

CALIFORNIA COASTAL COMMISSION

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November 23, 2005

To: Coastal Commissioners and Interested Parties

**From: Peter Douglas, Executive Director
Charles Lester, Deputy Director
Chris Kern, District Manager**

Subject: 2-02-02-EDD (North Pacifica LLC)

Public hearing and Commission determination of appealability for purposes of applicable hearing and notice procedures, pursuant to California Code of Regulations, Title 14, Section 13569, for a 43-unit residential subdivision and development approved for the 4000 block of Palmetto Avenue, Pacifica (APNs 009-402-250 and -260).

STAFF NOTE

On August 12, 2002, the City of Pacifica approved a coastal development permit (CDP) application for a 43-unit residential subdivision and associated development known as the "Pacifica Bowl." The City staff determined that the action was not appealable, but the Executive Director disagreed, and scheduled a hearing to resolve the question of appealability pursuant to 14 California Code of Regulations Section 13569. On October 9, 2002, the applicant, North Pacifica LLC, filed a petition seeking a writ of mandate challenging the Commission's preliminary action. North Pacifica's petition was denied on October 31, 2002 for failure to exhaust administrative remedies. North Pacifica appealed. The court of appeal affirmed the trial court decision on December 22, 2004.

North Pacifica filed a second action on December 2, 2002, and obtained a stay of Commission administrative proceedings pending the outcome of North Pacifica's appeal in the first action. On October 18, 2005, the court entered judgment in the Commission's favor and lifted the stay on administrative proceedings, effective November 2, 2005.

Staff also notes that this dispute resolution proceeding involves, in part, development that has already been undertaken. Such development consists of the clearing and grubbing of major vegetation on the project site. In November 2003 the Commission sought a temporary restraining order after it learned that North Pacifica was about to obtain a clearing and grubbing permit from the City. The Court denied the TRO on November 3, 2003, and the clearing and grubbing proceeded.

1.0 Executive Summary

The City of Pacifica Local Coastal Program ("LCP") was certified on June 7, 1994. The City assumed primary authority over the issuance of coastal development permits on June 10, 1994. After certification of a Local Coastal Program, the Coastal Commission is authorized under 14

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CCR Section 13569 to resolve disputes concerning whether development approved by the local government is categorically excluded, non-appealable, or appealable.

On August 12, 2002, on appeal from the Pacifica Planning Commission, the Pacifica City Council approved CDP-203-01 for a 43-unit subdivision and residential development including roadway and infrastructure improvements. The Commission received a Notice of Final Local Action ("FLAN") from the City on August 21, 2002. The City's FLAN designated the project as non-appealable (**Exhibit 3**).¹ The City Council's findings of approval, incorporating the Planning Commission's findings, found the project generally consistent with the LCP, but did not make specific findings with respect to the existence of wetlands within 100 feet of the approved development or whether the City approval was appealable to the Commission. Based on information received by Commission staff in connection with its review of the environmental impact report ("EIR") for the project, the Executive Director concluded that wetlands as defined under both 14 CCR Section 13577 and the certified LCP exist within 100 feet of the approved development. The information indicating the presence of wetlands principally includes the conclusions and facts stated in the draft and final EIRs, the wetland delineations performed in connection with CEQA review of the project, and the data sheets recording direct field observations by the applicant's biological consultant in connection with the wetland delineations. These items are discussed in detail below. The applicant denied the staff's request for a site visit by the Commission biologist in advance of this hearing (**Exhibit 30**).

By letter dated August 23, 2002, Commission staff informed the City and the applicant that pursuant to 14 CCR Section 13569 the Executive Director had determined that the project was appealable and that the FLAN was deficient because it did not meet the requirements of 14 CCR Section 13571 and Pacifica Zoning Code Section 9-4.4304(n) and requested that the City issue an accurate FLAN correctly describing the procedures for appeal (**Exhibit 4**). The August 23, 2002 letter also informed the City and applicant that pursuant to Section 13572 and Pacifica Zoning Code Section 9-4.4304(l), the CDP approved by the City (CDP-203-01) would remain suspended and would not become effective until a corrected notice had been issued and the ten-day appeal period to the Commission had elapsed. On September 5, 2002, the Commission received an appeal of the City's decision by John Curtis. This appellant is separately interested in the issue of appellate jurisdiction and has questioned City staff's opinions about appealability at various stages of the City's proceedings. The City informed Commission staff of its disagreement with the Executive Director's determination and contested the applicability of Section 13569 by letter dated September 11, 2002. The applicant has also taken issue with the Executive Director's determination and the Commission's authority to resolve questions of project appealability pursuant to Section 13569. The applicant filed suit in San Mateo County Superior Court seeking a writ of mandate declaring the Executive Director's determinations regarding the City's coastal development permit invalid and the CDP approved by the City to be immediately effective (**Exhibit 30**). On October 31, 2002, the Court found that the petitioner had failed to exhaust its administrative remedies before the Coastal Commission and denied the petition for peremptory writ of mandate. On December 22, 2004, the court of appeal ruled in the Commission's favor and affirmed the trial court judgment.

¹ The Commission never received an Initial Notice from the City about the City's processing of the application for the approved development as required by Sections 13565 and 13568 of the Commission's regulations and Pacifica Zoning Code Section 9-4.4304(g). Thus the Commission received no notice from the City of the City's determination with respect to the project's appealability prior to receipt of the City's Notice of Final Local Action.

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Under Section 13569, when a local jurisdiction disagrees with the Executive Director's determination regarding whether a development is appealable, non-appealable or categorically excluded, the Commission is required to hold a hearing to determine the appropriate designation at the next Commission meeting "in the appropriate geographic region of the state" following the local government's request. By letter dated September 17, 2002, Commission staff informed the City that the December Commission meeting in San Francisco would be the first opportunity for a Section 13569 hearing in the appropriate geographic region of the state (**Exhibit 9**).

After the Executive Director agendaized the matter for its December 2002 hearing agenda, North Pacifica filed a second lawsuit in San Mateo County Superior Court and obtained a stay of the Commission's administrative proceedings pending the outcome of North Pacifica's appeal in the first lawsuit. Therefore, the Commission removed from its agenda the hearing on the dispute over the appealability of the local government's action. On October 18, 2005, the court entered judgment in the Commission's favor and lifted the stay on administrative proceedings, effective November 2, 2005.

2.0 Executive Director's Recommendation

The Executive Director recommends that the Commission adopt the findings and resolution provided below determining that the approved development is appealable to the Commission in accordance with: (1) Coastal Act Section 30603(a)(1) because the approved development is located seaward of the inland right of way of the first public road paralleling the sea, and (2) Coastal Act Section 30603(a)(2) because the approved development is located within 100 feet of wetlands.

Motion

I move that the Commission reject the Executive Director's determination that the development approved by Pacifica City Council under CDP-203-01 on August 12, 2002 is appealable to the Coastal Commission.

Staff Recommendation

Staff recommends a NO vote. Failure of this motion will result in: (1) the Commission upholding the Executive Director's determination that the action by the Pacifica City Council on August 12, 2002 approving CDP-203-01 is appealable to the Coastal Commission; and (2) the adoption of the following resolution and findings. The affirmative vote of a majority of the Commissioners present is necessary to pass the motion.

Resolution

The Commission, by adoption of the attached findings, determines consistent with Section 13569 of Title 14 of the California Code of Regulations, that the action of the Pacifica City Council approving CDP-203-01 on August 12, 2002 is appealable to the Commission.

3.0 Recommended Findings and Declarations

The Commission finds and declares as follows:

3.1 Project Description

The project approved by the City consists of a subdivision and development of 43 residential units, including 19 single-family detached homes and 24 townhouses, an interior driveway and road network (including the improvement of the Edgemar Road right-of-way), necessary infrastructure and a private park/open space area on a total of 5.8 acres of land (the 4.2 acre bowl site plus approximately 1.6 acres of roadway construction and grading) at the 4000 block of Palmetto Avenue in Pacifica (APNs 009-402-250 and -260). (**Exhibit 3**) The project would involve in excess of 36,000 cubic yards each of cut and fill and substantial grading of the sloped site to create building pads. As part of the project, an existing 18-inch culvert draining to the ocean would be capped and buried and would not be incorporated into the new drainage system.

The approved project is located in the City of Pacifica north of Highway 1, east of Palmetto Avenue and west of the Pacific Point housing site. The project area is in the Fairmont West Neighborhood and is zoned as “high density residential,” which allows for a maximum potential density of 16 to 25 dwelling units per acre, subject to the application of LCP provisions to site conditions. The site itself is a large, sloping, bowl-shaped site. The land to the west of the project area, between Palmetto Avenue and the shoreline, is presently undeveloped and consists of coastal scrub habitat.

In its present condition, the project site is vegetated with a mix of native coastal and invasive non-native species. According to wetland studies of the site to date, several areas within 100 feet of the approved development are dominated by wetland vegetation and show evidence of other wetland indicators. In addition, these studies indicate the existence of a periodically inundated area characterized by the applicant’s consultant as a drainage ditch along Edgemar Road and a small, excavated area south of Edgemar Road, within 100 feet of the approved development, which are dominated by wetland vegetation. Edgemar Road is presently in a state of disrepair and is partially overgrown with vegetation.

3.2 Proximity of Development to Wetlands

As discussed further below, Wetland Area 1, the area south and immediately adjacent to Edgemar Road, is within 50 feet of Edgemar Road and within 100 feet of the project site. Wetland Area 2, the topographic depression on the parcel south of Edgemar Road, is 100 feet from Edgemar Road. The project site also includes Wetland Area 3, the ponded area in riparian scrub vegetation and Wetland Area 4, located on the western side of the site.

In addition to subdivision of the site, which is development within 100 feet of Areas 1, 3 and 4, the approved development includes clearing and grubbing of the entire site i.e. clearing of major vegetation within 100 feet of Areas 1, 3 and 4. (The applicant has already undertaken this development.) In addition, the development includes grading of the entire site, which is also development within 100 feet of Areas 1, 3 and 4. The development also includes construction of internal roads and other infrastructure and buildings within 100 feet of Wetland Areas 3 and 4 (and probably 1). Finally, the

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approved development includes the reconstruction/improvement of Edgemar Road within 100 feet of Wetland Areas 1 and 2.

3.3 Project Background

In connection with CEQA review of the project, the City of Pacifica first issued a Notice of Preparation of an EIR on August 27, 2001. A draft EIR (“DEIR”) was published in March 2002, and a final EIR (“FEIR”) was issued in June 2002. Commission staff commented on both the Notice of Preparation by letter dated October 4, 2001 and on the DEIR by letter dated May 3, 2002 (**Exhibits 16 and 17**). The DEIR stated that a City CDP, if approved, would authorize development within 100 feet of wetlands and would be appealable to the Commission (DEIR, IV-B-13). Both Commission staff CEQA comment letters informed the City and the applicant of the staff’s concerns about potential wetland impacts of the approved project.

According to the FLAN, the Pacifica Planning Commission originally approved CDP-203-01 on July 15, 2002. The Planning Commission approval of the CDP was subsequently upheld on appeal to the Pacifica City Council on August 12, 2002.

The Commission received the City’s FLAN, dated August 19, 2002, on August 21, 2002, designating the project as non-appealable (**Exhibit 3**). The FLAN was the first notice provided to the Commission by the City of the City’s coastal development permit review process and its designation of the development as non-appealable. The Commission did not receive from the City any initial notice of coastal development permit review or appeal designation as required by Commission regulation and City ordinance.

