

San Francisco Bay Conservation and Development Commission

375 Beale Street, Suite 510, San Francisco, California 94105 tel 415 352 3600 fax 888 348 5190

State of California | Gavin Newsom – Governor | info@bcdc.ca.gov | www.bcdc.ca.gov

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TO: Enforcement Committee Members

FROM: Lawrence J. Goldzband, Executive Director (415/352-3653; larry.goldzband@bcdc.ca.gov)
Karen Donovan, Attorney (415/352-3628; karen.donovan@bcdc.ca.gov)
Priscilla Njuguna, Enforcement Policy Manager (415/352-3640; priscilla.njuguna@bcdc.ca.gov)
Matthew Trujillo, Enforcement Analyst (415/352-3633; matthew.trujillo@bcdc.ca.gov)

SUBJECT: Executive Director’s Recommended Enforcement Decision Regarding Proposed Cease and Desist Order No. CCD2020.002.00 Issued to Param and Amandeep Dhillon

(For BCDC Enforcement Committee consideration on December 10, 2020)

Executive Director’s Recommendation

The Executive Director recommends that the Enforcement Committee adopt the Recommended Enforcement Decision, including the accompanying proposed Cease and Desist Order No. CCD2020.002.00 (“Order”) to Param and Amandeep Dhillon (“Respondents”), for the reasons stated below. This matter arises out of an enforcement action initiated by BCDC staff in January of 2020, following several reports of unauthorized activities occurring on Assessor Parcel Number 0052-160-090 (“parcel” or “property”) in Vallejo. Five acres of this approximately 8-acre parcel comprise the East Lagoon area of White Slough, which is protected from development pursuant to the White Slough Protection and Development Act and the White Slough Specific Area Plan.

As described in more detail below, Respondent Param Dhillon contracted with an individual in late October of 2019 to place several tons of dirt on the parcel and conduct grading activities. At this time, BCDC is proposing only an Order requiring Respondents to cease and desist from conducting any prohibited activities on the East Lagoon portion of the parcel. The proposed Order also requires Respondents to submit a report detailing the extent of fill placement and other unauthorized activities in East Lagoon and the actions that will be taken to restore the property.

Staff Report

I. SUMMARY OF BACKGROUND TO THE ALLEGED VIOLATION

A. White Slough Background

Located between the Napa River and the City of Vallejo, White Slough receives both tidal flow from the Napa River and fluvial flow from Austin Creek. In the early 1900s, levees were



constructed along the east bank of the Napa River to allow for the reclamation of wetlands adjacent to White Slough for agricultural activities. The levees were breached in 1964 and 1969 and subsequently repaired by the U.S. Army Corps of Engineers. Several years later, in the winters of 1976, 1977, and 1978, after the levees breached, the Corps had no authority to repair the levees and inspections of the levees indicated that the local interests had performed little maintenance following the repairs in 1969. In 1983, a combination of a 100-year high tide event and storm runoff caused extensive flooding in the vicinity of White Slough, with flooding occurring on Sonoma Boulevard and in other areas.

Recognizing that there was a need to fill portions of White Slough both to upgrade the sewer lines and other infrastructure in order to prevent additional damage to State Highway Route 37 and the adjacent areas, and also recognizing that the plans to widen Highway Route 37 would require activities in and adjacent to White Slough, the Legislature developed the White Slough Protection and Development Act, which was enacted in 1990. See Government Code §§ 66670-66682. This statute includes findings that White Slough, which was not previously within the jurisdiction of BCDC, subsequently became subject to the jurisdiction of BCDC after the winter of 1976-1977. Government Code § 66672. The Act declares that in order to preserve White Slough, there is a need to implement a plan to enhance the wetland values of White Slough, permanently protect wetland, tideland, marsh, and upland habitat areas, provide for an improved transportation links, provide flood protection for already developed upland areas, assure compatible upland development, and provide new public access to and along tidally influenced areas of South White Slough. Government Code § 66677.

The White Slough Protection and Development Act ("Act") required the City of Vallejo and Solano County, working with the San Francisco Bay Conservation and Development Commission, the Department of Transportation, and other local, state and federal agencies, to jointly adopt a final White Slough Specific Area Plan to include permanent protection and enhancement of at least 336 acres of tidal wetlands within White Slough and 132 acres of tidally influenced areas in South White Slough and provide for wetlands enhancement for all tidally influenced areas of South White Slough. Government Code § 66679. The Act required the plan to include a program for the acquisition, enhancement, and permanent preservation of those areas. *Id.* The Act further required the City of Vallejo and Solano County to adopt the provisions of the plan into their general and specific plans and issue or deny any necessary local permits for projects within White Slough based on the requirements of the plan and implementing ordinances.

