



Council Agenda Report

To: Mayor Silverstein and the Honorable Members of the City Council

Prepared by: Richard Mollica, Planning Director

Approved by: Steve McClary, City Manager

Date prepared: June 28, 2023 Meeting date: July 10, 2023

Subject: Consider Adoption of a Policy Interpreting the Use of Pesticides as Development

RECOMMENDED ACTION: Consider the adoption of the attached draft Council Interpretation regarding the Council's interpretation of the use of pesticides pursuant to Local Coastal Program (LCP) Land Use Policy (LUP) Policy 3.18 as "development" in the LCP Local Implementation Plan (LIP).

FISCAL IMPACT: There is no fiscal impact associated with the recommended action. The preparation and implementation of a policy or ordinance is part of normal staff operations and is included in the Adopted Budget for FY 2023-24.

WORK PLAN: This item is included as Item 5.j. in the Work Plan for Fiscal Year 2022-2023. Staff continue to work on ongoing projects and normal business while the FY 2023-24 Work Plan is finalized.

BACKGROUND: Since 2014, the City has strived to eliminate environmentally harmful poisons from within City limits and has taken numerous measures to restrict their use. In 2019, the City approved an Earth Friendly Management Policy, which governs pest management on City-owned, managed or leased property and bans the use of rodenticides on City property and prohibits their use in connection with any contract with the City. On June 28, 2021, the Council adopted Resolution No. 21-32 adopting the California Coastal Commission's (CCC) modifications to LUP Policy 3.18 on May 13, 2021, that included limitations on the use of pesticides throughout the City (CCC LCP-4-MAL-19-0164-3) and Resolution No. 21-33 initiating an amendment of the LIP to implement LUP Policy 3.18. On September 8, 2021, the CCC certified LUP Policy 3.18 and formally incorporated the policy as part of the City's LCP. Subsequently, meetings with community stakeholders occurred and feedback was received on implementation of LUP Policy 3.18

from the Council's Zoning Ordinance Revisions and Code Enforcement Subcommittee (ZORACES) on April 14, 2022.

On October 10, 2022, staff shared the feedback received with Council. At the October 2022 meeting, the Council directed staff to: 1) continue to prepare an amendment to the City's LIP to implement LUP Policy 3.18; and 2) bring back a policy adopting an interpretation of "development" subject to the requirements of LIP Section 13.3 that considers the "the use of pesticides, including insecticides, herbicides, rodenticides or any other similar toxic chemical substances, where the application of such substances would have the potential to significantly degrade Environmentally Sensitive Habitat Areas (ESHA) or coastal water quality or harm wildlife" as "development" and that such development is not classified as "maintenance" under LIP Section 13.4.2 and thereby not exempt from the requirement to obtain a CDP.

DISCUSSION: Following Council's direction in October 2022, staff prepared a draft policy for consideration that would interpret the use of pesticides as "development" per the LCP (Attachment 1). The Council may choose to adopt the draft policy, direct staff to modify the draft policy, or decline to adopt the policy. Below is a description of the draft policy.

LUP Amendment

The LUP was formally amended in October 2021 to incorporate LUP Policy 3.18 which reads:

Except as permitted pursuant to this provision or Policy 3.20, throughout the City of Malibu, development that involves the use of pesticides, including insecticides, herbicides, rodenticides or any other similar toxic chemical substances, shall be prohibited in cases where the application of such substances would have the potential to significantly degrade Environmentally Sensitive Habitat Areas or coastal water quality or harm wildlife. Herbicides may be used for the eradication of invasive plant species or habitat restoration, but only if the use of non-chemical methods for prevention and management such as physical, mechanical, cultural, and biological controls are infeasible. Herbicides shall be restricted to the least toxic product and method, and to the maximum extent feasible, shall be biodegradable, derived from natural sources, and used for a limited time. The City will identify non-toxic and earth-friendly management techniques for controlling pests and will conduct public outreach to promote the use of such techniques on property with the City.