In the FEIR the City’s prior statements concerning appealability of the development to the Commission were replaced with the following statements that determination of appealability was outside of the scope of the City’s CEQA determination:

The City of Pacifica does not determine the authority of the California Coastal Commission. The EIR has determined that the proposed project is consistent with the City’s own adopted LCP and has determined that the proposed project will not adversely affect wetlands. The scope of California Coastal Commission appeal [jurisdiction] is not relevant to the City’s CEQA process. (FEIR, I-3) [Emphasis added.]

The City has made no determination whether the Coastal Commission appeal jurisdiction applies to an excavated pit south of Edgemar road. (FEIR, III-3)

The FEIR also states in response to comments received from the applicant on the DEIR concerning Commission appeal jurisdiction:

[T]he commenter is correct as being within in stating that [sic] the City’s Zoning Code does not consider this site to be within the Coastal Commission’s Appeal Zone. (FEIR, III-18)

The August 12, 2002 City Council Agenda Summary Report states:

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According to the map provided to the City of Pacifica by the Coastal Commission, the project site does not fall within the Coastal Commission Appeal Zone.

Pursuant to 14 CCR Section 13576(a), in conjunction with the certification of a local government's LCP, the Commission adopts a map or maps depicting the areas where the Commission retains permit and appeal jurisdiction pursuant to Coastal Act Sections 30603(a)(1) and (a)(2). Accordingly, the Commission adopted the City of Pacifica Post LCP Certification Permit and Appeal Jurisdiction Map on November 17, 1993 in conjunction with certification of the City's LCP.

As stated in the August 12, 2002 City Council Agenda Summary Report, the project site is not shown within the Commission's appeal jurisdiction on the adopted map. However, in accordance with 14 CCR Section 13576(a), the adopted map includes the following required disclaimer:

This map has been prepared to show where the California Coastal Commission retains permit and appeal jurisdiction pursuant to Public Resources Code Sections 30519(b), 30603(a)(1) and (a)(2) and 30600.5(d). In addition, development may also be appealable pursuant to Public Resources Code Sections 30603(a)(3), (a)(4), and (a)(5). If questions arise concerning the precise location of the boundary of any area defined in the above sections, the matter should be referred to the local government and/or the Executive Director of the Commission for clarification and information. This plat may be updated as appropriate and may not include all lands where permit and appeal jurisdiction is retained by the Commission. [Emphasis added.]

By letter dated August 23, 2002, Commission staff informed the City and the applicant that, pursuant to 14 CCR Section 13569, the Executive Director had determined that the development approved by the City was appealable to the Commission and that the FLAN was deficient because it did not meet the requirements of 14 CCR Section 13571 and the Pacifica Zoning Code Section 9-4.4304(n) and requested that the City re-notice the project as appealable (**Exhibit 4**). In the same letter, the Commission staff informed the City and the applicant that pursuant to Section 13572 of the Commission's regulations and Pacifica Zoning Code Section 9-4.4304(1), CDP-203-01 would remain suspended and would not become effective until a corrected notice had been issued and the appeal period to the Commission had run. On September 5, 2002, the Commission received an appeal of the City's action on the development from John Curtis. By letter dated September 11, 2002, the City informed Commission staff of its disagreement with the Executive Director's determination of appealability and the applicability of Section 13569.

By letter to the City dated September 17, 2002, Commission staff indicated that since the City's determination concerning appealability of the approved development was not in accordance with the Executive Director's determination, the staff would schedule a Commission hearing to resolve this question pursuant to the provisions of 14 CCR Section 13569(d).

The applicant filed suit in San Mateo County Superior Court seeking a writ of mandate declaring the Executive Director's determinations regarding the City's CDP invalid and the CDP approved by the City to be immediately effective. On October 31, 2002, the Court found that the petitioner had failed to exhaust its administrative remedies before the Coastal Commission and denied the petition for peremptory writ of mandate. North Pacifica appealed. On December 22, 2004, the court of appeal affirmed the superior court decision. The court of appeal held that the

Commission has the authority to resolve the dispute regarding the appealability of the City's action and that the Commission properly suspended the coastal development permit approved by the City pending resolution of the dispute.

3.4 Authority for Commission Determination of Appeal Designation

Coastal Act Section 30603 defines the Commission's appellate jurisdiction over local government actions on CDPs. Section 30603(a) provides, in part, that:

After certification of its local coastal program, an action taken by a local government on a coastal development permit application may be appealed to the commission for only the following types of developments:

- (1) Developments approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance.
- (2) Developments approved by the local government not included within paragraph (1) that are located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff. [Emphasis added.]

After the certification of an LCP, the Commission is authorized under 14 CCR Section 13569 (Determination of Applicable Notice and Hearing Procedures) to resolve disputes between local governments and the Executive Director concerning the determination of the appropriate designation for development approved by a local coastal development permit (i.e., whether it is categorically excluded, non-appealable, or appealable) when an applicant, interested person or local government questions the appropriate designation and the Executive Director's determination differs from that of the local government. The purpose of this regulation is to provide an administrative process for the resolution of disputes between a local government and the Commission over the permit exemption, exclusion and appeal status of a development or local government action. Section 13569 provides:

The determination of whether a development is categorically excluded, non-appealable or appealable for purposes of notice, hearing and appeals procedures shall be made by the local government at the time the application for development within the coastal zone is submitted. This determination shall be made with reference to the certified Local Coastal Program, including any maps, categorical exclusions, land use designations and zoning ordinances which are adopted as part of the Local Coastal Program. Where an applicant, interested person, or a local government has a question as to the appropriate designation for the development, the following procedures shall establish whether a development is categorically excluded, non-appealable or appealable:

- (a) The local government shall make its determination as to what type of development is being proposed (i.e. categorically excluded, appealable, non-appealable) and shall inform the applicant of the notice and hearing requirements for that particular development. The local determination may be made by any designated local government employee(s) or any local body as provided in local government procedures.
- (b) If the determination of the local government is challenged by the applicant or an interested person, or if the local government wishes to have a Commission determination

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as to the appropriate designation, the local government shall notify the Commission by telephone of the dispute/question and shall request an Executive Director's opinion;

(c) The executive director shall, within two (2) working days of the local government request (or upon completion of a site inspection where such inspection is warranted), transmit his or her determination as to whether the development is categorically excluded, non-appealable or appealable:

(d) Where, after the executive director's investigation, the executive director's determination is not in accordance with the local government determination, the Commission shall hold a hearing for purposes of determining the appropriate designation for the area. The Commission shall schedule the hearing on the determination for the next Commission meeting (in the appropriate geographic region of the state) following the local government request. [Emphasis added.]

The Coastal Act conveys to local governments with certified Local Coastal Programs the primary permitting authority over projects proposed within their jurisdiction in the Coastal Zone, but confers to the Commission appellate review authority over specified types of development. Under Section 13569, it is contemplated that a local government would make an initial determination of project appealability “at the time the application for development within the coastal zone is submitted.” Under Sections 13565 and 13568 of the Commission regulations and Pacifica Zoning Code Section 9-4.4304(g), the City is required to provide Initial Notice to the Commission of coastal development permit review before the first public hearing, designating the project as appealable, non-appealable or categorically excluded.² In this case, the Commission never received an initial hearing notice of the City’s coastal development permit

² **§ 13565. Notice of Appealable Developments.**

Within ten (10) calendar days of accepting an application for an appealable coastal development permit (or local government equivalent) or at least seven (7) calendar days prior to the first public hearing on the development proposal, the local government shall provide notice by first class mail of pending application for appealable development. This notice shall be provided to . . . the Commission. . . .

§ 13568. Notice of Non-Appealable Developments.

(a) Notice of developments within the coastal zone that require a public hearing under local ordinance, but which are not appealable pursuant to Public Resources Code Section 30603 (and which are not categorically excluded) shall be provided in accordance with existing local government notice requirements which shall provide at a minimum:

Notice of developments shall be given at least ten (10) calendar days before a hearing in the following manner:

- . . .
- (5) notice by first class mail to the Commission.
- . . .

Pacifica Zoning Code Section 9-4.4304(g). Notice by mail. At least seven (7) calendar days prior to the first public Planning Commission hearing on a proposed coastal development permit, the Director shall provide notice by first-class mail of the pending coastal development permit application to: . . . (4) the California Coastal Commission . . .

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review process as required by these regulations. The first notice that the Commission received from the City of the City's determination of project appealability in the context of the City's CDP review process for the project was the FLAN.³ This FLAN, which the Commission received from the City, was deficient because it did not describe the procedures for appeal of the local decisions as required by Section 13571 of the Commission's regulations and Pacifica Zoning Code Section 9-4.4304(n).

The Commission's regulations anticipate that there may be disagreements regarding whether a particular project comes within the Commission's appeal jurisdiction. The procedures outlined in Section 13569 recognize that an administrative dispute resolution process would be preferable to (and quicker) than litigation. The applicant or any interested person may challenge the local government's appeal designation under Section 13569 by requesting a determination from the Commission's Executive Director. As stated above, an interested person has appealed the City's action to the Commission and has questioned City staff's opinions about appealability at various stages of the City's proceedings. As also stated above, contrary to the City's current position, the DEIR stated that a City coastal development permit, if approved, would authorize development within 100 feet of wetlands and would be appealable to the Commission. If the Executive Director and the local government are in disagreement over the appropriate processing status, as is the situation here, the Commission is charged with making the final determination. Since, in this case, the Executive Director has made a determination of appealability with which the City differs, the matter has been scheduled for hearing by the Commission.

Where, as here, (1) a disagreement as to the appealability of development approved by a local government has arisen; (2) Commission hearing under Section 13569 is required to resolve the disagreement; (3) the City failed to provide the Commission with an initial hearing notice of its processing of the project as required by 14 CCR Section 13565 and Pacifica Zoning Code Section 9-4.4304(g); and (4) the FLAN did not describe the procedures for appeal of the local decision to the Commission as required by 14 CCR Section 13571(a) and Pacifica Zoning Code Section 9-4.4304(n), any CDP approved by the local government is suspended and cannot become effective under Section 13572 of the Commission regulations and Pacifica Zoning Code Section 9-4.4304(1), until either (1) the Commission determines that the project is not in fact appealable, or (2) the Commission determines that the appeal submitted by John Curtis and any other appeal(s) subsequently filed raise no substantial issue concerning conformity of the approved development to the standards set forth in the City of Pacifica certified LCP or the public access policies of the Coastal Act.

Section 13571(a) provides that:

(a) Notice After Final Local Decision. (This section shall not apply to categorically excluded developments.) Within seven (7) calendar days of a local government completing its review and meeting the requirements of Section 13570, the local government shall notify by first class mail the Commission and any persons who specifically requested notice of such action by submitting a self-addressed, stamped envelope to the local government (or, where required, who paid a reasonable fee to receive such notice) of its action. Such notice shall include conditions of

³ The Initial Study and the DEIR prepared by the City originally stated that the project was in the Commission's appeal jurisdiction. The FEIR later disclaimed these earlier statements and expressly declined to make any assertion concerning Commission appellate jurisdiction in the context of CEQA review (FEIR I-4).

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approval and written findings and the procedures for appeal of the local decision to the Coastal Commission. [Emphasis added.]

