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Filed: 7/21/2020
 49th Day: 9/29/2020
 Staff: A.Llerandi-SD
 Staff Report: 8/17/2020
 Hearing Date: 9/10/2020

STAFF REPORT AND RECOMMENDATION ON APPEAL SUBSTANTIAL ISSUE DETERMINATION

Local Government:	City of San Diego
Decision:	Approved with Conditions
Appeal Number:	A-6-SAN-20-0029
Applicant:	City of San Diego Transportation and Storm Water Dept.
Location:	City-wide, San Diego, San Diego County.
Project Description:	Implementation of the Municipal Waterways Maintenance Plan (MWMP), a city-wide program governing the on-going repair, maintenance, and mitigation for city storm water infrastructure projects.
Appellants:	Vice Chair Brownsey and Commissioner Hart
Staff Recommendation:	Substantial Issue

IMPORTANT HEARING PROCEDURE NOTE

The Commission will not take testimony on this “substantial issue” recommendation unless at least three commissioners request it. The Commission may ask questions of the applicant, any aggrieved person, the Attorney General, or the executive director prior to determining whether or not to take testimony regarding whether the appeal raises a substantial issue. If the Commission takes testimony regarding whether the appeal raises a substantial issue, testimony is generally and at the discretion of the Chair limited to 3 minutes total per side. Only the applicant, persons who opposed the

application before the local government (or their representatives), and the local government shall be qualified to testify during this phase of the hearing. Others may submit comments in writing.

If the Commission finds that the appeal raises a substantial issue, the de novo phase of the hearing will occur at a future Commission meeting, during which it will take public testimony.

SUMMARY OF STAFF RECOMMENDATION

Staff recommends that the Commission, after public hearing, determine that a substantial issue exists with respect to the grounds on which the appeal has been filed.

The Municipal Waterways Maintenance Plan (MWMP) is a city-wide program intended by the City of San Diego to govern on-going repair and maintenance of storm water facilities maintained by the city's Transportation and Storm Water Department to ensure adequate flood control. The MWMP establishes annual prioritization of maintenance of storm water channels and facilities city-wide for the subsequent fiscal year, and generally describes the various maintenance measures and implementation methodologies to select from, the protocols taken to identify any sensitive resources present within the channels, how to minimize impacts from the maintenance, and the general categories of mitigation to choose from for unavoidable impacts. The MWMP requires the creation of project-specific Facility Maintenance Plans (FMP) for each distinct channel or facility to be maintained for the following fiscal year.

The MWMP as approved by the city is for an indefinite duration, with no expiration in either the coastal development permit or the MWMP. Under the program, the city would clear sediment, vegetation, and debris from storm water facilities, which include natural earthen channels, concrete-lined channels, and constructed inlets to maintain adequate storm water flows and avoid flooding of nearby areas. The maintenance work is mostly done by mechanized equipment, though where access is unavailable, it is done by hand. Most of the city's storm water system is located outside of the coastal zone, though there are numerous facilities covered by the MWMP located within the coastal zone, mostly clustered in the Sorrento Valley area, Mission Bay Park area, and the Tijuana River Valley area.

As approved, the city's approval of the MWMP contains several potential inconsistencies with the certified Local Coastal Program (LCP). The city's storm water channels often contain or abut sensitive habitat resources and are adjacent to and drain into several important coastal bodies of water. Clearing these channels, while necessary for flood control reasons, can result in significant impacts to biological resources which require mitigation. Because the MWMP permit has no expiration date, it would allow the city to take extensive action year after year, with no return to the Commission to evaluate the long-term impact of the plan or correct any apparent issues that might arise. The annual prioritization of maintenance activity means that channels in the coastal zone could remain unaltered for years (due to limited funds or other

circumstances), allowing the establishment of new habitat in the channels that would subsequently be impacted by maintenance clearing, without any ability for the Commission to review new circumstances. The city has stated that none of the other resource agencies reviewing the MWMP, such as the Army Corps of Engineers, US Fish and Wildlife Service, or Regional Water Quality Control Board, will be approving the program indefinitely.

