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Title: ORDINANCE GRANTING A THIRTY (30) YEAR EASEMENT TO POSEIDON RESOURCES (CHANNELSIDE) LP FOR ENVIRONMENTAL MITIGATION PURPOSES IN CONNECTION WITH THE OTAY RIVER ESTUARY RESTORATION PROJECT ADJACENT TO THE SAN DIEGO BAY NATIONAL WILDLIFE REFUGE IN SOUTH SAN DIEGO BAY

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Date	Ver.	Action By	Action	Result
6/14/2022	1	Board of Port Commissioners	adopted	

DATE: June 14, 2022

SUBJECT: OTAY RIVER ESTUARY RESTORATION PROJECT

ORDINANCE GRANTING A THIRTY (30) YEAR EASEMENT TO POSEIDON RESOURCES (CHANNELSIDE) LP FOR ENVIRONMENTAL MITIGATION PURPOSES IN CONNECTION WITH THE OTAY RIVER ESTUARY RESTORATION PROJECT ADJACENT TO THE SAN DIEGO BAY NATIONAL WILDLIFE REFUGE IN SOUTH SAN DIEGO BAY

EXECUTIVE SUMMARY:

The Otay River Estuary Restoration Project (“ORERP”) is a restoration project located in south San Diego Bay that was planned in partnership with the United States Fish & Wildlife Service (“USFWS”) and Poseidon Resources (Channelside) LP, a Delaware limited partnership (“Poseidon”). The goals of the ORERP are to implement the habitat restoration objectives of the USFWS 2006 San Diego Bay National Wildlife Refuge Comprehensive Conservation Plan and fulfill the applicable terms and conditions of the permits issued to Poseidon by the California Coastal Commission and San Diego Regional Water Quality Control Board for the Carlsbad Desalination Plant Project. In order to connect the restored habitat to the San Diego Bay, the northern levee of the project site, adjacent Pond 15 and as shown on Attachment A, will be breached to allow water to circulate throughout the habitat. The berm breach will impact District tidelands and completed pursuant to a separate administratively approved Right of Entry License Agreement between the District and Poseidon in the form attached to this agenda sheet as Attachment C. Following completion of the berm breach in accordance with the Right of Entry License Agreement, Poseidon will require an easement from the District covering 1.2 acres of submerged tidelands for the completed berm breach, resulting inlet channel, and continuing access, repair, monitoring, and maintenance purposes. Staff has negotiated a 30-year

Easement for Environmental Mitigation Purposes with Poseidon in the form attached to this agenda sheet as Attachment B. Staff recommends the Board adopt an Ordinance authorizing approval and execution of the Easement for Environmental Mitigation Purposes between the District and Poseidon conditioned upon Poseidon completing the aforementioned berm breach and related work pursuant to and in accordance with the terms of the Right of Entry License Agreement that will be approved administratively by District staff.

RECOMMENDATION:

Adopt Ordinance authorizing approval and execution of an Easement for Environmental Mitigation Purposes between the District and Poseidon Resources (Channelside) LP.

FISCAL IMPACT:

Approval of a 30-year Easement for Environmental Mitigation Purposes to Poseidon would result in annual rental payments of \$45,000 to the District subject to the Easement becoming effective following the relevant work being timely completed in accordance with the terms of an administratively approved Right of Entry License Agreement.

COMPASS STRATEGIC GOALS:

This agenda item supports the following Strategic Goal(s).

- A Port with a healthy and sustainable bay and its environment.
- A financially sustainable Port that drives job creation and regional economic vitality.

DISCUSSION:

Poseidon is seeking an Easement for Environmental Mitigation Purposes (“Easement”) in the form attached to this agenda sheet as Attachment B over District tidelands at the former South Bay Power Plant east and north of Pond 15 in the Chula Vista Bayfront for purposes of a berm breach, inlet channel, and the repair, maintenance, and monitoring of the same as part of Poseidon’s Otay River Estuary Restoration Project (“ORERP”). The ORERP is a restoration project located in south San Diego Bay that was planned in partnership with the United States Fish & Wildlife Service (“USFWS”) and Poseidon. The goals of the ORERP are to implement the habitat restoration objectives of the USFWS 2006 San Diego Bay National Wildlife Refuge Comprehensive Conservation Plan, and fulfill the applicable terms and conditions of the permits issued to Poseidon by the California Coastal Commission and San Diego Regional Water Quality Control Board for the Carlsbad Desalination Plant Project. The ORERP spans two non-contiguous sites within the South San Diego Bay Unit of the San Diego Bay National Wildlife Refuge (“NWR”). The first restoration site, which is located near the Otay River Floodplain, is in the northern [non-District owned] portion of Pond 20. The second restoration site, which is located at Pond 15, is adjacent to the Chula Vista Bayfront Planning District.