The LUP is a policy document in the City's LCP whose policies are implemented through the LIP the same way the City's General Plan policies are implemented through the City's Zoning Code. It is not directly enforceable, and enforcement action cannot be taken for violation of the LUP. The LIP currently does not include provisions to implement LUP Policy 3.18, but will once the LIP amendment is certified by the CCC.

LUP policies can also be implemented via conditions of approval associated with an approved Coastal Development Permit (CDP). Starting years ago, when this issue was first raised, staff began including a condition of approval on CDPs prohibiting the use of chemical pesticides and herbicides. The City's current condition of approval reads:

The use of pesticides, including insecticides, herbicides, rodenticides or any toxic chemical substance which has the potential to degrade biological resources shall prohibited throughout the City of Malibu. The eradication of invasive plant species or habitat restoration shall consider first the use of non-chemical methods for prevention and management such as physical, mechanical, cultural, and biological controls. Herbicides may be selected only after all other non-chemical methods have been exhausted. Herbicides shall be restricted to the least toxic product and method, and to the maximum extent feasible, shall be biodegradable, derived from natural sources, and use for a limited time

This practice was previously subject to challenge but, with the adoption of LUP Policy 3.18, this condition is enforceable and supported. As a result, new development, such as the construction of a new single-family residence or commercial structure, or remodels/additions that require a CDP, are subject to this condition. However, conditions of approval solely regulate the development associated with a CDP; they are not regulations applicable to citywide development.

The Coastal Act is fundamentally a permitting scheme that requires new development in the coastal zone to obtain a permit (CDP) that demonstrates the development complies with the Coastal Act. The Coastal Act cannot impose an obligation on individuals other than the requirement to obtain a CDP. The situations where a CDP is required are defined by the Coastal Act.

Under the Coastal Act, it is the LIP which contains the enforceable procedures and requirements in the City. As a result, to impose obligations (such as changing when a CDP is required), provisions must be added to the LIP to implement LUP Policy 3.18. It is those LIP provisions that would be enforceable and define what requirements would be imposed on development activity in the City. Without an implementing provision, issuing a citation for the use or placement of these chemicals on a property, that is not subject to a CDP condition prohibiting such action, would expose the City to liability and legal challenge.

Draft Policy: Use of Pesticides Considered “Development” under the LCP

Following Council's direction in October 2022, staff drafted an interpretation policy for consideration – that the use of pesticides, including insecticides, herbicides and rodenticides citywide is considered “development” as used in LIP Section 13.3 where the application of such substances would have the potential to significantly degrade ESHA or

coastal water quality or harm wildlife and is not considered “maintenance” pursuant to the list of CDP exemptions in LIP Section 13.4.2.

If adopted, the draft policy would broadly require a CDP for anyone who wants to use pesticides/herbicides/etc. outdoors. Use of pesticides would be subject to LCP permitting (i.e., receipt of a CDP would be required for such use), as well as LCP regulations and enforcement to the maximum extent allowed by law.

Recognizing that the draft policy is an interpretation of the LIP and not a formal amendment to the LIP, ultimately it would be intended to educate the community at-large and to provide guidance to City staff and the public until such time an amendment to the LIP is certified. Per the October 2022 Council Report, the draft policy would not consider the indoor use of pesticides as development.

If adopted, staff would conduct extended and continuing educational outreach to businesses, residents, pesticide operators/companies, gardeners, shopping centers, Chamber of Commerce and other entities and organizations, notifying them of the policy, educating them as to the harm created by pesticides and offering alternative solutions. As is practical by law, if there is non-compliance with the policy, Code Enforcement staff would address any violations through education and citation when a condition of a CDP prohibits pesticide/herbicide use.

Consideration of CCC Discussion Regulating the Use of Pesticides

It is important to note that the Coastal Act and LCP include a definition of “development” which defines what activity is subject to a CDP and what types of development are exempt from the requirement to obtain a CDP.