Under the MWMP, the city would draft project specific FMPs for particular projects. These FMPs, as well as any subsequent changes to them, would be reviewed through a Substantial Conformance Review (SCR) process to confirm compliance with the measures and protocols listed in the MWMP. However, under the locally approved SCR process, the discretion of review of an FMP's adequacy and its avoidance or lack thereof of impacts to sensitive habitat would lie solely with the city's Development Services Department (DSD), even for work proposed in the appealable areas of the coastal zone, and Department would check for consistency solely with the MWMP, without considering subsequent changes to the certified LCP. Furthermore, while the MWMP calls for the SCR package and notices of decision to be circulated to the public and certain resource agencies for review and comment, the SCR package would not be circulated to the Coastal Commission, despite the MWMP stating that SCRs could be appealed to the Coastal Commission. Rather, a Notice of Decision would be given to the Commission after the City has reviewed and made its decision regarding the SCR.

Along with approving the MWMP itself, the city's permit action also approved dozens of FMPs that were drafted along with the MWMP in preparation for the upcoming fiscal year. As part of this drafting of the initial round of FMPs and pursuant to the MWMP, the city and its consultants conducted biological surveys of the channels to be maintained in the initial round of FMPs and overlaid them with the channel areas to be cleared and maintained under the FMP, identifying the potential maximum impact that could arise of the maintenance were undertaken today. However, while the city identified and approved those habitat impacts, neither the MWMP or any of the FMPs contain actual mitigation plans for the proposed habitat impacts, instead simply listing five general categories of mitigation that the city will eventually choose from, which would then require the drafting and approval of a separate mitigation plan at a future undetermined date and location. Thus, with no finalized mitigation plan or even a specific bounded area in which the mitigation would occur, the city has approved impacts to mitigation resources without determining if suitable mitigation is feasible or how it would be implemented.

Finally, the Mitigation and Monitoring Reporting Program (MMRP) incorporated by reference into the MWMP calls for mitigating impacts to "disturbed" wetlands at a 2:1 ratio. The term "disturbed" is not defined by the certified LCP, though the city has indicated that it refers to wetlands that contain invasive species, such as Arundo reeds. However, Table 2A: Wetland Mitigation Ratios, located in the Biology Guidelines of the Land Development Manual, a supplementary document to the Land Development Code and, with it, comprising the certified Implementation Plan (IP), lists that mitigation for "coastal wetlands" (both "salt marsh" and "salt panne") and "freshwater marsh in the coastal zone," are to be mitigated at 4:1, indicating a clear intent of the LCP to mitigate

impacts to wetlands in the coastal zone at 4:1 ratio, and not lower. In past actions approving the predecessor storm water permit to the MWMP in 2012, the Commission clearly stated that it makes no distinction between “disturbed” and non-disturbed wetlands and requires them to be mitigated at the same 4:1 ratio. The city’s implementation of the MWMP with 2:1 mitigation ratio for an indefinite length of time would cause substantial impacts over the years to coastal habitat with inadequate compensatory mitigation and little opportunity for redress.

Because of the above-described inconsistencies with the LCP and the Coastal Act, staff recommends that the Commission determine that the project raises a substantial issue regarding conformance with the certified LCP and the Chapter 3 policies of the Coastal Act.

Standard of Review: Certified City of San Diego Local Coastal Program and the public access and recreation policies of Chapter 3 of the Coastal Act

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EXHIBITS

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[Exhibit 2 – Municipal Waterways Maintenance Plan](#)

[Exhibit 3 – Mitigation and Monitoring Reporting Program](#)

[Exhibit 4 – Sample Facility Maintenance Plan](#)

I. APPELLANTS CONTEND

The project as approved by the City does not conform to the City of San Diego's certified Local Coastal Program (LCP), regarding habitat protection policies or jurisdictional oversight.

II. LOCAL GOVERNMENT ACTION

The project was approved with conditions by the City Council on June 23, 2020.

III. APPEAL PROCEDURES

After certification of a Local Coastal Program (LCP), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits.

Section 30603(b)(1) of the Coastal Act states:

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.

Coastal Act Section 30625(b) states that the Commission shall hear an appeal unless it determines:

With respect to appeals to the commission after certification of a local coastal program that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603.

