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Prepared June 28, 2019 (for July 11, 2019 hearing)

To: Coastal Commissioners and Interested Persons

From: John Ainsworth, Executive Director
Dan Carl, Central Coast District Director
Katie Butler, Coastal Planner

Subject: **Dispute Resolution 3-19-0569-EDD (Cal-Am MPWSP Appealability).** Public hearing and Commission determination on dispute over appealability (pursuant to California Code of Regulations, Title 14, Section 13569) of the coastal development permit (CDP) denied by the City of Marina for components of the Monterey Peninsula Water Supply Project in the City's jurisdiction.

STAFF NOTE

California American Water's (Cal-Am's) proposed Monterey Peninsula Water Supply Project (MPWSP) has been locally controversial for many years, and there are a variety of viewpoints on the merits of that project. At the same time the question before the Commission for this dispute resolution hearing is *not* about the merits of that project. Rather, the question before the Commission in this hearing is narrowly focused on whether the City of Marina's decision on the project's local CDP is directly appealable to the Coastal Commission. As a result, the Commission will *not* take testimony regarding the merits of the project, but will *only* take testimony that is focused to the procedural question of appealability. All interested parties, including the City and Cal-Am, are advised to focus any input solely to the question of appealability for this hearing, and are further advised that any other type of input is inappropriate. If the Commission concurs with the Executive Director (and determines that the City's action is directly appealable to the Commission), then the CDP appeal itself will be agendaized for a public hearing at a later date (and at a future Commission meeting, not in July), at which time it will be appropriate for the merits of the project in relation to the City's denial to be debated. If the Commission concurs with the City, and determines that the City's action is not appealable, then the City's CDP denial will stand.

SUMMARY OF STAFF RECOMMENDATION

After a local coastal program (LCP) is certified by the Coastal Commission, the certified local government takes on the primary CDP processing role, including making determinations

regarding appealability of CDPs. However, some local government CDP processing decisions, such as whether a local CDP decision is appealable to the Commission, may be challenged, as specified in the Commission's regulations. When a processing decision is challenged, the Commission's regulations (and many LCPs, consistent with the Commission's regulations) require the local government to consult with the Commission's Executive Director. If the local government and the Executive Director agree on CDP processing procedures, then those procedures apply. If they do not agree, then the Coastal Commission is responsible for resolving the disagreement at a public hearing. These procedures are specified in Section 13569 of Title 14 of the California Code of Regulations (CCR) ("CCR Section 13569").

The City of Marina has a certified LCP. On March 7, 2019, the City Planning Commission denied Cal-Am's City of Marina CDP application (City Application Number 2018-01), which was an application for the components of the MPWSP located within the City's jurisdiction.¹ Prior to the Planning Commission's hearing, Commission staff advised the City that a Planning Commission denial on the local CDP could be appealed directly to the Coastal Commission (and could bypass appeal to the City Council) because (a) the project constitutes a major public works project (see Coastal Act Section 30603(a)(5)); and (b) the City charges a fee to appeal the decision locally to the City Council.² Subsequently, when the City notified Commission staff of the Planning Commission's CDP denial, Commission staff informed the City that that decision could be appealed directly to the Coastal Commission because the City charged a fee to appeal the decision locally to the City Council. Despite direct-to-the-Commission appeal being an available option, Cal-Am nonetheless initially appealed the City Planning Commission decision to the City Council, as provided for by the LCP. However, Cal-Am subsequently withdrew its local appeal prior to City Council action, thereby causing the Planning Commission's CDP denial to become the final City action. The City then issued its Final Local Action Notice (FLAN), in which it stated that its denial of the CDP was not appealable to the Coastal Commission. The Executive Director disagrees with the City regarding the appealability of the City's CDP denial to the Coastal Commission. By letter dated June 11, 2019, the City requested that the Commission hold a hearing, pursuant to Section 13569, to resolve the dispute regarding the appealability of the City's CDP action.

The City's position is that the CDP denial is not appealable to the Coastal Commission because: 1) Cal-Am (and presumably other individual appellants) failed to exhaust the local appeal process; 2) the LCP only allows Planning Commission *approvals* of a project to be appealed directly to the Coastal Commission; and 3) even if Cal-Am could appeal the Planning Commission's CDP denial to the Commission, its current appeal is untimely. The Executive Director's position is that, first, Cal-Am and other individuals were not required to exhaust local appeals prior to appealing the Planning Commission's CDP denial to the Commission because

¹ The MPWSP spans multiple local government LCP/CDP jurisdictions (including the Cities of Marina and Seaside and unincorporated Monterey County) as well as the Commission's retained CDP jurisdiction. The City's denial only applies to the portion of the project in the City of Marina's jurisdiction in the coastal zone.

