

A. Essential Public Project

Purpose & Intent

It is the intent of the City of San Diego that all City of San Diego departments and public projects approved by the City fully comply with the policies, regulations and management obligations Created on established as a result of the Environmentally Sensitive Lands Ordinance of the Municipal Code (ESL). However, deviation from the strict application of ESL regulations may be warranted when an essential public project serving basic infrastructure needs of the community or the region must be implemented and no feasible alternative exists which will strictly comply with the policies and regulations of ESL. The purpose of this deviation process is to provide a mechanism for relief from the strict application of wetland ESL regulations when necessary to implement an essential public project.

- (1) ***The project is an Essential Public Service Project as identified in the General/Community Plan; and***

The project is an essential public service project (e.g., circulation element road, trunk sewer, water main) that will service the community at large and not just a single property. The project must be identified in an adopted General Plan that envisioned the development of the project.

- (2) ***The proposed development, including, all alternatives deemed infeasible, are fully disclosed and analyzed in an appropriate CEQA document; and***

The CEQA document must fully analyze and describe the rationale for why project alternatives that minimize impacts to wetlands are infeasible. Public review of the environmental document must occur pursuant to the provisions of CEQA.

- (3) ***The potential impacts to wetland resources have been minimized to the maximum extent feasible; and***

The project is the least damaging practical alternative considering all the technical constraints of the project (e.g., roadway geometry, slope stability, geotechnical hazards, etc). Recognizing the wetland resources involved, minimization to the maximum extent feasible may include, but is not limited to, pipeline tunneling, bridging across floodways, Arizona crossings, and arch culverts. The project applicant will solicit input from the Resource Agencies prior to the first public hearing.

- (4) ***The proposed project has fully mitigated its impacts according to the Biology Guidelines.***

All impacts have been mitigated according to the requirements of the City's Biology Guidelines and the project would not have a significant adverse impact to the MSCP.

B. Economic Hardship

Purpose & Intent

It is the intent of the City of San Diego to ensure that all private development shall fully comply with the policies, regulations and management obligations established as a result of ESL. It is also the intention of the City to respect constitutionally protected private property rights. In rarely anticipated circumstances, it may be necessary to deviate from the strict application of ESL regulations in order to preserve a private property owner's right to have an economically viable use of property. The purpose of this deviation process is to disclose, evaluate and objectively determine the economic viability of a proposed project with and without the granting of a deviation. This process is intended to ensure that if a deviation is to be granted for economic hardship, it will only be done for circumstances not of the applicant's making. This means that a deviation should not be granted to achieve economic viability when the primary reason a project is economically unviable, absent the deviation, is because of a poor investment decision by a land owner. A deviation due to economic hardship should not be solely based on a prospective rezone. Any deviation for economic hardship should be the minimum necessary to achieve economic viable use of the property.

(1) Applicant has disclosed and provided all information for the City to determine whether the deviation is necessary to achieve an economically viable use of the property, including all of the following required information:

- a. The date the applicant purchased or otherwise acquired the property and from whom.
- b. The purchase price and the documentary transfer tax paid by the applicant for the property. The applicant must provide a current appraisal to establish that the purchase price was appropriate given fair market value at the time of purchase. Comparable land values used for this purpose should have similar restrictions as those on the property as identified in 1(d) below.
- c. The general plan, zoning or similar land use designations applicable to the property at the time the applicant acquired it, as well as any changes to these designations that occurred after acquisition.
- d. Any development restrictions or other restrictions on use, other than government regulatory restrictions described (c) above, that applied to the property at the time the applicant acquired it, or which have been imposed after acquisition.
- e. Any change in the size of the property since the time the applicant acquired it, including a discussion of the nature of the change, the circumstances and the relevant dates.
- f. A discussion of whether the applicant has sold, leased, or donated a portion of or interest in, the property since the time of purchase indicating the relevant dates, sales prices, rents, and nature of the portion or interests in the property that were sold or leased.
- g. Any title reports, litigation guarantees or similar documents in connection with all or a portion of the property of which the applicant is aware.

