

San Francisco Bay Conservation and Development Commission

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TO: Enforcement Committee Members

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**SUBJECT: Executive Director’s Recommendation Regarding Proposed Cease and Desist and Civil Penalty Order No. CDO 2019.001.00
Salt River Construction Corporation and Richard Moseley
(For Committee consideration on May 16, 2019)**

Executive Director’s Recommendation

The Executive Director recommends that the Enforcement Committee adopt this Recommended Enforcement Decision including the proposed Cease and Desist and Civil Penalty Order No. CCD2019.001.00 (“Order”) to Salt River Construction Corporation and Richard Moseley (“SRCC”), for the reasons stated below. This matter arises out of an enforcement action commenced by BCDC staff in June of 2018 after BCDC received information from witnesses regarding the unauthorized activities.

The matter was previously presented to the Enforcement Committee on February 21, 2019. After the Committee voted to recommend the adoption of the proposed Cease and Desist and Civil Penalty Order, the Commission remanded the matter to the Committee on April 18, 2019, in order to allow Mr. Moseley to appear and present his position.

Staff Report

I. SUMMARY OF THE BACKGROUND ON THE ALLEGED VIOLATIONS

A. Background Facts

The Complaint alleges three separate violations. The first alleged violation occurred on property near Schoonmaker Point Marina, located in Richardson’s Bay in Marin County. On November 25, 2017, a San Francisco Baykeeper patrol boat operator witnessed a barge near Schoonmaker Marina being propelled by an excavator bucket. Six days later, Baykeeper notified BCDC by email about the activity that staff had observed. The email included photographs and videos showing the dredging operator submerging the excavator bucket into the water to the Bay floor, dragging the bucket through sediment on the Bay floor to propel the barge forward, then removing the sediment with the excavator bucket, and finally placing the extracted material back into the Bay by releasing it from the excavator bucket. This activity was not authorized by the Commission, and BCDC staff identified known SRCC-owed equipment in the videos and photographs.

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The second and third violations occurred in Belmont Slough off the coast of Foster City. On March 27, 2018, a senior project manager for the U.S. Army Corps of Engineers emailed BCDC staff regarding the unlawful storage of two barges in Belmont Slough. The email described two SRCC barges that had been moored in the slough since approximately February 1, 2018. The barges were believed to have been moored in the slough following the completion of authorized dredging operations conducted for the Foster City dredging project for the Lagoon Intake Structure. Foster City emailed BCDC staff a map of the Foster City dredging project showing the approximate locations of the SRCC barges. The portion of the slough where the barges were located is designated as a California Department of Fish and Wildlife ("CDFW") Ecological Reserve, as well as a nature preserve by the Foster City Municipal Code, and a Wildlife Refuge Priority Use Area in the Commission's San Francisco Bay Plan Map Number 6. The Redwood Shores Ecological Reserve contains endangered species, including the salt marsh harvest mouse and Ridgway's rail, and Ridgway's rail breeding season begins annually around February 1. BCDC staff cannot be certain that SRCC's equipment and activities did not have an adverse impact on species in the marsh.

B. Prior Enforcement History

On two separate occasions in 2011, and then again in 2014, BCDC staff opened enforcement investigations against SRCC for unauthorized storing and mooring of barges. In 2011, without authorization, SRCC stored a yellow lash barge near the East Bay Regional Park District Aquatic Center following dredge work performed at the center in San Leandro Bay in Alameda County. In 2011, SRCC also stored, without authorization, boat dock sections in Point San Pablo Yacht Harbor in Contra Costa County. These boat dock sections were later towed out of the harbor at the urging of BCDC staff. A few years later, in 2014, several Bay Area residents notified BCDC that barge equipment was being stored, without authorization, offshore of Paradise Cay near Tiburon. BCDC staff instructed SRCC to remove the equipment.

In July of 2016, BCDC received a video of an SRCC barge grounded in a shallow portion of the Strawberry Channel in Mill Valley in Marin County. In an attempt to free itself, the SRCC barge was using its dredging arm and excavator bucket to drag itself through the channel, pulling up sediment from the channel floor in the process. In response, BCDC staff provided specific instructions to SRCC to not engage in this activity, warning against the environmental risks that the action could have on the Bay environment.

