

Master Response 5: Coastal Commission Wetland Fill Policies

This master response addresses the issues comments raise with respect to the proposed project's compliance with the California Wetlands Conservation Policy, as well as the proposed project's uses and their compliance with the California Coastal Commission's policies (Public Resources Code Section 30000 et seq.) regarding the filling of and/or impacts to wetlands for land uses that are not coastal dependent or otherwise permitted. The Coastal Commission staff comments that despite inconsistencies of the project with section 30233 of the Coastal Act, which authorizes filling of wetlands for particular uses, "the Draft EIR concludes that the project is nonetheless consistent with the Coastal Act because the project would purportedly attain the overall objective of the Coastal Act to enhance and preserve coastal resources, presumably because wetland enhancement would be performed at Clark Slough and the project would not result in a net loss of wetlands." The staff further questions the Draft EIR's reference to the conflict resolution provisions of section 30007.5, stating that that section "does not provide a basis of overcoming the inconsistencies of the project with the wetland fill policies in the manner suggested by the Draft EIR."

The Draft EIR addresses potential impacts to wetlands and other sensitive biological resources in Chapter IV.D, Biology and Chapter IV.I, Land Use and Planning. See especially Impact D-1 (the potential for the proposed project to have a substantial adverse effect on any species identified as a candidate, sensitive, or special status species), Impact D-3 (the potential for the proposed project to have a substantial adverse effect on federally protected wetlands) and Impact D-5 (the potential for the proposed project to conflict with any local policies or ordinances protecting biological resources), as well as their associated mitigation measures. In addition, see Impact I-2 (the potential for the proposed project to conflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project adopted for the purpose of avoiding or mitigating an environmental effect).

The Draft EIR also references analyses and findings of the following appendices:

- Appendix G: Biological Assessment the Marina Center Project Balloon Track Property, Eureka, California
- Appendix H: Investigation of the Presence of Wetlands Subject to Regulation under the California Coastal Act, Balloon Track Property, Eureka, Humboldt, California
- Appendix I: Balloon Track Coastal Zone Wetland Delineation Coastal Commission Methodology

This master response addresses in whole or in part the following comments: 3-1, 3-22, 3-23, 3-24, 3-25, 3-26, 9-15, 9-16, 13-3, 16-61, 16-143, 17-4, 17-16, 24-1, 24-3, 24-4, 24-7, 25-28, 25-30, 25-31, 31-5, 31-11, 37-1, 50-5, 52-38, 52-39, 52-40, 58-16, 66-9, 83-1, 84-7, 87-2, 87-3, 88-14, 95-16, 95-17, 113-1, 117-8, 122-22, 142-5, 148-8, 151-11, 151-12, 173-3, 174-4, 179-13, 179-14, and 179-22.

The comments express concern that the proposed project's filling of wetlands is not in compliance with the Coastal Act and that the proposed uses are inconsistent with, or are not authorized uses under the Act. The comments specifically state that:

- The proposed project's filling of wetlands conflicts with the California Coastal Commission's Allowable Use Analysis, which states, "To even allow partial filling of any wetland in exchange for restoration can result in a net loss of both wetland acreage and function."
- The proposed project's uses are inconsistent with the uses permitted by Section 30233 for fill in wetlands—the filling of wetlands for the purpose of mitigation is not listed as a permissible use. However, the Draft EIR concludes that the project is nonetheless consistent with the Coastal Act through the erroneous logic: that the conflict resolution provisions of Section 30007.5 of the Coastal Act could be used to override the acknowledged inconsistency with Section 30233.
- Due to the limitations on the overall amount of permissible coastal development in the area, the proposed project has an opportunity cost that is not discussed in the Draft EIR: It could foreclose future opportunities for coastal development in the area, despite the fact that there are no coastal-dependent developments competing for the project site or similar parcels nearby. Therefore, the Draft EIR could instead analyze potential future demand for coastal uses on the Bay, such as the Port of Humboldt Bay Revitalization Plan.
- The 1:1 mitigation ratio for replacement of wetlands is not adequate. The ratio should be based on more than just total acreage, and instead should factor in wetland function and value. This information can be gleaned from a full ecological assessment. Given that the Draft EIR does not include a full ecological assessment and that one has not been prepared, all conclusions regarding the benefit of the one-to-one (1:1) wetland replacement are unsubstantiated.
- The EIR should include a separate consistency analysis that would be required by the Coastal Commission in assessing the proposed changes to the Local Coastal Plan for purposes of certification. The City should have had these discussions prior to publication of the Draft EIR, and their conclusions should have been included in the Draft EIR.

