

## CALIFORNIA COASTAL COMMISSION

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 Hearing Date: 6/15/06

## STAFF REPORT AND RECOMMENDATION ON APPEAL SUBSTANTIAL ISSUE

**LOCAL GOVERNMENT:** County of Monterey

**DECISION:** Approval with Conditions

**APPEAL NO.:** A-3-MCO-06-022

**APPLICANT:** Pajaro-Sunny Mesa Community Services District

**AGENT:** Poseidon Resources Corporation

**PROJECT DESCRIPTION:** Construction and operation of a test desalination facility.

**PROJECT LOCATION:** 7697 Highway 1, Moss Landing (Monterey County), at the site of the former National Refractories facility.

**APPELLANTS:** Surfrider Foundation / Kaya Freeman  
 Commissioners Mike Reilly and Sara Wan

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**SUMMARY OF STAFF RECOMMENDATION:** The staff recommends that the Commission, after public hearing, determine that **substantial issue exists** with respect to the grounds on which the appeal has been filed. The appellants have raised substantial issues in that the project as approved and conditioned by the County through issuance of a Coastal Administrative Permit does not conform to applicable LCP policies.

### **SUBSTANTIVE FILE DOCUMENTS:**

- Certified County of Monterey Local Coastal Program
- County of Monterey File No. 3-MCO-06-117
- Coastal Commission Appeal File No. A-3-MCO-06-022
- Appeal Applications from Surfrider Foundation /Kaya Freeman, and Commissioners Reilly and Wan

**APPENDIX I:** Applicable LCP Provisions

## **I. APPELLANTS CONTEND THAT**

The project does not conform to County LCP provisions related to protection of marine biological resources, water quality, water resource development, and environmentally sensitive habitat.

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## **II. LOCAL GOVERNMENT ACTION**

On March 22, 2006, the County of Monterey Director of Planning and Building Inspection approved a Coastal Administrative Permit for the project. The County also determined the project met the requirements of a CEQA Class 6 Exemption, which exempts basic data collection and research activities.

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## **III. APPEAL PROCEDURES**

After certification of a LCP, the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits. Projects within cities and counties may be appealed if they are located within the appealable areas as defined by Section 30603(a) of the Coastal Act. The grounds for appeal are limited to the assertion that “development does not conform to the certified local coastal program.” Where the project is located between the first public road and the sea or within 300 feet of the mean high tide line, the grounds of appeal are limited to those contained in Section 30603(b) of the Coastal Act. Those grounds are that the development does not conform to the standards set forth in the certified local coastal program or the access policies set forth in the Coastal Act.

Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless it determines that no substantial issue is raised by the appeal. If the staff recommends “substantial issue” and no Commissioner objects, the Commission will proceed to a de novo hearing on the merits of the project at the same meeting if the staff has prepared a recommendation on said merits, or at a subsequent meeting if there is no such recommendation.

If the staff recommends “no substantial issue” or the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have three minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised. If substantial issue is found, the Commission will proceed to a full public hearing on the merits of the project at either the same or a subsequent meeting as described above. If the Commission conducts a de novo hearing on the permit application, the applicable test for the Commission to consider is whether the proposed development is in conformity with the certified Local Coastal Program. In addition, for projects located between the sea and the first public road paralleling the sea, Section 30604(c) of the Coastal Act requires a finding that the development conforms to the public access and public recreation policies of Chapter 3.

Pursuant to Section 13111 of the Commission's regulations, appeals of local government coastal development permit decisions may be filed by any two members of the Commission or by a permit applicant or any "aggrieved person who exhausted local appeals". Pursuant to Section 13117 of those regulations, the only persons qualified to testify before the Commission at the "substantial issue" stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government.<sup>1</sup> Testimony from other persons must be submitted in writing. At the time of the de novo hearing, any person may testify.

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#### **IV. MOTION**

*I move that the Commission determine that Appeal No. A-3-MCO-06-022 raises NO substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act.*

#### **STAFF RECOMMENDATION OF NO SUBSTANTIAL ISSUE:**

Staff recommends a **NO** vote. Failure of this motion will result in a de novo hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective.

