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Public comment by the Coast Property Owners Association on the Draft EIR for Monterey County's 2007 General Plan.

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SUMMARY OF ISSUES

- 1. Mitigation policies in the Draft Environmental Impact Report (DEIR) for the 2007 General Plan (Plan) must be changed to say they do not apply in the coastal zone, with an explanation why. | 1
- 2. The DEIR finds environmental impacts and proposes new Plan policies to mitigate them, but the impacts and mitigations are not supported by substantial factual evidence as required by the California Environmental Quality Act (CEQA), so must be deleted or modified accordingly. | 2
- 3. The DEIR misstates the ability of County plans to affect federal land use and must be changed to avoid missing opportunities to do so. | 3

DETAILED DISCUSSION

1. Mitigation policies in the DEIR must be changed to say they do not apply in the coastal zone, with an explanation why.

As adopted January 3, 2007, the Plan was designed to avoid conflicts with the County's four local coastal land use plans.¹ The Plan expressly states the intent to not change coastal plans.² | 4

The Plan also states that coastal plans "may require different standards and policies" and must be free to vary from other portions of the Plan.³

¹ "The four adopted local coastal land use plans contained in the existing 1982 Monterey County General Plan will not be amended as part of the 2007 General Plan. The 2007 General Plan's goals and policies have been developed with the LCPs in mind and do not contain any provisions that would conflict with the four adopted local coastal plans." (DEIR pages 4.1-19 and 20.)

² 2007 General Plan, Introduction, section 1.5.d., pages vi and viii. For example, "The County is not amending the Local Coastal Program as part of this 2006 General Plan. The County will review the LCP after adoption of the 2007 General Plan Update." (Underline added.)

³ "In accordance with the state Coastal Act, this approach recognizes that the coastal zone is a distinct and valuable natural resource which requires unique planning considerations and may require different standards and policies than may apply in the non-coastal areas of the County." (2007 General Plan, Introduction, section 1.5.d., page viii; underline added.)

The DEIR acknowledges the Plan's intent by stating that the DEIR will not change the County's coastal plans, that it did not analyze environmental impacts in coastal areas, and by describing the "project" analyzed by the DEIR as the County's general plan excluding coastal plans. For example:

The 2007 General Plan does not propose any changes to the LCP [Monterey County's Local Coastal Program]. Accordingly, these plans and land use patterns will not be analyzed in this EIR.... Any changes or updates made to these plans once the 2007 General Plan is adopted would require environmental review independent of this EIR. (DEIR, Project Description, at page 3-42; underline added.)

However, the DEIR then proposes new **county-wide** policies as mitigation measures.⁴ If included in the Plan as written, the DEIR's mitigation policies would expressly or impliedly apply in the coastal zone, which would not comply with CEQA, the Coastal Act, and Government Code general-plan statutes, for a number of reasons including:

- a. CEQA requires that determinations of significant impacts and related mitigation measures be based on substantial evidence in the record,⁵ and that the substantial evidence be based on facts.⁶ However, the DEIR did not analyze environmental impacts in the coastal zone.⁷ The DEIR does not provide fact-based substantial evidence showing that the Plan would result in significant impacts in the coastal zone, nor does it provide such evidence to show that DEIR mitigation policies are needed in the coastal zone to reduce impacts in the coastal zone.
- b. Monterey County's coastal land use plans are part of the Plan, and are therefore required by state general-plan law to be consistent with it.⁸ As adopted on January 3, 2007, the Plan was carefully crafted to avoid conflicts with coastal plans (see footnote

⁴ All DEIR mitigation policies would implicitly apply county-wide if adopted, and some expressly provide so. For example, Mitigation Measure BIO-2.1, reads in part, "The county shall develop and adopt a county-wide Stream Setback Ordinance ... [which] shall apply to all discretionary development within the County ..." (Underline added.) Coastal permits are discretionary permits.

Another express example, assuming DEIR mitigation BIO-1.5 contains a typographical error, it proposes a Comprehensive County Natural Communities Conservation Plan be prepared for all *unincorporated* areas.

