

NEWPORT BEACH HARBOR COMMISSION REGULAR MEETING MINUTES
Zoom Virtual Meeting, Newport Beach, CA
Wednesday, April 14, 2021
5 p.m.

1) **CALL MEETING TO ORDER**

The meeting was called to order at 5 p.m.

2) **ROLL CALL**

Commissioners: William Kenney, Jr., Chair
Scott Cunningham, Vice Chair
Ira Beer, Secretary
Marie Marston, Commissioner
Steve Scully, Commissioner
Gary Williams, Commissioner
Don Yahn, Commissioner

Staff Members: Carol Jacobs, Assistant City Manager
Dave Webb, Director of Public Works
Chris Miller, Public Works Administrative Manager
Jennifer Biddle, Administrative Support Specialist

3) **PLEDGE OF ALLEGIANCE** – Commissioner Marston

4) **PUBLIC COMMENTS**

Jim Mosher asked why the meeting is being held by Zoom when several other Boards and Commissions are holding their meetings in person. He shared that the Harbor Commission webpage does not reflect the new status of the Commission, as well as the new Rules of Procedures. He shared that on April 13, 2021, Council accepted a \$40,000 grant to buy two safety boats for the Marina Park Sailing Program.

5) **APPROVAL OF MINUTES**

1. **Draft Minutes of March 10, 2021, Harbor Commission Regular Meeting**

Commissioner Scully recommended on Page 2, the paragraph about the insurance addendum, should be removed and replaced with "that a lost payee should be added to Exhibit G – Insurance Addendum." On Page 4, the fifth paragraph down, the word rules should be replaced with Rules of Procedure.

Jim Mosher mentioned that on Page 3, the second paragraph towards the end, Vice Chair Cunningham's name is spelled wrong. Also, on the same page, the two sentences in the last paragraph should be written as one sentence that is separated by a comma.

Commissioner Marston moved to approve the draft Minutes of the March 10, 2021 meeting as amended. Commissioner Scully seconded the motion. The motion carried by the following roll call vote:

Ayes: Chair Kenney, Vice Chair Cunningham, Secretary Beer, Commissioner Marston, Commissioner Scully, Commissioner Williams, Commissioner Yahn

Nays: None

Abstaining: None

Absent: None

On page 4, 5th paragraph, _____ noted that "rules" should be rules of procedure.

2. Approval of Corrected January 13, 2021 Harbor Commission Meeting Minutes

Without objection, the motion carried by the following roll call vote:

Ayes: Chair Kenney, Vice Chair Cunningham, Secretary Beer, Commissioner Marston, Commissioner Scully, Commissioner Williams, Commissioner Yahn

Nays: None

Abstaining: None

Absent: None

6) PUBLIC HEARINGS

1. Request for an Encroachment into the Public Right-of-Way at Topaz Avenue adjacent to 526 S. Bay Front, Balboa Island

The property owner at 526 S. Bay Front, Balboa Island has requested approval for their vessel to encroach into the Topaz Avenue street end by nine-feet and has proposed to surrender their permitted onshore mooring S-028 located next to their dock.

Recommendation:

1) That the Harbor Commission adopt Resolution 2021-denying the variance.

OR

2) That if the Harbor Commission can make the requisite findings to support the granting of a variance, then adopt Resolution 2021-(a) determining this action is exempt from the California Environmental Quality Act (CEQA) pursuant to Section 15061(b)(3) of the CEQA Guidelines, California Code of Regulations, Title 14, Division 6, Chapter 3 (common sense exemption that CEQA applies only to projects which have the potential for causing a significant effect on the environment), and is also categorically exempt under Section 15301 (Existing Facilities) of the CEQA Guidelines; and (b) granting the variance. *space*

Chair Kenney gave the rules and procedures for the item.

