Chapter 20.44 – Resource Protection in the Coastal Zone [New]

Sections:

20.44.010 – Purpose

This Chapter regulates development in and adjacent to areas in the Coastal Zone where plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem that could easily be disturbed or degraded by human activities and developments. The intent is to implement policies in the Coastal Land Use Plan.

20.44.020 – Applicability

A. **Environmentally Sensitive Areas in the Coastal Zone.** This Chapter applies to development in the Coastal Zone on lots that abut or include Environmental Study Areas that are indicated in Figure NR-2 (Environmental Study Areas) in the General Plan. Within an ESA, sensitive areas shall include the following:

1. **Environmentally Sensitive Habitat Areas (ESHA).** Areas that are currently identified as ESHA or areas that may include ESHA; and

2. **Wetlands.** Wetlands that are currently delineated or that may be deemed suitable for delineation.

B. **Conflict.** In the event of a conflict between this Chapter and another provision in this Zoning Code or the Municipal Code, the more restrictive regulation shall control.

C. **Development defined.** For the purposes of this Chapter, development shall mean "Development" as defined in Part 7 (Definitions).

20.44.030 – Determination of Sensitive Areas and Buffer Areas

This Section provides procedures for identifying sensitive areas and buffer areas.

A. **Initial biological resources survey.** An applicant shall submit an initial biological resources survey that indicates the presence or potential for sensitive habitat or species on a site. The report shall be prepared by a qualified biologist and shall include the following:

1. Photographs of the site;

2. A discussion of the site's physical characteristics (e.g., topography, soil types, streams, etc.);

3. An identification of the presence or expected presence on the site of:

   a. Natural communities identified as rare by the California Department of Fish and Game;

   b. Rare, threatened, or endangered plant or animal species that are designated or are candidates for listing as rare, threatened, or endangered under State or Federal law; and

   c. Any other species for which there is compelling evidence of rarity (e.g., plants designated "1B" or "2" by the California Native Plant Society; identification in the List of California Terrestrial Natural Communities Recognized by the California Natural Diversity Database maintained by the California Department of Fish and Game; etc.).

4. A description of the degree of habitat integrity and connectivity to other natural areas. Attributes to be evaluated include the:

   a. Habitat's size and connectivity;

   b. Dominance by invasive/non-native species;

   c. Level of disturbance;

   d. Proximity to development; and

   e. Level of fragmentation and isolation.

5. A map depicting the location of biological resources.

B. Biological resources impact report. If the initial biological resources survey indicates the presence or potential for sensitive habitat or species on the site, an applicant shall submit a detailed biological resources impact report. The report shall be prepared by a qualified biologist and shall include the following:

1. A map depicting the overall boundaries of the sensitive area and recommended buffer areas;

2. A determination that the buffer areas required by Section 20.44.050 (Development Standards) will be adequate to protect the sensitive habitat or species, or a recommendation of more effective buffer areas, where applicable;

3. An evaluation of the individual and cumulative impacts of the proposed development on the habitat or species;

4. An analysis of unauthorized development, including grading or vegetation removal, that may have contributed to the degradation or elimination of habitat area;

5. A list of uses that are consistent with the preservation of habitat values, based upon the allowed uses listed in Section 20.44.040 (Allowed Activities and Uses);

6. A description of mitigation measures, including identification of potential mitigation sites, that would minimize or mitigate residual impacts that cannot be avoided.

C. Presumption of ESHA. For the purposes of this Chapter, habitats that are presumed to be an ESHA are identified in Table 3-10 (Habitats Presumed to be Environmentally Sensitive Habitat Areas), unless there are strong site-specific reasons to rebut that presumption. Existing developed areas and existing fuel modification areas required by the City of Newport Beach Fire Department or the Orange County Fire Authority for existing, legal structures do not meet the definition of ESHA.