⁵ "The lead agency shall determine whether a project may have a significant effect on the environment based on substantial evidence in light of the whole record." (PRC section 21082.2(a).)

⁶ CEQA/PRC section 21082.2(c) "Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts."

⁷ "The 2007 General Plan does not propose any changes to the LCP [Monterey County's Local Coastal Program]. Accordingly, these plans and land use patterns will not be analyzed in this EIR ... Any changes or updates made to these plans once the 2007 General Plan is adopted would require environmental review independent of this EIR." (DEIR, Project Description, page 3-42; underline added.)

⁸ "Pursuant to Public Resources Code §30108.5 and §30108.55, a coastal land use plan is incorporated into the community's general plan, therefore it must be consistent with the rest of the plan." (*State of California General Plan Guidelines, 2003*, page 176; underline added.)

"In construing the provisions of this article, the Legislature intends that the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency." (Government Code section 65300.5.)

1). However, DEIR mitigation policies are new policies that would conflict with coastal plans if applied county-wide (including the coastal zone). Moreover, DEIR mitigation policies would literally threaten lives and property if applied in the Big Sur coastal area.⁹

- c. As discussed above, Monterey County's Local Coastal Program will be reviewed for updating and amending after the Plan is completed (see footnote 2). The Coastal Act provides procedures for amending coastal plans.¹⁰ The Coastal Act's amendment process is subject to the act's provisions to maximize public participation in decisions affecting coastal planning.¹¹ CEQA provides that where there is a conflict between the Coastal Act and CEQA, the Coastal Act shall control.¹²

As discussed above, if DEIR mitigation policies are included in the Plan, and applied county-wide (including the coastal zone), general plan law will require that coastal land use plans be changed to be consistent with the DEIR's mitigation policies.

This would negate the Coastal Act's process for amending coastal plans (see footnote 9), and preclude the opportunity for the public to have meaningful input into the coastal planning process as required by the Coastal Act (see footnote 10). Policies in coastal plans would effectively be decided by the DEIR consultant outside the coastal-plan amendment process, before public hearings on coastal plans, and without environmental review or consideration of impacts on special communities or other factors considered during the Coastal Act's coastal-plan amendment process.

- d. The DEIR fails to recognize that all coastal permits are discretionary permits, leading to conflicting statements in the DEIR and Plan policies should DEIR mitigation policies be adopted and apply in the coastal zone.¹³ State general plan law precludes

⁹ The DEIR proposes treating numerous unlisted species and plant communities as if they are listed as threatened or endangered under state and federal endangered species acts. Such treatment for species and plant communities for which the DEIR does not substantiate the need for protection, would preclude or discourage creation of defensible space and wildfire fuel reduction in wildland/urban interface areas in Big Sur, areas that are overgrown and in need of wildfire-fuel reduction (in part due to other imprudent policies). This overgrowth threatens lives and property in the event of wildfire.

¹⁰ See, Coastal Act/Public Resources Code, section 30514.

¹¹ "The Legislature further finds and declares that the public has a right to fully participate in decisions affecting coastal planning, conservation and development; that achievement of sound coastal conservation and development is dependent upon public understanding and support; and that the continuing planning and implementation of programs for coastal conservation and development should include the widest opportunity for public participation." (Coastal Act/PRC, section 30006)

¹² "To the extent of any inconsistency or conflict between the provisions of the California Coastal Act of 1976 (Division 20 (commencing with Section 30000)) and the provisions of this division [CEQA], the provisions of Division 20 (commencing with Section 30000) shall control." (CEQA/PRC section 21174.)

¹³ For example, following are two statements from the DEIR's significance analysis that conflict due to the DEIR's use of the term "discretionary development." DEIR pages 4.9-75 and 4.9-76 respectively (underline added): 1) "For discretionary development, implementation of the General Plan policies alone would have resulted in significant impacts to the San Joaquin kit fox and to CEQA-defined special status species," and, 2) "Legal lot development without subdivision would result in conversion of habitat, but would have highly dispersed effects on CEQA-defined special status species and their habitat that on a landscape level is also considered less than significant."