During the negotiations to develop a Specific Area Plan for White Slough, which began prior to the enactment of the White Slough Act, there was a recognition of the need to protect East Lagoon, which is an approximately five-acre area located immediately east of Sonoma Boulevard (State Route 29), adjacent to the larger North Lagoon to the west of Sonoma Boulevard. Together, North Lagoon, South Lagoon, and the five-acre East Lagoon form the area referred to as South White Slough. Like the rest of South White Slough, the East Lagoon area is historically low lying and inundated in parts during the rainy season with flow from the adjacent area. The area is also within the 100-year floodplain. Currently East Lagoon is a muted-tidal seasonal marsh. Water ponds on the eastern portion of East Lagoon during the rainy season

and gradually diminishes and disappears over the dry periods from the late spring through fall. There is an upland transition zone on the eastern side of East Lagoon that can provide refugia for small mammals during high water periods. The area is surrounded by urban development on the northern, eastern, and southern sides.

On November 28, 1995, the Vallejo City Council approved the White Slough Specific Area Plan ("Plan"). The Plan was then approved by the Solano County Board of Supervisors on January 9, 1996. Subsequently, the Plan was tentatively approved by BCDC, pending planning and zoning changes.

The Land Use policies in the White Slough Specific Area Plan require the amendment of zoning designations, with South White Slough, including East Lagoon, to be zoned as RC, Resource Conservation. The Plan states that "[t]his city zoning will give South White Slough maximum protection while still allowing uses that are compatible with natural open space." In 1999, the City of Vallejo rezoned the East Lagoon parcel from "retail use" to "resource conservation" in accordance with the terms of the White Slough Plan. The City's current General Plan designates East Lagoon as Parks, Recreation, and Open Space.

The White Slough Act requires that in addition to obtaining permits required by law from the City of Vallejo or any state agency, any person placing fill, extracting materials, or making any substantial change in the use of any area within White Slough shall obtain a permit from BCDC. Government Code § 66681(b).

B. Violation Background

The Violation Report issued to Respondents details the activities that occurred on the property. These violations were first reported to BCDC in late October. Several reports submitted to BCDC in late October and early November described dump trucks depositing loads of dirt on the parcel and included photographs of the activities that were occurring. On November 8, 2019, BCDC staff visited the property and observed piles of dirt on the property. Staff from the San Francisco Regional Water Quality Control Board performed an inspection of the parcel on November 12, 2019, and observed activities including disking, grading, and the placement of imported fill material.

On November 18, 2019, BCDC opened Enforcement Case No. ER2019.060.00. On January 8, 2020, BCDC sent an Initial Contact Letter to Respondents describing the violations and directing them to cease all unauthorized work within BCDC's jurisdiction. BCDC staff subsequently met with Respondent Param Dhillon, on January 28, 2020, and spoke with him several times throughout the summer. On July 20, 2020, staff issued a Violation Report.

The proposed Order requires Respondents to cease and desist from undertaking any activities, including placing fill or making any substantial change in use of the area. The proposed Order also requires Respondents to submit a report detailing the extent of fill placed in East Lagoon and corrective actions that will be undertaken to restore the property. At this time, a Civil Penalty Order is not proposed, but penalties could be pursued in the future. In addition, if the proposed Order is approved and Respondents fail to comply with the terms, Respondents could be liable civilly for penalties in accordance with Section 66641 of the McAteer-Petris Act.



II. SUMMARY OF THE ESSENTIAL ALLEGATIONS IN THE VIOLATION REPORT

Based on reports submitted to BCDC and observations of the property, the Violation Report alleges that, starting in late October 2019, Respondents created a dirt road to allow trucks to enter the East Lagoon area off of Highway 29 and, for several weeks, trucks entered the property and placed fill throughout the five-acre area comprising East Lagoon.

Staff from BCDC and staff from the San Francisco Regional Water Quality Control Board, City of Vallejo, and U.S. Army Corps of Engineers also observed disking and grading activities that took place on the property in November and early December of 2019. In addition, BCDC received reports from members of the public of grading activities in late November and early December.

