



AGENDA NO: D-1

MEETING DATE: November 6, 2018

**THE FOLLOWING PUBLIC CORRESPONDENCE WAS
RECEIVED BY THE PLANNING COMMISSION FOLLOWING
POSTING OF THE AGENDA**

Cindy Jacinth

From: Cathy Novak
Sent: Tuesday, November 06, 2018 8:08 AM
To: Cindy Jacinth
Subject: RE: Revised comments for ESHA
Attachments: 17.12 Comments - Novak 11-6-18.pdf

I attached the revised version which includes my comments in the e-mail from last night. Here's my note from last night in case.

Hi Cindy,

I am so sorry that I need to send my comments for section 17.12 so late. As I know it is difficult to digest in a short time frame Between work and being out of town, I just couldn't get this all done any sooner. I have attached my comments for you and the PC. I am certainly happy to address any questions that you might have. I have provided these comments based upon the most recent projects that I have been working on with the Coastal Commission, ACOE and RWQCB. These projects include, Boatyard, Otter Rock, Harbor Hut, Gray's Inn, Associated Pacific and House of Ju Ju so you have an idea of what is behind each comment. As you know, rules and regulations change all the time so I was looking for a way to keep it simple, keep the intent of the policy but allow for future flexibility so we are not trying to redo this as we bring future projects forward. Please let me know if you have any questions. I hope my delivery of each item is clear. The one thing I didn't mention in my attached comment is that want to make sure that there is an understanding when there is reference to "fill" in coastal waters that under the Coastal Commission this includes pilings. This may be something that not everyone understands so I wanted to offer that up as something that folks should be aware of.

Thanks,
Cathy

From: Cindy Jacinth [mailto:cjacinth@morrobayca.gov]
Sent: Tuesday, November 06, 2018 7:55 AM
To: Cathy Novak
Subject: RE: Revised comments for ESHA

Thanks Cathy. I forwarded on to the consultant team. I didn't get the original comments you refer to in your email below.

Cindy

From: Cathy Novak
Sent: Tuesday, November 06, 2018 7:35 AM
To: Cindy Jacinth <cjacinth@morrobayca.gov>
Cc: Scot Graham <sgraham@morrobayca.gov>
Subject: Revised comments for ESHA

Hi Cindy,

I realized this morning that I wanted to add to a section that I had commented on so I revised my comments. I attached the updated one for you.

Thanks,
Cathy

Comments for Section 17.12 Environmentally Sensitive Habitat

17.12.070 Mitigation and Monitoring A. When Required. Mitigation and monitoring programs, including restoration plans and management programs, are required to minimize adverse impacts to sensitive habitat.

Comment: When will this program be required for submittal, i.e. before building permit? That is not feasible when it comes to eelgrass, for example, since the impacts that may require mitigation will not be known or available until after construction.

5. a. Wildlife Contingency Plan.

A Marine Wildlife Contingency Plan... specific methods that will be used to reduce pile-driving noise and comply with the standards of this Section. Power to the pile driver shall be ramped up to allow marine wildlife to detect a lower sound level and depart the area before full-power noise levels are produced.

Comment: When using a diesel hammer you cannot “ramp up” since the hammer is simply an on and off. A vibratory hammer can be “ramped up” since it is hydraulically operated.

The Plan shall identify a US Fish & Wildlife Service (USFWS)-approved biologist to monitor all construction within the water-lease area who shall be retained by the applicant.

Comment: modify to - ... biologist to monitor required construction areas who shall be retained... The Army Corps implements standards for the areas that need to be monitored. This may include areas that are not just in the water lease area. They do this in conjunction with the other agency input including NMFS.

... The approved biological monitor shall be present onsite during construction and shall have the authority to stop construction...

Comment: modify to - ... The approved biological monitor shall be present onsite during required construction activities and shall have the authority to stop construction... The monitor is not required to be onsite during the entire construction period but usually only during pile driving activities and maybe in other instances but this is usually spelled out in the ACOE permit.

5.b. Oil Spill Response and Recovery Plan.

- i. No refueling of equipment without adequate containment and spill response equipment. The barge shall have only double contained fuel storage below decks, with the spill containment and clean up kits on-site

and easily accessible. Spill containment and clean up kits shall include the following:

Comment: Not every barge or construction equipment will have double contained fuel storage below decks so this verbiage should be deleted. The Oil Spill Plan will include measures to show that fuels are stored safely.

c. Pre- and Post-construction Surveys.

