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# F12a

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Action Deadline: None  
Staff: Brian O'Neill - SC  
Staff Report: 7/24/2020  
Hearing Date: 8/14/2020

## STAFF REPORT: CDP APPLICATION

**Application Number:** A-3-MCO-17-0068

**Applicant:** Monterey Bay Aquarium Research Institute (MBARI)

**Project Location:** 7500 Sandholdt Road, Moss Landing, North Monterey County (APNs 133-252-001-000, 133-242-001, 133-242-008)

**Project Description:** Construct an approximately 5,200 square-foot, 32-foot tall storage building; 40,000 square feet of pavement (with 32 parking spaces and a storage area for 20 shipping containers); over 3,000 cubic yards of grading; and dune habitat restoration on three parcels located on Sandholt Road in Moss Landing adjacent to Moss Landing Harbor.

**Staff Recommendation:** Approval with Conditions

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## SUMMARY OF STAFF RECOMMENDATION

The Monterey Bay Aquarium Research Institute (MBARI) proposes to construct an approximately 5,200 square-foot storage structure and related improvements on a largely undeveloped site that consists of degraded and remnant coastal dunes. The project would ultimately cover approximately 1.7 acres of the 3.04 acre parcel with pavement and buildings. The remaining 1.34 acres would be restricted to only allow for dune restoration, beach access, and other public access uses. In addition, and a revised part of the application in the time since the Commission found substantial issue and took jurisdiction over the CDP application in 2018, MBARI proposes to retire any development potential and to instead restore and permanently protect the entirety of two adjacent dune parcels totaling some 3.56 acres (for a total of some 5 acres of

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restoration overall), and to do off-site dune enhancement and significant public access improvements as part of the proposed project.

All three parcels involved consist entirely of dune environmentally sensitive habitat area (ESHA), both because coastal dunes are categorically defined as ESHA in the Monterey County Local Coastal Program (LCP) and because the specific characteristics of the sites meet the definition of ESHA. The LCP strictly limits development in ESHA to resource-dependent uses. However, the LCP also mirrors the Coastal Act and is intended to be implemented in a manner that would avoid a takings of private property. Thus, if the Commission believes that strict application of the ESHA policies would likely lead to such a taking, the Commission can take steps to avoid such a taking by allowing for otherwise unallowable development provided it adheres as much as possible to LCP provisions, and is the minimum necessary to avoid a takings.

Here, MBARI owns almost 7 acres spread over three undeveloped parcels, and staff's analysis indicates that prohibiting development on all of that property, as would be required by LCP ESHA policies, could raise concerns that such action would constitute a take. As a result, staff and MBARI collaborated on identification of a project that would provide the minimum necessary amount of development to avoid such potential take, while still allowing MBARI an appropriate economic use of the property. The CDP, as conditioned, implements MBARI's revised proposal for that project, and would result in a global solution that permanently resolves ESHA issues and takings considerations on all three of MBARI's parcels. MBARI has stated that it is willing to accept conditions to completely restore and permanently protect all areas outside of the development envelope on all three parcels, which will protect these dune ESHA areas and provide mitigation to help offset project impacts otherwise. Staff believes that the project is as consistent as possible with the LCP while also eliminating concerns of potential takings claims.

Additionally, the proposed project is located in a vulnerable area that is subject to multiple coastal hazards, which will all be exacerbated by sea-level rise. Special conditions are also included in order to minimize coastal hazards risks as required by the LCP, including a prohibition on future armoring and requirements to identify alternative responses if threatened in the future. Further, MBARI has agreed to construct and maintain a series of public access enhancements and amenities to maximize public access in the area, including Sandholt Road trail and parking improvements, and boardwalks to formalize current volunteer trails through dunes. Along with conditions to protect other coastal resources, such as public views and water quality, the project can be found consistent with the intent of the LCP and the Coastal Act. MBARI has indicated that they are in agreement with the staff recommendation, and staff recommends approval of the CDP as conditioned. The motion to implement the staff recommendation is found on page 4 below.

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**EXHIBITS**

Exhibit 1 – Location Maps

Exhibit 2 – Site Photos

Exhibit 3 – Proposed Project Plans

Exhibit 4 – ESHA Memorandum by Dr. Lauren Garske-Garcia, Dated July 20, 2018

Exhibit 5 – Monterey County Conditions

## **I. MOTION AND RESOLUTION**

Staff recommends that the Commission, after public hearing, **approve** a CDP for the proposed development. To implement this recommendation, staff recommends a **yes** vote on the following motion. Passage of this motion will result in approval of the CDP as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

**Motion:** I move that the Commission approve Coastal Development Permit Number A-3-MCO-17-0068 for the development proposed by the applicant and as conditioned, and I recommend a yes vote.

**Resolution to Approve CDP:** The Commission hereby approves Coastal Development Permit Number A-3-MCO-17-0068 and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with Monterey County Local Coastal Program policies and Coastal Act access and recreation policies. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.

## **II. STANDARD CONDITIONS**

This permit is granted subject to the following standard conditions:

- 1. Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the Permittees or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
- 2. Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
- 3. Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
- 4. Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
- 5. Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the Permittees to bind all future owners and possessors of the subject property to the terms and conditions.

### III. SPECIAL CONDITIONS

This permit is granted subject to the following special conditions:

- 1. Approved Project and Final Plans.** This CDP authorizes construction of an approximately 5,200 square-foot, 32-foot tall storage building; 40,000 square feet of pavement (with 32 parking spaces and a storage area for 20 shipping containers); and approximately 3,000 cubic yards of grading on the Garner Site as shown on the plans titled “Proposed Field Program and Staging Building for MBARI” prepared by Wayne E. Iverson, Architect, dated 5/27/2020 and received by the Coastal Commission’s Central District Office via email on 6/1/2020 and sheets C-1 through C-4 of the plans prepared by Bestor Engineers, Inc. received by the Coastal Commission’s Central District Office via email on 6/1/2020 (see **Exhibit 3**). This CDP also authorizes public access improvements including the improvements to Sandholdt Road, public access boardwalks, and parking improvements as shown on the plans titled Public Access Potential Opportunities prepared by Flad Architects, dated 10/29/19 and received by the Coastal Commission’s Central District Office via email on 7/21/2020 (see **Exhibit 3**). This CDP also authorizes dune enhancement and restoration (see also Special Condition 3). PRIOR TO CONSTRUCTION, the Applicant shall submit Supplemental Plans for Executive Director review and written approval that meet the following requirements:

  - a. Fencing Plan.** A fencing plan that includes the final design and location of all fencing shall be submitted. The plan shall limit all fencing on the Garner site to a maximum of 6 feet in height, shall be designed to be as see-through as possible, and shall be designed to blend into the natural environment and the public view as much as possible.
  - b. Lighting Plan.** A revised exterior lighting plan shall be submitted that limits exterior lighting to the minimum necessary for pedestrian and vehicular safety purposes, as demonstrated by a light casting study. All lighting (exterior and interior) shall be sited and designed so that it limits the amount of light or glare visible from offsite to the maximum extent feasible (including through the use of lowest luminosity possible, directing lighting downward, etc.). All lighting shall be wildlife-friendly, shall use lamps that minimize the blue end of the visible spectrum, and continuous overnight lighting shall be prohibited. The plans shall be submitted with documentation demonstrating compliance with these lighting requirements.
  - c. Public Access Signage Plan.** A public access signage plan shall be submitted that provides for the installation of adequate informational and directional signage related to the parking areas and all boardwalks/sidewalks. All signs shall be sited and designed to provide clear information without adversely affecting public views and site character. Any existing signs in the project area not meeting such criteria shall be removed. The plans shall include signage details such as the location, materials, design and text for all signs, including all existing signs proposed to be retained.

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- d. **Davi Parking Restrictions.** The Plan shall be revised to identify appropriate limits (e.g., time restrictions, duration restrictions, etc.) on to the public parking areas fronting the Davi parcels, if required, to assure maximum public use of the parking spaces.

All requirements above and all requirements of the approved Supplemental Plans shall be enforceable components of this CDP. The Permittee shall undertake development in conformance with this condition and the approved Supplemental Plans. Minor adjustments to these requirements may be allowed by the Executive Director if such adjustments: (1) are deemed reasonable and necessary by the Executive Director; and (2) do not adversely impact coastal resources.