Section 13572 provides:

A local government's final decision on an application for an appealable development shall become effective after the ten (10) working day appeal period to the Commission has expired unless either of the following occur:

- (a) an appeal is filed in accordance with Section 13111;
- (b) the notice of final local government action does not meet the requirements of Section 13571;

When either of the circumstances in Section 13572(a) or (b) occur, the Commission shall, within five (5) calendar days of receiving notice of that circumstance, notify the local government and the applicant that the effective date of the local government action has been suspended. [Emphasis added.]

Pacifica Zoning Code Section 9-4.4304(1), similar to Section 13572, provides that CDPs for appealable development become effective only after the ten-working day appeal period has expired without appeal. These provisions make clear that a CDP for appealable development that is approved by local government action does not become effective until after the Commission receives a valid notice of final local action and the time period for appeals to the Commission has passed. Where the appealability of development approved by a local government is in dispute, the CDP cannot become effective before the outcome of the dispute resolution hearing. In the event that the Commission determines that the development approved by the local government is appealable to the Commission, Section 13572 of the Commission's regulations and Pacifica Zoning Code Section 9-4.4304(1)(2) require that the appeal period run before the permit can become effective. Commission staff notified the City and the applicant by letter dated August 23, 2002 that the permit approved by the City would remain suspended until after the Commission's resolution of the dispute and any appeal period had run (**Exhibit 4**).

North Pacifica argues that the Commission's role in reviewing a local government's determination regarding appealability is limited to evaluating whether substantial evidence in the record considered by the local government supports the local government's determination. According to North Pacifica, where conflicting evidence exists in the record, the Commission may not substitute its own judgment for the local government's so long as the local government's is reasonable.

North Pacifica is incorrect both with respect to the evidence that the Commission may consider and the standard of review. Nothing in Section 13569 in any way limits the evidence that the Commission may consider. To the contrary, by allowing for site inspections and requiring the Commission to hold a public hearing, Section 13569 assumes that in many instances the Commission will consider evidence that was not considered by the local government. Similarly, Section 13569 does not require the Commission to defer to a local government's interpretation of evidence that it did consider. The regulation instead establishes a process where the Commission independently evaluates the interpretation advanced by the local government, the Executive Director, and any interested persons. Case law that North Pacifica cites regarding judicial review of public agency actions or appellate review of trial court decisions is inapplicable here.

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Notwithstanding the Commission's ability to review evidence that was not considered by the local government, however, the evidence considered by the Commission for this determination is derived almost entirely from the record before the City of Pacifica. In addition, for the offsite wetland areas that are located within 100 feet of the proposed development, the dispute is a legal dispute about what kinds of physical features are considered wetlands for the purposes of determining appealability under the Coastal Act, not a factual dispute about what physical features are actually present.

North Pacifica argues in the alternative that the Commission should determine appealability on the basis of physical conditions that currently exist on the site, not on the basis of conditions that existed prior to November 2003 when North Pacifica cleared and grubbed the site. This is incorrect. The clearing and grubbing was the first stage of the physical development proposed by North Pacifica. Because the local CDP had been suspended, the clearing and grubbing was unpermitted development. Permit applicants may not defeat the Commission's appellate jurisdiction by engaging in unpermitted development that removes the physical features that establish the Commission's appellate jurisdiction. The Commission instead determines appealability as if the unpermitted development had not occurred.

If the Commission determines that the City's approval is not appealable, that determination would constitute final action by the Commission. If, in contrast, the Commission determines that the local action is appealable, that action would be only an initial step that would lead to a substantial issue hearing, and if the Commission finds a substantial issue, to a de novo hearing. The Commission's action becomes final after the last step of the process (finding of non-appealability, finding of no substantial issue, or vote after de novo hearing).

3.5 Analysis of Appeal Jurisdiction and Project Appealability

The following analysis of the development approved by the City that is the subject of this dispute discusses available evidence of the presence of wetlands on or near the property and concludes that the approved development is appealable to the Commission because it is located within 100 feet of wetlands as that term is defined in Section 13577, the Commission regulation used to determine whether a development is appealable to the Commission pursuant to Section 30603 of the Coastal Act.⁴

In addition, the approved development would also involve work to Palmetto Avenue, including curb cuts at the entrance road from Palmetto Avenue into the approved subdivision. Section 13577(i) defines the "first public road paralleling the sea" as that road nearest to the sea which:

- (A) is lawfully open to uninterrupted public use and is suitable for such use;
- (B) is publicly maintained;
- (C) is an improved, all-weather road open to motor vehicle traffic in at least one direction;
- (D) is not subject to any restrictions on use by the public except when closed due to an emergency or when closed temporarily for military purposes; and

⁴ In so finding, the Commission notes that the Commission biologist was not able to visit the project site, since the applicant denied staff access the site prior to the Commission hearing.

- (E) does in fact connect with other public roads providing a continuous access system, and generally parallels and follows the shoreline of the sea so as to include all portions of the sea where the physical features such as bays, lagoons, estuaries, and wetlands cause the waters of the sea to extend landward of the generally continuous coastline.

When based on a road designated pursuant to this section, the precise boundary of the permit and appeal jurisdiction shall be located along the inland right-of-way of such road.

Since a portion of the approved development is located seaward of the inland right-of-way of the first public road, such development occurs between the sea and the first public road and constitutes a separate basis for appeal jurisdiction under Coastal Act Section 30603(a)(1).

3.6 Development within 100 feet of a Wetland

In accordance with Coastal Act Section 30603(a)(2), development approved by a local government within 100 feet of any wetland is appealable to the Commission.

3.6.1 Wetland Definition for Purposes of Commission Appeal Jurisdiction

For purposes of determining appellate jurisdiction under Section 30603, Section 13577(a) of the Commission regulations defines “wetland” as follows:

- (1) Measure 100 feet landward from the upland limit of the wetland. Wetland shall be defined as land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes, and shall also include those types of wetlands where vegetation is lacking and soil is poorly developed or absent as a result of frequent and drastic fluctuations of surface water levels, wave action, water flow, turbidity or high concentrations of salts or other substances in the substrate. Such wetlands can be recognized by the presence of surface water or saturated substrate at some time during each year and their location within, or adjacent to, vegetated wetlands or deep-water habitats. For purposes of this section, the upland limit of a wetland shall be defined as:
 - (A) the boundary between land with predominantly hydrophytic cover and land with predominantly mesophytic or xerophytic cover;
 - (B) the boundary between soil that is predominantly hydric and soil that is predominantly nonhydric; or
 - (C) in the case of wetlands without vegetation or soils, the boundary between land that is flooded or saturated at some time during years of normal precipitation, and land that is not.
- (2) For the purposes of this section, the term "wetland" shall not include wetland habitat created by the presence of and associated with agricultural ponds and reservoirs where:
 - (A) the pond or reservoir was in fact constructed by a farmer or rancher for agricultural purposes; and

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(B) there is no evidence (e.g., aerial photographs, historical survey, etc.) showing that wetland habitat pre-dated the existence of the pond or reservoir. Areas with drained hydric soils that are no longer capable of supporting hydrophytes shall not be considered wetlands.

Coastal Act Section 30603(a)(2) and 14 CCR Section 13577 provide for appeals to the Commission of local actions approving development within 100 feet of the upland limit of any wetland meeting the definition of wetlands provided in Section 13577 of the Commission's regulations. Under this definition, an area qualifies as a wetland if the water table is at, near or above the land surface long enough to promote the formation of hydric soils or support the growth of hydrophytes. The Section 13577 wetland definition contains only one exception for man-made features, relating to "wetland habitat created by the presence of and associated with agricultural ponds and reservoirs" under certain conditions.

The definition of wetland used to determine whether a development is appealable to the Commission that is contained in Section 13577(a) of the Commission regulations is functionally identical to the definition of wetlands which is contained in the City's LCP and which is the standard of review for the Commission's review of the project on appeal pursuant to Coastal Act Section 30604. The LCP wetland definition contained in Zoning Code Section 9-4.4302(aw) also tracks the language of the Coastal Act Section 30121 definition of wetland (adding, however, the words "streams" and "creeks" to the Coastal Act definition wording):

"Wetland" shall mean land which may be covered periodically or permanently with shallow water, including saltwater marshes, freshwater marshes, streams, creeks, open or closed brackish water marshes, swamps, mudflats, and fens.

The LUP definition separately defines wetland as

[L]and where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes. In certain types of wetlands vegetation is lacking and soils are poorly developed or absent. Such wetlands can be recognized by the presence of surface water or saturated substrate at some time during each year and their location within, or adjacent to, vegetated wetlands or deep-water habitats.

The LCP wetland definition contained in Pacifica Zoning Code Section 9-4.4302(aw) is effectively the same as the Coastal Act Section 30121 definition of wetland, with the exception of the two, additional terms, "streams" and "creeks". The first sentence of the LUP definition similarly tracks the language of the Section 13577(a) wording. The balance of the LUP definition paraphrases Section 13577(a), clarifying how the special case of wetlands without either wetland vegetation or evidence of hydric soils can be identified. Since the LCP wetland definitions mirror the operative language of both Coastal Act Section 30121 and Section 13577(a), the scope of the wetland definition under the LCP is effectively identical to that contained in the Coastal Act and Commission regulations. More particularly, the broader Coastal Act and Pacifica Zoning Code definitions encompass and inform the definition contained in 14 CCR Section 13577(a) and the LUP. If the subject property contains wetlands that meet the standards of 14 CCR Section 13577(a), then the subject property also contains wetlands that meet the more general wetland definitions contained in both the Coastal Act and the certified

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LCP. In any event, as described further below, for purposes of determining whether the development approved by the City is appealable to Commission, the development approved by the City is appealable to the Commission and includes development within 100 feet of wetlands as defined according to all of the above-referenced definitions.

3.6.2 Evidence Concerning Wetlands

The following correspondence, studies and reports prepared in the course of the City's permit action and CEQA review have addressed the presence of wetlands on and near the project site:

- Thomas Reid Associates ("TRA") initial biological survey, dated April 1997 (**Exhibit 18**).
- Letter from Michael Josselyn, Wetland Research Associates ("WRA") to the Syndicor Real Estate Group, dated April 30, 1997 (**Exhibit 19**).
- WRA wetland delineation for the "Pacific Cove" Parcel, dated August 1999 (**Exhibit 20**).
- WRA revised jurisdictional wetlands map, dated November 30, 1999 (**Exhibit 21**).
- Letter from Thomas Fraser, WRA, to the City of Pacifica, dated December 27, 1999 (**Exhibit 22**).
- Army Corps letter to Tom Fraser, dated January 3, 2000 (**Exhibit 23**).
- Memorandum from Taylor Peterson, TRA, to Allison Knapp, City of Pacifica, dated January 24, 2000 (Peer review of the July 1999 WRA wetland delineation and the December 27, 1999 WRA LCP wetland delineation letter) (**Exhibit 24**).
- WRA wetland delineation for the "Edgemar Road Parcel," dated March 2000 (**Exhibit 25**).
- Army Corps letter to Tom Fraser, dated May 11, 2001 (**Exhibit 26**).
- Draft EIR, March 2002.
- Letter from Michael Josselyn, WRA, to the City of Pacifica, dated March 19, 2002 (**Exhibit 27**).
- Letter from Michael Josselyn, WRA, to the City of Pacifica, dated May 22, 2002 (**Exhibit 28**).
- FEIR, June 2002.
- Memorandum from Eben Polk, TRA, to Michael Josselyn, dated March 11, 2002 (**Exhibit 31**).