- h. Any offers to buy all or a portion of the property which the applicant solicited or received, including the approximate date of the offer and offered price.
- i. The applicant's costs associated with the ownership of the property, annualized to the extent feasible, for each of the years the applicant has owned the property, including property taxes, property assessments, debt service costs (such as mortgage and interest costs), and operation and management costs.
- j. Apart from any rent received from the leasing of all or a portion of the property, any income generated by the use of all or a portion of the property over years of ownership of the property. If there is any such income to report, it should be listed on an annualized basis along with a description of the uses that generate or has generated such income.
- k. Topographic, vegetative, hydrologic and soils information prepared by a qualified professional, which identifies the extent of the wetlands on the property.
- l. An analysis of alternatives (pursuant to CEQA and/or the 404 b(1) guidelines under the Clean Water Act) to the proposed project and an assessment of how the proposed project is the least environmentally damaging practicable alternative. The analysis of alternatives shall include an assessment of how each alternative will impact all wetlands and environmentally sensitive lands adjacent to and within the overall development plan area.

(2) *The proposed information has been reviewed by City staff, and the City Council makes the findings of economic infeasibility.*

The application for an economic viability determination has been reviewed by City Staff in consultation with outside economic professionals. The City shall develop a short list of outside economic consultants to review the economic viability determination. All consultants on the short list will be required to fully disclose their employment history at time of selection and any consultants that have worked for the project applicant within one year will not be selected. Project information will be supplied to the City who will then transfer the information to the outside consultant. Any communication between the applicant and the City's economic consultant shall occur only in the presence of designated City staff. City staff's recommendation to the City Manager is that the application and the information provided support the findings of economic infeasibility.

The findings of economic infeasibility, including summary documentation provided by the economic consultant that is not proprietary, are to be presented to the City decision-maker during the discretionary hearing.

(3) *The proposed development has mitigated to the maximum extent feasible, given the economic viability of the project.*

The project mitigation must conform with the Biology guidelines or the lack of full mitigation compliance must be justified as part of the economic viability determination. The deviation process will not be used solely to reduce or eliminate mitigation as required by the City of San Diego Biology Guidelines.

C. Biologically Superior Alternative

Purpose & Intent

It is the intent of the City of San Diego to protect and manage biological resources in full accordance with the regulations of the ESL. However, in rare instances, a deviation from the strict application of the policies and regulations may be warranted if an alternative can be proposed by the project applicant that achieves a superior biological result which provides a clear net increase in quality and viability (functions and value) for the type of biological resource being impacted. The purpose of this deviation is to describe a process for disclosing, evaluating and objectively determining the appropriate circumstances for when a Biologically Superior Deviation can be granted. It is the intent that this type of deviation process should only be used to impact low quality wetlands, including vernal pools. Proper analysis under this deviation process would justify a conclusion that if the deviation is granted, the lower quality biological resource is expendable in exchange for the extraordinary mitigation offered to not only offset the loss of the resource but to also appreciably increase the overall function and value of the resource being impacted.

- (1) ***The proposed development, including the proposal for a biologically superior alternative instead of avoidance of wetland impacts, is fully disclosed and analyzed in an appropriate CEQA document; and***

The CEQA document must fully analyze and describe the rationale for why the proposed project is considered to result in the conservation of a biologically superior resource compared to strict compliance with the provisions of the ESL. Public review of the environmental document must occur pursuant to the provisions of CEQA. Projects proposing to utilize this deviation section of the ESL after initial CEQA public review must include the new information and recirculate the CEQA document.

- (2) ***The wetland resources being impacted by the proposed development are of low biological quality; and***

Low biological quality will be specific to the resource type impacted (e.g, vernal pools, non-tidal salt marsh, riparian, and unvegetated channels).

Factors to determine low biological quality include: the diversity of native flora and fauna present, the rarity of the wetland community in light of the historic loss and remaining resources, the use of the wetland by endangered, sensitive, and other indigenous species, lack of proximity of the area to larger natural open spaces, (e.g., small < 1 acre) isolated areas in the middle of an urban landscape), no current or potential significant hydrologic, water quality, or flood control value, and the ecological role of the wetland in the surrounding landscape. Ecological role of the wetland in surrounding landscape includes:

- a. consideration of the current functioning of the wetland in relation to historical functioning of the system,
- b. size of the wetland, and
- c. connectivity to other wetland or upland systems (including use as a stopover or stepping stone by mobile species).

