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# Th12a

Appeal Filed: 2/19/2021  
Action Deadline: 4/30/2021  
Staff: Alexandra McCoy - SC  
Staff Report: 4/2/2021  
Hearing Date: 4/15/2021

## STAFF REPORT SUBSTANTIAL ISSUE DETERMINATION ONLY

**Appeal Number:** A-3-SLO-21-0017  
**Applicant:** Phillips 66  
**Appellant:** Jeff Edwards  
**Local Government:** San Luis Obispo County  
**Local Decision:** Coastal development permit application number DRC2019-00231 approved by the San Luis Obispo County Board of Supervisors on October 20, 2020.  
**Location:** Phillips 66 Santa Maria oil refinery located at 2555 Willow Road (also Highway 1) in unincorporated San Luis Obispo County.  
**Project Description:** Remediation of contaminated soils consisting of excavation and removal of approximately 14,520 cubic yards of soil containing hydrocarbon, asbestos, and domestic waste, and revegetation of the area with native hydroseed and native plants.  
**Staff Recommendation:** No Substantial Issue

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### IMPORTANT HEARING PROCEDURAL NOTE

Please note that this is a substantial issue only hearing, and testimony will be taken only on the question of whether the appeal raises a substantial issue. Such testimony is generally limited to three minutes total per side (although the Commission's Chair has the discretion to modify these time limits), so please plan your testimony accordingly. Only the Applicant, persons who opposed the application before the local government, the local government, and their proxies/representatives are allowed to testify during this

substantial issue phase of the hearing. Other interested parties may submit comments in writing. If the Commission finds that the appeal raises a substantial issue, then the Commission takes jurisdiction over the underlying coastal development permit (CDP) application and will then review that application at a future Commission meeting, at which time all persons are invited to testify. If the Commission finds that the appeal does not raise a substantial issue, then the local government CDP decision stands, and is thus final and effective.

#### SUMMARY OF STAFF RECOMMENDATION

San Luis Obispo County approved a CDP for a soil remediation project covering almost 1.5 acres at the Phillips 66 refinery facility in southern San Luis Obispo County. The project includes removal of contaminated soils for proper inland disposal, and then revegetation/restoration of the affected area. The Appellant contends that the County should have conditioned the project to require the Applicant to grant a revised public access easement (i.e., there already exists a recorded offer for a public access easement on this site by virtue of a prior unrelated CDP<sup>1</sup>) large enough to accommodate a southern vehicular access route into the seaward Oceano Dunes State Vehicular Recreation Area (ODSVRA). However, the project does not affect public access, it is located in a different part of the site than the existing recorded offer, and is not related to that offer in any way. In fact, although it is clear that the Appellant wants the County to require such a road, it is also clear that the LCP does not require it here. Thus, staff recommends that the Commission find that the appeal raises no substantial LCP conformance issue and decline to take jurisdiction over the CDP application for the project. The motion to do so is found on page 4 below.

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<sup>1</sup> As discussed further below, in that CDP action (A-3-SLO-13-014), the Commission found no substantial issue with San Luis Obispo County's approval of a CDP allowing a 10 percent increase in the daily maximum crude oil throughput produced at the existing refinery. The Appellant here raised substantially the same challenge to the terms of the OTD in 2013, as he does today.

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**EXHIBITS**

- Exhibit 1 – Project Location Map
- Exhibit 2 – Project Site Image
- Exhibit 3 – County’s Notice of Final Action
- Exhibit 4 – CDP Appeal Document
- Exhibit 5 – Coastal Zone Land Use Ordinance Section 23.04.420
- Exhibit 6 – Location of 2015 OTD Easement

**CORRESPONDENCE**

## 1. MOTION AND RESOLUTION

Staff recommends that the Commission determine that no substantial issue exists with respect to the grounds on which the appeal was filed. A finding of no substantial issue would mean that the Commission would not take jurisdiction over the underlying CDP application for the proposed project and would not conduct further hearings on this matter, and that the local government CDP decision stands and is thus final and effective. To implement this recommendation, staff recommends a yes vote on the following motion which, if passed, will result in the recommended no substantial issue finding. If the motion fails, then the Commission will have instead found a substantial issue and will instead take jurisdiction over the subject CDP application for future hearing and action. The motion passes only by an affirmative vote of a majority of the Commissioners present.