The January 24, 2000 Memorandum from Taylor Peterson of TRA to Allison Knapp refers to a third July 1999 wetland delineation prepared by WRA. A copy of this July 1999 WRA delineation, which may have been an earlier version of the August 1999 WRA delineation of the project site, has not been provided to the Commission. The applicant has refused to allow its wetland consultants to provide Commission staff with any documents and the City has advised

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that a copy of this delineation is not in its administrative record (**Exhibit 30**). Thus, it is not clear that the July 1999 delineation was before the City when it took action.

As noted above, the applicant refused Commission staff access to the project site in advance of this dispute resolution hearing. As a result, the Commission biologist has not visited the site.

3.6.3 Discussion of Potential Wetlands

Under the wetland definition stated in 14 CCR Section 13577(a)(1), the definition for purposes of determining Coastal Commission appeal jurisdiction, wetlands are defined as “land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes . . .” As this definition has consistently been applied by the Commission, the presence of any one of the three Army Corps wetland criteria, wetland hydrology, a predominance of wetland vegetation, or hydric soils, can be sufficient evidence to qualify an area as a wetland. For purposes of the Commission’s appeal jurisdiction over development approved by local government jurisdictions under certified LCPs, any development located within 100 feet of an area meeting the definition in 14 CCR 13577 is appealable to the Commission.⁵

The standard practice for wetland field delineation is contained in the 1987 Corps of Engineers Wetlands Delineation Manual. Guidelines are provided for the field identification of hydrophytic vegetation, hydric soils, and wetland hydrology.

Wetland vegetation is a community characteristic based on the relative frequency of upland and wetland species among the dominant vegetation. A predominance of wetland plants is demonstrated when greater than 50 percent of the dominant species present are listed as FAC, FACW, or OBL in the U.S. Fish and Wildlife Service List of Plant Species That Occur in Wetlands, Region O – California. The estimated likelihood of occurring in wetlands is between 33% and 67% for FAC species, between 67% and 99% for FACW species, and > 99% for OBL species.

Hydric soils are soils that are formed under conditions of saturation, flooding or ponding long enough during the growing season to develop anaerobic conditions in the upper part. The resultant physical and chemical conditions produce characteristic changes in the soil that can be detected in the field. Low chroma colors (due to the leaching and removal of ferrous iron) and redoximorphic features (analogous to rust concentrations) are the two most common field indicators of hydric soils. Flooding or ponding for more than seven consecutive days, the presence of a rotten egg smell, and the accumulation of organic matter also indicate hydric soils.

Wetland hydrology is demonstrated when field indicators of inundation or saturation are present. One “primary” or two “secondary” indicators are required to demonstrate hydrology. The best indicator is the observation of standing water or soil saturation, which is indicated by the accumulation of water in a soil pit. Other “primary” indicators are watermarks and drift lines, which are indicative of inundation and algal mats, which fall under the category “sediment deposits.” Secondary indicators are the presence of oxidized rhizospheres (root channels) associated with living plant roots in the upper 12 inches of the soil, presence of waterstained

⁵ As discussed above, the Section 13577(a) wetland definition is effectively the same as the LUP wetland definition.

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leaves, local soil survey hydrology data for identified soils, and the FAC-neutral test of the vegetation. The FAC-neutral test is the determination of predominance of wetland indicator species after excluding all FAC plants.

Available information, including the initial TRA site survey, the WRA wetland delineations and the various WRA correspondence, the TRA peer review, and the evidence and conclusions presented in the EIR, indicates that at least two areas within 100 feet of the approved development exhibit the presence of all three wetland criteria: (1) the area associated with what the applicant's biologist refers to as the unmaintained "drainage ditch" along Edgemar Road (Wetland Area 1) and (2) the excavated area on the parcel south of Edgemar Road adjacent to the project site (Wetland Area 2). In addition, two other areas on the project site appear to also qualify as wetlands: (1) what WRA's August 1999 delineation characterizes as "upland areas" dominated by arroyo willow that appear to carry winter surface flow and may contain a ponded area (Wetland Area 3) and (2) a wetlands area on the west side of the site (Wetland Area 4).

Discussion:

Following publication of the Commission staff's November 21, 2002 report, Commission staff received a copy of a memorandum from TRA to Michael Josselyn, dated March 11, 2002, summarizing and discussing field observations made by TRA staff during visits to the proposed project site and adjoining Edgemar parcel on March 27, 2001, January 23, 2002, February 5, 2002, and March 8, 2002. The memorandum referenced five photographs of the site, showing observations of very wet conditions, including flowing and standing water, and wetland vegetation (Exhibit 31). The TRA memorandum notes observations of "water at and above the surface of the Bowl site as well as the Fish parcel" during field visits and "evidence of potentially saturated soils, as suggested by surface water lingering for a stretch of multiple days" on sloped areas on days when it had not rained immediately prior to observation. The photos referenced in the memorandum, provided to Commission staff by TRA, show some of the inundated areas (Exhibit 31). The TRA memorandum also notes the presence of "multiple hydrophytic species (including FACW and OBL based on the USFWS plant list) in the area dominated by the arroyo willow, including rushes and California blackberry." The TRA memorandum concludes that, while these observations alone do not determine whether LCP wetlands are present, "the possibility for LCP wetlands [on the project site and adjoining Edgemar parcel] should be re-evaluated." Noting that the LCP wetland definition is broader than the Army Corps definition, TRA further concludes that, in the absence of analysis by a wetland delineator, the EIR "must assume that limited LCP wetlands may be present given [TRA's] recent observations."

The applicant has refused Commission staff's request to visit the project site. As a result, the Commission biologist has been unable to view any of the areas first-hand. Because the applicant has denied the Commission access to the project site, the Commission infers that evidence of Section 13577 wetlands may be present on the site because the applicant apparently believes a site visit would uncover evidence supporting the existence of wetlands. Even without drawing this inference from North Pacifica's reluctance to provide information about the property, the evidence supports a finding that wetlands are present on and adjacent to the project site. Nonetheless, the foregoing inference bolsters such a finding. In the absence of complete information, the Coastal Act requires the Commission to act in a manner protective of coastal

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resources. *See, e.g.*, Public Resources Code § 30009 (the Coastal Act “shall be liberally construed to accomplish its purposes and objectives”).

As discussed below, WRA’s conclusion that the areas associated with what WRA refers to as the unmaintained “drainage ditch” are not LCP wetlands is based on an apparent misunderstanding or misapplication of the provisions of the Coastal Act and 14 CCR Section 13577(a). In determining whether a wetland is protected under the Coastal Act and a LCP, the quality of the wetland is legally irrelevant (Kirkorowicz v. California Coastal Commission, 83 Cal. App. 4th 980 (2000)). The Section 13577(a) wetland definition contains only one exception for man-made features, specifically for “wetland habitat created by the presence of and associated with agricultural ponds and reservoirs” under certain conditions. The fact that certain areas exhibiting wetland criteria may be the result of man-made conditions is not otherwise relevant in applying this definition.

Each of these areas, the evidence showing them to be wetlands under 14 CCR Section 13577, and the applicant’s contentions that they are not wetlands, are discussed in sequence below:

(1) Area South and Immediately Adjacent to Edgemar Road (Wetland Area 1)

The area that WRA refers to as a “drainage ditch” in its March 2000 delineation of the Edgemar Road Parcel qualifies as a wetland under 14 CCR Section 13577. The March 2000 WRA delineation found that all three wetland criteria were present in this area, but that the area was exempt as a drainage ditch excavated in uplands (**Exhibit 25**).⁶ The copy of the WRA March 2000 delineation provided to the Commission by the City is missing the wetland map on page 7 of the report. (The City has advised that it does not have a copy of the map.) However, based on the description of this area in the delineation and in WRA’s March 19, 2002 letter to the City of Pacifica, this area lies within the public right-of-way on the eastern edge of the approximately 50-foot wide Edgemar Road, which straddles the boundary of the Bowl and Edgemar parcels, and is located less than 100 feet from the approved development.

The March 2000 WRA delineation determined that “[a]ll three wetland criteria are present” in this area, based on field work performed on June 11, 1999, but that the area is exempt as a drainage ditch. WRA’s March 19, 2002 letter states that other than a greater prevalence of invasive plants, “the site conditions have remained unchanged” since the date of WRA’s earlier site observations in connection with the delineation.

Wetland hydrology

The applicable data sheet (Plot 2A) attached to WRA’s March 2000 delineation records that “[h]ydrologic indicators [are] present” in this area, including the primary indicators of inundation and saturation of the upper 12 inches of soil (**Exhibit 25**).

⁶ The DEIR concluded based on this information that two, small areas south of Edgemar Road “meet Corps wetland criteria and are thus considered wetlands under the City of Pacifica’s [LCP] criteria” (DEIR, IV-B-2) and that these areas are “within 100 feet of the site” (DEIR, IV-B-13). In the FEIR the City’s prior statements concerning appealability of the development to the Commission were replaced with statements that determination of appealability was outside of the scope of the City’s CEQA determination (FEIR I-3 and III-3).

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WRA's March 19, 2002 letter to the City acknowledges that, although this area may be man-made, it exhibits "prolonged hydrology" (**Exhibit 27**). WRA additionally notes in its March 19, 2002 letter to the City of Pacifica that "[v]egetation and silt has accumulated in the ditch and its drainage has been impaired. Following storm events, water flows over the paved portion of Edgemar Road towards the Bowl parcel downslope of Edgemar Road." WRA further notes that this area "receives water from areas upslope of Edgemar Road including runoff from storm drains along the Pacific Coast Highway" and noted observations of ponding on Edgemar Road from water overflowing from the blocked ditch.

Therefore, the Commission finds that Wetland Area 1 is a wetland as defined by 14 CCR Section 13577 because the area exhibits wetland hydrology.

TRA's March 11, 2002 memorandum notes field observations of water flowing across Edgemar Road made on March 27, 2001, January 23, 2002, and February 5, 2002 and of standing water on both sides of the paved portion of the road on February 5, 2002 (**Exhibit 31**). While the memorandum does not pinpoint the exact location of the water observed, the standing water observed "on both sides of the paved road" on February 5, 2002 indicates observations of standing water in Wetland Area 1, which is located immediately adjacent to Edgemar Road. Photo 4, in particular, referenced in the TRA memorandum, "shows ponding along Edgemar Road on the Fish parcel" that was also observed by TRA staff in March 2000 (**Exhibit 31**).

Wetland vegetation

The data sheet for Plot 2A attached to WRA's March 2000 delineation states that the "[s]ite is dominated by hydrophytic vegetation" and lists the dominant plant species as Arroyo willow (*salix lasiolepis*) (FACW) (**Exhibit 25**). Therefore, the Commission finds that the area adjacent to Edgemar Road is a wetland as defined by 14 CCR Section 13577 because the area supports the growth of hydrophytes.

Hydric soils

The area also has hydric soils. The data sheet for Plot 2A attached to WRA's March 2000 delineation states, "Hydric soil indicators are present" in this area, including an aquic moisture regime and gleyed or low-chroma colors after sampling of 12-inch soil profiles (**Exhibit 25**). Therefore, the Commission finds that Wetland Area 1 is a wetland as defined by 14 CCR Section 13577 because the area has hydric soils.