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<sup>1</sup> Appellants Surfrider / Kaya Freeman did not participate in the County's decision on this coastal development permit. This would normally not allow them to appeal the decision to the Commission, since Section 13111 of the Commission's regulations limit the ability to file an appeal to "aggrieved person[s]" that "exhausted local appeals". The Appellants contend, however, that because the County failed to conduct a public hearing prior to its approval of this permit, they did not receive notice of the project and were not afforded an opportunity to participate in the process that precedes the County's approval of a permit.

As discussed below, we have reviewed the requirements of both the County's LCP and the Coastal Act regulations and have determined that the Coastal Commission's regulations require the County to hold a public hearing for this permit. As a result, the Appellants may be considered aggrieved persons, are not required to have exhausted local appeals, and may therefore be appellants and otherwise participate in this substantial issue appeal.

First, the Appellants are "aggrieved persons" as defined for purposes of this appeal in Section 13006 of the Commission's regulations and in Coastal Act Section 30801, which states, "...an 'aggrieved person' means any person who, in person or through a representative, appeared at a public hearing of the commission, local government, or port governing body in connection with the decision or action appealed, or who, by other appropriate means prior to a hearing, informed the commission, local government, or port governing body of the nature of his concerns or who for good cause was unable to do either". In this case, the lack of the required public hearing is "good cause" for the Appellants' non-participation in the County's process.

Next, Section 13573 of the Commission's regulations provides several circumstances where exhaustion of local appeals is not required in order for an aggrieved person to file an appeal with the Commission. These circumstances include, in Section 13573(a)(3), being "denied the right of the initial local appeal because local notice and hearing procedures did not comply with the provisions of this Article". Those provisions include Section 13566 of the Commission's regulations, which requires a local government to hold at least one public hearing for any appealable development.

In sum, because this project is an appealable development and because the County did not hold the hearing required by Coastal Commission regulation, the Appellants in this instance are not required to have participated in the local decision-making process in order to have standing for this appeal. They therefore have standing to bring this appeal to the Commission.

The motion passes only by an affirmative vote by a majority of the appointed Commissioners present.

### **RESOLUTION TO FIND SUBSTANTIAL ISSUE:**

The Commission finds that Appeal No. *A-3-MCO-06-022* presents a substantial issue with respect to the grounds on which the appeal has been filed under section 30603 of the Coastal Act regarding consistency with the certified local coastal plan and/or the public access and recreation policies of the Coastal Act.

### **V. FINDINGS AND DECLARATIONS**

The Commission finds and declares as follows:

- 1. Project Description:** The development approved by the County is a test desalination facility to be constructed and operated at the former site of the National Refractories facility in Moss Landing. The facility would be used to test the effectiveness of various desalination methods and types of equipment to assess whether a larger-scale seawater desalination facility would be feasible at the site. Other project objectives include generating information to help determine technical requirements and to identify potential impacts of a larger facility, assessing possible alternative configurations and desalination techniques, and providing public outreach and education regarding desalination.

The test facility would pump up to about 288,000 gallons per day (200 gallons per minute, or gpm) of seawater from Moss Landing Harbor through an existing but currently unused intake structure. The facility includes a skid-mounted dual desalination unit (two parallel reverse osmosis systems), two intake pumps with a total capacity of 200 gpm, pretreatment equipment, various storage tanks, piping and instrumentation systems, cleaning systems, and related equipment. It would process the water through a pre-treatment system and reverse osmosis membranes, and would treat the water with various chemicals, including chlorine, coagulants, polymers, and various cleaning agents. From the 200 gpm flow, the facility would create about 40 gpm of desalinated fresh water, about 40 to 60 gpm of concentrated salt water, and from 10 to 100 gpm of various effluent streams. Upon completion of the desalination and testing process, the various streams would be recombined and discharged back into Moss Landing Harbor through an existing outfall. The facility will be owned by Pajaro-Sunny Mesa, will be constructed and operated by Poseidon Resources, and will be sited on land leased from REV-X 173, LLC. The facility is anticipated to operate 24 hours a day, seven days a week, for up to three years.

- 2. Permit History:** On March 22, 2006, the Monterey County Director of Planning and Building Inspection approved Coastal Administrative Permit (Resolution #050541) for construction and operation of the test desalination facility. On April 3, 2006, the Coastal Commission received the City's Notice of Final Action and associated records to start the 10-working-day appeal period, which ended April 17, 2006. The appeals were filed on April 17, 2006.