LIP Section 2.1 includes the following definition:

DEVELOPMENT - means, on land, in or under water, the placement or erection of a solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; change in density or intensity of use of land, including but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water; or access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private or public or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes; kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted

pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).

As used in this section "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.

As part of the CCC's consideration of the City's amended LUP Policy 3.18 on May 13, 2021, CCC staff prepared an exhaustive report on the subject of regulating pesticides and consistency with the Coastal Act and other requirements. This report and attachments are available at the following link:

<https://documents.coastal.ca.gov/reports/2021/5/Th9b/Th9b-5-2021-report.pdf>

Prior to adopting a Council policy interpreting "development" in the LIP, staff recommends the Council review the May 2021 CCC report as it pertains to Coastal Act consistency and state and federal law.

For reference, relevant excerpts from the CCC's discussion on pages 20-23 are provided below:

The Coastal Act does not provide the Commission or local governments with plenary authority to regulate all ongoing activities or uses in the coastal zone. Rather, the Act regulates "development" in the coastal zone by requiring a coastal development permit for anyone wishing to undertake such development. (Coastal Act §§ 30600(a), 30106 (defining "development".) LCPs establish the kinds, locations and intensities of development allowed in the coastal zone and include policies and development standards necessary to achieve the objectives of the Coastal Act. Once an LCP is certified by the Commission and found to be consistent with the Coastal Act requirements, local governments then have the authority and responsibility to issue coastal development permits for proposed development. (Coastal Act § 30519(a).) The Coastal Act also permits the Commission, and local governments through their LCPs, to take non-regulatory actions such as conducting planning studies, promoting coastal education, and planning for public access, that are consistent with, and that implement the provisions of, the Coastal Act (See Coastal Act §§ 30108.6, 30330, 30500(a), 30530 et seq.).

The Coastal Act does not limit the power of cities and counties to adopt additional regulations that are not in conflict with the Coastal Act and that go beyond what is required by the Act. (Coastal Act § 30005.) Thus, local governments may generally use their inherent police power authority to regulate activities in a manner that is more stringent than the Coastal Act or that goes beyond the authority delegated to them under the Coastal Act. It is not uncommon for local governments to include such additional restrictions in their LCPs. But as described above, state law

disallows local regulation of pesticides, though it does not limit the authority of a state agency to administer any law that it is authorized or required to administer; in the case of the Coastal Act, local governments administer state law through their LCPs. Thus, local governments may include policies in their LCPs to regulate pesticide use to the extent that such policies are necessary or proper in carrying out the Coastal Act, such as by regulating the use of pesticides that qualify as, or are associated with, proposed development. Likewise, LCPs may contain non-regulatory policies that encourage alternatives to pesticides, promote education about pesticide alternatives, or restrict pesticide use on the local government's own property. However, LCP policies that purport to regulate pesticide use more broadly are likely preempted by the Food and Agriculture Code.

The non-profit group Poison Free Malibu has submitted correspondence asserting that the Commission can broadly regulate or ban pesticides, regardless of whether such use is associated with new development that would require a coastal development permit. It points to language in other LCPs that it says supports this position. Further, Poison Free Malibu cites a recent trial court decision involving a challenge to the certification of Los Angeles County's LCP for the Santa Monica Mountains (SMM LCP), where the Coastal Commission asserted that its decision to certify a pesticide restriction in the SMM LCP was not subject to the preemption of local regulations of pesticides (see Section IV. B. Background State Preemption).

Specifically, the Commission found that a ban on the use of most pesticides in the Santa Monica Mountains coastal region was necessary to avoid impacting ESHA and the biological productivity and quality of coastal waters. The Commission argued in court that it had the authority to restrict pesticide use in the certified LCP because California Food and Agricultural Code section 11501(c) does not limit the authority of a state agency to enforce or administer any law that the agency or department is authorized to enforce or administer. Judge Chalfant of the Los Angeles Superior Court ruled that, although the County was not permitted to regulate pesticide use itself, the Commission was permitted to require policies in the LCP that would have the County do so.