² Specifically, under the Coastal Commission's regulations, Cal-Am and the other individual appellants were not required to exhaust local appeals (as is normally a precursor to appeal a local decision to the Coastal Commission) because a fee was charged for local appeal (CCR Section 13573(a)(4)). Of note, Coastal Commissioner appeals (and there is also a Commissioner appeal of the City's denial action) are also exempt from the requirement to exhaust local appeals (per CCR Section 13573(b)).

the Commission's regulations allow for an appeal (without such exhaustion) of *any* CDP decision (approval or denial) directly to the Coastal Commission if the local government charges an appeal fee, which the City did here (again, see CCR Section 13573(a)(4)). Also, Commissioners do not need to exhaust local appeals before appealing final local decisions to the Commission; thus, any exhaustion requirement does not apply to the Commissioner appeal in this case (again, see CCR Section 13573(b)). Second, the LCP's general language stating that Planning Commission *approvals* (but not denials) of CDPs may be appealed to the Commission if the City charges an appeal fee must be read consistent with Coastal Act Section 30603(a)(5), which stipulates that approvals *and* denials of major public works projects are appealable to the Coastal Commission. The LCP may not be interpreted to foreclose aggrieved parties, including Commissioners, from appealing CDP denials to the Commission when the Coastal Act expressly provides for it. And third, all appeals in this matter were timely filed because they were received by the Commission's Central Coast District office during the prescribed appeal period (i.e., within 10 working days of the Commission receiving the City's FLAN). For all of these reasons, the City's denial of the CDP is directly appealable to the Commission.

Staff recommends that the Commission concur with the Executive Director's determination that the City's CDP action is directly appealable to the Coastal Commission. The motion to implement this recommendation is found on page 5 below.

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Appendix A – Substantive File Documents

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EXHIBITS

Exhibit 1: City and Commission Staff Correspondence

Exhibit 2: City’s Final Local Action Notice (in relevant part)

Exhibit 3: Coastal Commission’s Notification of Appeal

I. MOTION AND EXECUTIVE DIRECTOR'S RECOMMENDATION

The Executive Director has determined that the subject City of Marina CDP action is appealable to the Commission, and recommends that the Commission concur. To concur with the Executive Director's determination, the Executive Director recommends a **NO** vote on the motion below. Failure of this motion will result in: (1) the Commission upholding the Executive Director's determination that the action by the City of Marina denying City of Marina CDP Application Number 2018-01 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.

***Motion:** I move that the Commission **reject** the Executive Director's determination that the City of Marina's action on CDP 2018-01 that is the subject of Dispute Resolution Number 3-19-0569-EDD is appealable to the Commission, and I recommend a **no** vote.*

***Resolution:** The California Coastal Commission, by adoption of the attached findings, determines, consistent with Section 13569 of Title 14 of the California Code of Regulations, that the City of Marina action on the CDP for the components of the MPWSP in the City's jurisdiction that is the subject of Dispute Resolution Number 3-19-0569-EDD is appealable to the Commission.*

II. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

A. DISPUTE RESOLUTION PROCEDURES

The Commission's regulations provide a resolution mechanism for disputes regarding CDP processing. Section 13569 states:

***Section 13569 (Determination of Applicable Notice and Hearing Procedures).** 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 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.

Thus, in a situation like this where the City and the Executive Director are not in agreement on the appealability of the CDP decision on the proposed project, the Coastal Commission resolves that dispute at a public hearing. Here, the City has requested that the Commission use the Section 13569 procedure to resolve this dispute.

B. DISPUTE SUMMARY

On March 7, 2019, the City of Marina Planning Commission (PC) denied California-American Water's (Cal-Am's) City of Marina coastal development permit (CDP) application (City Application Number 2018-01) for the components of Cal-Am's proposed Monterey Peninsula Water Supply Project (MPWSP) that are located in the City's jurisdiction (the project).^{3,4} On March 11, 2019, City planning staff sent an email (see **Exhibit 1** for all referenced correspondence in this section) to Cal-Am informing them of the local coastal program (LCP) provisions for CDP appeals, and stating that the seven-day appeal period for Cal-Am to appeal the project denial to the City Council ran from March 8, 2019 to March 14, 2019. That email also provided the appeal form and stated that "any appeal would require payment of the appeal fee, currently \$2,780." On March 12, 2019, City staff sent a signed copy of the PC resolution via email to Cal-Am and Coastal Commission staff, and indicated in the cover memorandum that this was intended to be notice of the PC decision, consistent with LCP noticing requirements. That memorandum also reiterated the appeal period and appeal fee. On March 13, 2019, Cal-Am filed a timely appeal to the Marina City Council of the PC decision within the LCP-required seven-day appeal period.

³ Specifically, the project within the City's coastal zone area consists of seven subsurface intake slant wells and associated infrastructure at the CEMEX property; the initial segment of the source water pipeline leading away from the wells and toward the desalination plant; and a two-mile-long segment of the transmission main pipeline carrying treated water from the desalination plant. The plant itself and other project components are located outside the City's jurisdiction.

⁴ The MPWSP spans multiple local government LCP/CDP jurisdictions (including the Cities of Marina and Seaside and unincorporated Monterey County) as well as the Commission's retained CDP jurisdiction. The City's denial only applies to the portion of the project in the City of Marina's jurisdiction.