3. **Permit Jurisdiction:** The project is located within the Coastal Zone of the County of Monterey and is subject to the County's certified Local Coastal Plan (LCP). Portions of the project are also within 100' of coastal waters and thus within the appeal jurisdiction of the Coastal Commission. Additionally, a portion of the project is within the Commission's retained jurisdiction – the facility's intake and outfall are within coastal waters and the project involves both a "change in intensity of use" of those waters and a discharge to those waters – so the project will require a permit directly from the Commission. The applicant has applied for that permit; however, the application is not yet complete.
  
4. **Non-compliance with the Certified LCP:** The standard of review for this appeal is consistency with the certified LCP of the County of Monterey. Appellants contend that approval of the project by the City is inconsistent with several policies of the County's certified LCP. Appellants Reilly and Wan challenged the project's conformity to LCP provisions related to marine resources and water quality, and to environmentally sensitive habitat protection. Appellants Surfrider / Kaya Freeman challenged the project's conformity to LCP provisions related to water resource development. Each of the appeal issues raised raises a substantial issue with the project's conformity to the LCP.

**Appeal Issues Raising a Substantial Issue:**

***4a) Appeal Issue – Protection of Water Quality:***

Applicable LCP Provisions (see Appendix I):

- LCP Section 20.96 (which incorporates by reference County Ordinance Section 15.22, Discharge of Contaminants Into Waters of the County)
- Section 2.3.3.D of the LCP's North County Land Use Plan
- Section 20.144.070 from the LCP's Coastal Implementation Plan – Regulations for Development in the North County Land Use Plan Area, Water Resource Development

LCP Section 20.96 incorporates by reference County Ordinance Section 15.22, which prohibits the discharge of contaminants and pollution from new pipes into County waters. That section defines "contaminants" as "any physical, chemical, biological, or radiological substance or matter in water, including but not limited to toxic and hazardous chemicals, selenium, pesticides, nutrients, sediments, heavy metals, and trace elements from agricultural drainage water, sewage, and any other waste water in sufficient quantities that will be detrimental to the present and future beneficial users." It defines "pollution" as "any alteration of the quality of the waters of the County to a degree which unreasonably affects such waters for beneficial uses, or facilities which serve such beneficial uses. Pollution may include contamination." These LCP provisions, therefore, require a determination of whether a discharge would be detrimental to beneficial uses or whether it would unreasonably affect beneficial uses.

To determine whether a proposed discharge includes contamination or pollution as defined above, the LCP (at North County Land Use Plan Section 2.3.3.D) requires prior to approval submittal and review of a detailed and comprehensive report about the discharge, including its constituents, its likely environmental effects, an assessment of the most suitable location for the discharge, and other measures. Additionally, LCP Section 20.144.070, which is meant to protect water quality that may be adversely affected by projects such as this involving “intensification of water use”, requires submittal of a hydrologic report prior to County approval. That report is to include descriptions and analyses of local water resource characteristics, possible project alternatives, water conservation measures, and other related issues. Appellants contend that the project as approved by the County did not include the required reports and that it therefore does not conform to these LCP provisions.

The project would result in a new discharge into coastal waters. The discharge will include several cleaning compounds, coagulants, and polymers. The project, as approved by the County, did not include the detailed studies required by Section 2.3.3.D, which is necessary to determine whether these are detrimental contaminants and whether they would cause pollution that would affect beneficial uses. Additionally, the project is not conditioned to avoid or otherwise mitigate these discharges. Further, the project did not include the required hydrology report, which is necessary and likely important in determining whether the project is constructed and operated in a manner most protective of the County’s water resources and in a way that mitigates potential adverse impacts. Based on the record provided by the County, the information provided by the appellants, and the above, the project has not met the requirements of LCP Section 20.96, Section 20.144.070 of the LCP’s Coastal Implementation Plan – Regulations for Development in the North County Land Use Plan Area, Water Resource Development, and Section 2.3.3.D of the LCP’s North County Land Use Plan. Therefore, the Commission finds that a substantial issue exists with respect to the project’s consistency with these provisions of the County’s certified LCP.