Assistant City Manager Carol Jacobs shared that the applicant is requesting a 9-foot encroachment into the public right-of-way. In exchange, the applicant will remove their shore mooring, S-028. Currently, there is 690 square feet of dock space and is 85 feet long from the bulkhead to the end of the float. The existing dock was built to the property line but the City's Code says that you cannot cross the property line with a vessel. Also, there is a 20-foot space on one side of the dock with no space on the other side. After investigation, staff found that the existing dock was not built to plan in 1988 and that the dock is supposed to be more centrally located on the property. Currently, there is 17 feet between the end of the dock and S-028. In conclusion, staff could not find the required six findings and has recommended that the Commission deny the application.

Vice Chair Cunningham supported approval under the condition that the applicant will relinquish the mooring to the City.

Secretary Beer concurred with Vice Chair Cunningham but is concerned that the dock was not built to plan. He stated that currently the applicant can house two vessels at the dock but the proposal does not meet the conditions of Title 17.

Commissioner Marston also struggled with the fact that the dock was not built to plan and the problem could be rectified if the applicant rebuilt the dock to the configuration that is in the submitted plans. She mentioned that if the Commission agrees to the variance, then it will set a precedent for other applications.

Commissioner Williams concurred with Commissioner Marston's comment that the dock should be reconstructed to match the 1988 plans that were submitted to the City.

Commissioner Yahn supported Vice Chair Cunningham's comments. He is sensitive to the fact that this may set a precedent but felt that every variance request is unique. He confirmed that the proposal does not match the H-1 Policy and that it is not the applicant's fault that the dock was not built to the City's requirements that are drafted in the permit.

In answer to Chair Kenney's inquiry if there are any conditions or restrictions on the use of the dock, Ms. Jacobs answered no. Chair Kenney commented that the vessel that is housed on the southwest side of the dock is in violation because it is encroaching into the street end. He stated that all six findings contained in Section 17.05.040(d)2 must be made in order to grant the request for encroachment. He saw some benefit in removing the shore mooring, however, he felt that granting the variance would set a dangerous precedent.

Noel Pepys, the applicant, confirmed that the shore mooring will be donated to the City for the permanent right to use the space on the east side of the dock. The goal behind donating the shore mooring back to the City is to allow better public access.

Jim Mosher is very concerned that owners who have a permit for a shore mooring are considered the owners of the boat tackle, as well as the owners of the public trust land and have a right to transfer that to their private property. In terms of the findings, he stated that the property has no peculiar elements and a variance cannot be granted for a self-created situation. He encouraged the Commission not to grant the variance.

Vice Chair Cunningham clarified that mooring permittees have the right to park a boat in the public right-of-way and that is the purpose of the permit. He restated that there are already too many shore moorings in the harbor. He suggested that the Commission discuss changes that allow the Commission to authorize proposals similar to this proposal under certain conditions.

Secretary Beer commented that under the circumstances, granting a variance would constitute a special privilege inconsistent with the limitation to other properties in the City. Also, the proposal is in conflict with Title 17 and he could not see a way to get around those conflicts.

Commissioner Yahn supported the removal of the shore mooring in order for the applicant to park a vessel on the east side of the dock. He felt that this is an exception to the H-1 Policy and that there is a public benefit to the proposal. He agreed that the Commission needs to amend and clean up how the Commission treats future sand lines and the potential elimination of them.

Chair Kenney pointed out that a mooring permittee is granted a temporary license to use the waterways over public lands, revocable at any time, and the mooring permittee has to pay market rent for the use of the public tidelands. However, granting a variance provides the homeowner the perpetual right to use the property for free. He supported the idea of removing the shore mooring to provide more beach access but he is concerned that the Harbor Commission cannot make the findings that are listed in Section 17.25. He agreed that the Commission should revisit Title 17 after the ad hoc committee has concluded their study of shore moorings.