Also in July of 2016, the Executive Director issued a Cease and Desist Order relating to the unauthorized disposal of dredged material by SRCC into Lucky Channel near Larkspur (CDO No. ECN 2016.02). BCDC staff had observed an SRCC employee disposing of dredged material into the Lucky Channel rather than in the dredge material disposal scow for disposal at an authorized site. BCDC entered into a settlement with SRCC and the Greenbrae Marina Property Owners Association, the permittee. Among other actions, the settlement required SRCC to complete a personnel training seminar on how to properly conduct the dredging at floating docks and channels within the Larkspur Marina.

II. SUMMARY OF ALLEGED VIOLATIONS AND STAFF PROPOSED ADMINISTRATIVE PENALTY

Placing fill and extracting materials within San Francisco Bay without a permit from BCDC is a violation of the McAteer-Petris Act ("MPA"). California Government Code Section 66632(a) states, "Any person or governmental agency wishing to place fill, to extract material, or to make any substantial change in use of any water, land or structure within the area of the commission's jurisdiction shall secure a permit from the commission and, if required by law or by ordinance, from any city or county within which any part of the work is to be performed." "Fill" is defined in Government Code Section 66632 to mean earth or any other substance or material, including . . . structures floating at some or all times and moored for extended periods."

SRCC did not request or receive a permit for extraction of materials from or placement of fill in Richardson's Bay. By engaging in the activities in Richardson's Bay that were observed on November 25, 2017, resulting in extracting and placing fill without a BCDC permit, SRCC violated California Government Code Section 66632.

SRCC also did not request or receive a permit for mooring either of the dredging barges in Belmont Slough following the completion of the permitted Foster City operations. SRCC's mooring of each of the barges for an extended period of time constitutes unauthorized fill without a permit and violates California Government Code 66632(a). The use of the barges in the area where they were moored for an extensive period is also a violation of the California Code of Regulations which state that "only lightweight, hand-carried boats may be launched or operated within [Redwood Shores Ecological Reserve]." (14 C.C.R. §632(b)(62)(C) Redwood Shores State Marine Park). In addition, Foster City has enacted restrictions on boats within the marked boundaries of a preserve.

Government Code Section 66641.5(e) allows the Commission to administratively impose civil liability on any person or entity for any violation of the MPA or any term or condition of a permit issued by or on behalf of the Commission in an amount which shall not be less than \$10, nor more than \$2,000, for each day in which that violation occurs or persists. Section 66641.9(a) of the MPA states that in determining the amount of administrative civil liability, the Commission shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the violation is susceptible to removal or resolution, the cost to the state in pursuing the enforcement action, and with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary removal or resolution efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require.

In determining the appropriate recommended penalty, staff considered each violation separately and assigned daily penalties for the violations related to the failure to obtain a permit for mooring barges in Belmont Slough. The duration of the two Belmont Slough mooring violations was 53 days, extending from February 3, 2018, the day after the required completion of the permitted work, through March 27, 2018, when the record indicates that the barges were moved. Daily penalties in the amount of \$250 per day were assessed, resulting in a total

penalty of \$13,250 for each illegally moored barge. Factors used in calculating this penalty include the nature of the violation and prior history of violations. For the first violation, staff assessed a penalty of \$2,000 for the single day in November 25, 2017 where a barge was observed in Richardson's Bay engaging in unpermitted operations. This is the maximum per-day penalty set forth in Government Code section 66641.5(e), and the factors used in calculating this amount include the nature, extent, and gravity of the violation, and the prior history of violations.

The violation report issued to SRCC originally assessed penalties for 55 days, beginning on February 1, 2018, for the two violations involving the mooring of barges. In light of information indicating that Foster City had received authorization for a 2-day extension to continue the dredging project that SRCC was undertaking until February 2, 2018, staff has determined that the penalties should not be assessed for mooring of the barges before February 3, 2018. The violation report issued to SRCC also raised issues regarding the dredging operations that SRCC conducted in Belmont Slough under a contract with Foster City. In light of evidence provided by SRCC indicating that this work and the reporting on this work was performed under the direction of Foster City, staff is no longer pursuing penalties against SRCC for violations related dredging activities performed in Belmont Slough that were not covered by the permits issued for these activities.