***Motion:*** *I move that the Commission determine that Appeal Number A-3-SLO-21-0017 **raises no substantial issue** with respect to the grounds on which the appeal has been filed under Section 30603, and I recommend a **yes** vote.*

***Resolution to Find No Substantial Issue.*** *The Commission finds that Appeal Number A-3-SLO-21-0017 does not present a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the certified Local Coastal Program and/or the public access and recreation policies of the Coastal Act.*

## 2. FINDINGS AND DECLARATIONS

### A. Project Location and Description

The Phillips 66 Santa Maria Facility is located at 2555 Willow Road in unincorporated southern San Luis Obispo County inland of the Oceano Dunes State Vehicle Recreation Area (ODSVRA) (see **Exhibit 1**). The site is zoned for industrial use and currently includes an operating oil refinery along with undeveloped areas of coastal dunes. Open space, industrial, agricultural, and residential uses are located to the north, south, and east of the site.

The Phillips 66 Facility was originally built in 1955 and has been operating as an oil refinery since that time. The Applicant recently announced that the facility will be closing in 2023. As part of operations, the Applicant historically utilized a portion of the site as a disposal area, known as the Northern Inactive Waste Site (NIWS).<sup>2</sup> The NIWS occupies approximately 1.38 acres of the 560-acre site occupied by the refinery and related development, and is located just inland of the main access road into the facility (see **Exhibit 2**). The Applicant was directed by the Central Coast Regional Water Quality Control Board to remediate the NIWS.

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<sup>2</sup> The NIWS was operational from approximately 1955 to 1974 and was reportedly used for the disposal of refinery byproducts and domestic waste, including petroleum hydrocarbons and potential asbestos-containing materials.

Remediation activities will include excavation and removal of a total of 14,520 cubic yards of impacted soils to depths ranging from three to ten feet below grade. The contaminated soil will be transported via trucks to rail cars, which will then transport the soil to a waste-receiving facility in Utah. The site would then be revegetated with native hydroseed within 30 days of final excavation activities. Hydroseeding will take place over the entire area of disturbance, including the resulting slopes.

See **Exhibit 1** for a location map, see **Exhibit 2** for aerial photographs of the remediation site and surrounding area.

### **B. San Luis Obispo County CDP Approval**

On September 4, 2020, the San Luis Obispo County Planning Department approved a CDP for the above-described remediation of the NIWS. The County's approval also requires further native plant revegetation of the remediated site through a required habitat restoration plan. The Planning Department CDP approval was appealed by the current Appellant to the Board of Supervisors which, after deliberation, upheld the approval and denied the appeal on January 16, 2021, thus finalizing the County's CDP decision. The County's Final Local CDP Action Notice (see **Exhibit 3**) was received in the Coastal Commission's Central Coast District Office on February 8, 2021, and the Coastal Commission's ten-working-day appeal period for this action began on February 9, 2021 and concluded at 5 p.m. on February 23, 2021. One valid appeal (discussed below) was received during the appeal period.

### **C. Appeal Procedures**

Coastal Act Section 30603 provides for the appeal to the Coastal Commission of certain CDP decisions in jurisdictions with certified LCPs. The following categories of local CDP decisions are appealable: (a) approval of CDPs for development that is located (1) between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance, (2) 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, and (3) in a sensitive coastal resource area; or (b) for counties, approval of CDPs for development that is not designated as the principal permitted use under the LCP. In addition, any local action (approval or denial) on a CDP for a major public works project (including a publicly financed recreational facility and/or a special district development) or an energy facility is appealable to the Commission. This County CDP decision is appealable to the Commission because the project site is located between the first public road and the sea.

For appeals of a CDP approval, grounds for appeal are limited to allegations that the approved development does not conform to the LCP and/or to Coastal Act public access provisions. For appeals of a CDP denial, where allowed (i.e., such appeals are only allowed in extremely limited circumstances—see description of appealable actions, above), the grounds for appeal are limited to allegations that the development conforms to the LCP and to Coastal Act public access provisions.

The Commission's consideration of appeals is a two-step process. The first step is determining whether the appeal raises a substantial issue that the Commission, in the exercise of its discretion, finds to be significant enough to warrant the Commission taking jurisdiction over the CDP application. This step is often referred to as the "substantial issue" phase of an appeal. The Commission is required to begin its hearing on an appeal, addressing at least the substantial issue question, within 49-working days of the filing of the appeal unless the applicant has waived that requirement, in which case there is no deadline.