Conclusion

In June 1999, WRA conducted a wetland delineation of the Edgemar Road Parcel that was described in a March 2000 report. All three wetland criteria were found to be present in this area. Arroyo willow (FACW) made up 100% of the dominant species present, demonstrating a preponderance of hydrophytic vegetation. The soil was characterized as having low chroma colors and an aquic moisture regime (saturated and reduced soils) which are both demonstrative of hydric soils. Finally, wetland hydrology was apparent because the soil was covered with water and saturated in the upper 12 inches. Therefore, since wetland hydrology, wetland vegetation, and hydric soils were present, the Commission finds that this area is a wetland under 14 CCR Section 13577.

Inapplicability of Exception for Agricultural Ponds and Reservoirs Contained in 14 CCR Section 13577

As noted above, WRA found that all three wetland criteria are present at Wetland Area 1, but concluded that the area is not a wetland. In its analysis, WRA erroneously concludes that man-made features, even if satisfying wetland criteria, are exempt from the Section 13577(a) definition.

The Section 13577(a) wetland definition contains only one exception for man-made features, specifically for “wetland habitat created by the presence of and associated with agricultural ponds and reservoirs” under certain conditions. The fact that certain areas exhibiting wetland features may be the result of man-made conditions is therefore not relevant in applying this definition unless these conditions relate to agricultural ponds and reservoirs. In concluding that the area along the Edgemar right-of-way does not constitute a wetland, WRA relies on Appendix D of the Commission’s 1981 Statewide Interpretive Wetland Guidelines, which includes an exception for drainage ditches:

For purposes of identifying wetlands using technical criteria contained in this guideline, one limited exception will be made. That is, drainage ditches as defined herein will not be considered wetlands under the Coastal Act. A drainage ditch shall be defined as a narrow (usually less than 5 feet wide), man-made non-tidal ditch excavated from dry land.

WRA states that since the area was once a drainage ditch, it falls within the 1981 Guidelines drainage ditch exception. However, the 1981 Guidelines were intended as guidance in applying the policies of the Coastal Act prior to LCP certification. Coastal Act Section 30620(a)(3) provides:

Interpretive guidelines designed to assist local governments, the commission, and persons subject to this chapter in determining how the policies of this division shall be applied in the coastal zone prior to the certification of local coastal programs. However, the guidelines shall not supersede, enlarge, or diminish the powers or authority of the commission or any other public agency. [Emphasis added.]

Section 30620(a)(3) of the Coastal Act expressly states that the guidelines are designed to provide assistance in applying the policies of the Coastal Act prior to LCP certification. For purposes of determining appeal jurisdiction over development approved by local governments under a certified LCP, the 1981 Guidelines accordingly do not supersede, enlarge or diminish the Commission’s regulatory authority under the regulations, and in any case, are not applicable in evaluating the presence of wetlands under Section 13577(a). Moreover, Section 13577 of the Commission’s regulations was enacted *after* the 1981 guidelines, and although Section 13577 contains an express exclusion from the definition of wetlands for certain constructed agricultural ponds and reservoirs, it does not contain an exclusion for drainage ditches. To read an additional exception into the regulation would narrow the scope of the definition and contradict its plain wording.

Notably, the applicant’s biological consultant, while applying the 1981 Guidelines exception, himself acknowledges that due to lack of maintenance and siltation the area no longer effectively

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functions as a drainage ditch. For example, as WRA notes in its March 19, 2002 letter, “Vegetation and silt has accumulated in the ditch and its drainage has been impaired. Following storm events, water flows over the paved portion of Edgemar Road towards the Bowl parcel downslope of Edgemar Road.” WRA further notes that the area it refers to as the drainage ditch area “receives water from areas upslope of Edgemar Road including runoff from storm drains along the Pacific Coast Highway” and notes observations of ponding on Edgemar Road from water overflowing from the blocked ditch. These observations indicate that, even if the area in question was originally excavated as a drainage ditch, long neglect has caused it to lose its function as such. Therefore, even if the 1981 Guidelines were applicable in evaluating the presence of wetlands under Section 13577(a) for purposes of determining appeal jurisdiction over development approved by local governments under a certified LCP, it is highly questionable whether as a factual matter the exception referenced in the Guidelines would apply to the area in question because through long lack of maintenance and siltation the area’s function as a drainage ditch has been compromised.

In correspondence to Commission staff, the applicant has also argued that the drainage ditch cannot qualify as a wetland under the holding of Beach Colony II v. California Coastal Commission, 151 Cal. App. 3d 1107 (1984). According to the applicant, this decision provides authority for the rule that wet areas that are the result of human activity or man-made structures do not qualify as wetlands under the Coastal Act. However, Beach Colony II addresses the relationship of the common law doctrine of avulsion to the Coastal Act and applies to the limited circumstance of land that becomes inundated as the result of a sudden, violent event. That decision is not applicable to the conditions on this project site. While the wetland characteristics of certain portions of the project site, including the area characterized by WRA as a drainage ditch, may be the direct or indirect result of human activities, these conditions did not come about as the result of a sudden, violent event and do not come within the sole exception for agriculturally-related constructed features specified in Section 13577(a)(2).

Therefore, as discussed above and based on the presence of all three wetland criteria in this location, the Commission finds that the area characterized by the applicant’s biological consultant as a “drainage ditch” along the eastern edge of the Edgemar Road right-of-way is a wetland within the meaning of 14 CCR Section 13577 and is located within 100 feet of the approved development.

(2) Topographic Depression on Parcel South of Edgemar Road (Wetland Area 2)

WRA’s March 2000 wetland delineation of the Edgemar Road Parcel, located adjacent to the project site, indicates the presence of a second wetland area exhibiting all three wetland criteria located within 100 feet of the approved development (**Exhibit 25**). WRA’s May 22, 2002 comment letter on the DEIR contends that this area is man-made and has low biological value, but does not contradict the results of its earlier delineation (**Exhibit 28**). For the reasons discussed below, the Commission finds that this area is a wetland under 14 CCR Section 13577.

According to information provided by WRA, this second wetland area lies within 100 feet of Edgemar Road. The WRA May 22, 2002 letter attaches a figure showing the wetland area in relation to Edgemar Road and the graded portion of the site and acknowledges that a 100-foot distance, measured from the “center of this pit” (not the upland limit of wetland vegetation, the

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criteria specified for purposes of determining the boundary of a wetland pursuant to 14 CCR Section 13577), intersects Edgemar Road (**Exhibit 28**).

The Edgemar Road right-of-way intersects with Palmetto Avenue and divides the two undeveloped “Fish” and “Bowl” sites. Presently, although some remnants of pavement remain within the right-of-way, Edgemar Road is essentially an unimproved public right-of-way and does not function as a travel way. The entire alignment of Edgemar Road would be improved as part of the development approved by the City on the Bowl site. Improvement of Edgemar Road is necessary to serve the approved development. At this time, no development has been approved on the “Fish” site. Thus, unless development on the “Fish” site is approved in the future, the sole function of Edgemar Road would be to serve the development that is the subject of this dispute.

The applicant argued in comments on the DEIR that the improvement of Edgemar Road was not part of the project. However, the FEIR responded that the proposed improvements to Edgemar Road by any entity, public or private, came within the CEQA Guidelines’ definition of “project” (FEIR, III-17). Since the CDP approved by the City encompasses the proposed repair and re-grading of Edgemar Road, this work also forms part of the approved development for purposes of Coastal Commission review. Based on this information and the results of WRA’s March 2000 delineation, the approved development is located within 100 feet of the boundaries of Wetland Area 2.

The wetland delineation prepared by WRA dated March 2000 for the “Edgemar Road Parcel,” based on data collected on June 11, 1999, recorded field observations indicating this area is characterized by the presence of all three wetland criteria.

Wetland hydrology

The data sheet for Plot 1A attached to WRA’s March 2000 delineation states that hydrologic indicators and algal mats are present, including sediment deposits as a primary indicator of wetland hydrology (**Exhibit 25**). Therefore, the Commission finds that Wetland Area 2 is a wetland as defined by 14 CCR Section 13577 because the area exhibits wetland hydrology.

Wetland vegetation

The data sheet for Plot 1A attached to WRA’s March 2000 delineation states that the “[s]ite is dominated by hydrophytic vegetation” and lists the dominant wetland plant species as *Rumex crispus* (FACW-), *Hordeum brachyantherum* (FACW), *Juncus balticus* (OBL) and *Lotus comiculatus* (FAC) (**Exhibit 25**). Therefore, the Commission finds that the Wetland Area 2 is a wetland as defined by 14 CCR Section 13577 because the area has a predominance of wetland vegetation.

Hydric soils

The data sheet for Plot 1A attached to WRA’s March 2000 delineation states that hydric soil indicators are present in this area, including gleyed or low-chroma colors based on sampling of 12-inch soil profiles (**Exhibit 25**). Therefore, the Commission finds that the Wetland Area 2 is a wetland as defined by 14 CCR Section 13577 because the area has hydric soils.

The Army Corps determined that wetlands identified in Wetland Area 2 did not come under its jurisdiction because of their isolated nature (**Exhibit 26**). The fact that the Army Corps did not find wetlands on the project site that are subject to its jurisdiction under Section 404 of the Clean Water Act is not dispositive of the question, since the definition contained in 14 CCR Section 13577 is broader than the Corps applicable Section 404 definition. The DEIR concluded based on the information in the wetland delineation that two small areas south of Edgemar Road “meet Corps wetland criteria and are thus considered wetlands under the City of Pacifica’s [LCP] criteria” (DEIR, IV-B-2) and that these areas are “within 100 feet of the site” (DEIR, IV-B-13). After the applicant submitted “extensive correspondence” arguing that these wet areas did not qualify as LCP wetlands, the FEIR concluded specifically with respect to this wetland area that “[t]he City has not made a determination as to whether this wet area meets the jurisdictional definition of an LCP wetland and does not need to make such a determination for the EIR” because the area is upslope from the graded area of the project and would not be affected (FEIR, I-4) [emphasis added].

Conclusion

WRA delineated this area as part of its June 1999 fieldwork. The depression at least periodically ponds water and all three wetland criteria are present. The dominant species present were meadow barley (FACW), Baltic rush (OBL), bird-foot trefoil (FAC), and curly dock (FACW). Thus, there was a prevalence of hydrophytic vegetation. The soils had low chroma coloration in association with abundant, distinct mottles (a redoximorphic feature), which satisfies the hydric soil criterion. Hydrology was demonstrated by the presence of sediment deposits, which indicates previous inundation.

Because this area exhibits all 3 wetland criteria as documented in WRA’s March 2000 delineation, the Commission finds that it qualifies as a wetland within the meaning of 14 CCR Section 13577 and is located within 100 feet of the approved development and shown on the attachment to WRA’s May 22, 2002 comment letter.

(3) Ponded Area in Riparian Scrub Vegetation (Wetland Area 3)

The April 1997 TRA initial biological survey concluded, without specifying its exact location, that central coast riparian scrub habitat, that “may be characterized as a wetland,” covered approximately 1.1 acres of the site and adjoining parcel, and determined that wetland species including arroyo willow, twinberry, rushes, sedges, and English ivy were present along with at least “one small pool approximately 4 feet wide x 10 feet long x 1 foot deep” in the riparian scrub habitat. The TRA initial survey, while it did not include a scaled map showing the exact location of this area, described it as being located on the project site. The TRA initial survey recommended a wetland delineation to determine the presence of other wetland criteria (**Exhibit 18**). WRA’s April 30, 1997 letter to the Syndicor Real Estate Group, documenting WRA’s April 28, 1997 site visit also notes areas of central coast riparian scrub habitat on the site that “are dominated by wetland plants and therefore warrant a more in-depth inspection to determine the presence of the other two criteria [hydric soils and wetland hydrology] necessary for a federal jurisdictional wetland” and concludes that wetland hydrology may also be present on the site (**Exhibit 19**). WRA’s August 1999 wetland delineation for the Pacifica Cove Parcel makes no mention of this area.