- 2. **Approved Construction Plan.** The Permittee shall undertake construction consistent with sheets C-1 through C-4 of the plans prepared by Bestor Engineers, Inc. received by the Coastal Commission's Central District Office via email on 6/1/2020 and the narrative description submitted to the Coastal Commission's Central District Office via email on 7/25/2020 (see **Exhibit 3**), except construction shall also meet the following requirements (together the approved Construction Plan):
  - a. **Construction Areas.** All construction and staging areas shall occur within the development footprint on the Garner site, and all other areas shall be protected by temporary exclusionary fencing or other similar protection measures. Worker parking may be allowed along the street frontage.
  - b. **Construction Methods and Timing.** Construction shall be limited to daylight hours only (i.e., one hour before sunrise to one hour after sunset), and lighting of the work area is prohibited.
  - c. **Biologist Oversight.** The Permittee shall employ a project biologist monitor approved by the Executive Director to ensure compliance with all CDP terms and conditions applicable during the construction phase. Evidence of compliance shall be submitted by the project biologist monitor to the Executive Director each month while construction is proceeding, and upon completion of construction.
  - d. **Traffic Control Plan.** Construction shall ensure the continued regular and normal use and operation of all Moss Landing area roads and highways, especially as it pertains to Sandholdt Road, and to avoid impacts to adjacent areas, including neighborhoods, businesses, and public recreational access destinations, to the maximum extent feasible, including with respect to potential emergency access and evacuation needs.
  - e. **Best Management Practices.** Construction BMPs shall be implemented during construction consistent with Sheets C-2, C-3 and C-4 of the proposed plans (prepared by Bestor Engineers, Inc. received by the Coastal Commission's Central District Office via email on 6/1/2020 - see **Exhibit 3**) and as modified as follows: (a) dry cleanup methods will be used whenever possible and that if water cleanup is necessary, all runoff shall be collected to settle out sediments prior to

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discharge from the site, and that all de-watering operations shall include filtration mechanisms. Offsite equipment wash areas will be used whenever possible; if equipment must be washed onsite, the use of soaps, solvents, degreasers, or steam cleaning equipment shall be prohibited; in any event, such wash water shall be collected and appropriately disposed offsite, and shall not be allowed to enter any natural drainage areas; (c) concrete rinsate shall be collected and appropriately disposed offsite, and shall not be allowed to enter any natural drainage areas; (d) good construction housekeeping will be observed (e.g., clean up all leaks, drips, and other spills immediately; refuel vehicles and heavy equipment offsite and/or in one designated location; keep materials covered and out of the rain (including covering exposed piles of soil and wastes); dispose of all wastes properly, place trash receptacles on site for that purpose, and cover open trash receptacles during wet weather); and (e) all erosion and sediment controls shall be in place prior to the commencement of grading and/or construction as well as at the end of each day. Particular care shall be exercised to prevent foreign materials from making their way to natural drainage areas. Contractors shall insure that work crews are carefully briefed on the importance of observing appropriate construction BMP precautions and reporting any accidental spills and/or other forms of discharge.

- f. Post-Construction Requirements.** All construction areas shall be restored to their pre-construction state or better upon completion of work. Where appropriate and feasible, roads/sidewalks that were impacted by construction and are being restored shall employ stormwater management infrastructure BMPs, including bioswales, pervious pavers, garbage traps, and vegetative strips, as well as measures to enhance public recreational access and public views.
- g. Construction Site Documents.** A copy of the signed CDP and the approved Construction Plan shall be maintained in a conspicuous location at the construction job site at all times, and that such copies shall be available for public review on request. The signed CDP and approved Construction Plan shall also be retained in the project file at the Commission's Central Coast District office and be available for review by the public on request. All persons involved with the construction shall be briefed on the content and meaning of the CDP and the approved Construction Plan, and the public review requirements applicable to them, prior to commencement of construction.
- h. Construction Manager.** The MBARI construction manager is the designee to be contacted during construction should questions arise regarding the construction (in case of both regular inquiries and emergencies. The construction manager's contact information (i.e., address, phone numbers, email address, etc.) including, at a minimum, a telephone number (with message capabilities) and an email that will be made available 24 hours a day for the duration of construction, will be conspicuously posted at the job site where such contact information is readily visible from public viewing areas while still protecting public views as much as possible, along with indication that the construction manager should be contacted in the case of questions regarding the construction (in case of both regular

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inquiries and emergencies). The construction manager shall record the contact information (e.g., name, phone number, email, etc.) and nature of all complaints received regarding the construction, and shall investigate complaints and take remedial action, if necessary, within 24 hours of receipt of the complaint or inquiry. Any critical and/or significant complaints and related responses shall be reported to the Executive Director as soon as possible, and all complaints and all actions taken in response shall be summarized and provided to the Executive Director on a weekly basis.

- i. **Construction Specifications.** The construction specifications and materials (including all construction contracts) shall include appropriate penalty provisions to address non-compliance with the terms and conditions of this CDP and the approved Construction Plan, including provisions sufficient to offset the cost of retrieving or cleaning up improperly contained foreign materials, and provisions that require remediation for any work inconsistent with the terms and conditions of this CDP and the approved Construction Plan.
- j. **Notification.** The Permittee shall notify planning staff of the Coastal Commission's Central Coast District Office at least 3 working days in advance of commencement of construction, and immediately upon completion of construction.

All requirements above and all requirements of the approved Construction Plan shall be enforceable components of this CDP. The Permittee shall undertake construction in accordance with this condition and the approved Construction Plan. Minor adjustments to these requirements may be allowed by the Executive Director if such adjustments: (1) are deemed reasonable and necessary by the Executive Director; and (2) do not adversely impact coastal resources.

- 3. **Dune Restoration and Enhancement Plan.** PRIOR TO CONSTRUCTION, the Permittee shall submit two copies of a Dune Restoration and Enhancement Plan to the Executive Director for review and written approval. The Dune Restoration and Enhancement Plan shall be prepared by a qualified biologist, and it shall provide for dune habitat restoration, enhancement, maintenance, and monitoring for (1) all areas outside of the development footprint on the Garner site; (2) all areas on the Davi properties not devoted to the public parking or public access improvements; and (3) all areas from the seaward edge of the Garner and Davi properties to the beach (see **Exhibit 3**). In addition, the plan shall provide for the one-time removal of all non-native and/or invasive species and planting of plants native to the Moss Landing foredunes system consisting only of local genetic stock for the 10-foot wide area north of the Garner site that is owned by the Moss Landing Harbor District. No ongoing monitoring, maintenance, or reporting is required for the area on Harbor District property. The Dune Restoration and Enhancement Plan shall be designed to achieve compliance with this condition, including providing for, at a minimum, the following components:



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- a. Goals and Objectives.** Restoration shall be premised on substantially restoring and/or enhancing dune habitat so that it is self-functioning, high quality habitat in perpetuity.
- b. Map and Description of Existing Conditions.** A map and narrative description of the existing habitats present that will be impacted by development (including restoration and enhancement), including all plant and wildlife species present, and any special status species, shall be provided.
- c. Map and Description of Proposed Restoration and Enhancement Areas.** A map and narrative description of the proposed dune restoration/enhancement, with dune restoration/enhancement designed to primarily work with existing contours and use revegetation and limited temporary means, such as sand fencing or straw plugs, to facilitate development of dune forms. If dune-quality material from the Garner site becomes available as a result of regrading for construction, it may be reused within the dune restoration to recreate natural dune morphology; details concerning the proposed placement and shaping within the restoration areas shall be provided. If mechanical reshaping of contours is proposed to achieve restoration of a natural dune morphology, this shall be limited to the minimum extent necessary and within only the most degraded restoration areas. Contours shall be based on historical records of the area and/or the most proximal reference sites, as appropriate.
- d. Non-Native and Invasive Plant Removal.** All non-native and/or invasive species shall be removed, and continued removal shall occur on an as-needed basis to ensure complete eradication over time. The absolute cover of species listed by the California Invasive Plant Council shall not exceed 5% at any point following the onset of restoration.
- e. Planting Plan/Native Dune Plants.** A detailed planting plan emphasizing the use of seeds, plugs, or container plants planted prior to fall rains, unless another time period or planting method is fully described and justified within the plan. All vegetation planted in the dune restoration and enhancement areas shall consist only of plants native to the Moss Landing foredunes system and consist only of local genetic stock, and the plan shall be submitted with adequate evidence demonstrating that that is the case. The planting plan shall be based on vegetation community structure (e.g., species and relative densities) at an approved nearby reference site and shall be designed to avoid the use of irrigation following the plant establishment stage. If irrigation is considered necessary to initiate restoration, it should be temporary and provisions for its removal must be included in the plan.
- f. Sensitive Species.** If sensitive species (plants or animals) are identified within the dune areas that will be impacted, the design for the restored/enhanced habitat shall include any special provisions deemed necessary to facilitate the survival and success of those sensitive species, and such provisions shall be consistent with applicable state and federal requirements for these species. For example, federally-listed Monterey spineflower has been recorded from the Davi

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parcel in 2017, and at both the Davi and Garner parcels in 2018, and these records along with contemporaneous protocol-level surveys shall be used to delineate cumulative probable seedbanks using a maximum convex polygon approach, and disturbance in these areas shall be kept to the least amount necessary to achieve restoration goals and objectives.