On March 14, 2019, Coastal Commission staff sent a letter to City of Marina staff to clarify three points. First, the PC action was not a final CDP action ready to be reported to the Commission, because the final City action occurs either after the required appeal period for an appeal of the PC decision to the City Council has concluded without such an appeal or, if there is such an appeal, after the City Council makes a final decision in regards to the appeal. (In the case here, as discussed above, the City sent its “notice” of the PC decision before the local appeal period for said PC decision had even run.) Second, when the City’s action is final, a final local action notice (FLAN) is to be sent via first class mail to the Coastal Commission, and once a valid FLAN is received, the Commission’s 10-working-day appeal period will start the day after receipt and continue until 5pm on the 10th working day after receipt. (These requirements are set forth in the Coastal Act and Commission’s regulations (see Coastal Act Section 30603(c), and CCR Sections 13110-11 and 13571-72.) Finally, and reaffirming past direction provide to City staff on this issue prior to the PC hearing, the letter informed the City that, because the City charges a fee for appeals of PC CDP decisions to the City Council, an aggrieved party is not required to exhaust local appeals (i.e., in this case through the City Council), and can choose instead to appeal directly to the Coastal Commission (see CCR Section 13573(a)(4)).

On March 22, 2019, City staff responded in a letter stating that its March 12, 2019 email was not to be considered a FLAN, and that the City was aware, per the LCP provisions, that its decision was not final until Cal-Am’s appeal of the PC decision to the City Council was concluded. City staff also stated in that letter that the City disagreed with Coastal Commission staff on the ability of an aggrieved party to appeal a PC decision directly to the Coastal Commission, rather than exhausting local appeals, because the City charges an appeal fee for the filing or processing of an appeal. Specifically, the City noted that the Marina LCP governs the CDP appeal process, and that the LCP states that only a PC *approval* of a CDP can be directly appealed to the Coastal Commission if the City charges a local appeal fee. It also asserted that Coastal Commission staff’s only reference for the assertion that the PC decision can be appealed directly to the Coastal Commission is CCR Section 13573(a)(4). The letter further stated that, pursuant to CCR Sections 13302 to 13303, the City may adopt and enforce its own CDP process, and also noted that Cal-Am had no option under the LCP, nor had it attempted to, file an appeal of the PC decision with the Coastal Commission during the City’s operative seven-day local appeal period. The letter concluded that the City would proceed forward with evaluating Cal-Am’s appeal to the City Council and would adjudicate this matter in conformance with its LCP.

Cal-Am’s appeal of the PC CDP denial was scheduled for consideration by the City Council on April 30, 2019. However, on April 29, 2019, Cal-Am withdrew its appeal. On April 30, 2019, the City Council continued the scheduled hearing to May 6, 2019 without opening the public hearing. On May 6, 2019, the City Council, through the City Attorney, announced that a City Council public appeal hearing on the PC’s denial of the project would not be held because the appeal had been withdrawn by Cal-Am. No other local appeal had been filed by anyone else, which would have otherwise and independently justified holding a public hearing regarding the PC’s denial of the project. On May 13, 2019, the Central Coast District Office of the Coastal Commission received a FLAN from the City (via first class mail) documenting the City’s denial of a CDP for the portion of the project in the City’s CDP jurisdiction that indicated that the CDP was “not appealable” to the Coastal Commission. The FLAN indicated that the City’s final action on the CDP was taken by the PC during its March 7, 2019 CDP denial, and it included a note that stated that, because Cal-Am withdrew its appeal to the City Council, the PC denial

“constitutes final agency action under the Coastal Act, with no right of appeal to the Coastal Commission.” The City provided additional explanatory notes in the FLAN, reiterating that the City’s LCP governs the CDP appeal process, and that the City’s denial of the CDP for the project is final and effective, and that Cal-Am has forfeited any appeal to the Coastal Commission. See **Exhibit 2** for the relevant portions of the FLAN.

On May 14, 2019, Coastal Commission staff sent an email to City of Marina staff explaining that, pursuant to Coastal Act Section 30603(a)(5), and pursuant to the LCP (which cross-references Section 30603’s appealability criteria), *any* decision – approval or denial – of a major public works project, which the MPWSP qualifies as (as described below in “Section D”), is appealable to the Coastal Commission. Coastal staff stated that the LCP provision that the City interprets as only allowing appeals of PC *approvals* cannot take precedence over, and must be read consistent with, the statutory provisions of Coastal Act Section 30603(a)(5). To correct this deficiency, Coastal staff stated that “we are designating the City’s action as appealable and are beginning our 10-working-day appeal clock” as of the date of the email (i.e., beginning May 14th and ending at 5pm on May 28th). The email also noted two other points: (1) that the Marina LCP also provides for the Commission’s Executive Director to make a determination regarding appealability designations in situations such as this, and that in this case the Executive Director determined that the CDP denial was appealable to the Coastal Commission, and (2) that an aggrieved party is not required to have exhausted local appeals in order to appeal the PC’s decision because the City charges an appeal fee.

On May 21, 2019, the City responded to that email, stating that the City strongly disagreed with Commission staff’s position that the PC decision is appealable to the Coastal Commission and that the LCP specifically addresses this situation and is not ambiguous. The letter also stated that the Commission is exceeding its statutory authority by purporting to authorize Cal-Am to file an appeal with the Coastal Commission, and that the Commission also does not have the authority to unilaterally “correct” a FLAN prepared by the City.