WRA's December 27, 1999 letter recognized one area dominated by arroyo willow and one area dominated by twinberry on the project site, but erroneously concluded that the site did not contain LCP wetlands because both of these species are classified as facultative (FAC) species, equally likely to occur in uplands and wetlands, and only secondary indicators of wetland hydrology and no hydric soils were present (**Exhibit 22**). (Secondary indicators of wetland hydrology are not as significant an indication as primary indicators.) In fact, arroyo willow is a facultative wet (FACW) species, found 67% to 99% of the time in wetlands, and not a FAC species as stated by WRA. The Army Corps determined that no Corps jurisdictional wetlands were present on the project site (**Exhibit 23**). However, the fact that the Army Corps did not find wetlands on the project site that are subject to its jurisdiction under Section 404 of the Clean Water Act is not dispositive of the question, since the definition contained in 14 CCR Section 13577 is broader than the Corps applicable Section 404 definition.

TRA's January 24, 2000 peer review of the December 27, 1999 WRA LCP wetland delineation letter documents several discrepancies in WRA's application of the LCP definition. The peer review notes that WRA's LCP analysis ignores evidence of hydric soils found by the July 1999 WRA delineation. The TRA peer review also observes that WRA's LCP analysis finds only the facultative species willow and twinberry to be dominant in areas on the site, where the July 1999 WRA delineation had found several obligate and facultative plant species to be dominant. The Commission has been unable to obtain a copy of the referenced July 1999 WRA delineation as the applicant has refused to allow its wetland consultants to provide Commission staff with documentation and the City did not have a copy of this delineation (**Exhibit 30**).

The March 11, 2002 TRA memorandum includes extensive observations of wet conditions and wetland vegetation in Wetland Area 3 made by TRA staff during visits to the proposed project site on March 27, 2001, January 23, 2002, February 5, 2002, and March 8, 2002 (**Exhibit 31**). The TRA memorandum notes observations of "evidence of potentially saturated soils, as suggested by surface water lingering for a stretch of multiple days" on days when it had not rained immediately prior to observation in this area. Photographs of the site, referenced in the memorandum, show observations of very wet conditions, including flowing and standing water, and wetland vegetation (**Exhibit 31**). The TRA memorandum concludes that, while these observations alone do not determine whether LCP wetlands are present, "the possibility for LCP wetlands should be re-evaluated."

Wetland hydrology

As noted above, TRA's April 1997 initial biological survey recorded observations of at least "one small pool approximately 4 feet wide x 10 feet long x 1 foot deep" in the riparian scrub habitat on the project site, without specifying its exact location. The August 1999 WRA wetland delineation included no discussion of this area. The observations noted in TRA's initial survey indicate areas that were inundated or saturated for periods of long duration, which are primary indicators of wetland hydrology. The March 11, 2002 TRA memorandum includes extensive observations of wet conditions in Wetland Area 3 made by TRA staff during visits to the proposed project site on March 27, 2001, January 23, 2002, February 5, 2002, and March 8, 2002. This memorandum recounts that on March 27, 2001, the TRA field investigator "observed water seeping across the portion of Edgemar Road that winds into the willow/riparian area, and noted that water had pooled in small depressions in this sloped area. Photo 1 shows some dark streaks on Edgemar Road." On January 23, 2002, TRA staff "observed very wet conditions in

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the riparian scrub area. Photo 2 shows sheet water flowing across Edgemar Road . . .” On February 5, 2002, TRA staff “observed wet conditions, including water flow across the same part of Edgemar Road, and standing water on both sides of the paved road. Photo 3 shows the same sheet flow as that observed on 1/23/02 . . . “ On March 8, 2002, TRA staff “noted saturation of soil on the up-slope side of arroyo willows on the Bowl site.” These observations that the area is subject to inundated or saturated for periods of long duration are primary indicators of wetland hydrology. Therefore, the Commission finds that Wetland Area 3 is a wetland as defined by 14 CCR Section 13577 because the area exhibits wetland hydrology.

Wetland vegetation

TRA’s April 1997 initial biological survey determined that wetland species including arroyo willow, twinberry, rushes, sedges, and English ivy were present in this area (**Exhibit 18**). In addition, WRA’s April 30, 1997 letter to the Syndicor Real Estate Group, documenting WRA’s April 28, 1997 site visit also notes areas of central coast riparian scrub habitat on the site that “are dominated by wetland plants . . .” (**Exhibit 19**). The TRA January 24, 2000 peer review notes that WRA’s December 27, 1999 LCP analysis found only the facultative species willow⁷ to be dominant in this area on the site, where the July 1999 WRA delineation had found several obligate and facultative plant species to be dominant. The Commission has been unable to obtain a copy of the referenced July 1999 WRA delineation.⁸ The March 11, 2002 TRA memorandum notes observations of wetland vegetation in Wetland Area 3 made by TRA staff during visits to the proposed project site in 2001 and 2002. The TRA memorandum notes the presence of “multiple hydrophytic species (including FACW and OBL based on the USFWS plant list) in the area dominated by the arroyo willow, including rushes and California blackberry.” On their March 5, 2002 site visit, TRA staff noted the obligate wetland species *Juncus effusus* “in areas just upslope as well as adjacent to the willows on the Bowl site.” Based on the available evidence, the Commission finds that Wetland Area 3 is a wetland as defined by 14 CCR Section 13577 because the area has a predominance of wetland vegetation.

Hydric soils

The TRA January 24, 2000 peer review makes reference to evidence of hydric soils found by the July 1999 WRA delineation. As noted, the Commission has been unable to obtain a copy of the referenced July 1999 WRA delineation, but assumes in the absence of any contradictory evidence that the reference is accurate. Because the applicant has refused to allow the Commission’s Biologist to examine WRA’s July 1999 Wetland Delineation and to visit the site, the Commission relies on the January 24, 2000 TRA Review. Therefore, the Commission finds that Wetland Area 3 is a wetland as defined by 14 CCR Section 13577 because available evidence indicates that the area meets the hydric soils criteria.

Conclusion

The available evidence weighs in favor of a finding that portions of the riparian scrub habitat on the site qualify as wetlands under 14 CCR Section 13577 because of the presence of wetland

⁷ Arroyo willow (*salix lasiolepis*) is classified as FACW not FAC.

⁸ The applicant has refused to allow its wetland consultants to provide the Commission with copies of the July 1999 delineation, and the City did not have a copy of this delineation in its files. The August 1999 delineation of the project site does not record any observations of obligate wetland species, and does not explain the reason for revisions deleting such observations contained in the earlier July 1999 delineation.

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vegetation and wetland hydrology and the likely presence of hydric soils. As noted above, the fact that the Army Corps did not find wetlands on the project site that are subject to its jurisdiction under Section 404 of the Clean Water Act is not dispositive of the question, since the definition contained in 14 CCR Section 13577 is broader than the Corps' applicable Section 404 definition. The fact that the applicant has denied the Commission access to the project site further supports the Commission finding that evidence of Section 13577 wetlands exists on the site because the applicant apparently believes a site visit would provide additional evidence that wetlands are present on the site. In the absence of complete information, the Coastal Act requires the Commission to act in a manner protective of coastal resources.

The April 1997 TRA initial biological survey identified a wetland area in the stand of willows that extends from the southeastern portion of the Pacifica Cove parcel across Edgemar Road onto the eastern portion of the Edgemar property. The exact location was not specified and no map was provided in the report. This area meets at least two of the standard wetland criteria. Arroyo willow (FACW) was the only dominant plant species. Thus, hydrophytes are predominant at the site. Associated species included twinberry (FAC), rushes and sedges (generally FACW or OBL), and English ivy (not listed). Although the commission's Biologist has not been afforded the opportunity to review the supporting evidence, the only information available to the Commission at the time supports the determination that hydric soils are present at the area. A pond about 4 ft x 10 ft x 1-ft deep was present, which meets the hydrology criterion. The Commission finds that both a preponderance of hydrophytic vegetation and wetland hydrology were present and that this area is a wetland under CCR Section 13577. Therefore, based on the available evidence, the Commission accordingly finds that central coast riparian scrub and willow habitat described in the April 1997 TRA initial biological survey, located on the project site, is a wetland within the meaning of 14 CCR Section 13577 and is located within 100 feet of the approved development.

(4) Wetlands Area on the West Side of the Site (Wetland Area 4)

WRA's August 1999 report based on data collected on June 11, 1999 identified a wetland area on the west side of the site that met all three standard wetland criteria. The wetland delineator recorded the presence of oxidized rhizospheres and algal mats, which are demonstrative of wetland hydrology; the presence of low chroma colors associated with redoximorphic features and organic streaking, which are demonstrative of hydric soils; and a single dominant plant, twinberry (FAC), which is demonstrative of a predominance of hydrophytic vegetation. WRA's August 1999 wetland delineation of the Pacifica Cove parcel, based on field information collected on June 11, 1999, identified a wetland area on the west side of the site meeting all three ACOE jurisdictional criteria that "had two secondary hydrology indicators, oxidized root channels and algal mats" present, was "dominated by hydrophytic vegetation," particularly, twinberry (*Lonicera invulcrata*) (FAC), and "had hydric soils indicators present."

However, when wetland delineators from the Army Corps of Engineers visited the site on November 29, 1999, they found no field evidence of any one of the standard wetland criteria. The Army Corps concluded, despite WRA's initial observations indicating the presence of all three wetland indicators, that this area did not qualify as a wetland for purposes of Army Corps jurisdiction (**Exhibit 23**). To resolve this discrepancy, the Commission Biologist discussed the matter with Dan Martel, a senior delineator for the Corps who was present on the November site visit. Mr. Martel found that the soil colors were higher in chroma than those characteristic of

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hydric soils and that redoximorphic features were not present in the soils. Similarly, he could find no evidence of the hydrology indicators that had previously been reported, despite the fact that algal mats are persistent and relatively obvious features. Mr. Martel did find that twinberry was present, but that the community character of the vegetation was upland, although small patches may have been dominated by twinberry. The Commission Biologist concluded that the initial reporting of hydrology and hydric soil indicators was probably due to inexperience on the part of the delineator and was in error. Although small patches may be mostly twinberry, this indicator species is in the frequency class FAC, which means that it is expected to occur in uplands and wetlands with equal probability. Given the site characteristics described by Mr. Martel, the small depression appears to be upland and twinberry is apparently not acting as a hydrophyte in this situation.

TRA's January 24, 2000 peer review of the December 27, 1999 WRA LCP wetland delineation letter, however, documents several discrepancies in WRA's application of the LCP definition. Although it accepts WRA's premise that areas considered "drainage ditches" are not wetlands falling within ACOE's jurisdiction, the peer review notes that WRA's LCP analysis ignores the hydric soils found by the July 1999 WRA delineation. The TRA peer review also observes that WRA's LCP analysis finds only the facultative species willow and twinberry to be dominant in areas on the site where the July 1999 WRA delineation had found several obligate and facultative plant species to be dominant. Without a site visit by Commission staff, the Commission cannot rule out the possibility that the area is a wetland under 14 CCR Section 13577.