- g. Implementation Map.** A map showing the type, size, and location of all plant materials to be planted, the irrigation system (if any), topography and finish contours, and all other landscape features. If fencing is required to temporarily protect restored habitat, then such fencing shall be limited to temporary rope and pole barriers or equivalent and shall be sited and designed to limit public access and visual impacts as much as possible. Detailed guidance on plant propagation, planting methods, and irrigation shall be included, as shall a schedule for all restoration/enhancement activities.
- h. Best Management Practices.** A discussion of the specific BMPs that will be implemented to facilitate the success of the restoration and enhancement (such as sand fencing, straw plugs, and jute rolls to keep sand in place as seeds and plants are established, project staging area precautions, provisions for periodic adjustments to these BMPs, and ultimate removal of materials that are no longer necessary, etc.) shall be provided.
- i. Sand Source.** For any imported sand required to implement dune restoration and/or enhancement activities, including material proposed for reuse from the Garner construction site, a description of the sand source and its composition (see also Special Condition 1(m)). The new sand characteristics (e.g., grain size, color, sorting, angularity, etc.) must match the existing dune sand as closely as possible.
- j. Monitoring and Maintenance.** A detailed monitoring program designed to evaluate the success of the restoration and enhancement efforts, and to guide any adaptive management actions for ensuring long-term success shall be provided. Monitoring and maintenance of all restoration and enhancement areas shall continue for as long as any portion of the approved development exists, and shall at a minimum include:

  - 1. Schedule.** An initial five-year monitoring schedule, with conditional inclusion of additional years of the same monitoring if success criteria are not met in the initial five-year time frame.
  - 2. Monitoring Methods.** The monitoring program shall be supported by a clear rationale for the selected approaches and must describe the monitoring methods that will be used in detail (e.g., metrics, sampling frequency, timing, etc.). Power analyses shall inform the design of the sampling scheme, in order to ensure that there will be adequate statistical power to detect differences between success criteria and on-the-ground conditions within the restoration and enhancement areas. The analytical framework to be used for assessments shall also be clearly described in the narrative.

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- 3. Reference Sites.** At least one reference site shall be used to inform restoration objectives and may also be used to assess restoration success. Reference sites shall not occur within the restoration and enhancement areas, and shall be from the Moss Landing region. Criteria used for reference site selection shall be described (e.g., soil type, slope, aspect, proximity to restoration site, percent native cover, species richness, etc.), and for any assessments of restoration success, reference sites shall be monitored using the same methods as those employed at the restoration and enhancement areas.
  - 4. Success Criteria.** At a minimum, final success criteria for vegetation species diversity (including richness and evenness), native vegetative cover, non-native vegetative absolute cover less than or equal to 5%, and specific measures for any sensitive plant or wildlife species located in the restoration and enhancement areas shall be provided. Criteria may be relative or fixed, and may be based on reference sites or relevant literature.
  - 5. Data and Statistical Analysis.** A description of the data analysis methods and statistical thresholds employed shall be established as assessment rules for each success criterion. The statistical tests that will be used (e.g., a one or two sample t-test) to detect differences between success criteria and conditions observed at the restoration and enhancement areas shall be specified.
  - 6. Annual Reports.** A narrative report that includes a presentation of monitoring results, assessment of progress toward meeting success criteria, and any adaptive management recommendations, must be submitted each year to the Executive Director for review and approval for the first five years of the restoration (with the first report due one-year after initial restoration/enhancement activities are implemented), or for an adjusted time period dependent on restoration success. Raw data and associated metadata shall be provided in a digital format with the reports.
- k. Reporting and Contingency.** A cumulative restoration monitoring report following the achievement of all success criteria (within the same year), and every ten years thereafter, prepared by a qualified biologist that certifies the restoration is in conformance with the approved Dune Restoration and Enhancement Plan shall be submitted for the review and written approval of the Executive Director. In addition to the quantitative information specified in subsection (j) above, the report shall include photographic documentation of the restoration and enhancement areas from fixed points beginning the first year after initiation of the plan, annually for the first five years, and then every ten years after that, assuming success criteria are met within the first five years of the restoration. If, in the Executive Director's opinion, the monitoring reports and/or site inspections indicate the restoration and/or enhancement is not in conformance with or has failed to meet the success criteria specified in the approved Plan, then the Permittee shall submit a revised or supplemental restoration and enhancement plan for the review and written approval of the

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Executive Director. The revised or supplemental restoration plan shall be prepared by a qualified biologist, and shall specify measures to remediate those portions of the restoration/enhancement that has failed or is not in conformance with the original approved plan. These measures, and any subsequent measures necessary to carry out the approved Plan, shall be carried out in coordination with the direction of the Executive Director until the approved plan is established to the Executive Director's satisfaction.

**l. Dune Restoration and Enhancement Implemented Prior to Occupancy.**

Initial restoration and enhancement activities, including, at a minimum, non-native and invasive removal and initial site planting, shall be implemented prior to occupancy of the approved development.

**m. Dune Restoration and Enhancement Maintained.** All dune restoration and enhancement areas shall be maintained by the Permittee pursuant to the approved Dune Restoration and Enhancement Plan and the Executive Director's direction for as long as any portion of the approved development exists (see Special Condition 5(b)).

**n. Dune Restoration and Enhancement Area and Beach Access.** As indicated above, the dune restoration and enhancement area extends seaward to the beginning of the sandy beach (i.e., roughly at the seaward edge of vegetated dune), and the sandy beach area itself is available for general public recreational beach access (see also Special Condition 5). Over time, and especially with sea level rise, the sandy beach area (occupying a width of approximately 100 feet nearest the ocean) is expected to migrate inland, and the plan shall make clear that this is not only expected but an important adaptation feature. As the sandy beach migrates inland in this way, restoration/enhancement areas naturally converted to sandy beach shall not be required to be maintained as restoration/enhancement areas.

All requirements above and all requirements of the approved Dune Restoration and Enhancement Plan shall be enforceable components of this CDP. The Permittee shall undertake construction in accordance with this condition and the approved Dune Restoration and Enhancement Plan. Minor adjustments to these requirements may be allowed by the Executive Director if such adjustments: (1) are deemed reasonable and necessary by the Executive Director; and (2) do not adversely impact coastal resources.

**4. County Conditions Incorporated.** Monterey County-required Special Conditions 3.PD003(A) and 12.PDSP001 (which address cultural and archaeological resource protection); and 30.MM002 and 31.MM003 (which address bird resource protections) (see **Exhibit 5**) shall be adhered to as a condition of this CDP. Any materials required to be submitted to the County to meet the incorporated County condition requirements shall also be submitted to the Executive Director for review and approval, under the same review and approval criteria. For future condition compliance tracking purposes, the incorporated County conditions shall be considered subsections of this Special Condition 4. To the extent any such

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incorporated requirements of this Special Condition 4 conflict with the other terms and conditions of this CDP, the other terms and conditions of this CDP shall apply.

- 5. Public Access and Dune Habitat Restrictions.** PRIOR TO CONSTRUCTION, the Permittee shall execute and record a deed restriction in a form and content acceptable to the Executive Director reflecting the restrictions below.
- a. Public Access Restricted Area.** The public access restricted area applies to (1) the sandy beach area occupying the area on the Garner and Davi properties (i.e., APNs 133-252-001; 133-242-008; and 133-242-001) that extends from the mean high tide line to the first line of significant dune vegetation (roughly 100 feet in width, see **Exhibit 3**); and (2) all boardwalk areas (see Special Condition 1) (see public access restricted area generally depicted in **Exhibit 3**). The public access restricted area shall be ambulatory, and shall move inland as the sandy beach area (between mean high tide and the first line of significant dune vegetation) naturally migrates inland.
  - b. Dune Habitat Restricted Area.** The dune habitat restricted area shall consist of all of the Garner property (APN 133-252-001) outside of the development footprint (see also Special Condition 1) and all areas of the Davi properties (APNs 133-242-008 and 133-242-001) not devoted to the public parking or public access improvements (see also Special Condition 1) except portions of both properties that are located in the public access restricted area, including as it migrates inland (see above). See dune habitat restricted area generally depicted in **Exhibit 3**).
  - c. Allowed Uses and Development.** No development, as defined in Coastal Act Section 30106, shall occur within the restricted areas except for: (1) public recreational access uses and amenities in the public access restricted area; (2) dune restoration, enhancement, monitoring, and maintenance activities pursuant to the approved Dune Restoration and Enhancement Plan (Special Condition 3) in the dune habitat restricted area; and (3) public recreational access uses and amenities within the dune habitat restricted area if approved by the Executive Director. The deed restriction shall not be used or construed to allow anyone to interfere with any rights of public access acquired through use which may exist on the properties, and shall also provide that public access consistent with the terms and conditions of this CDP shall be uninterrupted at all times.
  - d. Recordation.** The deed restriction shall be recorded free of prior liens and any other encumbrances that the Executive Director determines may affect the interest being conveyed, and it shall include a metes and bounds legal description and corresponding graphic depiction of the legal parcels subject to this CDP, as well as a metes and bounds legal description and a corresponding graphic depiction, drawn to scale, of the perimeter of the restricted areas prepared by a licensed surveyor based on an on-site inspection of the restricted areas. All such area shall include notations as to the ambulatory nature of the restricted areas.