***4b) Appeal Issue – Protection of Environmentally Sensitive Habitats:***

Applicable LCP Provisions (see Appendix I):

- Section 2.3 of the LCP’s North County Land Use Plan
- Section 20.144.040 from the LCP’s Coastal Implementation Plan (Regulations for Development in the North County Land Use Plan Area, (Chapter 20.144)
- Section 5.5.2.3 of the LCP’s Moss Landing Community Plan

The project would draw in up to about 288,000 gallons per day of seawater from the estuarine waters of Moss Landing Harbor and Elkhorn Slough. These waters provide habitat for a number of marine organisms, including several sensitive species. The LCP describes these coastal waters as sensitive habitat areas. LCP Section 20.144.040 (from the Coastal Implementation Plan requires proposed developments that would be located in or affect these waters to provide, prior to permit approval, a biological survey that describes the potentially affected organisms and habitats, the anticipated impacts of the proposed development, and the recommended measures to mitigate those impacts.

Additionally, Section 2.3 of the North County Land Use Plan requires that development not establish a precedent for continued development that could cumulatively degrade the resource. That section further requires that development adjacent to environmentally sensitive habitats be compatible with the long-term maintenance of these habitats, and that it incorporate all site planning and design features needed to prevent habitat impacts. The LCP's Moss Landing Community Plan additionally requires that development be the least environmentally damaging alternative and that adverse environmental effects be mitigated to the maximum extent. Appellants contend that the project, as approved and conditioned by the County, does not comply with these LCP provisions because it would adversely affect these sensitive habitats through its seawater intake, but does not include the required biological survey, any measures to mitigate these impacts, or an evaluation of what mitigation measures are feasible.

The project, by pumping up to about 288,000 gallons of estuarine water per day, would cause an unknown level of entrainment and impingement to marine organisms, including some that may be sensitive species. The project, as approved by the County, did not include the biological report required pursuant to LCP Section 20.144.040. Additionally, the project does not include mitigation to address these impacts. Further, Section 2.3 requires that development not establish a precedent for continued development that could cumulatively degrade the resource. The test facility is intended to support construction of a larger desalination facility at this site and therefore can be viewed as a precedent-setting project that may lead to cumulative degradation of the resource unless adequate siting, design, and mitigation measures are included. Based on the record provided by the County, the information provided by the appellants, and the above, the project has not yet met the requirements of LCP Section 2.3.2 of the North County Land Use Plan, Section 20.144.040 of the Coastal Implementation Plan – Regulations for Development in the North County Land Use Plan Area, Chapter 20.144, and Section 5.5.2.3 of the Moss Landing Community Plan. Therefore, the Commission finds that a substantial issue exists with respect to the project's consistency with these provisions of the County's certified LCP.

## APPENDIX I: Applicable LCP Provisions

Listed in the order cited above:

- County Ordinance 15.22, as incorporated by reference by LCP Section 20.96
  - Section 2.3.3.D from the LCP's North County Land Use Plan, Marine Resources
  - Section 20.144.070 of the LCP's Coastal Implementation Plan – Regulations for Development in the North County Land Use Plan Area, Chapter 20.144
  - Section 2.3 of the LCP's North County Land Use Plan
  - Section 20.144.040 of the Coastal Implementation Plan – Regulations for Development in the North County Land Use Plan Area, Chapter 20.144
  - Section 5.5.2.3 of the LCP's Moss Landing Community Plan
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County Ordinance 15.22, as incorporated by reference in LCP Section 20.96, states in relevant part:

*15.22.020 Definitions.*

*For the purpose of this Chapter, the following words and phrases shall have the meanings respectfully ascribed to them by this Section:*

- A. Waters of the County. Any waters, surface or underground, including saline waters, within the boundaries of or abutting the County of Monterey.*
- B. Contaminant. Any physical, chemical, biological, or radiological substance or matter in water, including but not limited to toxic and hazardous chemicals, selenium, pesticides, nutrients, sediments, heavy metals, and trace elements from agricultural drainage water, sewage, and any other waste water in sufficient quantities that will be detrimental to the present and future beneficial users.*
- C. Contamination. Any impairment of the quality of the waters of the County by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease. "Contamination" shall include any equivalent effect resulting from the disposal of waster, whether or not waters of the County are affected.*
- D. Pollution. Any alteration of the quality of the waters of the County to a degree which unreasonably affects such waters for beneficial uses, or facilities which serve such beneficial uses. Pollution may include contamination.*
- E. Person. Includes an individual, firm, association, partnership, corporation, and public entity.*

*15.22.30.A. It shall be unlawful for any new pipes or conduits to carry discharges into the waters of the County which contain any contaminant or cause any contamination or pollution.*

*B. It shall be unlawful to discharge into the waters of the County any contaminant or cause any contamination or pollution.*