Wetland hydrology

Field observations noted in the August 1999 WRA wetland delineation record the presence of secondary indicators of hydrology, including oxidized root channels in the upper 12 inches of soil. As discussed above, the Commission biologist's conversations with the Army Corps wetland specialist who visited the site call these observations into question.

Wetland vegetation

Field observations recorded in the August 1999 WRA wetland delineation indicate a predominance of hydrophytic vegetation, specifically, twinberry (*Lonicera involucrata*) (FAC) (Plot 1A).

The TRA January 24, 2000 peer review notes that WRA's December 27, 1999 LCP analysis found only the facultative species twinberry to be dominant in areas on the site, where the July 1999 WRA delineation had found several obligate and facultative plant species to be dominant. The Commission has been unable to obtain a copy of the referenced July 1999 WRA delineation to explain this inconsistency. Without the July 1999 WRA delineation, the Commission is unable to verify these conclusions.

Hydric soils

Field observations recorded in the August 1999 WRA wetland delineation state the presence of hydric soil indicators, including gleyed or low chroma colors, organic streaking in sandy soils, and common, faint mottles in 12-inch soil profiles (Plot 1A). As discussed above, the

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Commission biologist's conversations with the Army Corps wetland specialist who visited the site call these observations into question.

Conclusion

As noted, the applicant has denied Commission staff the opportunity to visit the site. A site visit by the Commission Biologist would be desirable to resolve inconsistencies in the evidence contained in the file documents and independently confirm the wetland status of this area under 14 CCR Section 13577.

3.6.4 Proximity of Development to Wetlands

As discussed above, the property contains wetlands that meet the definition of wetlands in the Coastal Act and Section 13577 of the Commission's regulations as well as the definition contained in the certified LCP.

Wetland Area 1, the area south and immediately adjacent to Edgemar Road, is within 50 feet of Edgemar Road and within 100 feet of the project site. Wetland Area 2, the topographic depression on the parcel south of Edgemar Road, is 100 feet from Edgemar Road. The project site also includes Wetland Area 3, the ponded area in riparian scrub vegetation and Wetland Area 4, located on the western side of the site.

In addition to subdivision of the site, which is development within 100 feet of Areas 1, 3 and 4, the approved development includes clearing and grubbing of the entire site i.e. clearing of major vegetation (development) within 100 feet of Areas 1, 3 and 4. In addition, the development includes grading of the entire site, which is also development within 100 feet of Areas 1, 3 and 4. The development also includes construction of internal roads and other infrastructure and buildings within 100 feet of Wetland Areas 3 and 4 (and probably 1). Finally, the approved development includes the reconstruction/improvement of Edgemar Road within 100 feet of Areas 1 and 2.

In addition to the physical development of the property, "development" approved by the City includes a subdivision of the entire property. Section 30106 of the Coastal Act defines development, in part, as:

"Development" means, on land, change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code).

Similarly, Zoning Code Section 9-4.4302(z) of the City of Pacifica certified LCP defines development, in part, as:

"Development" shall mean on land, or in or under water within the Pacifica Coastal Zone, the following:

...

(4) A change in the density or intensity of use of land, including subdivisions and any other division of land, except where a division occurs as a result of a purchase by a public agency for public recreational use;

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Thus, the definition of "development" contained in the Coastal Act and the Pacifica LCP includes more than just physical development such as residential construction; the definition also includes non-physical changes such as changes to the density and intensity of use of land.

The overall subdivision of the entire property approved by the City of Pacifica constitutes "development" under both the Coastal Act and the City of Pacifica certified LCP. The subdivision approved by the City of Pacifica will change the intensity and density of use of the entire property, including Wetland Area 1 and Wetland Area 2 that contain undisputed wetlands. In other words, as approved by the City, "development" within the meaning of the Coastal Act and LCP will occur on the entirety of this property. Therefore, the Commission finds that since the entire property, including both the wetland and non-wetland areas, is subject to subdivision, the approved development will occur within 100 feet of a wetland as required by Section 30603(a)(2) of the Coastal Act. Therefore, the City's action approving the coastal development permit is appealable to the Commission pursuant to Section 30603(a)(2) of the Coastal Act.

3.7 Location Within 300 Feet of the Top of a Coastal Bluff

Coastal Commission staff originally informed the City and the applicant that the City's action might be appealable to the Commission under Coastal Act Section 30603(a) on the separate ground that the development approved by the local government was located within 300 feet of the top of a seaward facing coastal bluff. Further evaluation of the site in light of the applicable regulations indicates that the development approved by the local government does not appear to be located within 300 feet of a coastal bluff, as defined in the Commission regulations.

Section 13577(h) defines "coastal bluff" as follows:

- (1) those bluffs, the toe of which is now or was historically (generally within the last 200 years) subject to marine erosion; and
- (2) those bluffs, the toe of which is not now or was not historically subject to marine erosion, but the toe of which lies within an area otherwise identified in Public Resources Code Section 30603(a)(1) or (a)(2).

"Bluff line or edge" is defined by the same provision as follows:

[T]he upper termination of a bluff, cliff, or seacliff. In cases where the top edge of the cliff is rounded away from the face of the cliff as a result of erosional processes related to the presence of the steep cliff face, the bluff line or edge shall be defined as that point nearest the cliff beyond which the downward gradient of the surface increases more or less continuously until it reaches the general gradient of the cliff. In a case where there is a step like feature at the top of the cliff face, the landward edge of the topmost riser shall be taken to be the cliff edge. The termini of the bluff line, or edge along the seaward face of the bluff, shall be defined as a point reached by bisecting the angle formed by a line coinciding with the general trend of the bluff line along the seaward face of the bluff, and a line coinciding with the general trend of the bluff line along the inland facing portion of the bluff. Five hundred feet shall be the minimum length of bluff line or edge to be used in making these determinations.

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At the southern end of the bluff area west of Palmetto Avenue in the vicinity of the project site, there is a deep, vegetated gully that extends inland from the bluff at roughly a right angle to the general trend of the bluff line along the seaward face of the bluff. Applying the definition of “bluff line or edge” stated in Section 13577(h), the point reached by the angle bisecting the line coinciding with the general trend of the bluff line along the seaward face of the bluff and a line coinciding with the general trend of the bluff line along the gully would lie roughly along the general trend of the bluff line and greater than 300 feet from the project. For this reason, the City’s action does not appear to be independently appealable on this ground.

3.8 Conclusion

The Commission finds that development approved by the City under CDP-203-01 is: (1) located between the sea and the first public road paralleling the sea and (2) within 100 feet of wetlands as defined in 14 CCR Section 13577. Therefore, the City’s action approving CDP-203-01 is appealable to the Commission under Sections 30601(a)(1) and 30603(a)(2) of the Coastal Act.

The City’s certified LCP provides that the decisions of the approving authority on an application for a development appealable to the Coastal Commission shall become final and effective only after the appeal period to the Commission has expired and no appeal has been filed. In addition, the City’s certified LCP mirrors the requirements of Section 13572 of the Commission’s regulations that if the notice of final action is defective and does not contain certain required information, the permit decision will be stayed and will not become effective. In the case of the City’s approval, the City did not submit a valid notice of final local action. Therefore, pursuant to the Pacifica Zoning Code and section 13572 of the Commission’s regulations, as the notice of final local action was defective with respect to the City’s approval, the City’s action to approve a permit authorizing such appealable development is not effective.

EXHIBITS

1. Regional Location Map
2. Site Map
3. City of Pacifica Notice of Final Local Action on CDP-203-01
4. Letter from Peter Imhof to Michael Crabtree, City of Pacifica, dated August 23, 2002
5. Letter from Keith Fromm, North Pacifica, LLC, to Peter Imhof, dated September 9, 2002
6. Letter from Jaquelynn Pope, Warshaw & Pope, to Peter Imhof, dated September 10, 2002
7. Letter from Cecilia M. Quick, City of Pacifica City Attorney, to Peter Imhof, dated September 11, 2002
8. Letter from Keith Fromm, North Pacifica, LLC, to Chris Carr [sic], dated September 13, 2002
9. Letter from Peter Imhof to Michael Crabtree, City of Pacifica, dated September 17, 2002

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10. Letter to Keith Fromm, North Pacifica LLC, from Peter Imhof, dated September 17, 2002
11. Letter from Keith Fromm, North Pacifica, LLC, to Peter Douglas and Peter Imhof, dated September 23, 2002
12. Letter from Keith Fromm, North Pacifica, LLC, to Chris Kern, dated September 23, 2002
13. Letter from Keith Fromm, North Pacifica, LLC, to Peter Imhof, dated October 2, 2002
14. Letter from Keith Fromm, North Pacifica, LLC, to Peter Imhof, dated October 4, 2002
15. Letter from Keith Fromm, North Pacifica, LLC, to Peter Imhof, dated October 7, 2002
16. Commission staff comment letter on Notice of Preparation of EIR, dated October 4, 2001
17. Commission staff comment letter on draft EIR, dated May 3, 2002
18. TRA Initial Biological Survey, dated April 1997
19. Letter from WRA to the Syndicor Real Estate Group, dated April 30, 1997
20. WRA Wetland Delineation for the "Pacific Cove Parcel," dated August 1999
21. WRA revised jurisdictional wetlands map, dated November 30, 1999
22. Letter from WRA to the City of Pacifica, dated December 27, 1999
23. Letter from C. Fong, ACOE, to T. Fraser, WRA, dated January 3, 2000
24. Memorandum from Taylor Peterson, TRA, to Allison Knapp, City of Pacifica, dated January 24, 2000
25. WRA Wetland Delineation for the "Edgemar Road Parcel," dated March 2000
26. Letter from C. Fong, ACOE, to T. Fraser, WRA, dated May 11, 2001
27. Letter from WRA to the City of Pacifica, dated March 19, 2002
28. Letter from WRA to the City of Pacifica, dated May 22, 2002
29. Memorandum from Commission Biologist John Dixon to Peter Imhof, et al., dated November 21, 2002
30. Letter from Robert J. Kalmbach, North Pacifica LLC to Peter Imhof, dated November 22, 2002
31. Memorandum from Eben Polk, TRA, to Michael Josselyn, dated March 22, 2002.

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32. North Pacifica LLC Brief Number One
33. North Pacifica LLC Brief Number Two
34. North Pacifica Request for Subpoenas
35. November 18, 2005 letter from Christopher Pederson to Jaquelynn Pope regarding Request for Subpoenas
36. November 16, 2005 letter from Jaquelynn Pope to Joel Jacobs requesting Commission hearing procedures
37. November 17, 2005 letter from Jaquelynn Pope to Joel Jacobs requesting Commission hearing procedures
38. November 18, 2005 letter from Christopher Pederson to Jaquelynn Pope regarding Commission hearing procedures
39. November 17, 2005 letter from Jaquelynn Pope to Joel Jacobs regarding alleged misrepresentations
40. 2005 Supplemental Declaration of Keith Fromm (**REMOVED**)
41. December 22, 2004 Court of Appeal Decision North Pacifica LLC v. California Coastal Commission

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**December 2, 2005****To: Coastal Commissioners and Interested Persons****From: Peter Douglas, Executive Director
Charles Lester, Deputy Director
Chris Kern, District Manager****Subject: ADDENDUM to Staff Report for 2-02-02-EDD (North Pacifica LLC)**

North Pacifica has asserted a number of procedural and legal objections to this dispute resolution proceeding in submittals received shortly before and after the finalization of the staff report. The staff report responds to some objections, such as North Pacifica's arguments regarding the standard of review that the Commission should apply and the evidence that the Commission may consider. This addendum responds to North Pacifica's other objections.