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- e. **Duration.** The deed restriction shall run with the land in favor of the People of the State of California, binding the Permittee and all successors and assigns in perpetuity.

The Executive Director may extend the recordation deadline to allow issuance of the CDP if the Executive Director determines that the Permittee has diligently pursued recordation and has demonstrated good cause for any identified delays. Such deadline extension may be for any time period deemed reasonable by the Executive Director, provided at a minimum that recordation shall be required to precede use and occupancy of the approved project.

- 6. **Coastal Hazards.** By acceptance of this CDP, the Permittee acknowledges and agrees, on behalf of itself and all successors and assigns:
  - a. **Coastal Hazards.** That the site is subject to coastal hazards, including but not limited to waves, storms, flooding, landslide, shoreline retreat, erosion, and earth movement, many of which will worsen with future sea level rise.
  - b. **Assume Risks.** To assume all risks to the Permittee and the properties that are the subject of this CDP of injury and damage from such hazards in connection with this permitted development.
  - c. **Liability Waiver.** To unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards.
  - d. **Indemnification.** To indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards.
  - e. **Permittee Responsible.** That any adverse effects to property caused by the permitted project shall be fully the responsibility of the Permittee.
  - f. **Shoreline Armoring Prohibited.** That no shoreline armoring shall ever be constructed to protect the development approved pursuant to this CDP, including in the event that the development is threatened with damage or destruction from coastal hazards in the future. The Permittee hereby waives, on behalf of itself and all successors and assigns, any rights to construct such armoring that may exist under applicable law.
  - g. **Development Relocation/Removal.** The approved project may be constructed and used consistent with the terms and conditions of this CDP for only as long as development on the Garner property remains (1) safe for use and occupancy, and (2) located on private property. If any portion of the development is deemed unsafe by an appropriate public agency, or in the event that the mean high tide line migrates to within 25 feet of the seaward edge of the retaining wall on the

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Garner property (whether or not an appropriate public agency has deemed any use and/or development unsafe), the Permittee shall submit a geotechnical investigation prepared by a licensed coastal engineer and geologist that addresses whether any portions of the approved development are threatened by coastal hazards. The investigation shall be submitted to the Executive Director, and it shall identify all those immediate or potential future measures that could stabilize the threat of coastal hazards without shoreline armoring including, but not limited to, removal or relocation of portions of the approved project. If the geotechnical investigation concludes that any portion of the approved project is unsafe for its intended use without shoreline armoring, the Permittee shall, within 90 days of submitting the investigation, submit two copies of a Removal/Relocation Plan to the Executive Director for review and written approval. The Removal/Relocation Plan shall clearly describe the manner in which such development is to be removed/relocated and the affected area restored so as to best protect coastal resources, including adjacent sandy beach, dunes and the Pacific Ocean. In the event that portions of the development are destroyed by coastal hazards before they are removed/relocated, the Permittee shall remove all recoverable debris associated with the development from the beach, dunes, and ocean; shall lawfully dispose of the material in an approved disposal site; and shall restore the affected area so as to best protect coastal resources, including adjacent sandy beach, dunes and the Pacific Ocean.

- 7. Public Rights.** By acceptance of this CDP, the Permittee acknowledges and agrees, on behalf of itself and all successors and assigns, that the Coastal Commission's approval of this CDP shall not constitute a waiver of any public rights that may exist on the properties involved. The Permittee shall not use this CDP as evidence of a waiver of any public rights that may exist on the properties now or in the future.
- 8. Real Estate Disclosure.** Disclosure documents related to any future marketing and/or sale of the subject properties, including but not limited to specific marketing materials, sales contracts and similar documents, shall notify potential buyers of the terms and conditions of this CDP. A copy of this CDP shall be provided in all real estate disclosures.
- 9. Future Permitting.** All future proposed development related to this CDP and/or the properties involved shall require a new CDP or a CDP amendment that is processed through the Coastal Commission, unless the Executive Director determines a CDP or CDP amendment is not legally required.
- 10. Other Authorizations.** PRIOR TO CONSTRUCTION, the Permittee shall provide to the Executive Director written documentation of authorizations from all entities from which such authorization is necessary for the approved project, including, at a minimum, Monterey County and the Moss Landing Harbor District, or evidence that no such authorizations are required from each of these entities. The Permittee shall inform the Executive Director of any changes to the project required by any other such authorizations. Any such changes shall not be incorporated into the project

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until the Permittee obtains a Commission amendment to this CDP, unless the Executive Director determines that no amendment is legally required.

**11. Liability for Costs and Attorneys' Fees.** The Permittee shall reimburse the Coastal Commission in full for all Coastal Commission costs and attorneys' fees (including but not limited to such costs/fees that are: (1) charged by the Office of the Attorney General; and/or (2) required by a court) that the Coastal Commission incurs in connection with the defense of any action brought by a party other than the Permittee against the Coastal Commission, its officers, employees, agents, successors and/or assigns challenging the approval or issuance of this CDP, the interpretation and/or enforcement of CDP terms and conditions, or any other matter related to this CDP. The Permittee shall reimburse the Coastal Commission within 60 days of being informed by the Executive Director of the amount of such costs/fees. The Coastal Commission retains complete authority to conduct and direct the defense of any such action against the Coastal Commission, its officers, employees, agents, successors and/or assigns.

**12. Deed Restriction.** PRIOR TO CONSTRUCTION, the Permittee shall execute and record a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this CDP, the California Coastal Commission has authorized development on the subject properties, subject to terms and conditions that restrict the use and enjoyment of those properties (hereinafter referred to as "the terms and conditions of this CDP"); and (2) imposing all such terms and conditions of this CDP as covenants, conditions and restrictions on the use and enjoyment of the properties. The restriction shall include a legal description of the Permittee's Garner and Davi properties. It shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this CDP shall continue to restrict the use and enjoyment of the subject properties so long as this CDP remains in effect.

## **IV. FINDINGS AND DECLARATIONS**

The standard of review for this CDP application is the Monterey County certified LCP and, because the project is between the sea and the first public road, the public access and recreation policies of the Coastal Act. The Commission finds and declares as follows:

### **A. Project Location, Description, and Background**

The proposed project is located on three different parcels in Moss Landing in North Monterey County. The parcels are located along a sandspit situated between the Pacific Ocean to the west and Sandholdt Road and Moss Landing Harbor to the east. The entire area once contained coastal sand dune habitat and the remaining undeveloped portions of the sandspit still contain remnant habitat with varying degrees of disturbance. All of the development proposed by the Applicant is concentrated on a 3.04-acre parcel at the very tip of the sandspit, which is known as the Garner site. Though the Garner site remains predominantly undeveloped, the site has been used for



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storage purposes and contains some gravel parking areas and a perimeter fence. The other two parcels, which are proposed exclusively for habitat restoration and public access purposes, remain completely undeveloped except for remnants of since abandoned building foundations. These two parcels are known as the Davi sites, which together total approximately 3.56 acres, and they include remnant dunes and sandy beach areas. All of the parcels are designated for coastal dependent light industrial uses in the North County LUP and are zoned for light industrial uses. See **Exhibit 1** for project location maps and **Exhibit 2** for photos of the project site.