III. SUMMARY OF ESSENTIAL ALLEGATIONS NOT CONTESTED BY RESPONDENTS; DEFENSES AND MITIGATING FACTORS RAISED BY RESPONDENTS

Respondents have admitted that they engaged in the activities alleged in Richardson's Bay, and they have asserted in their defense that the activities they engaged in to propel their barge in shallow mud were less intrusive than using a tugboat, in part because the mud and disturbed sediment remained within the construction area. In response, staff has noted that Respondents were specifically instructed not to engage in this activity in the past, in large part because of the environmental risks involved in disturbing sediment and mud without an evaluation and authorization of the activity.

Respondents also have not denied that their barges were moored in Belmont Slough following the completion of the dredging operations that SRCC conducted for Foster City. Respondents assert in their defense that Foster City and the biological monitors retained by them failed to inform them that the barges were in sensitive areas. Respondents also assert that an agreement with Foster City, the permittee, provided approval for the continuing presence of the barges following the completion of the dredging and that Foster City was aware of the presence of the barges throughout the period from early February through the beginning of April. In addition, Respondents have stated that they do not know of an exhibit, map, diagram, or plan that establishes where the unauthorized moorings occurred. Staff, however, has rebutted these arguments by pointing to several emails from both personnel for the Corps of Engineers and Foster City that discussed the mooring of the barges. These included information indicating the location of the barges and time periods during which they were observed. Respondents were copied on some of the emails, and Respondents have not produced documents or photographs that rebut the assertion that their barges were in the

area. Also, neither Respondents nor Foster City ever requested authorization for Respondents to moor their barges in Belmont Slough following the conclusion of the dredging operation, and BCDC did not authorize the mooring of the barges. Respondents have not produced documentation to support the assertion that Foster City directed them to leave the barges in Belmont Slough following the dredging operation, and, once again, the mooring of Respondent's barges was not authorized by BCDC or any other agency. Respondents have now removed the barges, and a photograph taken on April 11, 2018, confirmed the removal of the barges.

IV. SUMMARY OF UNRESOLVED ISSUES: APPROPRIATE CIVIL PENALTY AND APPROPRIATE COMPLIANCE CONDITIONS

The primary unresolved issue is the appropriate amount of civil penalties for Respondents' violations. Government Code section 66641.5(e) provides that the Commission may administratively impose civil liability for any violation in an amount which shall not be less than \$10 nor more than \$2,000 for each day in which the violation occurs or persists, but may not administratively impose a penalty of more than \$30,000 for a single violation. The factors used in determining the amount of civil liability, as required by Government Code section 66641.9(a), are set forth above. The proposed penalties take into account the fact that Respondents have repeatedly engaged in the unauthorized activities that are the subject of the proposed Order. Staff also maintains that they are commensurate with the alleged harm, although SRCC continues to assert that they are severe.

The conditions in the proposed Order have been developed to ensure that Respondents do not repeat the violations. The Order requires Respondents to cease and desist from propelling scows, barges, or any other vessels by way of pulling or pushing with an excavator bucket along the San Francisco Bay floor, or in any location under the jurisdiction of the Commission, but the Order also allows SRCC to maneuver vessels or equipment using an excavator bucket, so long as the excavator bucket does not physically contact sediment or other material existing on the San Francisco Bay floor, or so long as the contact with the Bay floor is incidental and occurs within the dredging footprint. The Order also prohibits SRCC from mooring a vessel or equipment in sensitive areas, and requires that, when SRCC is not operating vessels or equipment as part of an ongoing dredging project, the vessels or equipment be moored at an equipment yard, and approved marina, or another similar location where SRCC is authorized to moor vessels and/or equipment for extended periods.

V. RECOMMENDATION

The Executive Director recommends that the Enforcement Committee adopt the accompanying proposed Cease and Desist and Civil Penalty Order No. CCD2019.001.01.

Attachments to this staff recommendation include: (1) the Violation Report; (2) the Statements of Defense; and (3) the Order.