If the staff recommends "substantial issue" and no Commissioner objects, the Commission will proceed directly to the de novo portion of the hearing on the merits of the project, then, or at a later date. If the staff recommends "no substantial issue" or the Commission decides to hear arguments and vote on the substantial issue question, those allowed to testify at the hearing will have 3 minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised. If substantial issue is found, the Commission will proceed to a full public hearing on the merits of the project then, or at a later date, reviewing the project de novo in accordance with sections 13057-13096 of the Commission's regulations. If the Commission conducts the de novo portion of the hearing on the permit application, the applicable standard of review for the Commission to consider is whether the proposed development is in conformity with the certified Local Coastal Program (LCP).

In addition, for projects located between the sea and the first public road paralleling the sea, Section 30604(c) of the Act requires that a finding must be made by the approving agency, whether the local government or the Coastal Commission on appeal, that the development is in conformity with the public access and public recreation policies of Chapter 3 of the Coastal Act. In other words, in regard to public access questions, the Commission is required to consider not only the certified LCP, but also applicable Chapter 3 policies when reviewing a project on appeal.

The only persons qualified to testify before the Commission at the "substantial issue" stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. At the time of the de novo portion of the hearing, any person may testify.

The Coastal Act requires that the Commission shall hear an appeal unless no substantial issue exists with respect to the grounds on which the appeal was filed under Section 30603. (§ 30625(b)(2).) Section 13115(c) of the Commission regulations provides that the Commission may consider the following five factors when determining if a local action raises a significant issue:

1. The degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP;
2. The extent and scope of the development as approved or denied by the local government;
3. The significance of the coastal resources affected by the decision;
4. The precedential value of the local government's decision for future interpretations of its LCP; and
5. Whether the appeal raises only local issues, or those of regional or statewide significance.

The Commission may, but need not, assign a particular weight to a factor.

Even when the Commission chooses not to hear an appeal, appellants nevertheless may obtain judicial review of the local government's coastal permit decision by filing a petition for a writ of mandate pursuant to the Code of Civil Procedure, section 1094.5.

The City of San Diego has a certified Local Coastal Program (LCP), and the subject site is located in an area where the Commission retains appeal jurisdiction because it is located between the first public road and the sea. Therefore, before the Commission considers the appeal de novo, the appeal must establish that a substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603. In this case, for the reasons discussed further below, the Commission exercises its discretion to determine that the development approved by the City raises substantial issue with regard to the appellant's contentions regarding coastal resources.

IV. SUBSTANTIAL ISSUE MOTION AND RESOLUTION

Motion:

I move that the Commission determine that Appeal No. A-6-SAN-20-0029 raises NO substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.

Staff recommends a **NO** vote. Failure of this motion will result in a de novo hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote by a majority of the Commissioners present.

Resolution:

The Commission hereby finds that Appeal No. A-6-SAN-20-0029 presents a substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

V. SUBSTANTIAL ISSUE FINDINGS AND DECLARATION

A. Project Description and Background

The Municipal Waterways Maintenance Plan (MWMP) addresses repair and maintenance activities throughout the City of San Diego and is intended to streamline the drafting and approval of specific channel maintenance projects. Under the MWMP, each year, the city would survey its storm water infrastructure and prioritize which segments warrant repair and maintenance activities for the following fiscal year under a cost-benefit analysis, after which Facility Maintenance Plans (FMP) would be drafted for each prioritized segment (if a previously drafted FMP does not already exist). FMPs are crafted by selecting from a general list of repair and maintenance activities (vegetation clearing, sediment removal, culvert clearing, concrete or earthen bank repair, etc.), a list of methodologies (machine excavation within the channel, excavation with machinery stationed outside the channel, hand removal, etc.), a selection of BMPs (e.g. stockpiling, flow diversion, etc.), environmental protocols to identify and avoid sensitive resources (animal habitat, sensitive vegetation, paleontological resources, etc.), and general mitigation categories for any unavoidable impacts.

The project site consists of storm water channels and intakes spread across the City of San Diego's coastal zone and located within its permitting jurisdiction, both within and outside of the areas appealable to the Coastal Commission, where the San Diego

certified LCP and the public access policies of Chapter 3 of the Coastal Act are the standard of review.