The Coastal Act and the Commission's implementing regulations are structured such that there is a presumption of a substantial issue when the Commission acts on this question, and the Commission generally considers a number of factors in making that determination.<sup>3</sup> At this stage, the Commission may only consider issues brought up by the appeal. At the substantial issue hearing, staff will make a recommendation for the Commission to find either substantial issue or no substantial issue. If staff makes the former recommendation, the Commission will not take testimony at the hearing on the substantial issue recommendation unless at least three Commissioners request it and, if no such hearing is requested, a substantial issue is automatically found. In both cases, when the Commission does take testimony, it is generally (and at the discretion of the Commission Chair) limited to three minutes total per side, and only the Applicant, persons who opposed the application before the local government, the local government, and their proxies/representatives are allowed to testify, while others may submit comments in writing.

If, following testimony and a public hearing, the Commission determines that the appeal does not raise a substantial issue, then the first step is the only step, and the local government's CDP decision stands. However, if the Commission finds a substantial issue, the Commission takes jurisdiction over the underlying CDP application for the proposed project, and the appeal heads to the second phase of the hearing on the appeal.

In the second phase of the appeal, if it occurs, the Commission must determine whether the proposed development is consistent with the applicable LCP (and in certain circumstances the Coastal Act's public access and recreation provisions). This step is often referred to as the "de novo" review phase of an appeal, and it entails reviewing the

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<sup>3</sup> The term substantial issue is not defined in the Coastal Act. The Commission's regulations simply indicate that the Commission will hear an appeal unless it "finds that the appeal raises no significant question" (California Code of Regulations, Title 14, Section 13115(b)). Section 13115(c) of the Commission regulations provides, along with past Commission practice, 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 and the Coastal Act's public access provisions; (2) the extent and scope of the development; (3) the significance of the coastal resources affected by the decision; (4) the precedential value of the local government's decision for future interpretation 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, and may make a substantial issue determination for other reasons as well.

proposed project in total. There is no legal deadline for the Commission to act on the de novo phase of an appeal. Staff will make a CDP decision recommendation to the Commission, and the Commission will conduct a public hearing to decide whether to approve, approve with conditions, or deny the subject CDP. Any person may testify during the de novo phase of an appeal hearing (if applicable).

#### **D. Summary of Appeal Contentions**

The Appellant contends that the County-approved project is inconsistent with the certified LCP because it does not adequately implement the public access requirements of LCP Section 23.04.420, especially with respect to vertical public access easement requirements. Specifically, the Appellant contends that: 1) the County failed to include an analysis relative to the need for a vertical public access easement to provide a future southern access road to the ODSVRA and did not condition the project accordingly; 2) the Applicant's prior offer to dedicate (OTD) a public access easement (from a 2013 CDP at the site) has not been fulfilled; and; 3) the size of the accessway should be increased to 80 feet in width to accommodate future potential southern vehicular access to the ODSVRA as described in State Parks' 2020 draft Public Works Plan (PWP) for the ODSVRA, and the County should encourage State Parks to accept the OTD easement to provide this access. Please see **Exhibit 4** for the appeal contentions.

#### **E. Substantial Issue Determination**

##### ***Applicable LCP Provisions***

The LCP's Coastal Zone Land Use Ordinance (CZLUO) is the implementing component of the LCP. The Appellant cites to CZLUO Section 23.04.420, which requires development located between the first public road and the tidelands to protect and/or provide for public access, and states in relevant part:<sup>4</sup>

##### ***23.04.420 - Coastal Access Required.***

*Development within the Coastal Zone between the first public road and the tidelands shall protect and/or provide coastal access as required by this section. The intent of these standards is to assure public rights of access to the coast are protected as guaranteed by the California Constitution. Coastal access standards are also established by this section to satisfy the intent of the California Coastal Act: ...*

*b. Protection of existing coastal access. Development shall not interfere with public rights of access to the sea where such rights were acquired through use or legislative authorization. Public access rights may include but are not limited to the use of dry sand and rocky beaches to the first line of terrestrial vegetation.*

*c. When new access is required. Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development*

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<sup>4</sup> See **Exhibit 5** for CZLUO Section 23.04.420 in its entirety.