Response

The CEQA Guidelines call for an EIR to discuss and evaluate any inconsistencies between a proposed project and applicable plans and policies. In keeping with the Guidelines, the Draft EIR analyzes in Chapter IV. I, Land Use and Planning, the project's consistency with the City of Eureka adopted General Plan and the Land Use portion of its certified Local Coastal Program, including policies pertinent to the filling of wetlands on the project site (also see Master Response 3 of this Final EIR). The Draft EIR on page IV.I-14 notes that the project is not fully consistent with certain policies in the California Coastal Act (specifically Section 30233) related to wetlands and what uses or purposes constitute permissible fill of wetlands in the coastal zone. Some parts of the proposed project, it should be noted, are consistent with Section 30233. The list of permissible uses under Section 30233 includes restoration and incidental public service purposes, as described in the Draft EIR and further clarified in this Final EIR (see Master

Response 4), the first phase of development proposed for the site would be limited to wetland restoration and site remediation activities only. As also noted in Master Response 4, the Project Applicant is requesting approvals and entitlements for Phase 1 only.

The Draft EIR goes on to state that the Legislature anticipated situations where strict adherence to one section of the Coastal Act might impede attainment of the Act's broader goals and in Section 30007.5 provided a mechanism for resolving policy conflicts. The mechanism specifically included balancing considerations of policy inconsistencies with what is most protective of significant coastal resources and recognizing that "broader policies which, for example, serve to concentrate development in close proximity to urban and employment centers may be more protective, overall, than specific wildlife habitat and other similar resources policies," (which certainly seems applicable to this project). Because the project, particularly given that the wetlands restoration component would be incorporated into Phase 1, would attain a key goal of the Coastal Act [30001.5(a)] to "[p]rotect, maintain, and where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources," the EIR concludes that the project's non-compliance with Section 30233 would not constitute a significant adverse environmental impact, pointing to Chapter IV.D, Biological Resources for a discussion of the physical effects on wetlands that would be associated with the project's inconsistencies with Section 30233.

The EIR supports this judgment because the existing wetlands on the site were largely created incidental to, and as a result of, past human activities on the site; are contaminated with elevated levels of substances harmful to human health and wildlife; are usually dry, subject to vegetation removal to protect against fires; and are scattered, such that they have limited habitat value. The project proposes to restore wetlands onsite in a quantity slightly greater than that which presently exists and to enhance their value by not only consolidating them but also by improving their hydrologic connectivity with Humboldt Bay and providing them with an upland buffer. The project would also provide a trail along the northwestern and eastern flanks of the wetland reserve, consistent with another basic Coastal Act goal [Section 30001.5 (c)] to "[m]aximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners."

Most importantly, the project proposes as its first phase of development a comprehensive remediation of the site and restoration of wetlands in a manner that would substantially reduce any potential for adverse water quality and/or ecological effects on receiving waters, such as Humboldt Bay, as a result of surface flows containing legacy contaminants on the site as described in Chapter IV.G of the Draft EIR. Consequently, the proposed project is in fact fully consistent with the California Wetlands Conservation Policy of 1993 ensuring no overall net loss of wetlands and to "achieve(ing) a long-term net gain in the quantity, quality and permanence of wetlands acreage and values in California."

In applying the Section 30007.5 conflict resolution provision of the Coastal Act to its review of projects, Coastal Commission staff have developed a discretionary practice of following a multi-step process to evaluate how each step applies to a given project as follows:

- 1) The project, as proposed, is inconsistent with at least one Chapter 3 policy;
- 2) The project, if denied or modified to eliminate the inconsistency, would affect coastal resources in a manner inconsistent with at least one other Chapter 3 policy that affirmatively requires protection or enhancement of those resources;
- 3) The project, if approved, would be fully consistent with the policy that affirmatively mandates resource protection or enhancement;
- 4) The project, if approved, would result in tangible resource enhancement over existing conditions;
- 5) The benefits of the project must result from the main purpose of the project, rather than from an ancillary component appended to the project to “create a conflict”; and,
- 6) There are no feasible alternatives that would achieve the objectives of the project without violating any Chapter 3 policies.