Project History

In October 2011, the City of San Diego approved a twenty-year permit for a master storm water program to streamline the review and approval process for repair and maintenance of storm water infrastructure. The Coastal Commission, as well as several non-profit organizations, appealed the city's permit on the grounds that it was inconsistent with the certified LCP's habitat protection policies because the city permit approved wide-ranging impacts from maintenance activities without analyzing alternatives or finalizing mitigation plans. Additionally, the twenty-year duration of the permit and the annual prioritization of channel maintenance created the possibility that certain channels could remain unmaintained for years, allowing new or additional habitat resources to arise that were not identified in the master storm water program and for which mitigation would not be identified until well after permit approval.

At the March 2012 hearing, the Commission found that the appeal raised substantial issue, and directed the city to work with Commission staff and other stakeholders to modify the program such that a supportable version could be brought back on de novo. After months of coordination, the City drafted a five-year program (subsequently amended to seven years) with a reduced facility coverage area concentrated in three coastal areas: Sorrento Valley, Mission Bay High School, and the Tijuana River Valley. In the revised program, the city more specifically detailed the proposed scope of maintenance work, provided greater detailed water quality Best Management Practices (BMPs), specified the maximum potential habitat impacts and related mitigation ratios, and identified specific mitigation sites and plans within the coastal zone. The revised program, including mitigation plans, was approved by the Commission on de novo at the November 2012 hearing.

The Commission-approved program was subsequently adopted by the city in 2013 as the Master Storm Water System Maintenance Program (Master Maintenance Permit – MMP – for short). Under the MMP, the city annually prioritized the storm water facilities to repair or maintain for the coming fiscal year, identified the necessary maintenance measures to restore adequate flood capacity in the least impactful manner, performed resource surveys to identify unavoidable impacts, and identified how the impacts would be mitigated under the approved mitigation plans. The city then compiled Individual Maintenance Plans (IMPs) and submitted a Substantial Conformance Review (SCR) package to Commission staff to demonstrate how the IMPs conformed to the MMP and how any unavoidable impacts were mitigated under the approved mitigation plans. Separately, the city also submitted quarterly and annual monitoring reports tracking the mitigation sites' progress vis-à-vis approved success criteria. Commission staff would then provide the City with a letter confirming that year's IMPs's conformance with the MMP and authorization to proceed with maintenance. The MMP expired in November 2019, and review of storm water maintenance activity subsequently reverted to the default of each maintenance project being development requiring its own separate permit review.

Prior to the end of the seven-year term of the MMP, the city began work on drafting the MWMP as a successor program. During its preparations, the city held meetings with Commission staff and other stake holders, during which Commission staff's comments primarily consisted of using the Commission's actions in reviewing and approving the 2012 program as a model for the successor program and ensuring that proper mitigation was identified for any new impacts arising from the successor program. The City completed its CEQA process and internal permit approvals earlier this year, and the Notice of Final Action for the MWMP was submitted to the Commission in July 2020.

Relatedly, because a portion of the city's storm water system in the coastal zone is in the Commission's permitting jurisdiction, the city also submitted a permit application to the Commission in July 2020 to apply the MWMP to those storm water facilities (CDP No. 6-20-0356). That application is currently pending.

B. Biological Resources

The Torrey Pines Community Plan states the following:

Torrey Pines Community Plan – Local Coastal Program Policies

Wetlands/Environmentally Sensitive Resources

The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted where there is no feasible, less environmentally damaging alternative, where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following newly permitted uses and activities”

- 1. Incidental public service purposes, including, but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines;*
- 2. Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas;*
- 3. Restorative purposes;*
- 4. Nature study, aquaculture or similar resource-dependent activities.*

The Tijuana River Valley Land Use Plan states the following:

Tijuana River Valley Land Use Plan – Specific Recommendations

The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to minor

incidental public service projects, restoration purposes, nature study, and mineral extraction.

Section 143.0130 of the San Diego Land Development Code, which serves as the certified IP, states:

Uses Allowed Within Environmentally Sensitive Lands

Allowed uses within environmentally sensitive lands are those allowed in the applicable zone, except where limited by this section.

[...]

