



Council Agenda Report

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

Prepared by: Jessica Thompson, Senior Planner

Approved by: Steve McClary, City Manager

Date prepared: September 28, 2022 Meeting date: October 10, 2022

Subject: Implementation of Land Use Policy 3.18 Addressing the Use of Rodenticides, Insecticides and Herbicides

RECOMMENDED ACTION: Evaluate and provide staff with direction regarding the proposed policy to implement Land Use Policy 3.18 or direct staff to prepare an amendment to the City's Local Implementation Plan (LIP) to implement Land Use Policy 3.18.

FISCAL IMPACT: There is no fiscal impact associated with the recommended action. However, if the policy or LIP amendment is adopted, staff will return with a work plan which will include a plan for implementation, outreach program, and enforcement plan.

WORK PLAN: This item was included as item 5.j. in the Adopted Work Plan for Fiscal Year 2022-2023.

DISCUSSION: In 2021, the Council adopted Resolution No. 21-33 adopting the California Coastal Commission's (CCC) modifications to the Local Coastal Program (LCP) Land Use Plan (LUP) Policy 3.18. LUP Policy 3.18 was amended to include limitations on the use of pesticides, rodenticides, and insecticides throughout the City. In addition, the Council directed staff to work members of Poison Free Malibu to develop an ordinance for the implementation of LUP Policy 3.18. This report presents the outcome of meetings with Poison Free Malibu and the direction from the Zoning Ordinance Revisions and Code Enforcement Subcommittee (ZORACES) that took place on April 14, 2022.

Background

Since 2014, the City has strived to eliminate environmentally harmful poisons from within City limits through numerous measures to restrict their use. However, the City's efforts were hampered by State law that preempts the ability of municipalities in California to create laws prohibiting the use of State-regulated chemicals. Specifically, Food and Agriculture Code section 11501.1(a) states:

This division and Division 7 (commencing with Section 12501) are of statewide concern and occupy the whole field of regulation regarding the registration, sale, transportation, or use of pesticides to the exclusion of all local regulation. Except as otherwise specifically provided in this code, no ordinance or regulation of local government, including, but not limited to, an action by a local governmental agency or department, a county board of supervisors or a city council, or a local regulation adopted by the use of an initiative measure, may prohibit or in any way attempt to regulate any matter relating to the registration, sale, transportation, or use of pesticides, and any of these ordinances, laws, or regulations are void and of no force or effect.

Despite regulatory obstacles, 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. Also, in 2019, the City Council adopted Resolution No. 19-54 amending LUP Policy 3.18, which created a policy mechanism to allow the City to create a regulatory framework to address the use of pesticides, rodenticides, on insecticides throughout the City.

While the Local Coastal Program amendment (LCPA) was undergoing the CCC's certification review process, staff proactively added a condition of approval on coastal development permits that prohibits the use of pesticides, rodenticides, and insecticides in association with the approved development which is consistent with LUP Policy 3.18 and addresses site-specific constraints.

It is important to note that after the submittal of the LCP amendment to the CCC, the State Legislature enacted AB 1788, which is a law that generally prohibits the use of second-generation anticoagulant rodenticides, except in certain instances, such as when used for eradication of invasive species on offshore islands. Although this law already restricts the use of rodenticides in Malibu, the subject LCP policy would go further than these restrictions because it would apply to all rodenticides and pesticides rather than just second-generation anticoagulant rodenticides.

The City Council adopted the CCC's modifications on June 28, 2021, to the City's proposed LCPA and as a result LUP Policy 3.18 now reads as follows:

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.

At the same Council meeting, the Council directed staff to develop an ordinance to amend the Local Implementation plan (LIP) to add provisions to implement LUP Policy 3.18. Similar to the City's Zoning Ordinance, the LIP is the document that defines how the City's land use policies are implemented. In addition, the Council directed staff to work with the concerned community members to develop the ordinance.