The proposed project is for the construction of an approximately 5,200 square-foot 32-foot tall storage structure on the Garner site. The project includes a retaining wall along the west and north property boundaries, as well as 6-foot tall security fence. The project includes 38,680 square feet of pavement to accommodate 32 parking spaces and 20 storage containers. The project would require approximately 3,152 cubic yards of grading (1,477 cubic yards of cut and 1,675 cubic yards of fill). The project would ultimately cover approximately 1.7 acres of the 3.04 acre Garner site with pavement and buildings. The remaining 1.34 acres would be restricted to only dune restoration, beach access, and other public access uses. In addition, the Applicant proposes to restore and permanently protect the entirety of the Davi parcels (3.56 acres), so the overall protected area would be almost 5 acres in total. The Applicant also proposes to provide public access improvements including boardwalks, road improvements that will increase public parking, and access signage. The project also includes mitigation measures to protect dune habitat outside of construction areas during construction, including the use of exclusionary fencing and shoring of cut slopes when excavation occurs within five feet of such areas. See the proposed project plans in **Exhibit 3**.

On February 7, 2018, the Commission found that the County's action approving the project raised a substantial issue of conformance with the LCP and took jurisdiction over the CDP application. The de novo hearing on the CDP application was not scheduled at that time, including to allow the Applicant an opportunity to provide additional geotechnical and dune habitat information, as well as to provide Commission technical staff with time to review those materials. The Applicant has provided the Commission with significant supplemental materials regarding these and other issues, and Commission staff and MBARI collaborated on identification of a project that would provide the minimum necessary amount of development to avoid potential take, while still allowing MBARI an appropriate economic use of the property. While there remain differing opinions on some ancillary issues, particularly with regard to the permitting history and extent of ESHA,<sup>1</sup> if approved as conditioned, these issues need not be fully

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<sup>1</sup> The Garner site in particular has a complicated permitting history. Commission staff believes that much of the existing development on this site (e.g., gravel, storage containers, fencing, etc.) is unpermitted and there are two open violation cases, a case opened in 2000 for grading and the placement of gravel without a CDP (Violation Number V-3-00-001) and a case opened in 2017 for ongoing storage uses without a CDP (Violation Number V-3-17-0011). The Applicant believes that this development either did not require a CDP or was approved under a 1989 CDP for a project that was never constructed. For projects that include a violation component, the Commission's practice is to analyze project impacts as if the unpermitted development had not occurred. Therefore, for the purposes of this report, the project is analyzed as if the Garner site development described was not present, and thus the underlying areas consists solely of undeveloped dune habitat, which as explained in more detail below constitutes ESHA.

resolved in order for the Commission to take action on the proposed project at this time.

**B. Coastal Development Permit Determination**

***North Monterey County Background***

North Monterey County coastline contains significant coastal resources, including broad beaches that provide excellent public access and recreational opportunities, as well as the highly sensitive coastal sand dunes that provide habitat for a variety of plant and animal species. Coastal sand dunes constitute one of the most geographically constrained habitats in California because they only form in certain conditions of sand supply in tandem with wind energy and direction. Dunes are a dynamic habitat subject to extremes of physical disturbance, drying, and salt spray. They support a unique suite of plant and animal species adapted to such harsh conditions. Many characteristic dune species are becoming increasingly uncommon. Even where degraded, the Coastal Commission has typically found this important and vulnerable habitat to be ESHA due to the rarity of the physical habitat and its important ecosystem functions, including supporting sensitive species. Specifically, several native plants known to generally occur in coastal dunes are either already listed, or are on the candidate list for the federal register of endangered and threatened species. These include the Seaside bird's beak (*Cordulanthus rigidus littoralis*), sand gilia (*Gilia tenuiflora arenaria*), Sandmat manzanita (*Arctostaphylos pumila*), Eastwood's ericameria (*Ericameria fasciculata*), coast wallflower (*Erysimum ammodophilum*), Menzies wallflower (*Erysimum menziesii*), and Monterey ceanothus (*Ceanothus rigidus*).

At 40 square miles, extending between Moss Landing and Monterey Harbors, the Monterey Bay dune complex is one of the largest remaining coastal dune fields in California. However, less than half of the dune field has survived urbanization, conversion to military or agricultural uses, sand mining, and shoreline erosion. The North County LCP recognizes this impact, noting that in the past “development and land use practices have been insensitive to the resources of this area.” The stated goal of LCP policies is to prevent future insensitivity to the area’s significant coastal resources and to ensure their protection for future generations. The LCP elaborates that “effective resource management will be increasingly vital in protecting the coast's natural resources as stressed in the California Coastal Act of 1976” and that “any allowed development in or near these resource areas must be properly located and designed.”

The LCP further recognizes that sensitive dune and beach areas not only provide important habitat functions, but are also vital to the scenic nature and very character of the County. The LCP notes that these important visual resources have also been degraded from past planning practices, stating that “these resources have suffered abuses in the form of siting of development, erosion, land clearing, and pollution in past years.” The LCP is designed to prevent further abuse and explains that “[r]estoration of degraded sites, especially those with high visibility, should be a community priority.” The LCP also recognizes the lack of public access opportunities on the sandspit and states

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The Applicant believes that only a portion of the Garner site constitutes ESHA. Regardless of this issue, the proposed terms and conditions of this CDP can be found consistent with the intent of the LCP, and approval of the project would result in a resolution of the two violations.

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that “rehabilitation of existing structures and new development should include amenities for visitors such as pathways or boardwalks to the shoreline.”

Thus, the LCP found that careful planning and strong regulations are vital to protect and preserve North County’s valuable natural resources, including highly sensitive and scenic sand dunes and public beaches in Moss Landing. The North County LCP’s policies and standards reflect that vision, as described below.

### **1. ESHA**

#### ***Applicable Provisions***

The Monterey County LCP includes an extensive policy framework meant to protect the area’s rich coastal resources, including through policies that protect the highly sensitive and rare coastal sand dunes. Specifically, the North County Land Use Plan (LUP) and its associated Implementation Plan (IP) contain numerous provisions that protect ESHA, including:

***LCP Policy 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.*

***LCP Policy 2.3.2.1.*** *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 haul-out 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.*

***LCP Policy 4.3.6.F.4.*** *A basic standard for all new or expanded industrial uses is the protection of North County’s natural resources. Only those industries determined to be compatible with the limited availability of fresh water and the high air quality required by agriculture shall be allowed. New or expanded industrial facilities shall be sited to avoid impacts to agriculture or environmentally sensitive habitats.*

***LCP Policy 2.3.2.8.*** *Where development is permitted in or adjacent to environmentally sensitive habitat areas (consistent with all other resource protection policies), the County, through the development review process, shall restrict the removal of indigenous vegetation and land disturbance (grading, excavation, paving, etc.) to the minimum amount necessary for structural improvements.*

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***LCP Policy 2.3.2.2.*** 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.

***IP Section 20.144.040.B.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.

***IP Section 20.02.040. Nature of Coastal Zoning Ordinance.*** This Title is not intended and shall not be construed as authorizing the County of Monterey, through the Board of Supervisors, Planning Commission, Zoning Administrator, Minor Subdivision Committee, Subdivision Committee or Director of Planning and Building Inspection, acting pursuant to this Title, to exercise its power to grant or deny a permit in a manner which will take or damage private property for public use without the payment of just compensation therefore.

The key LCP policy states that ESHA “shall be protected, maintained, and, where possible, enhanced and restored” (LCP Policy 2.3.1). Specifically, LCP Policy 2.3.2.1 recognizes that coastal dunes categorically constitute ESHA and that, 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.” LCP Policy 4.3.6.F.4. states that a “basic standard for all new or expanded industrial uses is the protection of North County's natural resources” and that “[n]ew or expanded industrial facilities shall be sited to avoid impacts to agriculture or environmentally sensitive habitats.” Where development is adjacent to ESHA, the LCP has strict guidelines to ensure that development does not impact habitat values, stating that: the County “shall restrict the removal of indigenous vegetation and land disturbance” (LCP Policy 2.3.2.8); shall “incorporate all site planning and design features needed to prevent habitat impacts” (LCP Policy 2.3.2.2); and projects “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” (IP Section 20.144.040.B.2).

Overall, these policies and IP sections are meant to ensure that development within ESHA is strictly limited only to resource dependent uses and is restricted to the

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minimum amount necessary to support such uses. All other development within ESHA is prohibited. Where development occurs adjacent to ESHA, development must be reduced and minimized as necessary to avoid impacts to adjacent habitat. However, all of these policies must also be construed within constitutional limits, and the IP explicitly states that these policies are not intended to be exercised “in a manner which will take or damage private property for public use without the payment of just compensation therefore.”