Within the Commission’s 10-working-day appeal period of May 14th to 5pm on May 28th, the Central Coast District Office of the Coastal Commission received a total of four appeals of the PC’s denial decision, from Cal-Am,⁵ the Castroville Community Services District, Brian LeNeve, and Commissioners Roberto Uranga and Erik Howell. On May 30, 2019, Central Coast District staff sent a notification of the appeals to the City (to the attention of the City’s Community Development Director, Fred Aegerter – see **Exhibit 3**), including identifying all of the appeals the Commission had received. On June 13, 2019, this same notice was also sent to all interested parties listed in the appeals, as well as other known interested parties to date.

On June 11, 2019, City staff sent a letter to Commission staff formally requesting a hearing regarding the appealability of the PC decision pursuant to CCR Section 13569(d). In sum, the City asserts that: 1) because the LCP states that a PC *approval* may be appealed directly to the Coastal Commission if the City charges a local appeal fee, aggrieved parties may not appeal the PC’s *denial* of a CDP directly to the Commission; 2) Cal-Am did not exhaust the City’s local

⁵ Cal-Am included a \$314,340 fee with its appeal pursuant to the Commission’s filing fee schedule, which stipulates that a fee is required for appeals by the applicant of a CDP denial by a local government. In this case, the fee was determined based on total development cost. (See CCR Section 13055(b)(5).)

appeal process by following through with its appeal to the City Council, and therefore, the PC decision is final and cannot be appealed to the Coastal Commission; and 3) Cal-Am's appeal is untimely.

The Executive Director's position is that, pursuant to Coastal Act Section 30603, *any* CDP decision on a major public works project – and not just an approval – is appealable to the Coastal Commission, and the LCP may not be interpreted to foreclose aggrieved parties, including Commissioners, from appealing CDP denials to the Commission when the Coastal Act expressly provides for it. Thus, a City CDP denial, such as is the case here, is expressly appealable to the Coastal Commission.

Furthermore, the Executive Director notes that CCR Section 13573(a)(4) provides that an appellant may appeal such local decision directly to the Coastal Commission (and is not required to exhaust local appeals as would otherwise normally be the case) when the local jurisdiction charges an appeal fee for the filing or processing of local appeals. The City here charged a fee for an appeal of the PC CDP denial to the City Council, and thus, potential appellants (including Cal-Am) are not required to exhaust local appeals and can appeal directly to the Coastal Commission. Furthermore, in the case of the Commissioner appeal that was filed, Commissioners do not need to exhaust local appeals before appealing final local decisions to the Commission, and thus any exhaustion requirement does not apply to the Commissioner appeal in this case (see CCR Section 13573(b)). And finally, the Executive Director notes that all of the subject appeals to the Commission are timely because they were filed within the statutory timeframe. In short, the City's final CDP decision (i.e., the PC CDP denial) may be appealed directly to the Commission without going through a City Council appeal process, and the four appeals are properly before the Commission.

Because the City's LCP and the Commission's regulations provide for the Executive Director to make a decision regarding appealability designations, but the City and the Executive Director do not agree on the appealability of the CDP action, the matter is to be decided by the Coastal Commission at a public hearing, as requested by the City, and as provided for by CCR Section 13569.

See **Exhibit 1** for all referenced correspondence, **Exhibit 2** for the relevant portions of the City's FLAN, and **Exhibit 3** for the Coastal Commission Notification of Appeal.

C. COASTAL ACT AND LCP FRAMEWORK

Coastal Act Section 30603 outlines which local CDP actions may be appealed to the Coastal Commission and otherwise describes the process for appeals under a certified LCP:

(a) 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 tideline 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.

(3) Developments approved by the local government not included within paragraph (1) or (2) that are located in a sensitive coastal resource area.

(4) Any development approved by a coastal county that is not designated as the principal permitted use under the zoning ordinance or zoning district map approved pursuant to Chapter 6 (commencing with Section 30500).

(5) Any development which constitutes a major public works project or a major energy facility. (emphasis added)

(b) (1) The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in this division.

(2) The grounds for an appeal of a denial of a permit pursuant to paragraph (5) subdivision (a) shall be limited to an allegation that the development conforms to the standards set forth in the certified local coastal program and the public access policies set forth in this division. (emphasis added)

(c) Any action described in subdivision (a) shall become final at the close of business on the 10th working day from the date of receipt by the commission of the notice of the local government's final action, unless an appeal is submitted within that time. Regardless of whether an appeal is submitted, the local government's action shall become final if an appeal fee is imposed pursuant to subdivision (d) of Section 30620 and is not deposited with the commission within the time prescribed.

(d) A local government taking an action on a coastal development permit shall send notification of its final action to the commission by certified mail within seven calendar days from the date of taking the action.

As stipulated in Section 30603(a)(5), an action taken by a local government on a CDP application may be appealed to the Commission for any development that constitutes a major public works project. The proposed project here qualifies as a major public works project, as described below in Section D. Coastal Act Section 30114 defines "public works," in applicable part, as:

(a) All production, storage, transmission, and recovery facilities for water, sewerage, telephone, and other similar utilities owned or operated by any public agency or by any utility subject to the jurisdiction of the Public Utilities Commission, except for energy facilities.

The Commission’s regulations, under CCR Section 13012(a) define “major public works,” in applicable part, as:

(a) “Major public works” and “Major energy facilities” mean facilities that cost more than \$277,033 with an automatic annual increase in accordance with the Engineering News Record (ENR) Construction Cost Index, except for those governed by the provisions of Public Resources Code Sections 30610, 30610.5, 30611 or 30624.