An interpretation of how the proposed project would relate to each of these steps is provided below.

The project, as proposed, is inconsistent with at least one Chapter 3 policy.

The project is inconsistent with Section 30233 because site remediation and other project uses are not explicitly included in the list of permitted uses for filling of wetlands.

The project, if denied or modified to eliminate the inconsistency, would affect coastal resources in a manner inconsistent with at least one other Chapter 3 policy that affirmatively requires protection or enhancement of those resources.

Denial of the project would be inconsistent with Section 30230, which requires, in part, that “marine resources shall be maintained, enhanced, and where feasible, restored.” Restoring and enhancing the remnants of Clark Slough on the project site would have a direct benefit to the marine resources of the Clark Slough and the adjoining Humboldt Bay. Denial of the project would also be inconsistent with Section 30231, which requires, in part that “the biological productivity and the quality of coastal waters, streams, wetlands, estuaries and lakes...shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and...controlling runoff.” The project would, as its first phase of development, provide a comprehensive remediation of the site and restoration of its degraded wetlands in a manner that would substantially reduce any potential for continuing adverse effects on water quality and/or biological productivity in Humboldt Bay as a result of surface flows containing legacy contaminants on the site.

The project, if approved, would be fully consistent with the policy that affirmatively mandates resource protection or enhancement.

Phase 1 of the development plan for the proposed project is designed to remediate and enhance the value of wetlands on the site and therefore is fully consistent with Coastal Act Sections 30230 and 30231.

The project, if approved, would result in tangible resource enhancement over existing conditions.

The wetlands in their current condition on the site provide limited habitat value. Consolidating and restoring the wetlands as proposed would greatly, and tangibly, enhance their ecological value.

The benefits of the project must result from the main purpose of the project, rather than from an ancillary component appended to the project to “create a conflict”.

The proposal to remediate as well as to restore and enhance wetlands on the site as the first phase of site development fulfills a basic objective of the project, namely to facilitate brownfield development and urban infill development within the redevelopment area of the City.

There are no feasible alternatives that would achieve the objectives of the project without violating any Chapter 3 policies.

The Draft EIR addresses and evaluates an “Off-Site Shoreline Property Alternative” which is approximately 30 acres in size and is, for the most part, zoned and planned for Commercial Waterfront uses with some Natural Resources zoning. The property is located adjacent to Humboldt Bay in the coastal zone and has about 16.5 acres of wetlands primarily around the outside edges of the property. The “Off-Site Shoreline Property Alternative” is discussed on pages VI-29 to VI-33 of the Draft EIR. The discussion concludes on the basis of a more general assessment that this alternative would be feasible. However, an amendment to the Local Coastal Program would also be required for this alternative and the need for wetland fill would also likely not be avoided, although a specific wetland delineation for that property has not been completed. Consequently, this alternative would not likely be able to achieve the objectives of the project without also violating Chapter 3 policies in the Coastal Act.

The Coastal Commission has employed balancing under Section 30007.5 to approve projects in circumstances analogous to those presented by this project on many occasions. For instance, in 2002, the Commission approved a Local Coastal Plan amendment of the City of Oxnard to annex a 91-acre site to the City and authorize a project providing remediation of contamination on the site, development of residential uses, and open space and habitat areas. The site was contaminated as a result of 30 years of use as an oil field waste disposal facility. The project proposed to remediate the contamination and pay for it from the proceeds of the residential development. Because the project required filling about 4.2 acres of wetlands, it was inconsistent with Section 30233, which limits development in wetlands to certain uses that do not include residential uses. The Commission found a conflict between this policy and the policies of Sections 30230, 30231, and 30240 calling for maintenance and improvement of the quality of sensitive coastal resources and water quality. The