*C. It shall be unlawful to place or cause to be placed any pipes or conduits that are to carry contaminants into the waters of the County.*

The LCP's North County Land Use Plan, Policy 2.3.3.D – Marine Resources, states:

*All new and/or expanding wastewater discharges into the coastal waters of Monterey County shall require a permit from the Health Department. Applicants for such permits shall be required to submit, at a minimum, the following information and studies:*

- 1. Three years monitoring records identifying the existing characteristics of the proposed wastewater discharge. Particular areas of concern include toxic chemicals, inorganic heavy metals, bacteria, and other indicators prescribed as threats to the health and safety of coastal waters, or*
- 2. Provide comprehensive projections of the proposed wastewater discharges; both quantitative and qualitative characteristics must be specifically identified. Specific figures for the indicators identified in (1) must be included in the projections.*
- 3. Provide complete information on levels of treatment proposed at the treatment facility to remove those indicators mentioned in (1). This information shall also include reliability and efficiency data of the proposed treatment.*
- 4. Provide a comprehensive monitoring plan for testing of wastewater for indicators identified in (1).*
- 5. Perform oceanographic studies to determine the most suitable location and methods for discharge into the ocean.*
- 6. Perform tests of ocean waters at the proposed discharge site and surrounding waters to establish baseline or background levels of toxic chemicals, heavy metals, bacteria and other water quality indicators. These tests must be performed no more than one year prior to submittal of the proposal. Historical data may not be substituted for this requirement.*
- 7. Perform toxicity studies to determine the impacts of the proposed wastewater discharges on marine life, as well as on recreational uses of the coastal waters.*
- 8. Identify and analyze alternative methods of wastewater disposal. This shall include hydrogeologic studies of the applicant's groundwater basin to determine the water quality problems in that area and if onsite disposal will have an adverse impact on groundwater quality. The data and results of requirements (1) through (8) must be submitted to the County's Chief of Environmental Health for evaluation and approval. A wastewater discharge permit shall be issued only if the above information demonstrates that the proposed wastewater discharge will not degrade marine habitats; will not create hazardous or dangerous conditions; and will not produce levels of pollutants that exceed any applicable state or federal water quality standards.*

Section 20.144.070 of the Coastal Implementation Plan (Regulations for Development in the North County Land Use Plan Area, Chapter 20.144 states, in relevant part:

*Intent of Section: The intent of this Section is to provide development standards which will protect the water quality of the North County surface water resources aquifers, and groundwater control new development to a level that can be served by identifiable, available, and long-term water supplies, and protect North County streams, estuaries, and wetlands from excessive sedimentation resulting from land use and development practices in the watershed areas.*

...

*D. Hydrologic Report Requirement*

*1. A hydrologic report shall be required for any development which involves intensification of water use. As an exemption to this requirement, a hydrologic report will not be required for the following: a) development of a single residence on a vacant, undeveloped parcel; and, b) development of an accessory structure, including a guesthouse. Uses where the water will be used for agricultural operations shall not be exempted from the hydrologic report.*

*2. The report shall be required, submitted, and approved by the Director Environmental Health prior to the application being determined complete.*

*3. The hydrologic report shall be prepared by a registered engineer or hydrologist, at the applicant's expense. A minimum of 4 copies shall be submitted.*

*4. The report shall be reviewed by the Health Department, Flood Control District and other departments or agencies appropriate for the specific project. A copy of the submitted report shall be sent to each reviewing agency by the Health Department, with comments requested by a specified date. After comments have been received, the Health Department may require that the report be revised to include additional information or assessment as deemed necessary by the reviewing agencies. A third party review, by a civil engineer or hydrologist at the applicant's expense, may also be required. All departmental review, report revisions, and third party review must be complete before the report may be approved by the Director of Planning and accepted by the Director of Planning.*