Secretary Beer moved that the request for the variance allowing the owner to birth a vessel on the westside of the pier at 526 South Bay Front extending into the Topaz Avenue street end be denied. Commissioner Scully seconded the motion. The motion carried by the following roll call vote:

Ayes:	Chair Kenney, Vice Chair Cunningham, Secretary Beer, Commissioner Marston, Commissioner Scully, Commissioner Williams
Nays:	Commissioner Yahn
Abstaining:	None
Absent:	None

2. Lower Newport Bay Confined Aquatic Disposal Construction Project, Draft Final Environmental Impact Report

The City has been working aggressively with the federal government for several years to undertake a much-needed channel dredging project within the Lower Harbor to reestablish navigation depths as well as to improve overall tidal flushing and water quality. As part of the dredging effort, the City proposes to construct a confined aquatic dredged material disposal site ("CAD") in the central portion of the Lower Harbor between Bay Island, Harbor Island and Lido Isle into which Newport dredged sediment which is unsuitable for open ocean disposal or nearshore placement, can be placed. Material generated from constructing the CAD will be transported and disposed along nearshore ocean beaches for replenishment or taken to an approved open ocean disposal site.

Recommendation:

- 1) Conduct a public hearing; and
- 2) Adopt Resolution No. HC2021-002 of the Harbor Commission of the City of Newport Beach, California, recommending the City Council certify Environmental Impact Report No. ER2021-001, adopt the Mitigation, Monitoring and Reporting Program, and approve the construction of a confined aquatic disposal facility and dredging outside the Federal Channels in Lower Newport Harbor (PA2019-020).

Chair Kenney gave the rules and procedures for the item.

Public Works Administrative Manager Chris Miller stated that the purpose of the Commission is to adopt the resolution recommending that City Council certify the Final Environmental Impact Report (EIR) and Mitigation, Monitoring and Reporting Program for the Confined Aquatic Disposal site (CAD). Staff estimates that Council will be reviewing and certifying the EIR in late May of 2021. The purpose of the project is to remove accumulated sediment and restore design navigation, improve tidal flushing, and restore full use of the harbor. The federal government maintains the federal waterways through the United States Army Corps of Engineers (USACE) and with local sponsor contributions. Phase One of the dredging project will start next week but the item before the Commission is to discuss Phase Two of the project. A Sediment Characterization Study was conducted and it determined that 90 percent of the sediment deposits are suitable for open ocean placement in the nearshore zones and the federal disposal zone named LA-3. Due to the presence of polychlorinated biphenyl (PCB) particles and mercury in 10 percent of the sediments found in the core samples, dredging in those areas is not feasible without identifying an alternative disposal method. Staff has identified a CAD site where the 10 percent of mercury-infused sediments will be disposed in a large, deep hole and then capped with clean, dredged material. The CAD construction process involves temporarily relocating the anchorage to the turning basin area, and material dug from the hole will be reused along Newport's nearshore ocean beaches or placed at LA-3. The CAD is designed to accommodate 156,900-cubic yards of material from the federal channels including roughly 50,000-cubic yards of RGP-54 dredged material from Newport residents. There will be an interim cap placed at the conclusion of the federal project and then no activity at the CAD site for 2-years. After the 2-years has concluded, residents will be allowed to place material in the disposal site for up to 6-months. By default, the Environmental Protection Agency (EPA) excepts 1.0 parts per million of mercury to be disposed of at LA-3. The City and partners were successful in negotiating that limit to 1.5 parts per million of mercury. Also, per these negotiations, the EPA recommended that a Sediment Management Plan be drafted. That report is a living document that creates an inventory of the harbor's sediment within and outside the federal channels. It also identifies sediment management options, locations and permitting requirements. Staff developed a Basis of Design Report that details subsurface conditions and soil types; necessary size and dimension; long-term placement of sediment and other items. Per the requirements of the California Environmental Quality Act (CEQA), a public scoping study was conducted in December of 2019, public comment began in December 2020 on the draft EIR and the public comment period ended in January 2021. The EIR contains the draft Final EIR, response to comments, modifications to the draft EIR and the draft Mitigation, Monitoring and Reporting Program.