A survey identifying areas of eelgrass within the lease areas shall be completed within 60 days before start of construction and prior to issuance of a building permit....

Comment: The "within 60 days" should be deleted. This language is not consistent with the CEMP. The CEMP pre-construction surveys should be conducted during the growing season which is April 1 to October 31. If the pre-con survey is done between April 1 and July 31, the survey is valid for 60 days. If the survey is done after August 1, the survey is valid until March 31 the following year. Additionally, there are and will be times where you can get permission from NMFS via the ACOE (it's the ACOE permit) to conduct pre-con surveys during the non-growing seasons.

...If additional eelgrass is identified that would be directly shaded by the proposed project, then the report shall identify remedial measures to offset such reduction within the eelgrass beds at a ratio of 1.2:1 in line with the specifications for mitigation of eelgrass habitat as provided for in the California Eelgrass Mitigation Policy....

Comment: This should be modified since impacts to eelgrass may not come from "direct shading". It appears the objective of this part is to require mitigation for impacts so therefore, the policy should simply state that impacts to eelgrass should be mitigated as provided for in the CEMP. I might add that additional language include that the it is "consistent with the CEMP or future eelgrass policies as approved by NMFS for staff implementing existing NMFS authorities under MSA, FWCA and NEPA." Adding this language will allow for future federal eelgrass policies to be modified without the City needing to change its ZO. Furthermore, under the CEMP you can have different mitigation ratios for localized impacts. So specificity for mitigation ratios should not be in the ZO but just to be consistent with the CEMP and federal policies.

...A post construction survey identifying areas of eelgrass shall be completed within 30 days and the report due within 90 days after completion of construction....

Comment: This language should be deleted to be consistent with the CEMP. Not all projects are required to do a post construction survey. In some cases there are projects where there is no eelgrass so no post construction survey is required. Additionally there are cases where there is eelgrass present close by or there is an inconsequential amount of eelgrass so the work can avoid eelgrass or it is deemed that there is no impact (under the CEMP) and the ACOE, through comments from NMFS, can waive the requirement to do a post construction survey.

...Any change in eelgrass extent shall be documented and reported to the Community Development Director. If the report identifies a reduction in eelgrass coverage then a plan shall be prepared to identify the appropriate mitigations necessary and in line with the specifications for mitigation of eelgrass habitat as provided for in the California Eelgrass Mitigation Policy, dated October 2014.

Comment: So overall the CEMP does not trigger the need to provide mitigation for "any reduction" in the eelgrass. For example the CEMP states, "...compensatory mitigation may not be necessary for actions impacting less than 10 square meters of eelgrass." This should be on a case by case basis and as provided for in the CEMP. Consultation as to the appropriate mitigation for impacts to eelgrass would require the consultation with NMFS and their approvals for any plan. The City should accept the consultation and final determination for any plan when approved by NMFS.

d. Noise Mitigation Plan.

...Prior to issuance of a building permit, a pile driving plan and hydro-acoustical noise mitigation plan shall be submitted to the Community Development Director...

Comment: Typically we submit a pile driving plan to the City prior to issuance of a building permit so that is not a problem. However, the language as written includes a "hydro-acoustical noise mitigation plan" which is not something that is readily available. The thought behind this statement, and the balance of the language, is to provide a noise mitigation plan for projects that use pile driving equipment that would generate noise levels that "(i) an accumulated 187 dB SEL as measured 5 meters from the source; and (ii) peak dB above 208 dB as measured 10

meters from the source” so it is clear with the City now that using a vibratory hammer does not exceed the levels and therefore require a special noise mitigation plan. So my thought is to modify the language so that a “hydro-acoustical noise mitigation plan” would be required for any equipment that proposes the use of any equipment that would approach the limits set as mentioned above. For example, vibratory hammer and jetting piles would not generate a noise level that is close to the limits so therefore those would be exempt from the requirement to provide a plan.

f. To reduce potential turbidity-associated impacts, silt screens should be used when and where they will be effective. The relatively high tidal currents within Morro Bay could reduce the effectiveness of silt screens and should be considered prior to placing of these screens.