Staff met several times with Poison Free Malibu to receive input on how to proceed with the implementation of LUP Policy 3.18. As a result of those meetings, Poison Free Malibu requested that the City adopt a policy that determines that the application of pesticides, rodenticides, and insecticides are considered development, rather than a LIP amendment.

On April 14, 2022, staff presented to ZORACES a draft policy that was the result of discussions and comments provided by Poison Free Malibu. In addition, staff also presented the pros and cons of implementing the proposed policy versus processing an amendment to the City's LIP. The ZORACES subcommittee made the following recommendations:

- Present the proposed policy as drafted to the City Council;
- Consult with City legal counsel; and
- Develop options for enforcement of the policy.

Result of Consultation with the City's Legal Counsel

It is advisable that an amendment to the City's LIP be put forward to implement the proposed policy to allow for citations to be issued for violations of that policy. A policy is appropriate to interpret provisions of the City's LIP to ensure it is consistently applied, particularly where provisions of the LIP are ambiguous or can be read to conflict with each other. However, a policy cannot create new law, it can only provide guidance about interpreting the laws that exist. In addition, an individual cannot be fined or cited for violation of a policy—only violation of actual code provisions is subject to administrative fines or enforcement action.

Based on review by the City's Attorney's office, the proposed policy would be subject to legal challenge and the potential award of attorney's fees against the City. If the state had not prohibited cities from regulating pesticides and herbicides the City could adopt an ordinance that implements the proposed policy. However, as the City is attempting to address this prohibition by putting these provisions into its LCP, it must also put the provisions it wants to apply into its LIP.

The LUP is a policy document 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 the LIP, and the City's zoning code, which contain the enforceable procedures and requirements in the City. As a result, provisions must be added to the LIP to implement LUP Policy 3.18. It is those LIP provisions that will be enforceable and which will govern how the policy is applied and what requirements are imposed on the City's residents.

The Coastal Act and the City's LIP define when a coastal development permit (CDP) is required and what types of development are exempt from the requirement to obtain a CDP. LUP Policy 3.18 could be implemented by adjusting when a CDP is required (or when development is exempt from the requirement to obtain one), but until such changes are made the current provisions remain unchanged. Under the City's LIP a CDP is not required for the use of bait boxes, nor for the application of herbicides to lawns or gardens as it does not fall under the category of new development. Furthermore, the City pursued the option of stating that application of these materials are beyond the scope of maintenance and repair activities as defined in LIP Section 13.4.2. However, Coastal Commission staff informed City that the criteria in LIP Section 13.4.2 comes directly from the Coastal Act and any changes to that section raise consistency issues with the Coastal Act. To change this, the LIP must be amended.

Enforcement

Upon final adoption of a policy or LIP amendment, City staff will present a workplan to the Council which will include an implementation plan, to address public outreach, and enforcement. The outreach program may include continuing educational outreach to businesses, residents, pesticide operators/companies, gardeners, shopping centers, the Malibu Chamber of Commerce, and other entities and organizations, notifying them of the restrictions, educating them as to the harm created by pesticides and offering alternative solutions. In addition, based on the direction staff receives from the Council on how to proceed, staff will include a discussion on what options are available for enforcement in the workplan.

Attached to this report is the proposed policy as presented to ZORACES.

ATTACHMENTS:

- A. Draft Policy for Council Consideration
- B. April 14, 2022, ZORACES Agenda Report

DRAFT POLICY – IMPLEMENTATION OF LUP POLICY 3.18

1.a. Pursuant to Land Use Policy 3.18, the outdoor use of rodenticides (rodent poison) is prohibited whether in bait boxes or by other application. Insecticides and herbicides are prohibited if they are in EPA toxicity Danger (category 1), warning (category 2), or caution (category 3). To use an insecticide or herbicide with an ingredient listed in Category 1, 2, or 3 is considered development per land use policy 3.18.

Pursuant to Section VII.B of the Earth Friendly Management Policy Categories 1, 2, and 3 are as follows:

“B. Chemical Prohibitions for the Pesticide List.