Other Coastal Commission regulations regarding appeals stipulate that, if a local government charges an appeal fee, an appellant is not required to exhaust local appeals. In other words, an appellant can appeal a local government’s CDP decision directly to the Coastal Commission if the local government charges a fee to appeal through the various levels of local government decisionmaking. Specifically, CCR Section 13573 states in applicable part:

*(a) An appellant shall be deemed to have exhausted local appeals for purposes of Section 13111 and shall be qualified as an aggrieved person where the appellant has pursued his or her appeal to the local appellate body (bodies) as required by the local government appeal procedures; **except that exhaustion of all local appeals shall not be required if any of the following occur:***

(1) The local government or jurisdiction require an appellant to appeal to more local appellate bodies than have been certified as appellate bodies for permits in the coastal zone, in the implementation section of the Local Coastal Program.

(2) An appellant was denied the right of the initial local appeal by a local ordinance which restricts the class of persons who may appeal a local decision.

(3) An appellant was denied the right of local appeal because local notice and hearing procedures for the development did not comply with the provisions of this Article.

(4) The local government jurisdiction charges an appeal fee for the filing or processing of appeals. (emphases added)

The City of Marina LCP Implementation Plan (IP) comports with the Coastal Act regulations regarding CDP appeals in that it stipulates that applications for property within the LCP appeal zone (defined the same as Coastal Act Section 30603(a)(1) and (2)) may be appealed to the Coastal Commission, and development outside the designated appeal zone may be appealed only if it constitutes a major public works project. Applicable City of Marina IP sections read:

Eligibility for Coastal Permit Appeal

Any zoning or subdivision action within the Coastal Zone may be appealed to the City Council. Only applications for property within the Local Coastal Permit Appeal Zone may be appealed to the State Coastal Commission. Specific criteria exist in law to define this Appeal Zone:⁶

⁶ Section 30603 of the California Coastal Act of 1976.

1. Location between the sea and first public road paralleling the sea or within 300 feet of the inland extent of any beach or 300 feet of the mean high tide line of the sea where there is no beach, whichever is the greater distance;

2. Location on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, stream or within 300 feet of the top of seaward face of any coastal bluff and not included in item one.

Development outside the specifically designated Permit Appeal Zone may be appealed only if:

1. The development constitutes a major public works project or major energy facility. (emphasis added)

All applicable projects, including major public works projects or major energy facilities may be appealed by an applicant, any two (2) members of the State Coastal Commission or an “aggrieved person.”

Thus, this part of the IP, like the Coastal Act, provides that a CDP action (whether approval or denial) of a major public works project is appealable to the Coastal Commission. However, the City’s IP adds an apparent limitation related to appeals not present in either the Coastal Act or the Commission’s regulations. Specifically, it states that, when an appeal fee is charged, affirmative PC decisions for development within the appeal zone may be appealed directly to the Coastal Commission (IP p. 12 and p. 13, respectively):

*The City of Marina may charge a fee for a Coastal Permit and appeal of such permit. This fee will be based on administrative costs and will be reviewed periodically by the City Council. The fee shall be established in the same manner as other City fees. If the City Council determines to charge a fee for a Coastal Permit appeal, **it will then become possible to appeal any affirmative Planning Commission decision on a Coastal Permit (within the appeal zone) directly to the Coastal Commission. (emphasis added)***

And:

Appeals to the Coastal Commission must follow at least one local action on the application. If Marina charges a local appeal fee, Coastal Development Permits approved by the Planning Commission may be appealed directly to the State.

The IP also provides the following timeline for CDP actions and appeals, with another apparent limitation that approved CDPs may be appealed to the Coastal Commission (last paragraph):

Timeline on Coastal Permit Application

Ten (10) days prior to a public hearing on any Coastal Permit, the City shall provide public notice by publication in a newspaper of general circulation and by first class mail. The mailed notice shall be provided to all persons who submit a written request for such notice along with a stamped self-addressed envelope. The mailed notice shall also be provided to the State Coastal Commission, all property owners and tenants within one hundred (100) feet of the project site.

Within seven (7) days of the Planning Commission action on any Coastal Permit the City shall provide written notice to the State Coastal Commission and all persons who have submitted written request for such notice along with a stamped self-addressed envelope. The Planning Commission's decision on any Coastal Permit may be appealed to the City Council within seven (7) days of the Planning Commission's action.

Ten (10) days prior to any City Council appeal hearing on a Coastal Permit decision the City shall provide notice of such hearing by first class mail to the State Coastal Commission and all persons who have submitted written request for such notice along with a stamped self-addressed envelope. In addition, notice of such hearing shall be published in a newspaper of general circulation at least ten (10) days prior to the hearing.