(d) Wetlands in the Coastal Overlay Zone. Uses permitted in wetlands shall be limited to the following:

(1) Aquaculture, wetlands-related scientific research and wetlands-related educational uses;

(2) Wetland restoration projects where the primary purpose is restoration of the habitat;

(3) Incidental public service projects, where it has been demonstrated that there is no feasible less environmentally damaging location or alternative, and where mitigation measures have been provided to minimize adverse environmental effects.

(e) Wetland buffer areas in the Coastal Overlay Zone. Permitted uses in wetland buffer areas shall be limited to the following:

(1) Public Access paths;

(2) Fences;

(3) Restoration and enhancement activities; and

(4) Other improvements necessary to protect wetlands.

Section 143.0141 of the Land Development Code states:

Development Regulations for Sensitive Biological Resources

Development that proposed encroachment into sensitive biological resources requires a development permit in accordance with Section 143.0110, unless exempted pursuant to Section 143.0110(c) and is subject to the following regulations and the Biology Guidelines in the Land Development Manual.

(a) General Regulations for Sensitive Biological Resources

(1) All development occurring in sensitive biological resources is subject to a site-specific impact analysis conducted by a qualified Biologist, in accordance with the Biology Guidelines in the Land Development Manual. The impact analysis shall evaluate impacts to sensitive biological resources and CEQA sensitive species. The analysis shall determine the corresponding mitigation, where appropriate, and the requirements for protection and management. Mitigation may include any of the following, as appropriate to the nature and extent of the impact:

(A) Dedication in fee title to the City of San Diego; or

(B) Dedication of a covenant of easement in favor of the City of San Diego, the California Department of Fish and Wildlife and the U.S. Fish and Wildlife Service for either:

(i) An off-site location with long-term viability and biological values equal to or greater than the impacted site, and with limited right of entry for habitat management, as necessary; or

(ii) On-site creation of new habitat, preservation of existing habitat outside the Coastal Overlay Zone, or enhancement of existing degraded habitat, with limited right of entry for habitat management, as necessary. The location of the easement must have long-term viability and biological values equal to or greater than the impacted site.

(iii) In off-site locations or on-site, Zone Two brush management shall be placed within a covenant of easement, but may not qualify for mitigation purposes.

[...]

(2) Sensitive biological resources that are outside of the allowable development area on a premises, or are acquired as off-site mitigation as a condition of permit issuance, are to be left in a natural state and used only for those passive activities allowed as a condition of permit approval. If the land is not dedicated in fee to the City, identification of permissible passive activities and any other conditions of the permit shall be incorporated into a covenant of easement that shall be recorded against title to the property, in accordance with procedures set forth in Section 143.0152. The U.S. Fish and Wildlife Service and the California Department of Fish and Wildlife are to be named as third-party beneficiaries to any covenant of easement recorded pursuant to this section.

[...]

(b) Wetland Regulations

(1) State and federal law regulate adverse impacts to wetlands and listed species habitat. The applicant shall confer, when applicable, with the U.S. Army Corps of Engineers, U.S. Fish & Wildlife Service and/or California Department of Fish and Wildlife before any public hearing for the development proposal.

(2) The applicant shall solicit input from U.S. Army Corps of Engineers, U.S. Fish & Wildlife Service and/or California Department of Fish and Wildlife on impact avoidance, minimization, mitigation and buffer requirements, including the need for upland transitional habitat.

(3) The applicant shall, to the maximum extent feasible, incorporate U.S. Army Corps of Engineers, U.S. Fish & Wildlife Service and/or California Department of Fish and Wildlife recommendations into the development proposal prior to the first public hearing.

(4) Construction permits shall not be issued for any project that impacts wetlands or listed species habitat until all necessary federal and state permits have been obtained.

(5) Impacts to wetlands shall be avoided, except where permitted in accordance with Section 143.0141(b)(6). A wetland buffer shall be maintained around all wetlands as appropriate to protect the functions and values of the wetlands. In the Coastal Overlay Zone, the applicant shall provide a minimum 100-foot buffer, unless a lesser or greater buffer is warranted as determined through the process described in this section.