Pesticides included in the pesticide use list shall not contain ingredients identified in the following sources:

1. Products listed as Toxicity Category 1, 2, or 3
2. California’s Proposition 65 list (the Safe Drinking Water and Toxic Enforcement Act of 1986, materials known to the State to cause cancer or reproductive or developmental toxicity)
3. California’s Department of Pesticide Regulation groundwater protection list (Food and Agriculture Code 13145(d))
4. Organophosphates, or organochlorines, or carbamates listed by the United States Environmental Protection Agency (Office of Pesticides Programs, Document 735-F-99-14, May 1999), or California Environmental Protection Agency, Department of Pesticide Regulation Chemical Inquiries Database
5. A known carcinogen, probable carcinogen, or possible carcinogen by the United States Environmental Protection Agency as per “List of Chemicals Evaluated for Carcinogenic Potential.”
6. Any known endocrine disruptor listed by the United States Environmental Protection Agency or the European Union, Endocrine Disruptors website”

1.b. EPA eco-exempt Category 4 products are permissible.

They are described here: <https://www.epa.gov/sites/production/files/2018-01/documents/minrisk-active-ingredients-tolerances-jan-2018.pdf>

2. The indoor use of pesticides is not regulated by this policy.

3. The City will do 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 restrictions, educating them as to the harm created by pesticides and offering alternative solutions. This outreach should be funded by license fees and fines.

4. As the unauthorized application of these materials is considered a possible environmental threat. Therefore, if the presence of these materials is observed it can be proactively enforced and will be fined subject to Malibu Municipal Code Chapter 1.10 (Administrative Citation and Penalties).

5. City staff will implement outreach and education citywide. If there is non-compliance Code Enforcement staff will address the violation at that time.



Zoning Ordinance Revisions and Code Enforcement Subcommittee (ZORACES) Agenda Report

Zoning Ordinance
Revisions and Code
Enforcement
Subcommittee
Special Meeting
04-14-22

Item 3.B.

To: Councilmember Pierson and Councilmember Uhring

Prepared by: Jessica Thompson, Senior Planner

Reviewed by: Richard Mollica, Planning Director

Approved by: Steve McClary, Interim City Manager

Date prepared: April 11, 2022 Meeting date: April 14, 2022

Subject: Implementation of Land Use Policy 3.18 Addressing the Use of Rodenticides, Insecticides and Herbicides

RECOMMENDED ACTION: Discuss whether a policy or an ordinance to the Local Coastal Program (LCP) Local Implementation Plan (LIP) should be prepared to implement Land Use Plan Policy 3.18.

DISCUSSION: In 2021, after the Council adopted the California Coastal Commission's (CCC) modifications to Land Use Plan Policy 3.18, the Council adopted Resolution No. 21-33 initiating an amendment to the LIP to add provisions to enforce LUP Policy 3:18. In addition, the Council directed staff to work with community stakeholders to develop an ordinance. This report presents the outcome of meetings with community stakeholders and seeks the Subcommittee's guidance.

Background

Since 2014, the City has strived to eliminate environmentally harmful poisons from within the city limits and has taken numerous measures to restrict their use. However, the City's efforts were hampered by State law that preempted the ability of municipalities in California to create laws prohibiting the use of State-regulated chemicals. Despite regulatory obstacles, 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. Also, in 2019, the City Council adopted Resolution No. 19-54 amending LUP Policy 3.18, which created a policy mechanism to allow the City to create a regulatory

framework to address the use of pesticides, rodenticides, and insecticides throughout the City.

While the LCP amendment was undergoing the CCC's certification review process, to further advance the City's goals, the City added a condition of approval on newly approved coastal development permits that prohibits the use of pesticides, rodenticides, and insecticides.

It is important to note after the submittal of the LCP amendment to the CCC, the State Legislature enacted AB 1788, which is a law that generally prohibits the use of second-generation anticoagulant rodenticides, except in certain instances, such as when used for eradication of invasive species on offshore islands. Although this law already restricts the use of rodenticides in Malibu, the subject LCP policy would go further than these restrictions because it would apply to all rodenticides and pesticides rather than just second-generation anticoagulant rodenticides.

