleged financial liabilities under these sections of the Coastal Act. Pursuant to the terms of the proposed settlement, Respondent has agreed to cease undertaking unpermitted development; has agreed to phase out their operation altogether; agrees to protect, during the remaining time of their ownership, the habitat value of the Property; agrees to sell the property to a nonprofit or governmental entity at a reduced purchase price; and has also agreed to limit the potential uses of the property to a limited number of purposes, including but not limited to public access, conservation, low-impact passive recreation, and public education, which will improve public access and habitat on the site in the future. The financial commitments represented by the package of settlement factors reflect a settlement of the Respondent's obligations under the Coastal Act, including section 30821 and 30820.

E. DEFENSES ALLEGED

Respondent submitted an extremely voluminous Statement of Defense to this action and raised a number of issues. As part of this Consent Order, and in the light of the agreement reached among the parties, Respondent has withdrawn that document and it is therefore not before the Commission. Therefore, the Commission is also foregoing its response to these issues.

F. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

The Commission finds that issuance of this Cease and Desist Order to compel the removal of unpermitted development from the property, as well as the implementation of the order, is exempt from any applicable 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 (section 21084) 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].” CEQA (section 21068) defines significant effects as meaning adverse changes. The Commission finds that the actions required by the proposed Cease and Desist Order will not have significant adverse effects on the environment, within the meaning of CEQA. Furthermore, the CEQA Guidelines (which, like the Commission's regulations, are codified in 14 CCR) provide the list of types of projects found not to have a significant effect on the environment, which are known as “categorical exemptions,” in Article 19 (14 CCR §§ 15300 *et seq.*). The proposed Order is exempt from the requirement for the preparation of an Environmental Impact Report, based on 14 CCR Sections 15060(c)(2) and (3), 15061(b)(2), 15307, 15308 and 15321 of CEQA Guidelines.

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.

Again, CEQA defines the phrase “significant effect on the environment” (in Section 21068) to mean “a substantial, or potentially substantial, adverse change in the environment.” The actions required by the proposed Consent Order require very limited changes to the physical environment and no harm to the environment. Thus, the actions required in this Consent Order 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 is consistent with other activities in the exempt classes listed above. This case falls within that factor as well.

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

G. SUMMARY OF FINDINGS OF FACT

1. RMC Pacific Materials, LLC, was the owner of the Property at the time the Commission enforcement staff commenced investigation of the Coastal Act violations at issue in this hearing and remains as the owner of the Property.
2. The Property is located at Lapis Sand Plant, Lapis Road, City of Marina, Monterey County that the Monterey County Assessor’s Office has designated with four assessor parcel numbers (APNs 203-011-019-000 and 203-011-001-000, 203-011-016-000, and 203-011-020-000).
3. The Property listed is Section #2 above is located in the Coastal Zone.
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 requires a permit from the Commission without securing a permit.
5. Development occurred, as defined by Coastal Act Section 30106, without a coastal development permit and no exemption or other exception from Coastal Act permit requirements apply.
6. Unpermitted development and development inconsistent with Coastal Act Sections 30210, 30223, 30240, 30251, 30253, and 30821, and analogous sections of the City of Marina LCP, has occurred on the Property. The unpermitted development was undertaken without a coastal development permit and, therefore, the jurisdictional requirements for the issuance of a cease and desist order have been met.

7. The obligations of the Agreement, if completed in compliance with the Agreement and the plan(s) required therein, will be consistent with Chapter 3 of the Coastal Act.
8. The criteria for issuance of a cease and desist order have been met pursuant to Section 30810 of the Coastal Act.
9. The public will benefit through this Agreement as it: 1) it provides interim operating conditions necessary to limit the scope of the operation and protect coastal resources while the unpermitted development is phased out; 2) it establishes a finite date for the sand extraction operations to cease, by December 31, 2020; 3) it establishes a maximum amount of sand that may be removed during the cessation period in any given year to 240,000 tons/year (approximately 177,000 cu yards/year); 4) it requires CEMEX to undertake restoration and reclamation activities to restore the habitat values of the Property; 5) it provides an additional three year period to wind down operations on the upland portion of the property and to begin reclamation and restoration activities, and provide for a period of time for transition of employees (no additional mining of sand will occur during this period); 6) it requires CEMEX to transfer the Property, at a reduced purchase price, to a non-profit or governmental entity approved by the Commission; 7) it requires as part of any sale, a deed restriction be put in place to protect the property and limit the potential uses of the property to conservation- related purposes, including but not limited to public access, conservation, low-impact passive recreation, and public education, which will improve public access and habitat on the site in the future; 8) it provides for CEMEX to withdraw its Vested Rights Claim and Statement of Defense and agree not to sue the Coastal Commission over the issuance or enforcement of this Agreement; and 9) it provides for monitoring reports and significant penalties for violations of the agreement.
10. The statutory authority for imposition of administrative penalties is provided in Section 30821 of the Coastal Act. Section 30820 and 30822 of the Coastal Act create potential civil liability for violations of the Coastal Act more generally. The criteria for these sections have been met here.
11. As stated in #6 above, unpermitted development has occurred on the Property, which is owned by Respondent. These actions are inconsistent with the Coastal Act and subject Respondent to civil liabilities under the Coastal Act. Through this Agreement, Respondent has agreed to resolve their financial liabilities associated with the Unpermitted Development under the Coastal Act.