*5. The hydrologic report shall contain, at a minimum, the following elements:*

- a. location map;*
- b. to-scale site plan showing the entire parcel and proposed and existing structures, roads, land use, landscaping, wells, and water lines, and hydrologic and drainage features;*
- c. description of how water is currently supplied and how it will be supplied to the proposed development;*
- d. assessment of existing and proposed water usage, including water usage for landscaped and other vegetated areas;*
- e. description of hydrologic setting and features on the parcel and in the area, and for areas presently cultivated or proposed for cultivation;*
- f. description of investigation methods, including review of well logs, (subject to owner's permission) on-site and off-site testing, and contacts with Health Department and Flood Control District staff;*
- g. description of other development activity in the area, both proposed and under construction;*
- h. assessment of the individual and cumulative impacts of the proposed development on the quantity and quality of the groundwater table and local aquifer, specifically addressing nitrates, TDS, and toxic chemicals;*
- i. assessment of the proposed development's individual and cumulative impact on the aquifer's safe long-term yield level, saltwater intrusion, and long-term maintenance of local coastal priority agricultural water supplies;*
- j. description and assessment of project alternatives, including reduced density, if needed to mitigate the proposed development's adverse impacts as identified above; and, recommendations for water conservation measures, addressing siting, construction, and landscaping and including retention of water on site to maximize groundwater recharge and reclamation of water.*

Section 2.3 of the LCP's North County Land Use Plan states, in relevant part:

*...Environmentally sensitive habitats are areas in which plant or animal life or their habitats are rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments. These include Areas of Special Biological Significance as identified by the State Water Resources Control Board; rare and endangered species habitat, all coastal wetlands and lagoons, all marine wildlife, and kelp beds; and indigenous dune plant habitats.*

*The Coastal Act emphasizes the importance of maintaining environmentally sensitive habitats and further stresses that future development within or adjacent to sensitive areas must be appropriate with respect to type of use, siting, and design to ensure that the sensitive areas are not degraded or threatened. Only coastal-dependent uses are permitted within sensitive habitat areas including nature education and research, hunting, fishing, and aquaculture. Among the sensitive habitat areas found nearest the coast are the Monterey Bay itself, the delicate dunes and beaches, and the large sloughs and saltwater marshes--each with a different and changing degree of salinity. A unique community of vegetation and wildlife is supported in each area.*

*... Perhaps most unique among all of these habitats are the sloughs, the estuarine waters resulting from the mixing of seawater with freshwater. They are also some of the most sensitive. The sloughs provide a sanctuary for harbor seals, sea otters, and a great variety of fish and birds. Factors with the potential to severely affect the stability and viability of the estuarine habitat are alterations in the drainage systems, sedimentation, and obstacles to water circulation (i.e., tidegates or undersized culverts). Oil spills are a particularly devastating possibility.*

*... The quality of North County's coastal waters could be jeopardized by increased discharges of wastewater, with predictable negative impacts on the health and welfare of the County's citizens. The potential sources for this wastewater originate from both within and outside of Monterey County. It is therefore imperative that the County have strict guidelines and controls for all wastewater discharges into Monterey Bay and the County's coastal waters.*

*2.3.1 Key Policy: The environmentally sensitive habitats of North County are unique, limited, and fragile resources of statewide significance, important to the enrichment of present and future generations of county residents and visitors; accordingly, they shall be protected, maintained, and, where possible, enhanced and restored.*

*2.3.2 General Policies:*

*1. With the exception of resource dependent uses, all development, including vegetation removal, excavation, grading, filling, and the construction of roads and structures, shall be prohibited in the following environmentally sensitive habitat areas: riparian corridors, wetlands, dunes, sites of known rare and endangered species of plants and animals, rookeries, major roosting and haulout sites, and other wildlife breeding or nursery areas identified as environmentally sensitive. Resource dependent uses, including nature education and research hunting, fishing and aquaculture, where*

*allowed by the plan, shall be allowed within environmentally sensitive habitats only if such uses will not cause significant disruption of habitat values.*

*2. Land uses adjacent to locations of environmentally sensitive habitats shall be compatible with the long-term maintenance of the resource. New land uses shall be considered compatible only where they incorporate all site planning and design features needed to prevent habitat impacts, upon habitat values and where they do not establish a precedent for continued land development which, on a cumulative basis, could degrade the resource.*

*3. New development adjacent to locations of environmentally sensitive habitats shall be compatible with the long-term maintenance of the resource. New subdivisions shall be approved only where significant impacts to environmentally sensitive habitats from development of proposed parcels will not occur.*

*4. To protect environmentally sensitive habitats and the high wildlife values associated with large areas of undisturbed habitat, the County shall maintain significant and, where possible, contiguous areas of undisturbed land for low intensity recreation, education, or resource conservation use. To this end, parcels of land totally within sensitive habitat areas shall not be further subdivided. On parcels adjacent to sensitive habitats, or containing sensitive habitats as part of their acreage, development shall be clustered to prevent habitat impacts.*