(6) Outside the Coastal Overlay Zone, encroachment into a vernal pool is allowed outside of the MHPA where the development is consistent with the Biology Guidelines of the Land Development Manual and VPHCP. Such development does not require a deviation to the wetland regulations

Section 143.0145 of the Land Development Code states:

Development Regulations for Special Flood Hazard Areas

[...]

(3) Channelization or other substantial alteration of rivers or streams shall be limited to that necessary for the following:

(A) Essential public service projects, where no other feasible construction method or alternative project location exists; and

(B) Flood control projects, where no other feasible method for protecting existing public or private development exists and where such protection is necessary for public safety.

(C) Projects where the primary function is the improvement of fish and wildlife habitat.

[...]

(5) Development that involves channelization or other substantial alteration of rivers or streams is subject to the following requirements.

(A) All requirements and relevant recommendations of hydrological studies for the watershed of the affected stream, as approved by the City Engineer, shall be incorporated into the project design and mitigation measures. These requirements include erosional characteristics, flow velocities, volume, sediment transport, and maintenance of hydrology.

(B) The channel shall be designed to ensure that the following occur:

(i) Stream scour is minimized;

(ii) Erosion protection is provided;

(iii) Water flow velocities are maintained as specified by the City Engineer;

(iv) There are neither significant increases nor contributions to downstream bank erosion and sedimentation of sensitive biological resources; acceptable techniques to control stream sediment include planting riparian vegetation in and near the stream and detention or retention basins;

(v) Wildlife habitat and corridors are maintained;

(vi) Resource management criteria are implemented consistent with applicable land use plans; and

(vii) Groundwater recharge capability is maintained or improved.

(C) Channels that accommodate a base flood shall do so without increasing the water surface elevation more than one foot at any point from the level of a nonconfined base flood in the natural undeveloped floodplain. Channels may accommodate less than a base flood (low-flow channels), but shall be designed and constructed in accordance with FEMA regulations.

(D) All artificial channels shall consist of natural bottoms and sides and shall be designed and sized to accommodate existing and proposed riparian vegetation and other natural or proposed constraints. Where maintenance is proposed or required to keep vegetation at existing levels compatible with the design

capacity of the channel, a responsible party shall be identified and a maintenance and monitoring process shall be established to the satisfaction of the City Engineer.

(6) Development shall not significantly adversely affect existing sensitive biological resources on-site or off-site.

The City's storm water system is comprised of several different types of facilities such as natural (earthen) and artificial (concrete, rip rap) channels, which are used to convey storm runoff throughout the metropolitan area. Maintenance of channels primarily involves the removal of accumulated sediment, vegetation, and debris to restore design conveyance capacity, as vegetation may slow flows and sediment may reduce the volume carrying capacity of the channel. The drainages within the coastal zone affected by the MWMP are substantially natural drainages. Within these drainages, there exist and is the potential for establishment of additional wetlands, sensitive uplands, and various wildlife species.

In preparing the MWMP, the city also prepared an initial inventory of project-specific FMPs for the first round of maintenance activities to be undertaken during the fiscal year following approval of the MWMP. Pursuant to the MWMP, in preparing the FMPs, the city and its consultants conducted biological surveys of the storm water segments slated for maintenance and overlaid them with the maintenance project footprint the FMPs recommended in order to identify the anticipated habitat impacts that would arise from implementation of the maintenance, such as how many acres of vegetation would be removed by maintenance clearing. However, while the city identified the known impacts that will arise from future maintenance activities, the city has not identified or ensured adequate mitigation for these impacts is available. Rather, the MWMP simply describes five general categories of mitigation: currently active mitigation sites, mitigation sites with draft plans currently undergoing separate review, general areas where future mitigation sites could potentially be found, purchasing mitigation credits, or third-party mitigation banks. Except for the first category, which consists of mitigation sites constructed to offset previous development impacts, including those arising from the preceding 2012 MMP, none of the other categories involve specific, approved mitigation plans that can be implemented at this time. Thus, in approving the MWMP, the city has approved specific, known habitat impacts without also identifying and ensuring appropriate mitigation will occur as required by the LCP.