Public Works Director Webb clarified that the EPA has no concerns of disposal of sediments within the harbor and that their concern is open ocean disposal. He emphasized that the unsuitable materials have extremely low levels of contamination.

multiple sites were reviewed + then one was selected

for soil disposal

Public Works Administrative Manager Miller continued his presentation on the CEQA review process. CEQA requires project alternatives to be identified. After reviewing all the alternatives listed in the draft EIR, staff is proposing one central location within the harbor for the CAD. This alternative results in a reduction in transit time during construction and deeper water allows the scows to be filled to maximum capacity. The proposed CAD site results in no significant and unavoidable impacts after mitigation. Various mitigations are being proposed and are built into staff's analysis. If the City Council certifies the EIR in May of 2021, staff will seek the required regulatory permits as well as continue to seek funding for the project. The project is estimated to be \$20 million with the City providing \$10 million and the USACE providing the other \$10 million.

In answer to Secretary Beer's question how close to shore will the dredging be for Lido Island, Public Works Administrative Manager Miller explained that the 20-foot deep federal channel is roughly one-third of the channel between Via Lido Nord and Coast Highway. Dredging will take place on the Coast Highway side and there will be no dredging immediately adjacent to Via Lido Nord. Director of Public Works Webb added that homeowners have the option to dredge under their docks and have those materials be disposed of in the CAD. In reply to Secretary Beer's query if staff has an estimate of how much material is unsuitable with respect to the 50,000-cubic yards that is reserved for residents, Public Works Administrative Manager Miller said that 50,000-cubic yards will make a significant dent in removing unsuitable material from the harbor. Secretary Beer mentioned that he did not see any mitigation measures addressing large swells. Steve Cappellino, Anchor QEA, stated that the material placement during certain peak tides would be minimized to avoid the material drifting. There is no limit for near-shore placement of clean material but the contractors must comply with safety rules. Also, the contractors are governed by general rules for disposal in the open ocean that is not reflected in the mitigation and monitoring reporting document.

In response to Commissioner Marston's inquiry if property owners know they have contaminated material under their docks, Public Works Administrative Manager Miller explained that staff will be reaching out to residents and notifying them that they can use the CAD if they need to dispose of contaminated sediments. Commissioner Marston suggested that staff send the letters to residents as soon as possible so that residents can begin the planning process. In answer to her question what is the current navigational depth and what will it be after the project is done, Public Works Administrative Manager Miller shared that folks have expressed that there are sections that can become very shallow. The federal authorized depth in the channel adjacent to Coast Highway is 20-feet but currently, it is in the 15- to 16-foot range. In other parts of the federal channel, the authorized depth is 15-feet deep and currently, it is in the range of 11- to 12-feet. Staff does a bathymetry survey every year which shows how much sediment accumulates from year to year. Within the past year, the survey has shown that harbor wide, the sediment level, if spread over the entire harbor, would be the equivalent of an inch or so. In reply to Commissioner Marston's questions if annual inspection of the CAD is adequate and if a biologist is the right professional to perform water quality monitoring, Mr. Cappellino disclosed that the annual inspection recommendation is what has happened at other CAD sites and is adequate. He explained that biologist is a loose term and is meant to indicate that the professional has to be trained in water quality monitoring. Commissioner Marston recommended that the term biologist be revised to allow for any water quality professional to perform the monitoring. For mitigation measure Hydro -2, she recommended that the language reflect that silk curtains shall be used instead of silk curtains could be used. Mr. Cappellino clarified that in other CAD sites, contractors were not required to use a silk curtain but it had to be available and ready in case they were directed to use it.

In answer to Commissioner Scully's question if there will be work rules of when the contractor can dispose into the CAD and what is the soil testing procedure for testing the soil around the CAD, Public Works Administrative Manager Miller answered that there are rules within the Mitigation and Monitoring Reporting Program that only during certain tides can the contractor dispose in the CAD. Mr. Cappellino shared that all design specifications will be included in the eventual dredging contract. Public Works Administrative Manager Miller added that staff will work with the USACE to include all of the components in the contracting documents. Commissioner Scully supported having all drifting material be dragged back into the CAD. In reply to his inquiry if there will be any repairs done to the breakwater, Public Works Administrative Manager Miller specified that is a separate project and staff is currently in the planning stage for the east jetty.