Within five (5) days of any final City Council action on an appeal of a Coastal Permit the City shall notify, by first class mail, the State Coastal Commission and all persons who have submitted a written request for such notice along with a stamped self-addressed envelope.⁵

*Within twenty-one (21) days of the final City Council action on a Coastal Permit within the appeal zone, resulting in **approval** of a Coastal Permit, an appeal of such decision may be filed by an aggrieved party with the State Coastal Commission or an appeal may be filed by the State Coastal Commission. Therefore, within the appeal zone, twenty-one (21) days must lapse from the date of an affirmative local decision on a Coastal Permit before such action can be deemed final. After this twenty-one (21) day period expires, the Coastal Permit/Notice of Permit Decision may be issued to the applicant. (**emphasis added**)*

Finally, the IP allows for the Executive Director to make a final determination on appealability as follows:

Whether an appeal and appellant meet these criteria will be determined by the Executive Director of the State Coastal Commission during the first two (2) working days after the ten (10) working days required for notification of the decision from the local jurisdiction to the State. After State Coastal Commission action, the City will receive a Notice of Permit Decision. If it is affirmative, the City will be able to issue a Coastal Development Permit consistent with the findings of the State Coastal Commission on the appeal.

D. CDP APPEALABILITY

As described above, the PC denied the CDP for the project, and Cal-Am appealed that decision to the City Council, but then withdrew its appeal prior to the City Council action. As such, the PC action was deemed the City's final action on the matter, and the City sent a FLAN to the Central Coast District office of the Coastal Commission that was marked by the City as "non-appealable." Cal-Am, two Commissioners, and others then appealed the PC decision to the Coastal Commission after Commission staff informed the City that the FLAN was in fact appealable and Commission staff deemed the 10-working-day appeal period to run between May 14th and 5pm on May 28th.

The City contends that the PC action is not appealable to the Coastal Commission because the LCP provides that, if the City Council charges an appeal fee (which it does), only affirmative PC CDP decisions may be appealed directly to the Coastal Commission. Because this was a PC CDP denial, the City claims it cannot be appealed to the Coastal Commission. The City also contends that Cal-Am failed to exhaust the local appeal process and therefore may not appeal the City's final decision to the Coastal Commission. In its FLAN and in a May 21, 2019 letter to the Commission, the City has also claimed that any Cal-Am appeal to the Commission is untimely.

First, the City of Marina IP generally reflects Coastal Act standards with respect to the types of local actions that are appealable to the Coastal Commission. Under "Eligibility for Coastal Permit Appeal," the IP, like Coastal Act Section 30603, is clear that development that constitutes a major public works project may be appealed to the Coastal Commission and that "all applicable projects, including major public works projects and major energy facilities, may be appealed by an applicant, any two (2) members of the State Coastal Commission, or an aggrieved person." The project is subject to the jurisdiction of the Public Utilities Commission; it involves the production, storage, transmission, and recovery facilities for water; and its stated costs are greatly above the costs defined for "major public works" in CCR Section 13012(a). As such, the project meets the definition of a major public works project, and any CDP action (approval or denial) for it is appealable to the Commission under both Coastal Act Section 30603(a)(5) and the City's IP.

Regarding interpretation of project appealability under the IP, it is worth noting that Section 30603(a) of the Coastal Act, upon which these provisions of the IP are based and derive their statutory authority, distinguishes between development for which only local *approvals* are appealable to the Commission (see, specifically subsections (a)(1) through (a)(4)), and development for which any decision is appealable (i.e., allowing appeal for "*any* development which constitutes a major public works project" (see subsection (a)(5) (emphasis added))). Thus, the Coastal Act sets up an explicit and clear appellate system in which, for most cases, only local development *approvals* are appealable to the Commission; however, the exception is that *any* action (denial or approval) of a major public works project is appealable to the Commission. Given the limited ability to appeal local CDP denials, it is unsurprising that the LCP uses general language stating that CDP approvals may be appealed to the Commission. This generically worded language should not be interpreted in a manner that conflicts with the Coastal Act and its implementing regulations, and which would deprive Commissioners and other aggrieved parties from appealing final local permit denials of major public works projects directly to the Coastal Commission as is statutorily provided for by the Coastal Act.

Recent published caselaw has also held that LCP policies must be interpreted as incorporating, at a minimum, the policies and standards of the Coastal Act (see *McAllister v. Cal. Coastal Com'n* (2008) 169 Cal.App.4th 912, 931 ("*McAllister*"). In other words, LCPs must be interpreted consistent with the Coastal Act (from which LCPs derive their authority), and in that sense Coastal Act policies set the "floor" as to minimum requirements for LCPs in order to be found consistent with the Coastal Act. Section 13560 of the Commission's regulations also states this explicitly: "The provisions of this Article shall constitute minimum standards of notice and hearing requirements for local governments and for the Commission in reviewing development projects after certification of a local coastal program." Under this provision, Section 13573's

allowance of appeals to the Commission when local governments charge appeal fees is a minimum requirement; the LCP may not be interpreted to contravene this requirement.⁷

LCPs may be more protective of the policy considerations protected by the Coastal Act, but not less so. With respect to the question of appealability of a major public works project, the Coastal Act is structured to provide maximum opportunity for appeal of a local decision on a major public works project (regardless of whether that local decision was an approval or denial), and the City's interpretation that only a PC approval of the project would have been appealable directly to the Commission is not consistent with the Coastal Act in that regard. Thus, to the extent that the City interprets its LCP to only allow for appeal of a PC approval of a major public works project directly to the Commission, this interpretation is not tenable.