#### ***Analysis***

The LCP defines ESHA as any area that provides habitat for, and has the potential to support, rare or valuable plant and animal life. Thus, ESHA is not limited solely to areas that are pristine and contain individual occurrences of rare or valuable species. ESHA also includes any deteriorated area that may still viably provide habitat for rare or especially valuable plant or animal life. Additionally, IP Section 2.3.2.1 categorically deems coastal dune habitat in Northern Monterey County to be ESHA. Thus, even if there were dune habitats onsite that were deteriorated, any existing habitat that is identified as dune constitutes ESHA regardless of its deteriorated condition.

In addition, the Commission has consistently found that coastal dunes, even when disturbed or degraded, do constitute ESHA if the area displays certain dune traits, such as an occurrence of plant species normally associated with dunes, substrate that displays dune characteristics, or dune morphology. The Commission has a long history of protecting coastal dune ESHA, including degraded dunes, and has found that degraded dunes can be successfully restored to high quality fully functioning dune habitat, thus facilitating the presence of rare or especially valuable plant or animal life, or their habitats.

With respect to the project sites, Commission staff ecologist Dr. Laruen Garske-Garcia has evaluated the development site to determine the extent of ESHA (see **Exhibit 4**). Dr. Garske-Garcia reviewed all of the materials submitted by the Applicant, reviewed photographic evidence of the site, and has personally visited the site on several occasions. Her analysis notes the rarity and importance of beach-dune complexes generally and also explains that the central foredunes of the Monterey Dune complex found along Moss Landing sandspit are critically imperiled and are a particularly rare and important natural community. The central foredunes provide habitat for a number of endangered dune plant species, including the Monterey gilia and Monterey spineflower, the latter of which was recently observed on one of the Davi parcels. Although no individual rare plants have been found on the Garner site, the parcel may contain dormant seed banks that would germinate in more favorable conditions. The site would likely support these species, particularly if it were restored. This area also provides habitat for rare fauna, including the Globose dune beetle, California legless lizard, and western snowy plover. Her analysis does identify a small 0.25-acre flat area at the southeast of the Garner site that consists of damper organic material and lacks any dune vegetation. However, she believes that this area was likely historically a dune swale that was filled with organic material and that this area constitutes central foredune ESHA as well. Based on this analysis, the entire Garner site is ESHA, both because coastal dunes are categorically defined as ESHA in the LCP and the specific

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characteristics of the site fit within the definition of ESHA because it has the potential to support, rare or valuable plant and animal life. In addition, and for similar reasons, all of the Davi sites are also ESHA.

As described above, the LCP ESHA policies are meant to ensure that development within ESHA is strictly limited to resource dependent uses and all other development within ESHA is prohibited. Where development occurs in or adjacent to ESHA, development must be designed to protect, maintain, and restore habitat values. In this case, the project includes significant development (i.e., a 5,200 square-foot structure, 38,680 square feet of pavement, 1,477 cubic yards of cut, 1,675 cubic yards of fill, chain link fencing, and related improvements) for the purposes of parking and research equipment storage. Although the Applicant generally participates in research and education activities, the project itself is not dependent on a location within dune ESHA and could actually be located just about anywhere. Because the LCP prohibits all non-resource-dependent development within ESHA, the project consists of uses that are not dependent on a location within dune ESHA, and the project would result in the permanent loss of approximately 40,000 square-feet of ESHA on the Garner site, the project would typically be prohibited by the LCP.

However, the LCP also mirrors the Coastal Act and is intended to be implemented in a manner that would avoid a takings of private property. Thus, if the Commission believes that strict application of the ESHA policies would likely lead to such a taking, the Commission can take steps to avoid such a taking by allowing for otherwise unallowable development provided it adheres as much as possible to LCP provisions, and is the minimum necessary to avoid a takings. The Garner site already provides some economic benefit due to the presence of a 160 square-foot research facility, known as the MARS project, which received CDP approval from the County in 2005. A taking is thus not a concern with that particular parcel, but the Applicant also owns the Davi parcels that remain almost completely undeveloped. Concerns over effecting a takings could result if the Commission were to deny all development on these parcels in the future.

Here, MBARI owns almost 7 acres spread over three almost entirely undeveloped parcels, and the Commission's analysis indicates that prohibiting development on all of that property, as would be required by LCP ESHA policies, could raise concerns that such action would constitute a take. As a result, staff and MBARI collaborated on identification of a project that would provide the minimum necessary amount of development to avoid such potential take, while still allowing MBARI an appropriate economic use of the property. This CDP, as conditioned, implements MBARI's revised proposal for that project, and would result in a global solution that permanently resolves ESHA issues and takings considerations on all three of MBARI's parcels. MBARI has stated that it is willing to accept conditions to completely restore and permanently protect all areas outside of the development envelope on all three parcels, which will protect these dune ESHA areas and provide mitigation to help offset project impacts otherwise. Additionally, the Applicant has agreed to remove invasive species and plant dune vegetation within a 10-foot area owned by the Moss Landing Harbor District just north of the boardwalk that will be constructed at the north end of the Garner site,

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helping to further offset the impacts to ESHA on the Garner site.

With respect to the proposed public access improvements, the Commission has a long history of approving trail projects, including boardwalks and paved and unpaved paths, within a variety of habitats determined to be ESHA.<sup>2</sup> In general in such approvals, the Commission has found that although trails through ESHA may cover a portion of an environmentally sensitive habitat to allow for public access to, within, and through the ESHA, trail development can be considered a form of nature study or similar resource-dependent activity because: (1) it is a development type that is integral to the appreciation and comprehension of the biophysical elements that comprise an environmentally sensitive habitat area; and (2) the trail is dependent upon the presence of the natural area resource through which it passes to provide a nature study and interpretive experience. Thus, such trails through ESHA can constitute resource-dependent interpretive trails when they serve an interpretative purpose, including nature study, and thus meet the resource-dependency test of Coastal Act Section 30240.

Thus, **Special Condition 3** requires the completion of a dune restoration plan that maps and describes the restoration areas, requires removal of invasive species and planting of appropriate dune species, provides for success criteria to analyze the efficacy of the plan, requires monitoring and maintenance of the restoration areas over time, and requires the submission of monitoring reports and contingencies to provide for adaptive management. Moreover, in order to ensure that these areas are permanently protected, **Special Condition 5** requires the Applicant to record a restriction, free of liens or other encumbrances, that limits future development within the restoration areas solely for habitat restoration or public access uses.

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<sup>2</sup> The following is a non-comprehensive list of some of the projects the Commission has approved that include trail development through ESHA. The trails in these projects include paved and unpaved trails and boardwalks. Some provide pedestrian-only access, while others allow multi-use access, including bicycles and wheelchair access: CDP 2-07-018 (Sonoma County Regional Parks – multi-use path consisting of crushed rock, located in coastal scrub habitat containing sensitive plant species); CDP 3-01-101 (Del Monte Beach re-subdivision – boardwalk through dune habitat); 3-01-003 (Grover Beach Boardwalk – boardwalk through dune habitat); CDP 3-87-258 (Asilomar State Beach Boardwalk – boardwalk through dune habitat); CDP A-3-SLO-04-035 (PG&E Spent Fuel Storage – unpaved paths through coastal terrace prairie habitat); CDP 3-05-071 (Morro Bay Harborwalk – paved road and paved trail through dune habitat); CDP A-1-MEN-06-052 (Redwood Coast Public Access Improvements – unpaved paths through rare plant habitat and riparian habitat); 80-P-046-A1 (Humboldt County Public Works Subdivision – compacted gravel trail through riparian habitat); CDP 3-00-092 (Monterey Dune Recreation Trail and Parking Lot – paved multiuse path through dune habitat); CDP 1-07-005 (Crescent City Harbor Trail North Segment – Class I and Class III multiuse trails involving some wetland fill); CDP 3-97-062 (Sand City bike path – paved path through dune habitat); CDP 3-06-069 (Fort Ord Dunes State Park Improvements – unpaved path through dune habitat); CDPs 3-98-095 and 3-98-095-A1 (Elfin Forest Boardwalk – boardwalk through terrestrial habitat ESHA); CDP 6-06-043 (Otay River Valley Regional Park trails – decomposed granite trails through coastal sage scrub and wetland habitat); CDP 3-11-074 (Arana Gulch Master Plan – paved trails through coastal terrace prairie habitat); CDP 3-13-012 (Piedras Blancas Highway 1 Realignment – trails/boardwalks through coastal terrace prairie and wetland habitats); CDP 3-14-1613 (Fort Ord Dunes State Park Campground – paved and unpaved trails through dune habitat); CDP Waiver 3-17-0734-W (Asilomar Dunes trail realignment – boardwalk trails through dune habitat); CDP 3-19-0340 (Moss Landing Trail – paved bicycle and pedestrian path involving some wetland fill).