Instead, the permit states that the under the MWMP, no approved FMP can be *implemented* until it identifies and obtains approval for specific mitigation plans at some future undetermined date. However, this delay is not allowed under the LCP, as it requires that all projects that would impact sensitive habitat must conduct an impact analysis, and that "[t]he impact analysis shall evaluate impacts to sensitive biological resources and CEQA sensitive species. The analysis shall determine the corresponding mitigation, where appropriate, and the requirements for protection and management." (143.0141(a)(1).) The MMPA includes the impact determination, but not determination of appropriate mitigation and its management.

Related to the issue of the lack of biological analysis and identification of appropriate mitigation is the annual prioritization process of the maintenance work. Given that the proposed prioritization process will occur on a “cost-benefit” analysis that can rely on a wide assortment of changing, non-coastal factors, it is possible that multiple drainages could remain off the priority list and thus unaltered for several years, with the establishment of new or additional habitat in the interim that was not accounted for in the initial permit approval. As a variety of non-habitat-related factors play a part in determining where and when maintenance activity occurs, it is possible that a situation may arise such that maintenance of a channel in the coastal zone is delayed for several years, allowing substantial wetland habitat to accumulate until such time as emergency maintenance action to clear a channel may be required, leading to substantial impacts to coastal habitat without full review which might have been avoided.

This is substantially the situation that occurred in the lead up to the 2012 MMP, when the city’s irregular maintenance of its coastal storm water channels led to over ten acres of habitat becoming established therein and slated for removal due to flooding impacts without properly identified mitigation. In its 2012 action, the Commission identified those impacts as permanent impacts requiring the identification of full, planned mitigation. While the city under the 2012 MMP has been much more consistent in performing annual maintenance on its coastal channels to avoid a repeat of the 2012 situation regarding accumulated habitat, the MWMP covers a greater number of channels than the MMP and has identified new habitat beyond the 2012 MMP that would be impacted by future maintenance. However, many of those channels with newly identified habitat are not included in the initial round of prioritized FMPs, and there is no known date as to when the city’s cost-benefit analysis will prioritize those channels, meaning it is possible that the habitat could grow further, leading to additional impacts for which no adequate mitigation plan is currently known. This indeterminate nature of both the volume of impacts and adequacy of mitigation does not conform to the basic requirement of the LCP to be able to ensure the maintenance of the coastal zone’s habitat value through the provision of adequate mitigation for known, specific impacts.

Related to impacts to habitat, the MWMP is proposing to mitigate in kind at specific ratios contained in the Mitigation and Monitoring Reporting Program (MMRP), incorporated into the MMPA by reference. The MWMP will first seek on-site mitigation, then, if on-site is not feasible, it will look to mitigation within the same watershed, and finally to mitigation elsewhere within the coastal zone. However, the MMRP identifies impacts to “disturbed” wetlands to be mitigated at only a 2:1 ratio. The term “disturbed” is not defined in the LCP or MWMP, though in the past the city has said it involves wetlands containing invasive species, such as Arundo reed. However, the Commission does not differentiate between “disturbed” and undisturbed wetlands for purposes of calculating impacts and subsequent mitigation. This same issue arose in the 2012 MMP when the city proposed the same 2:1 mitigation ratio, and in its de novo approval, the Commission required 4:1 mitigation ratio for impacts to wetlands, disturbed or not. There have been no changes to the LCP in the interim warranting any change in the mitigation requirement, and thus the MWMP’s 2:1 mitigation ratio for “disturbed” wetlands is inadequate to properly mitigate for habitat impacts and thus not in conformance with the habitat protection policies of the LCP.

The city's approval of an indefinite permit for the MWMP, a program that lacks any formal or specific mitigation plan for identified habitat impacts both now and in the future and which calls for inadequate mitigation ratios for certain habitat impacts, presents a clear risk of loss of habitat value in the coastal zone and inadequate measures to mitigate for years to come. These nonconformities present a substantial issue with regards to the certified LCP.

C. Jurisdiction

Section 126.0710 of the San Diego Land Development Code states in relevant part:

(a) A Coastal Development Permit that has been approved by the City may be appealed to the Coastal Commission if the coastal development that is authorized by the permit is located within the appealable area of the Coastal Overlay Zone.

[...]