*projects except where: (1) Access would be inconsistent with public safety, military security needs or the protection of fragile coastal resources; ...*

*d. Type of access required: (1) Vertical Access: ... (ii) In rural areas: In rural areas where no dedicated or public access exists within one mile, or if the site has more than one mile of coastal frontage, an accessway shall be provided for each mile of frontage... (2) Vertical access dedication. Accessways shall be a minimum width of five feet in urban areas and 10 feet in rural areas...*

*e. Timing of access requirements. The type and extent of access to be dedicated, and/or constructed and maintained, as well as the method by which its continuing availability for public use is to be guaranteed, shall be established at the time of land use permit approval, as provided by this section. (1) Dedication: Shall occur before issuance of construction permits or the start of any construction activity not requiring a permit. (2) Construction of improvements: Shall occur at the same time as construction of the approved development, unless another time is established through conditions of land use permit approval. (3) Opening access for public use: No new coastal access required by this section shall be opened or otherwise made available for public use until a public agency or private association approved by the county agrees to accept responsibility for maintenance of the accessway and any liability resulting from public use of the accessway. (4) Interference with public use prohibited: Following an offer to dedicate public access pursuant to subsection e(1) of this section, the property owner shall not interfere with use by the public of the areas subject to the offer before acceptance by the responsible entity.*

Importantly, the LCP's access provisions are not sufficient by themselves to compel applicants to provide public access on their property. On the contrary, land use jurisprudence makes clear that access, such as that required by LCP Section 23.04.420, can only be required if 1) there is also a reasonable nexus (i.e., that the project leads to a public access impact requiring mitigation), and; 2) any required access mitigation is roughly proportional to the impact being mitigated (see e.g. *Nollan v. California Coastal Commission* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374). Although this LCP does not reference these binding legal requirements (as is not unusual for older LCPs, such as this), these requirements from caselaw continue to apply even if they are not explicitly contained in the LCP.

### **Analysis**

The Appellant contends that the County did not analyze or condition this project relative to CZLUO Section 23.04.420. However, the County's CDP action included public access findings where the County determined "there is no nexus for coastal access improvements" inasmuch as the project has no impact on public access (see **Exhibit 3**). The Commission concurs. Here, because the remediation project is located inland of the main facility access road in an area that does not accommodate public access, it does not appear that the project would have an impact on public access.

The Appellant also raises concerns that an existing OTD on the site is inadequate for public access and believes that the OTD needs to be enlarged to accommodate a southern vehicular accessway into ODSVRA. Whether the current OTD is or is not the right type or size of OTD is unrelated to the CDP that is the subject of this appeal. As described above, there is no public access nexus with the remediation project demanding mitigation and the referenced OTD is associated with a prior CDP action that is not relevant to the appealed project. It appears that the Appellant is improperly seeking to challenge the sufficiency of an unrelated OTD from an unrelated 2013 CDP action. The time to challenge the sufficiency of that OTD has long since passed and it may not be collaterally attacked through the appeal of an unrelated project.

Construing the Appellant's contentions broadly, the only real question is whether the prior OTD condition has been appropriately addressed inasmuch as the County's LCP requires any violations to be resolved as part of CDP applications.<sup>5</sup> In that prior case, the County approved a CDP in 2013 to allow increased production capacity at the site,<sup>6</sup> and in doing so required a public access OTD as follows:

*Prior to issuance of the Notice to Proceed authorizing an increase in refinery throughput, the applicant shall comply with Section 23.04.420 – Coastal Access Required. Construction of improvements associated with vertical public access (if required) shall occur within 10 years of the effective date of this permit (including any required Coastal Development Permit to authorize such construction) or at the time of any subsequent use permit approved at the project site, whichever occurs first. The approximate location of the vertical access required by this condition of approval shall be located within or immediately adjacent to the existing maintenance road as shown in Exhibit D-Project Graphic (Coastal Access Location Map 1 and 2). [See Exhibit 6 for the location maps mentioned in the condition.]*

The Applicant properly recorded the required OTD on April 1, 2015 and it provides for a 10-foot-wide public access easement on the seaward side of the driveway into the Applicant's facility, extending from Highway 1 to State Parks' ODSVRA property (see **Exhibit 6**). The easement roughly tracks an existing maintenance road area that is bisected by railroad tracks owned and operated by the Union Pacific Railroad (and where the OTD does not apply as it is not located on the Applicant's property), and it has not yet been accepted. The County, as the CDP decisionmaker for that 2013 action,

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<sup>5</sup> See CZLUO Section 23.01.034(c), which states (in relevant part): "Compliance with applicable provisions of this title and code is required as follows: ...**Application where violation exists.** No application for land use permit, construction permit or land division shall be approved where an existing land use, building or parcel is being maintained in violation of any applicable provisions of the Subdivision Map Act, this code or any condition of approval of a land use permit, except where the application incorporates measures proposed by the applicant to correct the violation, and correction will occur before establishment of the new proposed use, or recordation of a final or parcel map in the case of a land division or the permit is necessary to maintain the health and/or safety of the occupants."