With respect to the effect that the appeal fee has in regards to appealability of PC decisions directly to the Coastal Commission, the LCP states in two locations that if the City charges a local appeal fee, affirmative PC decisions (i.e., PC approvals) may be appealed directly to the Coastal Commission (instead of first exhausting local appeals process through the City Council). However, consistent with the guiding legal principles discussed above, including *McAllister*, this LCP provision must be read consistent with CCR Section 13573, which provides that an appellant is excused from the need to exhaust local appeals if the local government charges an appeal fee. In addition, CCR Section 13573 does not distinguish between approvals or denials, and thus applies in all circumstances associated with potential appeals.

In addition, pursuant to CCR Section 13573(b), exhaustion of local appeals is not required for Commissioner appeals. Thus, even if the law was otherwise and Cal-Am (and other parties) could not appeal the PC action directly to the Commission due to its decision to withdraw its City Council appeal, Commissioners Uranga and Howell were not required to exhaust local appeals. Likewise, interpreting the LCP to forbid Commissioner appeals of PC denials would deny Commissioners a right they have under the Coastal Act to appeal important local decisions, and therefore this interpretation must be rejected. The City's argument about Cal-Am's alleged failure to exhaust local appeals is therefore inapplicable to the Commissioner appeals on file. Commissioners were permitted to appeal the City's decision within the appeal period that commenced after the local decision became final. If the City Council would like more control over its process and does not want Commissioners to be able to appeal PC decisions, the regulations provide for that. Specifically, the City may amend its LCP to provide that Commissioner appeals from PC decisions will be suspended pending the City Council's consideration of the matter (see CCR Section 13573(b)). However, the City's current LCP has no such provision. Accordingly, the Commissioner appeals are proper, and Commissioners were not required to pay local appeal fees, proceed through the local appeal process, or take any other action prior to appealing the PC denial to the Commission.

⁷ In its FLAN, the City claimed that Coastal Act regulations permit the City to adopt and enforce its own permit system, thereby implying that this allows the City to have an LCP with requirements that differ from, and conflict with, Coastal Act requirements. However, the City cites CCR Sections 13302-303 to support its argument, and these provisions do not apply to jurisdictions with fully certified LCPs. Rather, they apply to jurisdictions, such as the City of Los Angeles, that operate their own permit system without a fully certified LCP, pursuant to the authority in Coastal Act Section 30600(b) (see CCR Section 13300).

In addition to being contrary to the Coastal Act and its implementing regulations, the City's interpretations of the relevant LCP provisions are not required by the plain text of the LCP provisions themselves. Specifically, the IP states that affirmative PC decisions may be appealed directly to the Coastal Commission if a local appeal fee is charged, but it does not explicitly state that *only* affirmative PC decisions can be appealed directly to the Commission. The applicable IP language states "it will then become possible to appeal any affirmative Planning Commission decision..." and "...Coastal Development Permits approved by the Planning Commission may be appealed directly to the State." In other words, absent more specific or narrowly confined language to specify that these provisions apply only to PC approvals, the IP could be read to mean that other PC decisions (like denial of a major public works project) could also be appealed to the Coastal Commission when an appeal fee is charged. As discussed above, such a reading makes sense given that most appeals deal with local approvals rather than denials, and such a reading is compelled in order to interpret the LCP consistent with minimum Coastal Act requirements.

In addition, it appears as though certain specific language of the provisions related to CDP appeals contained within the Coastal Act was not directly incorporated into the LCP when it was prepared and certified. For example, Coastal Act Section 30603(a) only allows for appeals of development approved by local government in most cases (subsections (a)(1)-(4)), but the IP's "Eligibility for Coastal Permit Appeal" section does not contain the exact same limiting language of 30603(a)(4) ["development approved..."]. The language of the "Eligibility for Coastal Permit Appeal" section also appears to contradict other provisions of the IP that state that only approved CDPs may be appealed to the Coastal Commission. As a result, the LCP is internally inconsistent in some ways and could be interpreted to be inconsistent with the Coastal Act and the Commission's regulations. In such a case, it is particularly important to interpret the LCP to be consistent with the Coastal Act and its implementing regulations, and to ensure that it is not interpreted and carried out in a manner that deprives aggrieved parties or Commissioners of the right to appeal to the Commission local decisions regarding major public works projects under the Coastal Act.

To summarize, the Coastal Act and the Commission's regulations dictate that 1) any CDP action on a major public works project is appealable to the Coastal Commission, and 2) appellants may be excused from the need to exhaust local appeals if the local government charges an appeal fee, regardless of what type of action the local government takes on the CDP. They also provide that Commissioners need not exhaust local appeals before appealing local CDP actions to the Commission. As discussed above, LCP requirements for appeals must be interpreted to be consistent with the CDP appeal provisions in the Coastal Act and the Commission's regulations. Although it is up to the local government in the first instance to interpret and carry out its LCP, courts have made it clear that "the Legislature made the Commission, not the [local jurisdiction], the final word on the interpretation of the LCP."⁸ Here, for the reasons discussed in this report, the PC's denial of Cal-Am's CDP for the MPWSP components in the City's CDP jurisdiction became an appealable final action after Cal-Am withdrew its City Council appeal. Because the City charged an appeal fee, neither Cal-Am nor other appellants were required to file or complete

⁸ *Charles A. Pratt Constr. Co. v. California Coastal Com.* (2008) 162 Cal. App. 4th 1068, 1078 (citing Coastal Act Section 30603(b)).

a City Council appeal prior to appealing the CDP denial to the Coastal Commission, and the City's denial of the CDP is appealable to the Commission.