Page 52 of the MWMP describes how reviews and approvals of maintenance activity under MWMP will occur. When the City has prioritized the stormwater segments it wishes to maintain for the subsequent fiscal year, it will draft a new FMP or identify a previously existing one to reuse. When the FMP is proposed, the SCR process will review the FMP to determine whether it conforms to the requirements of the MWMP and is thus authorized for implementation without needing to obtain further permits or amendments. The MWMP states that SCR will occur through a "Process Two" that will allow the public to appeal the city's finding that an FMP substantially conforms to the MWMP to the City Council and Coastal Commission. However, despite stating that the SCR determination is appealable to the Commission and requiring the circulation of the SCR information package to multiple resource agencies for review and comment, the permit does not require the SCR package to be circulated to the Commission. Rather, the city will instead send the Commission a "Notice of Decision" after the SCR package has been reviewed and a final decision made by the city, which could then be appealed, according to the MWMP, to the Commission. Without being part of the review process, it is difficult to see what oversight the Commission would have on these projects. Given the indefinite duration of the city's permit for the MWMP, this process would severely limit the Commission's oversight of development occurring within the coastal zone.

Additionally, it is unclear how the "appeal" system as described by the MWMP would function. The LCP states that CDPs approved by the city for development in the appealable area of the city's jurisdiction of the coastal zone may be appealed to the Coastal Commission. However, under the MWMP, the city will not be issuing new CDPs, but rather SCR determinations as to whether FMPs conform to the MWMP. It is unclear under what provision of the LCP a member of the public would be able to appeal an SCR determination to the Commission, and under what standard such a Commission review would entail. An appeal to the Commission must be based on the claim that a local government's permit action is not in conformance with the certified LCP. However, by the MWMP's own design, the SCRs are not permit actions, and only CDPs are appealable to the Coastal Commission.

Furthermore, given that the city's approval of the MWMP is indefinite and would not be amended except at the sole discretion of the City, it is possible – and highly likely – that the LCP will subsequently change over the years after the MWMP is approved. The City will be reviewing projects for consistency with the MWMP, not the LCP, but without issuance of a CDP, adherence to the LCP is not required, and an appeal based on inconsistency with the LCP would not be possible.

Finally, with no fixed permit duration, the city would have the sole discretion on when and if to amend the MWMP and bring it back for additional LCP review and public hearings, removing an important opportunity to periodically assess the effectiveness of the program and bring it up to conformance with the latest updates to the certified LCP.

Thus, the indefinite nature of the city's approval of the MWMP, its exclusion of the Commission from subsequent involvement in the SCR process, and the potentially inappropriate or inadequate application of the Commission's appeal process would significantly limit the Commission's oversight of development within the coastal zone and impair the jurisdictional oversight of the Commission's appeal authority, supporting a finding of substantial issue.

D. Substantial Issue Factors

As discussed above, there is inadequate factual and legal support for the City's determination that the proposed development is consistent with the certified LCP. In this case, the city's permit approves indefinite impacts to identified habitat resources but lacks the required review and approval of adequate mitigation plans, and what mitigation it does call for in any yet-to-be-determined mitigation plan will be lower than is required with the plan's 2:1 mitigation for impacts to "disturbed" wetlands. The indefinite nature of the city's approval of the MWMP and its exclusion of the Commission from the SCR process means that Commission oversight of development within and adjacent to water channels within the coastal zone, which have high potential for sensitive habitat establishment, will be severely curtailed, and potentially negated until such time as the city in its sole discretion amends the permit. The other factors that the Commission normally considers when evaluating whether a local government's action raises a substantial issue also support a finding of substantial issue. The objections to the project suggested by the appellants raise substantial issues of regional or statewide significance, as San Diego is one of the largest jurisdictions in the coastal zone, and its storm water system drains into several watersheds containing lagoons, bays, and rivers. The manner and duration of the MWMP could set an adverse precedent for future actions taken by other coastal jurisdictions in maintaining their storm water systems, often a large and costly undertaking that local governments are likely to streamline. Thus, the city's decision has the potential to establish adverse precedential value for future interpretations of the certified LCP.

APPENDIX A – SUBSTANTIVE FILE DOCUMENTS

- Final Environmental Impact Report for the Municipal Waterways Maintenance Plan San Diego, CA SCH No. 2017071022 Project No. 616992 – March 2020
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