<sup>6</sup> Note that the current Appellant also appealed that 2013 County CDP decision to the Commission on near identical grounds (Appeal Number A-3-SLO-13-014) and the Commission determined that the County's CDP action raised no substantial issue.

believes the offer and recordation of the OTD meets the intent of Condition #17 and the County has affirmed that Phillips 66 has substantially complied with this condition on multiple occasions. Further, the road area is sufficient to accommodate public access should the easement be accepted, and that no additional improvements are necessary. Thus, the referenced timeline in the condition above (i.e., to construct such improvements within 10 years or when the next use permit is approved (i.e., this CDP for remediation is such a use permit)) is inapplicable here; the Applicant is in compliance with the OTD condition, and there is no violation requiring resolution under CZLUO Section 23.01.034(c).

In short, the Appellant contends that the County should have conditioned the project to require the Applicant to grant a revised public access easement large enough to accommodate a southern vehicular access route seaward into the ODSVRA. However, the project does not affect public access, is located in a different part of the site than the existing recorded offer, is not related to that offer in any way, and the requirements of CZLUO Section 23.01.034(c) do not apply because the relevant condition in the 2013 CDP is not being violated. Further, although it is clear that the Appellant wants the County to require such a road, it is also clear that the LCP does not require same in this case.

### **Conclusion**

When considering a project on appeal, the Commission must first determine whether the project raises a substantial issue of LCP conformity or public access, such that the Commission should assert jurisdiction over the CDP application for such development. At this stage, the Commission has the discretion to find that the project does or does not raise a substantial issue of Coastal Act public access and/or LCP conformance. In the past, the Commission has considered the following five factors to decide whether the issues raised in a given case are “substantial”: (1) the degree of factual and legal support for the local government’s decision; (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 as opposed to those of regional or statewide significance. The Commission may, but need not, assign a particular weight to a factor, and may make a substantial issue determination for other reasons as well.

As described above, the appeal contentions relate to the project’s consistency with the public access policies of the certified LCP and the Coastal Act. In this case, the County included an analysis of the proposed project’s public access consistency, and concluded that that remediation project had no potential to change or inhibit public access, and thus that no additional public access would (or could) be required as a condition of approval for the project. The County provided adequate legal support for its CDP decision, and the first factor strongly supports a no substantial issue determination.

As to the scope, while the remediation project occupies nearly 1.5 acres, it is on a much larger site, and thus the relative scope is small. Thus, the second factor slightly supports

a finding of substantial issue. The project is designed to improve and enhance resources through remediation, including dune area enhancement. While the coastal dune area resources are significant, they are being improved, therefore the third factor also slightly substantial issue determination.

As to precedential value, the County properly followed the clear terms of straightforward portions of the LCP. The County did not have to engage in difficult questions of LCP interpretation in its approval of this CDP. Therefore, the precedential value of the County's decision is low, and the fourth factor weighs against finding substantial issue. And while issues associated with dune resources and public access in general are important regionally and statewide, this appeal does not engage with them in a substantive way because the Appellant's contentions are largely based on an unrelated CDP. Therefore, this appeal does not raise issues of regional or statewide importance and the fifth factor also weighs against finding a substantial issue.

Taken together, the first, fourth, and fifth factors weigh heavily against finding substantial issue, while the second and third factors weigh slightly in support of finding substantial issue. Therefore, on balance, the Commission finds that the appeal contentions do not raise a substantial LCP or Coastal Act public access conformance issue and thus the Commission declines to take jurisdiction over the CDP application for this project.

### 3. APPENDICES

#### **A. Substantive File Documents<sup>7</sup>**

- San Luis Obispo County CDP File DRC2008-001
- San Luis Obispo County CDP File DRC2020-0050

#### **B. Staff Contacts with Agencies and Groups**

- San Luis Obispo County Department of Planning and Building
- Phillips 66

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<sup>7</sup> These documents are available for review from the Commission's Central Coast District office.