Commission resolved the conflict by finding that remediation of the site contamination together with mitigation of impacts on wetlands and sensitive resources was most protective of coastal resources. [Spinosa, 2006. California Coastal Commission Staff Report. Regular Calendar. Applicants Bill and Sherry Tilch. Application No. 1-06-033]

The proposed project presents a similar policy conflict to the Oxnard case in that the site's contamination, resulting from years of use of the site as a railroad yard, calls for remediation to benefit human health, wildlife, and the environment and, without remediation, the existing degraded conditions would persist. Remediation of the site contamination entails permanently filling approximately 6.15 acres of wetlands and construction of the wetland reserve as delineated under the Coastal Act; remediation, though, is not among Section 30233's list of allowed purposes for filling wetlands.⁷ The project would create, restore, and preserve a total of approximately 9 acres of higher quality wetlands on the site. Under section 30007.5, the City and the Commission may resolve this policy conflict by determining that on balance it is more protective of significant coastal resources to remediate the site contamination as proposed in the project while mitigating resulting impacts on wetlands.

Other examples where the Coastal Commission has employed balancing under Section 30007.5 to resolve policy conflicts in other analogous circumstances, all within the last five years, include:

- CDP No. 1-08-017 (Wiyot Tribe) (Staff report June 27, 2008; approved July 11, 2008), balancing conflict between policies on protecting wetlands and policies on protecting water quality with respect to remediation of site contamination.
- LCP Amendment No. 2-06B (City of San Diego, Creekside Villas) (Staff Report June 5, 2007; approved Jan. 9, 2008), balancing conflict between policies on protecting ESHA and policies on concentrating development with respect to residential uses.
- Consistency Certification No. CC-008-07 (North County Transit District, San Diego County) (Approved June 15, 2007), balancing conflict between policies on protecting wetlands and policies on protecting water quality and air quality, promoting energy conservation, maximizing public access, and reducing vehicle miles traveled with respect to extension of a railroad line.
- LRDP Amendment No. 1-06 and CDP No. 4-06-097 (U.C. at Santa Barbara) (Staff Report Nov. 3, 2006; approved Nov. 17, 2006), balancing conflict between policies on protecting wetlands and ESHA and policies on protecting water quality, maximizing public access, and concentrating development with respect to university residential uses.
- LCP Amendment No. 3-03B (City of San Diego, Crescent Heights) (Staff Report Feb. 16, 2005; approved Mar. 16, 2005), balancing conflict between policies on protecting ESHA and policies on concentrating development with respect to residential uses.
- Revised Findings on City of Oxnard LCP Amendment No. OXN-MAJ-1-00, North Shore at Mandalay Bay (May 22, 2002; approved June 10, 2002).

⁷ The wetland impact numbers have been updated since the Draft EIR. Please see response to comment 1-2 on page 5-3 of the Final EIR for further explanation.

Finally, to the extent that remediation of site contamination may be inconsistent with the policy of Section 30233, that inconsistency may be resolved in keeping with the Coastal Act by the City exercising its authority to abate a nuisance (Pub. Res. Code Section 30005) and/or the Regional Water Quality Control Board exercising its authority to make determinations relating to water quality (Pub. Res. Code Section 30412(b)).

In summary, the Draft EIR's conclusions that some parts of the proposed project are potentially inconsistent with some provisions of the Coastal Act and that, given the nature of the site and the proposal to compensate for the filling of wetlands through onsite wetland restoration of at least equal quantity and of greater quality, the environmental impact of that inconsistency is less than significant, is well-supported by the evidence. The slightly greater than 1:1 replacement ratio for wetland mitigation in this case is also justified because of the low quality of the existing wetlands on the site, due to their degraded character and scattered presence on the site, and the fact that the wetland restoration component would occur as part of the first phase of site development.

Note as well that an inconsistency with a land use plan or coastal policy, in and of itself, is an analytical conclusion regarding the project's conformity to a plan but is not necessarily a physical impact on the environment. (*See Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170.) Potential physical impacts caused by the project's potential inconsistencies with particular land use plans or policies are addressed in other sections of the Draft EIR (e.g., Chapter IV.D, Biological Resources).