Comment: If the intent of the policy is to reduce erosion and sediment control, then I might suggest alternative language so that you are not locked into “silt screens”. Here are two conditions from a current RWQCB permit that might be helpful:

The Applicant shall implement and maintain an effective combination of erosion and sediment control measures (e.g., turbidity curtains, fiber rolls, erosion control blankets, hydromulching, straw with tackifiers, temporary basins) to prevent erosion and capture sediment.

Erosion and sediment control measures and other construction BMPs shall be implemented and maintained in accordance with all specifications governing their proper design, installation, operation, and maintenance.

C. Habitat Creation/Restoration.

1. ESHA. Mitigation for impacts to ESHA and other sensitive resources shall be in the form of habitat creation or substantial restoration. The mitigation shall occur on site wherever possible. Off-site mitigation measures shall only be approved when it is not feasible to fully mitigate impacts on site.

Comment: It appears that the eelgrass mitigation is included in this section by default. A statement that the mitigation shall be in the form of “habitat creation or substantial restoration” may not specifically apply to eelgrass. If eelgrass is not included in this section, it is not clear and maybe there needs to be a statement as such.

D. Mitigation Ratios. Adverse impacts shall be mitigated at a ratio necessary to achieve the specific mitigation objectives and performance standards identified in the mitigation and monitoring program and approved by the review authority.

E. Restoration Plans. A restoration and management plan shall be submitted. Restoration plans shall be reviewed and approved by a qualified professional prior to accepting sites for mitigation.

F. Timing. Restoration/mitigation shall occur before or simultaneously with construction of the approved development. 1. Any off-site mitigation site shall be purchased and legally restricted and/or dedicated before impacts to the development site can proceed.

Comment: It appears that the above sections, D, E & F for eelgrass are included by default. A statement that this may not specifically apply to eelgrass should be included since the CEMP is involved with these items.

G. In-Lieu Fee for Wetland and/or Eelgrass Impacts.

In-Lieu Fee for Wetland and/or Eelgrass Impacts.

Comment: Consider revising this to "Mitigation Options for Wetland and/or Eelgrass Impacts." As for eelgrass, there are several options that can be used for mitigation options. For example, in-lieu is one however there are Comprehensive management plans, In-kind mitigation, Mitigation banks, Out-of-kind mitigation and In-kind Mitigation. Have several options for eelgrass under the CEMP would be an important tool for projects needing to mitigate for eelgrass impacts.

An in-lieu fee may be paid to an appropriate public agency to mitigate wetland and/or eelgrass impacts, if no appropriate mitigation site can be acquired.

Comment: Specifically commenting about eelgrass, there should be an addition of a "Non-governmental agency or non-profit" since a public agency may not be able to accept the in-lieu fee or be in a place to utilize the money if paid.

Payment of an in-lieu fee would only be an option if an applicant is unable to find a potential restoration site.

Comment: As far as eelgrass, it is onerous to require the applicant to provide documentation that they are unable to find a "potential restoration site" or they may be **able** to find a "potential restoration site". It may infeasible for them to actually mitigate the eelgrass and the requirements for continued monitoring, reporting and continued success for any replanting or restoration that could be identified. In the case of eelgrass, it may be more effective for the participation of an in-lieu fee to an organization such as the NEP, which looks a more global picture of the eelgrass for the entire bay rather than a small spot for restoration of

a small impact. My suggestion is to modify the language that would allow, for eelgrass, the ability for an in-lieu fee payment as provided for under the CEMP and as approved by the permitting agencies.

The fee shall be based on the following factors:

1. The habitat type.
2. The costs of acquisition.
3. The cost per acre to restore or create a comparable wetland within the region where the impact occurred.
4. The acreage of the habitat affected, based on the final approved project.

Comment: The above is really focused on landside ESHA impacts and mitigation but does not really apply to eelgrass. The NFMS is amenable to consideration of fees for impacts to eelgrass but at this point in time, there is no direct language that would be usable for the above. The NMFS would consider the fee on a case by case basis so if there would be additional language specifically for eelgrass that would allow for the fee to be calculated by the agency based upon the specific case, then the eelgrass concerns could be addressed.

H. Monitoring.

Comment: In general these policies are geared toward landside development however eelgrass becomes a part of the overall policy. If the City were to write an addition to the policy that eelgrass monitoring will be done as provided for under the CEMP and any subsequent eelgrass policies, then I think we can separate out the concerns with polices and eelgrass which is so different than the other ESHA that you are trying to address.