TABLE 3-10
HABITATS PRESUMED TO BE ENVIRONMENTALLY SENSITIVE HABITAT AREAS

Wetland Habitats	Terrestrial Habitats
Alkali meadows	Maritime succulent scrub
Coastal brackish marsh	Southern coastal bluff scrub
Coastal freshwater marsh	Southern dune scrub
Freshwater seeps	Southern maritime chaparral
Southern coastal salt marsh	Southern willow scrub
Southern hardpan vernal pools	Southern cottonwood willow riparian forest
	Southern arroyo willow forest
	Southern black willow forest
	Southern sycamore alder riparian woodland
	Southern coastal purple needlegrass grassland
	Southern coast live oak riparian forest
	Coastal sage scrub (When adjacent to coastal salt marsh or other wetlands)

D. Wetland delineation. If the initial biological resources survey and/or the biological resources impact report indicate(s) the presence or potential for wetland species or indicators on the site, an applicant shall submit a delineation of wetland areas on the site. The delineation shall be prepared by a qualified biologist and shall be based on the following:

1. Definitions contained in Section 13577(b) of Title 14 of the California Code of Regulations. A preponderance of hydric soils or a preponderance of wetland indicator species shall be considered presumptive evidence of wetland conditions; and

2. Statewide Interpretive Guidelines for Wetlands and Other Environmentally Sensitive Habitat Areas published by the California Coastal Commission.

20.44.040 – Allowed Activities and Uses

This Section lists uses that may be allowed in sensitive areas and buffer areas.

A. Sensitive areas. The following uses may be allowed in sensitive areas, provided that they are consistent with the preservation of animal or plant life:

1. Biology-related educational, interpretive, or scientific research uses (e.g., bird-watching, noncommercial fishing, nature study, etc.) that do not significantly impair plant and animal life;

2. Wildlife refuge;

3. Habitat restoration projects where the purpose is restoration of the habitat;

4. Open space;

5. Passive recreation;

6. Public access boardwalks, paths, and trails; and

7. Diking, dredging, and filling activities that comply with Subsection C, below.

B. Buffer areas. All of the activities and uses allowed in sensitive areas listed in Subsection A, above, and any of the following shall be allowed in buffer areas:

1. Fences;

2. Road and bridge replacements;

3. Incidental public facilities when there is no other feasible, environmentally less damaging alternative;

4. Signs and small information kiosks; and

5. Other improvements necessary to protect habitat resources.

C. Diking, dredging, and filling.

1. For diking, dredging, and filling activities affecting lands and waters below the mean high water line, see Municipal Code Title 17 (Harbor Code).

2. Diking, dredging, and filling of wetlands above the mean high water line shall be limited to the following activities, provided that there is no feasible, less environmentally damaging alternative and that mitigation measures have been provided to minimize adverse environmental effects:

   a. Construction or expansion of port/marine facilities;

   b. Construction or expansion of coastal-dependent industrial facilities (e.g., commercial fishing facilities, commercial ferry facilities, etc.);

   c. In open coastal waters, other than wetlands, including estuaries and streams, new or expanded boating facilities (i.e., slips, access ramps, piers, marinas, launching ramps) and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities;

d. Incidental public service activities that temporarily impact the resources of the area (e.g., burying cables and pipes, inspection of piers, maintenance of existing intake and outfall pipes, etc.);

e. Recreational docks and piers within the intertidal areas, including wetlands, in Newport Harbor;

f. Maintenance or replacement of existing bulkheads when expansion or encroachment into coastal waters is limited to the minimum extent necessary to repair, maintain, or replace an existing bulkhead and the backfill is not used to create new usable residential land areas;

g. Sand extraction for restoring beaches, except in environmentally sensitive habitat areas;

h. Restoration activities; and

i. Nature study, aquaculture, or similar resource-dependent activities.

3. Restoration activities listed in Paragraph 2, above, may include some fill if the wetlands are small, extremely isolated, and incapable of being restored. Small, extremely isolated parcels that are incapable of being restored to biologically productive systems may be filled and developed for uses not ordinarily allowed only if the actions establish stable and logical boundaries between urban and wetland areas and if the applicant provides funds sufficient to accomplish an approved restoration program in the same general region. All of the following criteria shall be satisfied before the filling may be allowed:

a. The area of the wetland to be filled is less than 1 acre;

b. The wetland to be filled is not contiguous or adjacent to a larger wetland;

c. The wetland to be filled is so small and isolated that it is not capable of recovering and maintaining a high level of biological productivity without major restoration activities;

d. The wetland does not provide significant habitat value to marine and wildlife species, and is not used by any species that are rare or endangered;

e. Restoration of another wetland to mitigate for fill can most feasibly be achieved in conjunction with filling a small wetland. The mitigation measure shall be carried out in a manner that would result in no net loss of either wetland acreage or habitat value;

f. Restoration site is abutting or adjacent to a larger, contiguous wetland area providing significant habitat value to fish and wildlife that would benefit from the addition of more area;

g. The restoration site is within the general area surrounding the wetland where the fill occurred; and

h. The California Department of Fish and Game and the U.S. Fish and Wildlife Service has determined that the proposed restoration project can be successfully carried out.