*5. Where private or public development is proposed in documented or potential locations of environmentally sensitive habitats – particularly those habitats identified in General Policy No.1 – field surveys by qualified individuals or agencies shall be required in order to determine precise locations and to recommend mitigating measures to ensure protection of any sensitive habitat present. The required survey shall document that the proposed development complies with all applicable environmentally sensitive habitat policies.*

Section 20.144.040 of the Coastal Implementation Plan (Regulations for Development in the North County Land Use Plan Area, Chapter 20.144) states, in relevant part:

*Intent of Section: The intent of this Section is to provide development standards which will allow for the protection, maintenance, and, where possible, enhancement and restoration of North County environmentally sensitive habitats. The environmentally sensitive habitats of North County are unique, limited, and fragile resources of Statewide significance, important to the enrichment of present and future generations of County residents and visitors.*

*A. Biological Survey Requirement*

*1. A biological survey shall be required for all proposed development meeting one or more of the following criteria:*

- a. the development is located within an environmentally sensitive habitat, as shown on current North County Environmentally Sensitive Habitat resource map or other available resource information, or through the planner's on-site investigation;*
- b. the development is potentially located within an environmentally sensitive habitat, according to available resource information or on-site investigation;*

- c. *the development is or may potentially be located within 100 feet of an environmentally sensitive habitat, and/or has potential to negatively impact the long-term maintenance of the habitat, as determined through staff's project review; or,*
        - d. *there is disagreement between staff and the applicant as to whether the proposed development meets one of the above criteria.*
  2. *The survey shall be required, submitted, and meet approval of the Planning Department prior to the project application being determined complete. 2 copies of the survey report shall be submitted.*
  3. *The survey shall be prepared by a qualified biologist, as selected from the County's list of Consulting Biologists. Report preparation shall be at the applicant's expense.*
  4. *The biological survey shall contain the following elements:*
    - a. *identify the property surveyed, with accompanying location map and site plan showing topography and all existing and proposed structures and roads, and the proposed project site(s);*
    - b. *describe the method of survey;*
    - c. *identify the type(s) of plant and animal habitats found on the site (and/or on adjacent properties where development is adjacent to the habitat), with an accompanying map delineating habitat location(s);*
    - d. *identify the plant and animal species, including rare and endangered species, found on the site (or on adjacent properties, where development is adjacent to the habitat) with a map showing their habitat locations*
    - e. *in areas of potential public access, determine the maximum amount and type(s) of public use which will allow for the long-term maintenance of the habitat;*
    - f. *describe and assess potential impacts of the development on the environmentally sensitive habitat(s) found on the site and/or on neighboring properties;*
    - g. *recommend mitigation measures, such as setbacks from the habitat, building envelopes, and modifications to proposed siting, location, size, design, vegetation removal, and grading, which will reduce impacts to on-site or neighboring habitats and allow for the habitat's long-term maintenance;*
    - h. *assess whether the mitigation measures will reduce the development's impact to an insignificant level, which is the level at which the longterm maintenance of the habitat is assured; and,*
    - i. *other information or assessment as necessary to determine or assure compliance with resource protection standards of the North County Land Use Plan and of this ordinance.*

*The biological survey may be waived by the Director of Planning for development of a single family dwelling on a vacant lot of record created through subdivision or lot line adjustment, for which a biological survey was prepared according to the requirements of this section.*

#### ***B. General Development Standards***

*1. All development, including vegetation removal, excavation, grading, filling, and construction of roads and structures, shall be prohibited in the following environmentally sensitive habitat areas: riparian corridors, wetlands, dunes, Sites of known rare and endangered species of plants and animals, rookeries, major roosting and haul-out sites, and other wildlife breeding or nursery areas identified as environmentally sensitive. As an exception, resource dependent uses, including nature education and research hunting,*

*fishing and aquaculture, where allowed by the North County Land Use Plan, or activities for maintenance of existing structures and roads, or activities for watershed restoration may be allowed within environmentally sensitive habitats if it has been determined through the biological survey that impacts of development will not harm the habitat's long-term maintenance.*

*2. Development on parcels containing or within 100 feet of environmentally sensitive habitats, as identified on the current North County Environmentally Sensitive Habitat resource map, other resource information, or planner's on-site investigation, shall not be permitted to adversely impact the habitat's long-term maintenance, as determined through the biological survey prepared for the project. Proposals shall be modified for siting, location, bulk, size, design, grading vegetation removal, and/or other methods where such modifications will reduce impacts to an insignificant level and assure the habitat's long-term maintenance. Also, the recommended mitigation measures of the biological survey will be considered by the decision-making body and incorporated into the conditions of approval as found necessary by the decision-making body to implement land use plan policies and this ordinance and made conditions of project approval.*

...