In the coastal zone -- the first statement says that development on existing lots would cause significant impacts (this because all coastal development permits are discretionary permits, even for a single

conflicting provisions in general plans (see footnote 8, paragraph 2).

Every policy change proposed by the DEIR that does not expressly limit its application to areas outside the coastal zone must include the following statement in the policy, clarifying that it does not apply in the coastal zone, with an explanation why (in order that the rationale is not lost to institutional memory over time):

This policy shall not apply within Monterey County's coastal zone. This policy was recommended as a mitigation measure to address environmental impacts caused by the 2007 General Plan (as adopted January 3, 2007). The 2007 General Plan does not change Monterey County's Local Coastal Program, and environmental impacts in Monterey County's coastal zone were not analyzed as part of the 2007 General Plan environmental review.

4

Further, maps in the DEIR must be changed to exclude coastal areas as these areas are not part of the project and are not properly included in the DEIR CEQA analysis. The Plan's maps were carefully composed to exclude coastal areas (for example, see 2007 General Plan Figure LU1, Land Use, Coast (Non-coastal)), but the DEIR improperly includes coastal areas in DEIR maps (for example, Exhibit 4.9-1).

Tables in the DEIR must also be changed to exclude references to coastal areas, as coastal areas are not included in the project the DEIR is supposed to analyze (for example, Tables 4.9-1 and 4.9-5 must be changed to remove references to the Big Sur coastal area or to species and plant communities that occur only in the Big Sur coastal area in Monterey County).

Without changing the DEIR to remove references to coastal areas, and changing its mitigation policies to clearly state they do not apply in the coastal zone, the Plan would: violate CEQA requirements that environmental impacts and measures to mitigate them be based upon fact-based substantial evidence in the record; not conform with state general plan consistency requirements; negate Coastal Act provisions on amending coastal plans and its mandate to maximize public participation in that process; and, literally threaten lives and property in overgrown coastal areas like Big Sur.

In addition to the foregoing, Big Sur's unique topography, large-lot zoning, viewshed protections, limits on subdivisions, public land ownership, and other considerations were not included in the DEIR analysis. Applying the DEIR's rationale and mitigation policies in the Big Sur area simply does not make sense.

2. The DEIR finds environmental impacts and proposes new Plan policies to mitigate them, but the impacts and mitigations are not supported by substantial factual evidence as required by the California Environmental Quality Act (CEQA) so must be deleted or modified accordingly.

5

CPOA supports public comment on the DEIR submitted by the Monterey County Farm Bureau and the Plan for the People (attached). Those comments object to new Plan policies proposed by the DEIR as mitigation for impacts to species and plant communities without a

residence on an existing parcel); the second statement says that the same development on existing lots would not cause significant impacts. Similar misuse of "discretionary development," and "discretionary permit" causes conflicts throughout the DEIR, and would in the Plan if DEIR mitigation policies are made applicable in the coastal zone.

substantial factual showing of the impacts or need for the mitigations.

The DEIR proposes that the Plan's definition for "special status species" be greatly expanded to include numerous unlisted species and plant groupings. The DEIR proposes a new definition for this expanded class of vegetation that it proposes to treat like species that have been listed pursuant to the state or federal endangered species acts. The DEIR calls its new definition, "CEQA-defined special-status species." However, CEQA does not define "special status species," does not require the definition, and does not use the term "special status species."

The DEIR apparently assumes that plant groupings such as plant communities can readily be identified by experts, like a species can be identified; however, that assumption is mistaken.

For example, the DEIR lists "maritime chaparral" as a plant community that should be included in its definition of "CEQA-defined special-status species." However, even the Coastal Commission acknowledges that the maritime chaparral plant community is so ambiguously defined its identification is subject to the "vacillation of personal opinion," even by experts.¹⁴

Given that experts cannot agree on what or where the maritime chaparral plant community is, one wonders how the DEIR consultants decided there are 12,597 acres of the maritime chaparral plant community in Monterey County, or 9,805 acres in the Fort Ord community area,¹⁵ and how they decided precisely how many acres there are of other plant communities.