The City also makes two other assertions that are somewhat related to the appealability determination. First, the City asserts that Commission staff improperly revised the FLAN for the CDP action by deeming the City's action appealable, and that Commission staff does not have the authority to unilaterally correct a FLAN prepared by the City. The City cites CCR Section 13332 to support its position that the Executive Director may not unilaterally correct a FLAN, but must instead issue a notice of defective FLAN, and wait for the local jurisdiction to issue a corrected FLAN, before starting an appeal period. However, this provision does not apply to jurisdictions that have fully certified LCPs (see CCR Section 13300). Rather, for jurisdictions with certified LCPs, Commission staff may issue notices of defective FLANs, but there is no requirement that they do so (see CCR Section 13110). Commission staff properly chose not to issue a notice of defective FLAN here, but rather to use the Executive Director determination (described below) to find the City action appealable and to deem the FLAN effective for purposes of beginning the appeal period.

The City further claims that Commission staff's interpretations are not supported by the LCP and that the Executive Director does not have authority to overrule the plain text of the LCP or substitute his viewpoint for the City's decision in this situation. However, the LCP states: "Whether an appeal and appellant meet these criteria [regarding appealability] will be determined by the Executive Director of the State Coastal Commission during the first two (2) working days after the ten (10) working days required for notification of the decision from the local jurisdiction to the State." Coastal Commission staff received the FLAN on May 13, 2019, and informed the City via email on May 14, 2019 of the Executive Director's position that the CDP was appealable, and that the 10-working-day appeal period would commence on that same day. Thus, the Executive Director, through the Central Coast District staff, made a determination, pursuant to the above-cited provision of the LCP, that the City's action on the CDP was appealable to the Commission. The LCP clearly allows for and anticipates an Executive Director determination in this very situation. In any case, the City has exercised its right, pursuant to Section 13569, to have the Commission decide the question of appealability of the PC's denial of the CDP for the project, which Commission staff has processed and agendized for Commission action at a public hearing at the July 2019 Commission meeting.

Finally, in its FLAN and in a May 21, 2019 letter to the Commission, the City also claimed that any Cal-Am appeal to the Commission is untimely. The City's argument appears to be that, after Cal-Am withdrew its appeal to the City Council, the PC decision became the final action, and that any period for appealing the PC decision to the Coastal Commission began running from the date of the PC action. The Commission agrees that the PC action became the final City action after Cal-Am withdrew its City Council appeal. However, the period for appealing final local actions runs from the time the Coastal Commission receives a notice of final local action (CCR Section 13110). Here, the City's action was not *final* until Cal-Am withdrew its local appeal and no other party was pursuing a local appeal; at that time, the City sent its FLAN, which the Commission received on May 13, 2019. The Commission's 10-working day appeal period began on May 14, 2019. Cal-Am and other appellants filed appeals within that 10-working-day period, and the appeals are thus timely.

E. CONCLUSION

The City of Marina LCP is both internally inconsistent and includes apparent limitations related to appeals that extend beyond that which are allowed by the Coastal Act and the Commission's regulations. The LCP identifies any action on major public works projects as appealable to the Coastal Commission, but the City interprets subsequent text to stipulate that only CDPs *approved* by the City Council (or CDPs approved by the PC if a local appeal fee is charged) may be appealed to the Coastal Commission. This creates confusion regarding CDP appealability for the public, the City, and the Commission, and is not consistent with the Coastal Act or the Commission's regulations in that regard. In the case of ambiguous and potentially inconsistent language in the LCP, CDP and appeals procedures in the City of Marina LCP must (and can) be read to be consistent with the Coastal Act and its implementing regulations. Thus, the Commission concludes that the Planning Commission's denial decision on the CDP for the project is appealable to the Coastal Commission, both because the project that was denied constitutes a major public works project and because the City charges an appeal fee for filing and processing local appeals. Additionally, Commissioner appeals are not subject to local exhaustion requirements in any event. Furthermore, the Commission strongly recommends that the City of Marina submit an LCP amendment to conform the CDP appealability provisions of the LCP with the Coastal Act and Commission regulations as soon as possible to avoid such confusion in future scenarios.⁹

⁹ For example, the Coastal Act and its regulations provide a 10-working-day appeal period to the Commission. (Section 30603(c) and CCR Section 13110). However, the LCP states that an appeal to the Commission may be filed within 21 days of the City Council approving a CDP for development within the appeal zone.

APPENDIX A – SUBSTANTIVE FILE DOCUMENTS¹⁰

- City of Marina Final Local Action Notice for City CDP Application Number 2018-01, Resolution No. 2019-06
- Coastal Commission Appeal No. A-3-MRA-19-0034
- City of Marina LCP
- Coastal Act and Title 14 of the California Code of Regulations

APPENDIX B – STAFF CONTACT WITH AGENCIES AND GROUPS

- City of Marina Staff

¹⁰ These documents are available for review in the Commission’s Central Coast District office.