After numerous meetings and negotiations with the California Coastal Commission, City officials, and community stakeholders, on June 28, 2021, the City Council adopted the CCC's modifications to the City's proposed LCP Land Use Policy (LUP) Policy 3.18 to read as follows:

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.

At the same Council meeting, the Council directed staff to develop an ordinance to amend the LIP to add provisions to enforce LUP Policy 3:18. Similar to the City's Zoning Ordinance, the LIP is the document that outlines how to implement the City's land use policies. In addition, the Council directed staff to work with community stakeholders to develop the ordinance.

Issue

As stated, staff met several times with community stakeholders. They recommended the City adopt a policy that determines that the application of pesticides, rodenticides, and

insecticides is considered as development, rather than an ordinance, in order to expedite the implementation of LUP Policy 3:18. Attached to this report is the proposed policy that is the result of the meetings between staff and stakeholders.

While an ordinance and a policy may accomplish the same goals, each presents its own advantages and disadvantages. Below is an abbreviated summary of each:

Policy

- Process – May be adopted by the City Council by resolution and may be revised on an as-needed basis.
- Certification – Does not require certification by the CCC.
- Enforcement – The determination that the application of these chemicals is considered development may be legally challenged because, unlike an ordinance, it is not a law. In addition, terms or provisions included in the policy will not be explicitly defined in the City's Zoning Ordinance, furthering the chance that the policy may be challenged.

Ordinance

- Process – In order to adopt an ordinance, public hearings before the Planning Commission and City Council are required. In addition, amendments to the LCP require certification by the CCC. While ordinances may also be amended as needed, the public hearing and certification review process is required.
- Certification – Requires hearings before the Planning Commission and City Council, followed by certification (often coming with modifications) by the CCC.
- Enforcement – Subject to the enforcement procedures in both the Malibu Municipal Code and LCP and more difficult to legally challenge.

Since the community stakeholders have recommended that the City process a policy and the Council directed staff to prepare an ordinance, staff is seeking guidance from the Subcommittee.

STAFF FOLLOW-UP: Following comments from the Subcommittee, staff will either present the attached draft policy to the City Council or draft an amendment to the LIP for recommendation by the Planning Commission and consideration and adoption by the City Council. Should the Subcommittee recommend that staff prepare an ordinance, staff will return for further guidance on terms and other provisions to be incorporated into an ordinance.

ATTACHMENT: Draft Policy

DRAFT POLICY – IMPLEMENTATION OF LUP POLICY 3.18

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3. California’s Department of Pesticide Regulation groundwater protection list (Food and Agriculture Code 13145(d))
4. Organophosphates, or organochlorines, or carbamates listed by the United States Environmental Protection Agency (Office of Pesticides Programs, Document 735-F-99-14, May 1999), or California Environmental Protection Agency, Department of Pesticide Regulation Chemical Inquiries Database
5. A known carcinogen, probable carcinogen, or possible carcinogen by the United States Environmental Protection Agency as per “List of Chemicals Evaluated for Carcinogenic Potential.”
6. Any known endocrine disruptor listed by the United States Environmental Protection Agency or the European Union, Endocrine Disruptors website”

1.b. EPA eco-exempt Category 4 products are permissible.

They are described here: <https://www.epa.gov/sites/production/files/2018-01/documents/minrisk-active-ingredients-tolerances-jan-2018.pdf>

2. The indoor use of pesticides is not regulated by this policy.

3. The city will do 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 restrictions, educating them as to the harm created by pesticides and offering alternative solutions. This outreach should be funded by license fees and fines.

4. As the unauthorized application of these materials is considered a possible environmental threat. Therefore, if the presence of these materials is observed it can be proactively enforced and will be fined subject to Malibu Municipal Code (MMC) Chapter 1.10 Administrative Citation and Penalties.

5. City staff will implement outreach and education citywide. If there is non-compliance Code Enforcement staff will address the violation at that time.