### *C. Specific Development Standards*

#### *2. Riparian, Wetland, and Aquatic Habitats*

- d. All development shall be set a minimum of 100 feet back from the landward edge of vegetation associated with coastal wetlands, including but not limited to McClusky Slough, Pajaro River, Salinas River, Salinas River lagoon, Elkhorn Slough, Bennett Slough, and Moro Cojo Slough. As an exception, permanent structures necessary for recreational, scientific, or educational use of the habitat may be permitted within the setback area where it is demonstrated that: 1) the structure cannot be located elsewhere; and, 2) the development does not significantly disrupt or adversely impact the habitat as determined in the biological survey prepared for the project. As a further exception, the permanent structures along Moss Landing Road on the west side of Moro Cojo Slough which are located within the 100 foot setback, as shown in Attachment 4, may be replaced, provided that: 1) the replaced be sited in the same location on the affected property as the structure to be replaced; 2) the replacement shall conform to the requirements of the applicable zoning district; 3) the replacement structure shall be for the same use as the structure to be replaced; 4) the replacement structure shall not exceed either the floor area, height or bulk of the structure to be replaced by more than 10%; and 5) the replacement does not adversely impact the habitat as determined in the biological survey prepared for the project. Where development is proposed on any portion of a parcel containing area within a 100 foot setback of the landward edge of coastal wetland vegetation, the setback area shall be placed in an open space easement as a condition of project approval. The easement shall be in accordance with the requirements of Section 20.142.130.*
- e. Development which includes dredging or other major construction activities which are considered to be those with potential to adversely impact riparian, wetland, or aquatic habitats shall be conducted so as to avoid breeding seasons and other critical phases in the life cycles of commercial species of fish and shellfish and other rare, endangered, and threatened indigenous species. Recommended mitigation measures to avoid disruption of plant and animal*

*lifecycles, as contained in the biological survey required in accordance with Section 20.144.040.A, shall be made conditions of project approval.*

- f. Development and recreational activities near the harbor seal haul-out areas, as shown on current North County Environmentally Sensitive Habitat resource map, or through a biologic report, the planner's on-site investigation, or other resource information, shall not adversely impact the continued viability and long-term maintenance of this habitat. As such, conditions of project approval and project modifications, as recommended in the biological survey, shall be required where necessary to mitigate adverse habitat impacts.*
- g. New development shall not be permitted adjacent to estuarine areas where such development may result in: 1) drainage or discharge of oil or other toxic substances into the estuary; or, 2) increase in the hazard of oil spill or toxic substance discharge into the estuary. As such, development on parcels containing, adjacent to, or with drainage into estuarine areas must comply with all Monterey County Code regulations of toxics and hazardous substances, as administered by the County Health Department. As such, the applicant for development on such parcels shall be required to contact the County Health Department for a review of the development's conformance with Titles 22 and 23 of the Public Resources Code and with applicable sections of the Monterey County Code pertaining to toxics and hazardous substances, prior to the application being determined complete. The applicant shall be required to provide written verification from the Health Department that: 1) the project complies with Code requirements; or, conditions of project approval, 2) with the proposed development will comply with Code requirements and will not result in or increase the hazard of drainage or discharge of oil or other toxic substances into the estuary; or, 3) additional studies must be completed prior to the Health Department's verification. Such studies shall be completed prior to the application being considered complete, and shall include such information and testing as determined necessary by the Health Department. Conditions of project approval shall be applied as necessary to assure no impacts to the estuary related to hazardous or toxic substances.*

Section 5.5.2.3 of the LCP's Moss Landing Community Plan states, in relevant part:

*The least environmentally damaging alternative should be selected for on-site modernization and upgrading of existing facilities. When selection of the least environmentally damaging alternative is not possible for technical reasons, adverse environmental effects of the preferred alternative shall be mitigated to the maximum extent.*