Poison Free Malibu cites this decision as evidence that a citywide pesticide ban, rather than a ban on pesticide use that qualifies as, or may occur in connection with, proposed development, is appropriate. However, the ruling did not distinguish between banning pesticides categorically versus banning them in connection with proposed development; rather, it only involved a challenge regarding whether the Commission's requirement of pesticide regulations in LCPs is generally permissible. The issue of whether the Commission or a local government can require a ban on all pesticide use, regardless of whether such use constitutes or is associated with proposed development was not raised. In addition, although other LCPs—such as the SMM LCP—include broadly worded policies and provisions that could be viewed

as broadly restricting or prohibiting the use of pesticides, the Commission's intent in certifying those policies was to regulate pesticides to the extent authorized by the Coastal Act. Since the Coastal Act provides authority to regulate "development," then LCPs may only carry out the Coastal Act by regulating pesticides in connection with, or to the extent their application itself qualifies as, such development...

The Coastal Commission does not enforce the Food and Agriculture Code's restriction on local regulation of pesticides and is not the arbiter of whether local pesticide restrictions are preempted. If a jurisdiction proposed a pesticide ban (or other pesticide policy) that exceeded what was necessary or proper to carry out the Coastal Act, but was not actually inconsistent with the Coastal Act's Chapter 3 protective policies, the Commission might be able to certify it despite questions about whether or not it was preempted. However, there would be a question about whether the policy was preempted and could take effect...

ENVIRONMENTAL IMPACT: The proposed City Council actions do not constitute an "approval" or a "project" under the definitions set forth in CEQA Guidelines Sections 15352 and 15378 because no direct or indirect changes to the physical environment would occur. CEQA requires that the City adequately assess the environmental impacts of projects and reasonably foreseeable activities that may result from projects prior to the approval of the same. Any project developed as a result of the City Council's action that requires the City or the City Council's discretionary approval resulting in a physical change to the environment will be analyzed in accordance with CEQA prior to such approval.

When a CDP application is submitted, the City will at that time conduct preliminary review of the application in accordance with CEQA. The current City Council action in no way limits the exercise of the City's sole and absolute discretion as part of a potential future action. Therefore, no further CEQA review is required. The proposed City Council actions are merely a step-in furtherance of an amendment to the LUP that received final certification by the CCC on September 8, 2021, for which environmental review was performed, and no further environmental review is required.

CONCLUSION: If the Council adopts the attached policy, City staff will conduct educational outreach to the community on the use of pesticides citywide and would use the policy as guidance until such times that an LCP amendment is certified.

ATTACHMENT:
Draft Council Policy



LCP Interpretation

Number: XX

Dated: June XX, 2023

Amended: N/A

Planning Director: Richard Mollica

LCP Section: LCP LUP Policy 3.18

Title: Use of Pesticides Considered Development Under the Local Coastal Program (LCP)

Issue: On September 8, 2021 the California Coastal Commission certified LUP Policy 3.18 which provides that the use of pesticides, including insecticides, herbicides and rodenticides is considered “development” and subject to LCP permitting, regulations and enforcement to the maximum extent allowed by law and regulatory agencies such the Los Angeles County Department of Public Health and Vector Control District. Currently, the LCP Local Implementation Plan (LIP) must be amended to implement LUP Policy 3.18 and until such a time that the amendment is made, this interpretation serves to educate the community and provide guidance to City staff in the implementation of LUP Policy 3.18.

Interpretation: The Council considers the use of pesticides, including insecticides, herbicides, rodenticides or any other similar toxic chemical substances to be “development” as used in LIP Section 13.3 where the application of such substances would have the potential to significantly degrade Environmentally Sensitive Habitat Areas (ESHA) or coastal water quality or harm wildlife. Such development is also not considered to be “maintenance” under LIP Section 13.4.2 and therefore, a Coastal Development Permit is required prior to such use. This policy does not apply to the indoor use of such substances.