Implementation of the ORERP will involve the excavation of approximately 320,000 cubic yards of soil from the Otay River Floodplain Site to create a range of intertidal habitats (i.e., mudflat, salt marsh) and the transport and placement of approximately 265,000 cubic yards of this excavated material to Pond 15 (the remaining material will be placed in adjacent NWR lands outside of District tidelands). This material added to Pond 15 will raise Pond 15’s floor to elevations suitable to support tidal and intertidal wetland habitats. Once the desired elevations have been achieved within Pond 15,

the northern levee of the pond will be breached to connect the restored pond with San Diego Bay (this is the portion of the ORERP within historic District tidelands). The footprint of the inlet/outlet excavation area is approximately 1.7 acres with approximately 1.2 acres of the inlet/outlet excavation area located to the north of the existing Pond 15 levee and in the District's jurisdiction. Short term access for construction purposes, a temporary truck haul route, and a temporary construction staging area is to be provided via an administratively approved Right of Entry License Agreement (the "Right of Entry") in the form attached hereto as Attachment C. Long-term access to the 1.2-acre parcel and completed berm breach and inlet channel for repair, maintenance, and monitoring purposes is to be provided via the Easement, with the Easement's effectiveness to be conditioned on the timely completion of the relevant work under the Right of Entry.

The USFWS prepared and approved an Environmental Impact Statement ("EIS") in 2018, and a subsequent Environmental Action Statement ("EAS") in 2020, to analyze the environmental impacts of the ORERP. Pursuant to the District's Coastal Development Permit ("CDP") Regulations, the portion of ORERP that is located within the District's coastal permitting jurisdiction required issuance of a non-appealable CDP from the District. Staff determined that the portion of the ORERP that is located within the District's coastal permitting jurisdiction is consistent with the certified Port Master Plan. Pursuant to California Environmental Quality Act ("CEQA") Guidelines 15221, the District determined that the EIS and EAS were satisfactorily completed in a manner to enable the District to adopt the NEPA documents as a responsible agency under CEQA. The Board subsequently approved the CDP and these findings at its December 8, 2020 meeting.

Staff has agreed upon price and terms for the Right of Entry and, following completion of construction, for the use of the berm breach area as well as the inlet channel within submerged District tidelands pursuant to the Easement using market rates. The proposed Easement includes initial annual rent of \$45,000 with three percent (3%) annual escalations for a term of 30 years to allow for continuing access rights for repair, monitoring, and maintenance. To determine the rental amount, staff reviewed recent appraisals from BAE's recent eel grass restoration mitigation lease which is adjacent to Poseidon's project. These previous appraisals and subsequent negotiations with BAE valued submerged land which has been restored for mitigation purposes.

Staff recommends the Board adopt an Ordinance authorizing approval and execution of an Easement between the District and Poseidon Resources (Channelside) LP with the Easement's effectiveness to be conditioned upon the relevant work being timely completed in accordance with the terms of an administratively approved Right of Entry.

General Counsel's Comments:

The Office of the General Counsel has reviewed this agenda sheet and the attachments as presented to it and approves the same as to form and legality.

Environmental Review:

The proposed Board action for the ordinance granting a thirty (30) year easement to Poseidon Resources (Channelside) LP for a berm breach as part of the Otay River Estuary Restoration Project was adequately covered in the ORERP Environmental Impact Statement (EIS) and Environmental Action Statement (EAS) prepared by the USFWS pursuant to the National Environmental Policy Act, which were considered in place of an Environmental Impact Report by the District on December 8, 2020 (pursuant to CEQA Guidelines Section 15221). The proposed project is not a separate "project"

for CEQA purposes but is a subsequent discretionary approval related to a previously approved project. (CEQA Guidelines § 15378(c); Van de Kamps Coalition v. Board of Trustees of Los Angeles Comm. College Dist. (2012) 206 Cal.App.4th 1036.) Additionally, pursuant to CEQA Guidelines Sections 15162 and 15163, and based on the review of the entire record, including without limitation, the use of the EIS and EAS in place of an EIR, the District finds and recommends that the proposed Board action does not require further environmental review as: 1) no substantial changes are proposed to the project and no substantial changes have occurred that require major revisions to the EIS and EAS due to the involvement or new significant environmental effects or an increase in severity of previously identified significant effects; and 2) no new information of substantial importance has come to light that (a) shows the Project will have one or more significant effects not discussed in the EIS and EAS, (b) identifies significant impacts would not be more severe than those analyzed in the EIS and EAS, (c) shows that mitigation measures or alternatives are now feasible that were identified as infeasible and those mitigation measures or alternatives would reduce significant impacts, and (d) no changes to mitigation measures or alternatives have been identified or are required. Because none of these factors have been triggered, the District has the discretion to require no further analysis or environmental documentation (CEQA Guidelines § 15162(b)). Pursuant to CEQA Guidelines §15162(b), the District finds and recommends that no further analysis or environmental documentation is necessary. Accordingly, the proposed Board action is merely a step in furtherance of the original project for which environmental review was performed and no supplemental or subsequent CEQA review has been triggered, and no further environmental review is required.

In addition, this Board item complies with Section 87 of the Port Act, which allows for the establishment and maintenance of those lands for open space, ecological preservation and habitat restoration. The Port Act was enacted by the California Legislature and is consistent with the Public Trust Doctrine. Consequently, the proposed Board actions are consistent with the Public Trust Doctrine.

Finally, the project was covered in the Coastal Development Permit (CDP) that was conditionally approved by the District on December 8, 2020. Issuance of the CDP was conditioned on Poseidon Resources (Channelside) LP obtaining real property rights from the District. The proposed Board action are consistent with the project in that CDP. No additional action under the California Coastal Act is required at this time.

Diversity, Equity, and Inclusion Program:

This agenda sheet has no direct DEI impact on District workforce or contract reporting at this time.

PREPARED BY:

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Attachment(s):

- Attachment A: Site Map
- Attachment B: Proposed Easement for Environmental Mitigation Purposes
- Attachment C: Right of Entry License Agreement