Neither CEQA nor the California or federal endangered species acts extend protection to plant communities or other plant groupings, apparently for good reason.

The DEIR references a database on the California Department of Fish and Game's website, as if it justifies extending protection to "sensitive communities" and "natural communities."¹⁶ However, although the database can be found on the CDFG website, the information in the database is not generated solely by the CDFG.

Rather, the database is overseen by a non-profit organization, Nature Serve, an offshoot of the non-profit Nature Conservancy.¹⁷ Listing in this database is not subject to the rigorous listing requirements set out in the California and federal endangered species acts. Similarly, the inventory in the California Natural Diversity Database includes information prepared by the California Native Plant Society, another nonprofit organization.¹⁸

¹⁴ "Dr. Taylor stated that in the United States, nomenclature of plant communities has by professional practice been an informal process He stated that the syntaxonomy of maritime chaparral has not been formally studied, hence arguments as to the identity of a particular stand of chaparral as either falling within or without such a category is subject to the vacillation of personal opinion." (Coastal Staff's restatement of a Commission expert's opinion in Foster Revised Findings, A-3-MCO-06-018, p. 21, last par. (<http://documents.coastal.ca.gov/reports/2008/1/Th16a-1-2008.pdf>); underline added.)

¹⁵ For example, see Tables 4.9-1 on DEIR page 4.9-4 and 4.9-2 on page 4.9-5.

¹⁶ For example, see the introduction to Table 4.9-3 on DEIR page 4.9-7.

¹⁷ See, http://www.dfg.ca.gov/biogeodata/cnddb/cnddb_info.asp

¹⁸ See, <http://cnps.org/cnps/rareplants/cnddb.php>

Extending protection to plant groupings and species listed on these web sites, when they are not listed in Title 50 Code of Federal Regulations or Title 14 California Code of Regulations, avoids the due process provided by the statutory listing processes. Landowners could be subject to restrictions on land use without rational basis. Plant communities and species may have been included on these lists due to a request by a non-profit's donor, or for other reasons unconnected with the need for protection.

5

The DEIR must use the definition for "special status species" provided in the Plan's Glossary, and must reanalyze all related findings of significant impacts and need for mitigation consistent with the definition in the Plan.

3. The DEIR misstates the ability of County plans to affect federal land use and must be changed to avoid missing opportunities to do so.

The DEIR states that the County cannot exercise jurisdiction over federal lands.¹⁹ However, though technically correct, that statement is misleading. The County can exercise control over federal lands to the extent the federal government has ceded such control to the county.

One such opportunity is provided by the Healthy Forests Restoration Act of 2003. There, Congress provided that "communities at risk" surrounding federal land managed by the US Forest Service and the Bureau of Land Management can provide a measure of control over such federal lands with regard to the way firebreaks are maintained and wildfire fuels are managed, on the federal land. The vehicle for exerting this measure of control over federal land use is adoption of a "Community Wildfire Protection Plan." Monterey County is a required signatory to a CWPP for communities in unincorporated Monterey County.

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Also, the federal Coastal Zone Management Act provides that federal agencies must act consistent with adopted coastal plans that are approved by the National Oceanic and Atmospheric Administration. Monterey County's current coastal Land Use Plans are such plans, and federal agencies like the US Forest Service must act consistent with them, with certain exceptions. One coastal staff person has described the process of obtaining a "consistency determination" by a federal agency as very much like the process for obtaining a coastal permit.

Other federal law may subject federal agencies and federal land to a level of control by the County. Rather than dismissing these opportunities, the DEIR should be changed to acknowledge that there are now means by which the county can exert a measure of control over federal lands, and that additional means may become available in the future. Mitigation policies (such as BIO-1.1) should be modified to remove language that dismisses the possibility of County control over federal lands (should it be included in the Plan).

Respectfully submitted,



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Director

¹⁹ For example, "Lands within unincorporated areas that are owned by the federal government ... are not subject to County jurisdiction." (DEIR page 3-2.)