In reply to Commissioner Yahn's query how staff came up with the placement of the CAD and the status of the mooring fields and anchorage areas during construction, Public Works Administrative Manager Miller summarized that the CAD is placed in a central location within the harbor and covers the convergence of several federal channels. He confirmed that the moorings occupied by Newport Harbor Yacht Club will be affected but in prior dredging projects, there was great collaboration between the yacht club and the City. Staff predicted that the Newport Harbor Yacht Club will be impacted for a short amount of time and the CAD will not affect the Newport Harbor Yacht Club mooring field. In terms of anchorage, it would be relocated to the west side of Lido Island during the dredge of the CAD. Then during the 2-year hiatus, the anchorage will be moved back, and then moved back to the west side of Lido Island when the CAD is open for residents for the 6-months.

In answer to Chair Kenney's query if the City analyzed how much it would be to ^{place} placing the contaminated material in a land-based fill site and if the City can afford the project, Public Works Administrative Manager Miller answered that staff did run that cost analysis and he emphasized that City Council will have to determine if the City can afford to do the project or not. Staff is hoping that the federal government will provide half of the cost. *which project? land disposal or CAD?*

In response to Secretary Beer's question is there a plan in place if homeowners do not dredge and dispose of their contaminated material, Director of Public Works Webb mentioned that the RGP material is quite a ways away from the federal channel and he predicted that it would not drift back into the channel. Adam Gale, Anchor QEA, emphasized that there has been a minimal increase of sediment from year to year.

Gary Hill is very much in favor of the project.

Shana Conzelman is in favor of dredging but is not in favor of having a CAD. She mentioned that the contaminants can be taken out of the harbor on a barge instead of being trucked out. She wanted to know what level of contaminants will be allowed in the CAD. She is frustrated that the project is only for commercial areas and not homeowners. She asked why the area between the seawall and the pierhead line for homeowners is not addressed.

Brent Mardian reviewed his background in working with other CAD projects. He mentioned that there are very specific recommendations listed in the 2009 Harbor Area Management Plan for hydrodynamic modeling for site-specific hydrodynamic models in Newport Bay that address water quality issues. He stated that an option that was not evaluated in the EIR is a confined disposal facility that is sequestered from the water.

In answer to Chair Kenney's query if Mr. Mardian was compensated for his extensive EIR review or if he did it on his own, Mr. Mardian stated he did it on his own.

Palmer Luckey stated he wants the contaminated materials. He agreed that many alternative options are not listed in the draft EIR, there is technology that can be used that was not addressed, and there are residents who are interested in funding the cleanup of the bay.

Lauren Chase, Orange County Coastkeeper, raised three areas of concern; the City's inadequate public engagement, the City's inadequate alternatives analyses and the City's inadequate protection of biological resources. For these reasons, Orange County Coastkeeper has requested the Commission to reject the draft EIR and incorporate into the EIR all comments from other agencies that the City will have to receive permits from.

Brooke De La Rosa stated that the draft EIR does not recognize how much the CAD will impact recreation in the bay. The proposed CAD site is an area heavily used by the sailing community and she requested that the Commission reject the proposal.

Jim Mosher specified that on Page 2 of the Resolution, the Harbor Commission did not hold a meeting in Council's Chambers as is written in the resolution. He stated that staff's presentation did not review what potential impacts the draft EIR uncovered and how those impacts will be mitigated.

Terri Reeder, Santa Ana Regional Water Quality Control Board, emphasized that the Board does not consider the contaminants to be low-level concentrations. Staff's presentation indicated that Southern California Dredge Materials Management Team has reviewed the project and she emphasized that they have not reviewed the project. ?

Vice Chair Cunningham supported the dredging project and saw many positive outcomes the project will provide.

Secretary Beer supported the dredging but wanted to have additional time to explore other alternatives for disposal.

Commissioner Marston agreed with Secretary Beer's comments. She announced that she wanted to have more time to explore Mr. Luckey's offer, ~~as well as another alternative~~ before a decision is made.

Commissioner Scully confirmed that the harbor needs to be dredged and that hauling the material out of the state would be very expensive. He supported the CAD unless another alternative presents itself.