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As conditioned, the proposed project will protect significant dune resources on the sandspit, and will result in considerable dune restoration thereto. Although the proposed development on the Garner site is not wholly consistent with the LCP's ESHA policies because the project is not a resource dependent use and will lead to permanent loss of dune habitat, the project is as consistent as possible with these policies in light of concerns that denial of development on the Davi properties could be considered a take of such properties. Overall, the project as conditioned will provide for a global solution for this area that results in significant and contiguous restored dunes that furthers the intent of the LCP's ESHA policies.

## **2. Coastal Armoring and Hazards**

### ***Applicable Provisions***

The Monterey County LCP includes policies designed to minimize alteration of the natural shoreline and minimize risks from coastal hazards. Specifically, the North County LUP and its associated IP contain numerous provisions regarding hazards, including:

***LCP Policy 2.8.1. Key Policy.*** Land uses and development in areas of high geologic, flood, tsunami, and fire hazard shall be carefully regulated through the best available planning practices in order to minimize risks to life and property and damage to the natural environment.

***LCP Policy 2.4.2.1.*** Further alteration of natural shoreline processes including drainage, erosion, water circulation, and sand transport, shall be limited to protection of public beaches, existing significant structures, coastal dependent development, and the public health and safety.

***IP Section 20.144.060.C.1.*** Diking, dredging, filling, and construction resulting in alteration of natural shoreline processes, including those related to drainage, water circulation, and sand transport, shall be prohibited except where for protection of public beaches, existing significant structures (such as public roads), coastal dependent development, or for public health and safety. Where a proposed development's impacts on the shoreline processes are not fully known, or in question, appropriate professional engineering, hydrological, geological, biological, or their studies shall be required for the necessary assessment, geological reports shall be prepared in accordance with Section 20.144.100.A.1.

***LCP 2.8.2.1.*** All development shall be sited and designed to minimize risk from geologic, flood, tsunami or fire hazards to a level generally acceptable to the community. Areas of a parcel which are subject to high hazard(s) shall generally be considered unsuitable for development. Any proposed development in high hazard areas shall require the preparation of an environmental or geotechnical report prior to County review of the project.

Thus, the North County LCP prohibits alteration of the natural shoreline, except when required for the "protection of public beaches, existing significant structures, coastal dependent development, and the public health and safety." For areas subject to high



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hazards, the LCP requires development in these areas to “be sited and designed to minimize risk from geologic, flood, tsunami or fire hazards.” Overall, these policies and IP sections are meant to protect natural shoreline processes and ensure careful planning and analysis of development in areas subject to coastal hazards.

### ***Analysis***

The proposed project is located in a vulnerable area that is subject to multiple hazards including tsunami, flooding, wave attack, and coastal erosion; all of which will be exacerbated by sea-level rise. Although the dune and proposed dune restoration will offer some limited protection to the project components, impacts from coastal hazards in this area are inevitable. In order to minimize such risks as required by the LCP, the proposed structure is designed to be easily removeable if under the threat. To ensure that hazard planning is completed proactively, **Special Condition 6(g)** requires MBARI to develop a hazard mitigation plan when the mean high tide migrates to within 25 feet of the western fence line. The plan must identify potential response options, including removal and restoration of the site. **Special Condition 6** also requires the Applicant to acknowledge the site is subject to coastal hazards, assume the risk and liability of such hazards, indemnify the Commission from any liability caused by coastal hazards, and take responsibility for any harm caused. To ensure that any potential future purchasers of the property are informed of the hazards, **Special Condition 8** requires that MBARI disclose such hazards in any future marketing or real estate materials.

In addition, the LCP prohibits altering the natural shoreline, including through the construction of shoreline armoring, except when required to protect certain categories of development such as coastal dependent development. Coastal dependent development is defined as development that requires a site on or adjacent to the sea to be able to function at all. Although much of MBARI’s research is coastal-dependent and many MBARI projects (including the MARS project, MBARI’s docks, ocean intakes, etc.) constitute coastal-dependent development, this particular project is limited solely to storage uses that do not require a location adjacent to the sea to function. Although the project supports, and is clearly related to MBARI’s coastal-dependent activities, the proposed storage uses in this particular instance do not require a location adjacent to the sea to function and therefore are ineligible for coastal armoring. **Special Condition 6(f)** therefore prohibits future armoring at the site because such armoring is prohibited by the LCP.

As conditioned, the project appropriately minimizes potential future risks from coastal hazards, ensures that hazard responses are proactively planned, and prohibits future shoreline armoring as required by the LCP. Thus, the project can be found consistent with the LCP’s coastal hazards policies.

### **3. Visual Resources**

#### ***Applicable Provisions***

The North County LUP includes strong protections for scenic resources and the character of the Moss Landing area. The LUP policies are intended to not only protect scenic resources from new development, but to enhance visually degraded areas.

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Relevant LCP visual provisions include:

***LCP Policy 2.2.1. Key Policy.*** In order to protect the visual resources of North County, development should be prohibited to the fullest extent possible in beach, dune, estuary, and wetland areas. Only low intensity development that can be sited, screened, or designed to minimize visual impacts, shall be allowed on scenic hills, slopes, and ridgelines.

***LCP Policy 2.2.2.2.*** The coastal dunes and beaches, estuaries, and wetlands, should be designated for recreation or environmental conservation land uses that are compatible with protection of scenic resources. Facilities that are provided to accompany such uses shall be designed and sited to be unobtrusive and compatible with the visual character of the area.

***LCP Policy 2.2.3.3.*** Structures shall generally be sited so as not to block public views of the shoreline; development proposals shall be revised if necessary to accomplish this goal. Necessary structures in public view between the road and shoreline (such as agricultural buildings) shall be functionally designed, and sited so as to protect the maximum possible open views. Other development in public view between the road and shoreline (such as residential or commercial structures) shall be designed with materials, colors, landscaping and fencing appropriate to the rural setting.

***LCP Policy 5.6.3.6.*** Views of the Moss Landing community, harbor and dunes from Highway 1 should be protected through regulation of landscaping and siting of new development adjacent to the highway to minimize the loss of visual access.

***LCP Policy 5.6.3.7.b.*** The Island - Design standards should enhance the commercial fishing and historical cannery character of this area. Building and bulk controls consistent with the low-lying vertical character (1 and 2 stories) and small scale of most of the buildings along the Island should be developed. Wall material should be limited to the use of natural wood for building facades near the cannery buildings. The "HR" Zoning District should be applied to the canneries where feasible, and other guidelines for preservation, should be applied as long as they do not conflict with the use of the buildings for commercial fishing purposes. Rehabilitation of existing structures and new development should include amenities for visitors such as pathways or boardwalks to the shoreline; removal or screening of unsightly storage areas. An off-street parking lot should be considered at the end of the Island, and new development proposals should provide off-street parking.

***IP Section 20.144.030.B.2.*** Development which is: 1) within coastal dunes, beaches, estuaries, and wetlands; 2) on parcels within public view to and along the ocean shoreline from Highway 1, Molera Road, Struve Road and public beaches; or, 3) on parcels within public view to and along the shoreline of Elkhorn Slough shall meet the following standards:

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- a. The location and siting of structures shall allow for their maximum screening from public view by existing topography or vegetation and to minimize obstruction of or intrusion of views of the shoreline from public viewing areas.*
- b. The design of structures, including fencing, shall incorporate natural materials, earth-tone colors, and otherwise blend with the rural setting.*
- c. Landscaping and lighting shall be unobtrusive and blend with the rural setting. Landscaping and incorporate native plants common to the area, as contained in Attachment 3.*
- d. The structures shall be modified for bulk, size, and height where necessary to protect and minimize visibility from the public viewshed.*

Thus, the North County LCP seeks to minimize development within coastal dunes as much as possible and emphasizes development that respects dune topography and blends into the natural environment.

### **Analysis**

The proposed project site is located within a scenic shoreline area that contains coastal dunes and is adjacent to heavily used public access and public viewing areas. MBARI has proposed various changes to the project in its updated proposal in order to lessen the visual impact of the project, including a more natural finish to the storage structure that will better blend in with the dune landscape and a fencing that is setback further from the public sidewalk and boardwalk to better protect views. As now proposed, and although it remains a large industrial development in the dunes, the design is more consistent with the LCP policies that require development to be modified in order to minimize visual impact. However, additional modifications are necessary to ensure that lighting is unobtrusive and blends in with the surroundings as required by the LCP.

**Special Condition 1(b)** therefore requires MBARI to submit a revised lighting plan that minimizes lighting structures as much as feasible and prohibits continuous overnight lighting to reduce nighttime view impacts.