Examples of low quality wetlands include unvegetated first order streamss, areas containing monotypic stands of invasive (e.g., *Arundo donax*) species or opportunistic species, or an area of minor natural drainage containing only a few riparian scrub species. Only wetlands with little or no restoration potential considering its biological role in the surrounding landscape could be considered low quality. Presence of exotics is only one indicator of low biological quality.

Factors to determine if an area can be reasonably expected to retain long-term functions and biological value include: ownership (public vs. private), surrounding land uses, planned development, existing zoning, existing and future edge effects, and foreseeable management and/or enhancement opportunity.

Quality will be considered on a case-by-case basis given the following factors and best available scientific information. A determination of low quality will be made through consideration of these factors, however, not all factors need to be present to be considered a low quality pool

A. Vernal Pools: Determination of Low Quality

(1) Only low quality vernal pools could be considered for impacts under the Biologically Superior Alternative. Low quality will be determined on a case-by-case basis and thoroughly analyzed in the Biology Report using the following biological and physical factors. In general, low quality will consist of pools with low biological value and low long-term viability. Note: the City does not regulate artificially-created wetlands in historically non-wetland areas.

(2) Characterizations of vernal pool flora and fauna must be accomplished during the proper seasons. Sampling must be done between December and May to ensure adequate characterization of the vernal pools. Adequate surveys should be done to determine ponding and vernal pool flora. Surveys for fairy shrimp must be done in accordance with current U.S. Fish and Wildlife Service fairy shrimp survey protocol.

(3) Timing of the first rainfall and subsequent filling of the basins should be determined during the evaluation process.

Lower Quality

Biological Factors	Endangered and Sensitive Species	No endangered or rare vernal pool species, as identified in the following list: <i>Brodiaea orcuttii</i> ♦, <i>Downingia cuspidata</i> , <i>Eryngium aristulatum ssp. parishii</i> , <i>Myosurus minimus var. apus</i> , <i>Navarettia fossalis</i> , <i>Orcuttia californica</i> , <i>Pogogyne abramsii</i> , <i>Pogogyne nudiuscula</i> ♦When within vernal pool basins and watersheds.
	Flora and Faunal Diversity	Low species richness of vernal pool endemic plants and/or animals. Few individuals present.
	Habitat Area	Few basins with a cumulatively small amount of habitat (basin surface area) relative to other nearby vernal pool complexes.
	Limited potential for Ecosystem Enhancement	Severe compaction of the watershed. Unable to find historic basins. Basins isolated from areas of native pollinators (i.e., intact surrounding native uplands). Hardpan or clay substrate irrevocably damaged.
Long-term Viability	Long-term Defensibility	Private lands currently zoned for development and immediately adjacent to development.
	Connectivity	Basin(s) not connected to MHPA or other existing or planned open space.
	Status of Watershed	Watershed partially developed, irrevocably altered, or inadequate to supply water for vernal pool viability.
	Source and Quality of Water	Urban runoff from partially developed watershed. Water source is in part exclusively from the man-made runoff which could be eliminated by diversion.

B. Salt Marsh, Salt Panne, and Mudflats: Determination of Low Quality

(1) Tidally-influenced coastal salt marsh, salt panne and mudflats will never be considered low quality. A biologically superior deviations alternative must not be granted for tidally-influenced wetlands.

(2) Characterizations of flora and fauna must be accomplished during the proper season. Sampling must be done at the most appropriate time to characterize the resident and migratory species. Evaluations of the tidal range must include the highest spring and neap tides.

(3) Water and soil salinity samples should be conducted in areas of questionable tidal influence.

Lower Quality

Biological Factors	Endangered Species	No use by endangered or threatened plant or animal species.
	Habitat Function	Little or no function as coastal salt marsh, salt panne, or mudflat habitat, including habitat for migratory birds.
	Potential for Ecosystem Enhancement	Low feasibility for restoration to tidal influence (e.g., > 1/4 miles). Coastal wetlands must not be tidally influenced for three or more years.
Long-term Viability	Long-term Defensibility	Private lands currently zoned for development and immediately adjacent to development.
	Connectivity	Wetland not connected to MHPA or other existing or planned open space.
	Hydrologic Function	No significant hydrologic, water quality or flood control value.