Commissioner Williams echoed all of Commissioner Scully's comments but he also supported Secretary Beer's comments of exploring all options before a final decision is made.

Commissioner Yahn agreed with Commissioner Scully's comments. He emphasized that having a CAD is not a new concept, many places have used a CAD and it makes sense for the harbor to use a CAD at this time.

Chair Kenney believed that the project should move forward.

Secretary Beer requested that an ad hoc committee be formed and have them meet with representatives who are interested in providing financial support for other alternatives.

Vice Chair Cunningham to approve Resolution HC2021-002 and correct the resolution stating that the Harbor Commission held their meeting via Zoom. Commissioner Marston seconded the motion. The motion carried by the following roll call vote:

Ayes:	Chair Kenney, Vice Chair Cunningham, Commissioner Marston, Commissioner Scully, Commissioner Williams, Commissioner Yahn
Nays:	None
Abstaining:	Secretary Beer
Absent:	None

Chair Kenney requested input from the Commission regarding the formation of an ad hoc committee.

Vice Chair Cunningham supported it.

Secretary Beer emphasized that his intention of supporting the formation of an ad hoc committee is to clean up all the contaminated material within the harbor.

Commissioner Marston concurred.

Commissioner Scully supported it but cautioned that dealing with contaminated material is very challenging.

Commissioner Williams supported the formation of an ad hoc committee.

Commissioner Yahn is concerned about the logistics of public outreach but he supported it.

Commissioner Yahn announced he would chair the ad hoc committee and Secretary Beer expressed that he would like to be involved.

Public Works Director Webb noted that staff is happy to help the ad hoc committee and reach out to residents.

7) **CURRENT BUSINESS**

1. **Harbor Commission 2021 Objectives**

Each ad hoc committee studying their respective Functional Area within the Commission's 2021 Objectives, will provide a progress update.

Recommendation:

- 1) Find this action exempt from the California Environmental Quality Act (CEQA) pursuant to Sections 15060(c)(2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and 15060(c)(3) (the activity is not a project as defined in Section 15378) of the CEQA Guidelines, California Code of Regulations, Title 14, Chapter 3, because it has no potential for resulting in physical change to the environment, directly or indirectly; and
- 2) Receive and file.

Functional Area 1: Chair Kenney shared that the new Mooring Permits are being distributed and comments have been submitted to staff and the appraiser regarding the appraisal of Mooring Permit fees.

Functional Area 2: Secretary Beer reported that work continues on the Mooring Extension Request and revisions to Council Policy H-3.

Functional Area 3: Vice Chair Cunningham confirmed that work continues on all objectives and will provide an extensive update at the May 2021 Harbor Commission meeting.

Functional Area 4: Commissioner Scully stated that conversations have been happening with Harbor Code Enforcement regarding Objective 4.1 and he predicted that the objective will come to a close soon. He mentioned he will provide a more thorough update on the other two objectives at the next Harbor Commission meeting.

2. **Harbormaster Update – March 2021 Activities**

The Harbormaster is responsible for the management of the City's mooring fields, the Marina Park Guest Marina and Harbor on-water code enforcement activities. This report will update the Commission on the Harbor Department's activities for March 2021.

Recommendation:

- 1) Find this action exempt from the California Environmental Quality Act (CEQA) pursuant to Sections 15060(c)(2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and 15060(c)(3) (the activity is not a project as defined in Section 15378) of the CEQA Guidelines, California Code of Regulations, Title 14, Chapter 3, because it has no potential for resulting in physical change to the environment, directly or indirectly; and
- 2) Receive and file.

Ms. Jacobs reported that \$100,000 is available for the Vessel Turn in Program and staff has a list of folks who are interested in the program. As stated by Chair Kenney, the new Mooring Permits are being distributed. With provided funding, the City's oldest vessel has been decommissioned and replaced with a new vessel. In terms of the Small Harbor Operator Registration, eight businesses have been registered and staff continues to work with small businesses to help them become registered and receive a Marine Activity Permit (MAP). On May 7, 2021, the City will host a boat auction.