20.44.050 – Development Standards

This Section provides standards applicable to sensitive areas and buffer areas.

A. Buffer areas. Development shall provide the following minimum buffer areas as measured from the boundary of the sensitive area, unless a greater or lesser width is required or allowed by the review authority:

1. Adjacent to an Environmentally Sensitive Habitat Area – 50-foot wide buffer area; and

2. Adjacent to a Wetland – 100-foot wide buffer area.

B. Diking, dredging, and filling.

1. Diking, dredging, and filling of a wetland above the mean high water line shall avoid significant disruption of marine and wildlife habitats and water circulation.

2. Activities shall maintain functional capacity of habitat areas. For the purposes of this Section, functional capacity means the ability of the wetland to be self-sustaining and to maintain natural species diversity. In order to establish that the functional capacity is being maintained, the development shall not:

   a. Alter presently occurring plant and animal populations in the ecosystem in a manner that would impair the long-term stability of the ecosystem (i.e., natural species diversity, abundance, and composition are essentially unchanged as a result of the project);

   b. Harm or destroy a species or habitat that is rare or endangered;

   c. Harm a species or habitat that is essential to the natural biological functioning of the wetland or estuary; or

   d. Significantly reduce consumptive (e.g., fishing, etc.) or non-consumptive (e.g., water quality, research opportunity, etc.) values of the wetland ecosystem.

C. Fencing.

1. During and after construction, fencing shall be installed to minimize adverse impacts on sensitive areas.

2. Fencing shall not impact public views or the free passage of native wildlife and shall employ design and materials determined by the review authority to be compatible with the visual and biological character of the habitat.

D. Vegetation.

1. Buffer areas shall be planted and maintained exclusively with vegetation that is consistent with the adjacent habitat values and indigenous native plants. Invasive plant species shall be prohibited.

2. Fuel modification zones shall comply with Section 20.48.080 (Fuel Modification).

E. Lighting. Lighting fixtures shall shield and direct exterior lighting away from sensitive habitat areas in compliance with Section 20.30.060 (Outdoor Lighting).

F. Site planning and design.

1. Development shall be designed and sited to protect against any significant disruption of habitat values and to avoid the need to extend fuel modification zones into sensitive areas.

2. Development shall be compatible with the continued viability of sensitive resources.

3. Land divisions, including lot line adjustments, shall be designed to avoid new development within sensitive areas and to minimize adverse impacts to sensitive resources.

G. Erosion and sediment control. Erosion and sediment controls, including best management practices (BMPs) to minimize siltation, sedimentation, and erosion, shall be installed before and during construction and shall be left in place until the site is stabilized with permanent vegetation.

H. Removal of unauthorized structures. Unauthorized structures shall be removed before issuance of any permit.

I. No net loss. Wetland areas shall sustain "no net loss."

20.44.060 – Permit Requirements

A. Application requirements. Permit applications for new development shall include the:

1. Information required by Section 20.66.020 (Coastal Development Permits); and

2. Initial biological resources survey required in Section 20.44.030 (Determination of Sensitive Areas and Buffer Areas); and/or the

3. Biological resources impact report required in Section 20.44.030 (Determination of Sensitive Areas and Buffer Areas).

B. Subdivisions. If a sensitive area is within the boundaries of a proposed subdivision, the sensitive area shall be shown on the Tentative Map and offered for dedication to the City. When a sensitive area is already in existence at the time a Tentative Map is filed, the status of the sensitive area, whether public or private, shall be identified on the Tentative Map.

C. Habitat restoration or creation. As a condition of permit approval, the review authority may require habitat restoration or creation.

1. Timing. The restoration or creation of habitat may be required before completion of a development, unless a performance guarantee is provided in compliance with Section 20.68.060 (Performance Guarantees) to ensure restoration and monitoring of the effort.