C. Freshwater or Brackish Wetlands: Determination of Low Quality

- (1) Characterizations of freshwater and brackish wetlands flora and fauna must be accomplished during the proper season. Sampling must be done at the most appropriate time to characterize the resident and migratory species.
- (2) Hydrologic evaluations of the effects of any impacts on the upstream and downstream biota and flooding must be conducted as part of the review process.
- (3) Examples of low quality wetlands include unvegetated first order streams, areas containing monotypic stands of invasive species or opportunistic species within minor natural drainages containing only a few riparian scrub species, or isolated patches of mulefat scrub in primarily upland areas, but also include the factors listed below.

Lower Quality

Biological Factors	Endangered Species	Outside of any documented occupied (breeding and non-breeding) territory of any endangered or threatened wetland plant or animal species based upon the best available scientific and project-specific information.
	Flora and Faunal Diversity	Low species richness of native plants and/or animals present.
	Habitat Area	Limited function as freshwater wetland habitat, including habitat for migratory birds.
	Ecological Role of the Wetland	Development would not change or alter historic functions of the wetland in its regional context. Historical functioning of the wetland was and is low. The wetland is small and isolated from other wetlands.
	Potential for Ecosystem Enhancement	Within the context of the surrounding landscape, there is low feasibility for enhancement/restoration to significant habitat or hydrologic functioning.
Long-term Viability	Long-term Defensibility	Private lands currently zoned for development. Immediately adjacent to development.
	Connectivity	Lack of proximity to larger natural open space areas as viewed in regional context.
	Hydrologic Function	Volume and retention time of water within the wetland should not be significant enough to aid in water quality improvements. No significant ground water recharge occurs within the wetland (based on drainage study). No significant flood control value or velocity reduction function.

(3) *The proposed development and proposed mitigation results in a biologically superior net gain in overall function and values for the type of wetland resource being impacted; and*

The project must create or restore an equal acreage of the same type of wetland resource that is being impacted. For every one acre of wetland resource being impacted at least one acre of the same type of wetland habitat must be created or restored pursuant to Section 3A and B below. Additional acreage to satisfy the mitigation obligation may consist of acquisition of high quality wetland resources or enhancement of degraded resources such as exotic species removal and native plantings.

All proposed mitigation must demonstrate an increase in the overall function and values for the type of *wetland* resource being impacted compared to the pre-mitigation conditions. Increased function can include an increase in the availability of habitat for native fauna, an increase in native flora diversity, a decrease in invasive species, an increase in ground water recharge, water quality improvements and sedimentation deposition rates. Success criteria using best currently available information for the particular resource being impacted will be required as part of the restoration plan.

In order to achieve a biologically superior alternative, one of the following will be required for impacts to wetlands and must be included in the revegetation/restoration plan for the mitigation area. The applicant is responsible for choosing which option will be implemented as part of a biologically superior alternative. Should “A” be chosen, then the existing requirements for management and monitoring will be followed. Should “B” be chosen, then the mitigation ratios will be as currently listed in the City of San Diego Biology Guidelines.

A. Mitigation will be provided at the following ratios for the habitats given below:

Coastal Wetlands 8:1
Riparian Forest or Woodland (oak, sycamore, or willow) 6:1
Riparian Scrub 4:1
Riparian Scrub in Coastal Overlay Zone 6:1
Freshwater Marsh 4:1
Freshwater Marsh in Coastal Overlay Zone 8:1
Natural Flood Channel 4:1
Disturbed Wetlands 4:1
Vernal Pools 4:1 to 8:1
Marine Habitats 4:1
Eelgrass Beds 4:1

Mitigation must be provided within or adjacent to the MHPA.

B. For land granted in fee title to the to the City, payment of an endowment to provide for the long-term management and monitoring of the mitigation area for the term of the City's MSCP (10a) permit. The endowment will be calculated at a rate equivalent to what the City is spending per acre for similar open space areas (considering size and proximity to urban development) within the MHPA at the time of project approval. The endowment will be used to pay for the long-term management of the mitigation area and to off set any public funding needed to manage these areas allowing public management funding to be concentrated in other areas of the MHPA.

(4) *The United States Fish and Wildlife Service and California Department of Fish and Game have concurred with the Biologically Superior Alternative.*

Approval shall come in the form of a written response supporting the project during the CEQA public review process in which the proposed biologically superior mitigation has been evaluated. Lack of an unequivocal concurrence is deemed to be concurrence.