The Personal Involvement of Executive Director Peter Douglas and the Delegation of Executive Director Authority to Commission Staff

North Pacifica argues that because Section 13569 of the Commission's regulations refers to the "executive director" making determinations and conducting investigations, the Commission may not hold a dispute resolution hearing pursuant to Section 13569 unless the executive director has personally made those determinations and investigations. This is incorrect. Public Resources Code Section 30335 requires the Commission to prescribe the duties of the executive director. The Commission has done this through the promulgation of regulations, which establish numerous executive director responsibilities. The regulations, however, also expressly allow the executive director to delegate the performance of *any* executive director functions except as specifically provided by Commission resolution. 14 C.C.R. § 13032(b). The regulations do not require that the delegation of functions be done in a particular manner or reduced to writing. No Commission resolution specifically prohibits the executive director from delegating functions established in Section 13569.

Through long-established practice, the executive director has delegated most functions regarding Commission staff review of permit applications, permit appeals, and related procedures such as the resolution of disputes with local governments regarding the appealability of local coastal development permits. This includes review of local government notices regarding permit applications, final local actions on permit applications, and determinations by Commission staff regarding the appealability of local CDPs. The executive director, of course, retains responsibility for ensuring that delegated functions are properly executed. *See* 14 C.C.R. § 13032(b).

In this instance, Commission staff reviewed the final local action notice and documents in the Commission's possession regarding the presence of wetlands on or near the Pacifica Bowl site, as well as other information relevant to determining the appealability of the City's approval. Pursuant to longstanding practice, Commission staff notified the City of the deficiency in the final local action notice and subsequently of the determination regarding the appealability of the project. Executive Director Peter Douglas and Commission staff recall having discussed early in the process the dispute regarding the appealability of the North Pacifica project and the grounds for determining that the local approval of the project is appealable. Executive Director Douglas did in fact review the issues and agreed that the project is appealable and that the Commission should proceed with dispute resolution pursuant to Section 13569.

Because Commission staff acted pursuant to the delegated authority of the executive director, the requirements of Section 13569 regarding executive director investigations and determinations are satisfied. Moreover, Executive Director Douglas, in consultation with Commission staff, has in fact determined that the North Pacifica project is appealable.

Other Procedural and Jurisdictional Objections

North Pacifica also argues that the Executive Director did not have the authority to commence this dispute resolution proceeding absent a formal request from the applicant, the City, or another interested person; that the proceeding could not be commenced after the local government had already taken final action; that the Commission lost jurisdiction by not acting on the appeal submitted by John Curtis within 49 days; and that the Commission otherwise did not have the authority to conduct a dispute resolution proceeding regarding North Pacifica's project. The court of appeal rejected all of these arguments and held that the Commission is "empowered to hold an appealability hearing." *North Pacifica LLC v. California Coastal Commission*, California Court of Appeal, First Appellate District, Case No. A101434, slip op. at 7 (**Exhibit 41**).

North Pacifica further argues that the Coastal Commission's sole remedy was to file suit against the City, that the City's action is administrative res judicata because the Commission did not file a timely lawsuit against the City, and that the Commission is barred from challenging the City's action because the Commission did not file suit challenging findings in the Final Environmental Impact Report (FEIR) that North Pacifica contends establish that the project is not appealable. The court of appeal decision that the Commission has the authority to conduct an appealability hearing disposes of North Pacifica's argument that the Commission's sole remedy was to file suit against the City. In addition, as discussed in the staff report, the FEIR expressly declined to reach any conclusions regarding the appealability of the project.

North Pacifica also argues that it has not received adequate notice regarding the dispute resolution hearing. For hearings regarding permit applications and appeals, the Commission's regulations require the Commission to mail notice to all interested persons at least 10 days in advance of the hearing. 14 C.C.R. § 13063(a). The Commission mailed notice and a copy of the staff report to North Pacifica on November 29, 2005, substantially earlier than required by the Commission's regulations.

North Pacifica Allegations Regarding Commission Bias

North Pacifica makes a variety of claims in support of its argument that it cannot obtain a fair hearing in this matter because of Commission bias. As an initial matter, North Pacifica presented a number of bias arguments to the court of appeal, and to the trial court in the second action. Both courts rejected the bias arguments, and ruled in favor of the Commission. Nonetheless, North Pacifica is repeating many of those arguments here.

North Pacifica argues now that the manner in which the Commission has litigated the three lawsuits that North Pacifica has filed against the Commission and Commission employees demonstrates Commission bias regarding the appealability of North Pacifica's project. This is incorrect. The Commission's arguments in these lawsuits have been intended to protect the Commission's authority to conduct the dispute resolution hearing, not to determine what the outcome of the hearing should be. The Commission sought a temporary restraining order against North Pacifica in the fall of 2003 in order to prevent clearing and grubbing of the Pacifica Bowl site. The Commission argued that because the local coastal development permit was suspended pending resolution of the dispute regarding appealability, the clearing and grubbing activity would be unpermitted development in violation of the Coastal Act. The Commission also sought to preserve the status quo pending resolution of the litigation regarding the status of the local CDP. The superior court did not grant the Commission's request for a temporary restraining order (and the Commission dismissed the underlying complaint), but the court of appeal subsequently agreed with the Commission that the local CDP was suspended pending resolution of the dispute.

North Pacifica also argues that the Commission is biased because it has discussed North Pacifica's lawsuits against the Commission and Commission employees in closed session, has authorized the Attorney General's Office to represent the current and former Commission employees whom North Pacifica has sued, and would allegedly be liable for damages if the Commission decides the project is not appealable.

North Pacifica's arguments, if accepted, would allow any person to sue the Commission or its employees and then argue that the Commission may not act on the subject matter of the litigation if the Commission exercises its legal right and obligation to defend itself and its employees. In any event, the Commission is entitled to discuss pending litigation in closed session and is obligated to defend its employees against lawsuits challenging conduct within the scope of their employment. The right of the Commission to consult with its attorneys regarding pending litigation in no way establishes Commission bias regarding actions that it has not yet taken.

North Pacifica's allegations regarding the Commission's potential financial liability if it acts one way or another also fail to establish bias. As an initial matter, North Pacifica's contention that the Commission will be liable for damages caused by project delay if the Commission determines the project is not appealable lacks merit. Through its aggressive litigation strategy, North Pacifica is responsible for the delays in holding the dispute resolution hearing. Moreover, any delay caused by the dispute resolution procedure would not give rise to liability under California or federal law. In addition, it is not unusual for applicants or other interested persons to argue that the Commission's actions may expose itself to liability. The Commission

nonetheless acts on the basis of the law and the facts in the record before it. The threat of financial liability, therefore, does not establish Commission bias.

North Pacifica also argues that the Commission has improperly commingled its adjudicatory function with investigatory, advisory, and prosecutorial roles. This, too, is incorrect. Commission staff has engaged in investigations and made recommendations to the Commission regarding the appealability of the project. The Commission itself has not engaged in those roles. In the dispute resolution hearing, the Commission will adjudicate whether the project is appealable in light of the evidence and arguments put forward by Commission staff, North Pacifica, and other interested persons.

Finally, it is important to note that North Pacifica does not claim that any commissioners have a personal financial interest in the decision or that any commissioners have made any past statements or engaged in any other activity that creates the appearance of a conflict or bias.

North Pacifica Submittals That Disclose Attorney Work Product

As of the date of this addendum, North Pacifica has submitted three documents in connection with this proceeding – Brief 3, Brief 4, and a letter from Keith Fromm to Deputy Attorney General Joel Jacobs dated November 22, 2005 -- that disclose confidential attorney work product of the Commission's litigation counsel. North Pacifica obtained a copy of the attorney work product through discovery in litigation North Pacifica filed against the City of Pacifica relating to this project. In that litigation the court issued a protective order strictly limiting North Pacifica's use of the work product document. The Attorney General's Office and subsequently Commission staff counsel informed North Pacifica that documents that disclose confidential attorney work product that is the subject of the protective order would not be distributed to Commissioners or put in the administrative record (**Exhibits 48 and 49**). Both letters also informed North Pacifica that, if it submitted revised versions of the documents that do not disclose the attorney work product, the revised versions would be distributed to Commissioners and placed in the public record. To date, North Pacifica has not submitted revised versions of the documents.

The Commission has filed a motion for sanctions against North Pacifica for violations of the protective order. The hearing on the motion is scheduled for Wednesday, December 14, 2005. Once the court rules, staff will consider the matter further in light of the ruling.

The supplemental declaration of Keith Fromm that is listed as Exhibit 40 of the staff report was not attached to copies of the staff report that were distributed to members of the public because the declaration contained confidential communications among the City of Pacifica's attorneys (**Exhibit 45**). Shortly before the mailing of copies of the staff report to the public, the City of Pacifica objected to the distribution of the document, and so staff delayed mailing the document in order to consider the City's objection. Shortly thereafter, however, the City withdrew its objection to the declaration (**Exhibit 47**). Accordingly, the supplemental declaration, including all exhibits, is attached to the addendum.

North Pacifica Request for Discovery, Cross-Examination, and Voir Dire

North Pacifica has requested that the Commission issue subpoenas for documents relating to this matter and that it be given the opportunity to conduct depositions, cross-examine witnesses, and to question Commissioners regarding potential bias. The Commission's regulations do not provide for such procedures and the authorities cited by North Pacifica do not apply to the Commission. North Pacifica, however, has had multiple opportunities to inspect the Commission's file on this proceeding. In addition, in response to Public Records Act requests, the Commission allowed North Pacifica to inspect numerous documents, including the files for other Section 13569 dispute resolution proceedings (**Exhibit 42**).

EXHIBITS

[NOTE: Some of the pages from Exhibit Numbers 19, 20, and 25 were inadvertently left out of the November 23, 2005 Staff Report due to a reproduction error. As such, these exhibits are provided in their entirety with this addendum.]

19. Letter from WRA to Syndicor Real Estate Group, dated April 30, 1997
20. WRA Wetland Delineation for the "Pacific Cove Parcel," dated August 1999
25. WRA Wetland Delineation for the "Edgemar Road Parcel," dated March 2000
40. 2005 Supplemental Declaration of Keith Fromm including exhibits (removed from the November 23, 2005 staff report)
42. November 18, 2005 letter from Christopher Pederson to Jaquelynn Pope regarding Public Records Act requests
43. November 22, 2005 letter from Chris Kern to Keith Fromm regarding site visit
44. November 28, 2005 letter from Keith Fromm to Chris Kern regarding site visit
45. November 28, 2005 letter from Patrick McMahon to Chris Kern regarding objection to North Pacifica exhibit
46. November 29, 2005 letter from Jaquelynn Pope and Keith Fromm to Patrick McMahon regarding objection to North Pacifica exhibit
47. November 30, 2005 letter from Patrick McMahon to Chris Kern withdrawing objection to North Pacifica exhibit
48. November 18, 2005 letter from Joel Jacobs to Jacqueline Pope and Keith Fromm regarding attorney work product

2-02-02-EDD Addendum (Pacifica Bowl)

49. December 1, 2005 letter from Christopher Pederson to Jaquelynn Pope and Keith Fromm regarding attorney work product
50. North Pacifica Supplemental Brief to Brief Number Two