2. Restoration and monitoring plan. A restoration and monitoring plan may be required that includes the following:

a. A clear statement of the goals of the restoration for all habitat types.

b. A description of the desired habitat.

c. Quantitative description of the chosen restoration site;

d. Identification of a qualified biologist who will serve as the restoration manager and be personally responsible for all phases of the restoration;

f. A specific grading plan if the topography must be altered;

e. An erosion control plan, if soil or other substrate will be significantly disturbed during the course of the restoration;

h. A plan that specifies the eradication and control of invasive plants;

i. A planting plan that specifies a detailed plant palette using local native stock or using plants, cuttings, or seeds, which are obtained from a nursery that certifies the local origin. The planting plan should provide specifications for preparation of nursery stock and include technical details of planting methods (e.g., spacing, micorrhyzal inoculation, etc.);

j. An irrigation plan that describes the method and timing of watering and ensures removal of watering infrastructure by the end of the monitoring period;

k. An interim monitoring plan that includes maintenance and remediation activities, interim performance goals, assessment methods, and schedule; and

l. A final monitoring plan to determine whether the restoration has been successful that specifies:

(1) A basis for selection of the performance criteria;

(2) Types of performance criteria;

(3) Procedure for judging success;

(4) Formal sampling design;

(5) Sample size;

(6) Approval of a final report; and

(7) Provision for possible further action.

D. Evidence of other permits. Before any construction, alteration, or other improvement in areas designated as wetlands, the applicant shall submit the following:

1. Section 404 permit. A Section 404 permit from the U.S. Army Corps of Engineers;

2. Letter from CDFG. Letter from the California Department of Fish and Game confirming compliance with Section 1602 of the California Fish and Game Code; and

3. Waiver/certificate from RWQCB. A waiver or certificate of conformance with water quality standards issued by the Santa Ana Regional Water Quality Control Board, if applicable.

E. Mitigation measures. If a project involves diking, dredging, or filling of a wetland, the review authority may require any of the following minimum mitigation measures as a condition of approval:

1. Create or restore wetlands.

a. Plan elements. If an appropriate mitigation site is available, the applicant shall submit a detailed plan that includes provisions for:

(1) Acquiring title to the mitigation site;

(2) "In-kind" wetland restoration or creation where possible;

(3) Where "out-of-kind" mitigation is necessary, restoration or creation of wetlands that are of equal or greater biological productivity to the wetland that was filled or dredged; and

(4) Dedication of the restored or created wetland and buffer to a public agency, or permanent restriction of their use to open space purposes.

b. Mitigation ratio.

(1) Adverse impacts shall be mitigated at a ratio of 3:1 for impacts to seasonal wetlands, freshwater marsh and riparian areas, and at a ratio of 4:1 for impacts to vernal pools and saltmarsh (the ratio representing the acreage of the area to be restored/created to the acreage of the area diked or filled), unless the applicant provides evidence establishing, and the approving authority finds, that restoration or creation of a lesser area of wetlands will fully mitigate the adverse impacts of the dike or fill project.

(2) However, in no event shall the mitigation ratio be less than 2:1 unless, prior to the development impacts, the mitigation is completed and is empirically demonstrated to meet performance criteria that establish that the created or restored wetlands are functionally equivalent or superior to the impacted wetlands.

c. Location of mitigation. The mitigation shall occur on-site wherever possible. Where not possible, mitigation should occur in the same watershed.

d. Acquisition of mitigation site. The mitigation site shall be purchased and legally restricted and/or dedicated before the dike or fill development may proceed.

2. Open equivalent (diked) areas to tidal action. The review authority may allow the applicant to open equivalent areas to tidal action or provide other sources of surface water in place of creating or restoring wetlands as required by Subparagraph 1, above.

3. Timing. Restoration may precede the diking, dredging, or filling project. At a minimum, the review authority shall require restoration to occur simultaneously with project construction.

4. Monitoring. Where impacts to wetlands are allowed, the review authority shall require monitoring of mitigation measures for a period of sufficient time to determine if mitigation objectives and performance standards are being met. Mid-course corrections shall be implemented if necessary to meet the objectives or performance standards. Monitoring reports shall be submitted during the monitoring period that document the success or failure of the mitigation. To help ensure that the mitigation project is self-sustaining, final monitoring for all mitigation projects shall take place after at least 3 years with no remediation or maintenance activities other than weeding. If performance standards are not met by the end of the prescribed monitoring period, the monitoring period shall be extended or the applicant shall submit an amendment application proposing alternative mitigation measures and implement the approved changes. Unless the review authority determines that a different mitigation monitoring schedule is appropriate, monitoring shall occur for a period of not less than 5 years.