In addition, as described above, the project has been conditioned to require restoration and permanently protect the Davi parcels and portions of the Garner parcel, which will not only protect these dune habitats, but will also ensure their visual condition is improved and preserved within this scenic area, thus enhancing the dune viewscape and helping to otherwise offset remaining project visual impacts. As a result, the project can be found consistent with the intent of the LCP visual resource policies.

## **4. Public Access**

### **Applicable Provisions**

The North County LUP includes policies aimed at maximizing public access, including specific requirements for the Moss Landing area. Because the project is between the sea and the first public road, the project must also be consistent with the public access and recreation policies of Chapter 3 of the Coastal Act. Applicable provisions include:

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**LCP Policy 5.6.3.7(b).** *The Island . . . Rehabilitation of existing structures and new development should include amenities for visitors such as pathways or boardwalks to the shoreline; removal or screening of unsightly storage areas. An off-street parking lot should be considered at the end of the Island, and new development proposals should provide off-street parking.*

**Coastal Act Section 30210.** *In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

**Coastal Act Section 30211.** *Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.*

**Coastal Act Section 30212(a).** *Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where: (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or, (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway. . .*

**Coastal Act Section 30213.** *Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred.*

**Coastal Act Section 30220.** *Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.*

**Coastal Act Section 30221.** *Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.*

**Coastal Act Section 30222.** *The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry.*

**Coastal Act Section 30223.** *Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.*

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Thus, the North County LCP requires development in the project area to provide public access amenities such pathways or boardwalks. The Coastal Act also requires public access to be maximized, prohibits development from interfering with the public's right to access, and requires new development to provide public access.

### **Analysis**

The project site is located directly adjacent to public beaches and the Moss Landing Harbor, both heavily used public access locations. In order to improve public access in the area, MBARI has proposed to construct and maintain a variety of public access enhancements and amenities to help improve public access in the area. MBARI will make improvements to the end of Sandholt Road and provide a public parking area fronting the Davi parcels that will lead to increased public parking opportunities in the area. MBARI has also agreed to construct a public boardwalk on the north end of the Garner site that will take users from the end of Sandholdt road to the beach, as well as a boardwalk fronting the Davi parcel. The project will also incorporate public access signage marking the new public parking areas and accessways. **Special Condition 1** memorializes the proposal and **Special Condition 5** requires a deed restriction that permanently protects the public access areas and ensures that the public access spaces are maintained over time. To ensure that the project does not interfere with any public rights that may exist consistent with Coast Act Section 30211, **Special Condition 7** expressly states that the Commission's approval of the project does not constitute a waiver of any such rights.

Thus, the project, as proposed, provides significant public access improvements and improves public access opportunities, consistent with the LCP and the Coastal Act.

## **5. Water Quality**

### **Applicable Provisions**

Water quality in North Monterey County is of great concern due to the various important and sensitive coastal waters in the area, including the Moro Cojo and Elkhorn Sloughs, Moss Landing Harbor, and Pacific Ocean. In order to ensure new development does not adversely impact water quality, the LCP states the following:

***LCP Policy 2.5.3.C.6(c).** Erosion control plans shall be required for all new development as set forth in the Erosion Control Ordinance. These plans shall incorporate measures for on-site reduction of bare ground and maximum retention of storm water runoff resulting from impervious surfaces...*

### **Analysis**

The project site is located directly adjacent to coastal waters, including the harbor and Elkhorn Slough, and the Pacific Ocean. The project includes significant grading and construction related activities, which may lead to construction related water quality impacts, such as polluted runoff. Construction activities can also adversely impact coastal water quality by causing erosion and sedimentation through the removal of vegetation and the movement of earth. The increase in impervious surfaces that will result from the project will also impact water quality by altering natural drainage patterns

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and providing areas for the accumulation of pollutants that could eventually be carried into the adjacent waters.

The primary mechanisms to address the proposed project's water quality impacts are to require construction best management practices (BMPs), reduce the overall area of the development, and improve post-construction drainage. With less development area, there would be a reduction in the potential polluted runoff that could ultimately be flushed off site. As described above, the restoration and permanent protection of the dune areas will accomplish this by minimizing the development envelope and concentrating impervious development to one portion of the site. Moreover, the habitat restoration and landscaping requirements of **Special Condition 3** will also help control erosion and provide for more natural drainage patterns that disperse runoff.

Further protections include implementing erosion control BMP's during construction and providing postconstruction drainage plans that control runoff in the long term, as specified in **Special Condition 2(f)**. To ensure that such measures are implemented, **Special Condition 2** requires that a copy of the construction plans are maintained on the site at all times and that a construction manager is designated to oversee the project and respond to any complaints. As conditioned, the proposed project would maintain water quality and would not adversely impact coastal waters; and, as such, is consistent with the LCP.

### **6. Indemnification**

Coastal Act Section 30620(c)(1) authorizes the Commission to require applicants to reimburse the Commission for expenses incurred in processing CDP applications. Thus, the Commission is authorized to require reimbursement for expenses incurred in defending its action on the pending CDP application in the event that the Commission's action is challenged by a party other than the Applicant. Therefore, consistent with Section 30620(c), **Special Condition 11** requires the Applicant to reimburse any costs and attorney fees that the Commission incurs in connection with the defense of any action brought by a party other than the Applicant challenging the approval or issuance of this CDP, the interpretation and/or enforcement of CDP terms and conditions, or any other matter related to this CDP.

### **7. California Environmental Quality Act (CEQA)**

Section 13096 of the California Code of Regulations requires that a specific finding be made in conjunction with CDP applications showing the application to be consistent with any applicable requirements of CEQA. Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The Coastal Commission's review and analysis of CDP applications has been certified by the Secretary of the Natural Resources Agency as being the functional equivalent of environmental review under CEQA. The Commission has reviewed the relevant coastal resource issues associated with the proposed project, including with respect to ESHA,

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coastal hazards, scenic and visual resources, public access, and water quality; and has identified appropriate and necessary modifications to address adverse impacts to such coastal resources to the extent allowed while avoiding a taking of private property without just compensation. All comments received to date have been addressed in the findings above. All above findings are incorporated herein in their entirety by reference.

The Commission finds that only as modified and conditioned by this CDP will the proposed project avoid significant adverse effects on the environment within the meaning of CEQA. As such, there are no additional feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse environmental effects that approval of the proposed project, as modified, would have on the environment within the meaning of CEQA. If so modified, the proposed project will not result in any significant environmental effects for which feasible mitigation measures have not been employed consistent with CEQA Section 21080.5(d)(2)(A).

## **Appendix A – Substantive File Documents<sup>3</sup>**

- *Plant Survey for the Garner Property, Sandholdt Road, Moss Landing, Monterey County AP 133-252-001*, Coats Consulting. June 17, 1987.
- *Archaeological Reconnaissance 7500 Sandholdt Road*, Archaeological Consulting. February 26, 2008.
- *Updated Biological Report for Monterey Bay Aquarium Research Institute Proposed Field Program Staging Facility*, Rana Creek Habitat Restoration. April 26, 2013.
- *Update of Original Geotechnical Investigation Report for Staging Building and Storage Facility*, Soil Surveys Inc. February 20, 2013.
- *Updated Transportation Analysis for MBARI Field Staging Building*, Hatch Mott MacDonald. August 4, 2015.
- *MBARI Moss Landing Preliminary Stormwater Control Report*, Bestor Engineers, Inc. October 27, 2015.
- *Mitigated Negative Declaration for Monterey Bay Aquarium Research Institute*, Monterey County. October 21, 2016.
- *Monterey Bay Aquarium Research Institute Field Expedition Staging Building Response to Coastal Hazard Issues Raised in California Coastal Commission Appeal*, Gary Griggs Consulting. January, 2018.
- *Supplement to Updated Biological Report for Monterey Bay Aquarium Research Institute Field Expedition Staging Building*, Rana Creek Habitat Restoration. January 3, 2018.
- *Monterey Bay Aquarium Research Institute Field Expedition Staging Building Moss Landing Spit History and Status of the Dunes*, Gary Griggs Consulting. June, 2018.
- *Updated Summary of the Origin and Status of Sand Dunes on the Northern End of the Moss Landing Sand Spit*, Gary Griggs Consulting. September 10, 2018.
- *MBARI Dune Assessment*, Cooper Ecological Monitoring, Inc. September 12, 2018.

## **Appendix B – Staff Contact with Agencies and Groups**

- *Monterey Bay Aquarium Research Institute (MBARI)*
- *Monterey County Resources Management Agency*

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<sup>3</sup> These documents are available for review in the Commission's Central Coast District office.