The Violation Report states that these activities violate Section 66681(b) of the White Slough Protection and Development Act, because the placement of fill and substantial changes in use were undertaken without authorization from BCDC.

III. SUMMARY OF ESSENTIAL ALLEGATIONS EITHER ADMITTED OR NOT CONTESTED BY RESPONDENT

Respondents have admitted that they placed dirt on the property. In their statement of defense, Respondents state that they authorized a local trucking company to place 55 yards of clean dirt on the property in order to fill holes and ditches and to be able to use a tractor to mow weeds on the property.

Respondents have also submitted a memorandum prepared for them by Dr. Stuart Sigel regarding "Potential for Jurisdictional Wetlands or Waters and Options for Next Steps, Dhillon Property." This memorandum does not contest that the property where Respondents conducted the activities includes the five acres that comprise East Lagoon. The memorandum states that based on observations of historical aerial photographs there is standing surface water in the winter and spring months on the southwestern portion of the Parcel. The memorandum also states that the property is identified in the White Slough Specific Area Plan as the "East Lagoon" area, which is permanently protected. In addition, the memorandum states that the property is zoned as "Parks, Recreation and Open Space" by the City of Vallejo.

IV. DEFENSES AND MITIGATING FACTORS RAISED BY RESPONDENT

A. Mitigating Factors

Respondents have stated that they were unaware of the status of the property when they acquired it from Solano County in a tax sale in June of 2019. The Tax Deed that was recorded on June 25, 2019, states that the parcel was sold to Param and Amandeep Dhillon at a public auction on June 11-12, 2019.

In support of their argument that they were misled about the status of the parcel and whether the activities were prohibited, Respondents have submitted an email that was sent to them by Pascale Soumoy, a BCDC staffmember, on June 13, 2019. In June of 2019, Ms. Soumoy responded to an inquiry call regarding the status of the property. In the email that Respondents provided, Ms. Soumoy states that it appears that the parcel at 4018 Sonoma Boulevard is outside of BCDC's jurisdiction. The email also states "you may want to contact



BCDC should you decide to develop the property to confirm this.” In addition, it states “the following agencies may have jurisdiction over your property and you may want to contact them as well – US Army Corps of Engineers, CA Department of Fish and Wildlife, Regional Water Quality Control Board, and the CA State Lands Commission.”

Respondents also state that 55 yards of dirt were placed on the property based on information provided by the City of Vallejo Public Works Department. Respondent Param Dhillon states that the City informed him that no permits were required for the placement of up to 55 yards of dirt. He states that he lives a considerable distance from the Parcel and that other dirt on the property could have been the result of illegal dumping.

Based on the number of truck trips reported to BCDC and observations of the site, there is a likelihood that more than 55 cubic yards of dirt were placed on the Parcel. In addition, on November 18, 2019, after Respondents began the fill activities, the City of Vallejo issued an Administrative Warning requiring activities to cease on the property. The Notice stated that Respondents should cease dumping dirt and filling in the property without first securing the necessary permits and authorizations. On December 9, 2019, after the City observed additional activities on the property, the City issued an Administrative Citation, with a \$200 fine, requiring Respondents to stop filling in dirt piles on the property and obtain a grading permit. In accordance with the White Slough Specific Area Plan, the City has also zoned the property with a designation that precludes development of the East Lagoon area. The current land use designation is Parks, Recreation, and Open Space.

B. Defenses

Respondents' primary defense is that they were unaware of the restrictions on developing the property and were misinformed by BCDC staff and City of Vallejo staff. This is not a defense to the allegations, and it does not exonerate them from responsibility for filling and grading East Lagoon without authorization from BCDC. *See Leslie Salt Co. v. San Francisco Bay Conservation and Development Commission*, 153 Cal.App.3d 605, 618 (1984) (finding that BCDC's cease and desist power extends to landowners regardless of whether they actually placed fill or know its origin). The courts have confirmed that the McAteer-Petris Act and other statutes that BCDC administers represent the exercise by government of the traditional power to regulate public nuisances and impose strict liability on landowners. *Id.* at 618-619.

The email that Ms. Soumoy sent to Respondent Param Dhillon also informed Mr. Dhillon that he should contact BCDC and other regulatory agencies before conducting activities on his property. This email was sent in June of 2019, more than four months before Mr. Dhillon began placing fill on the property. Mr. Dhillon did not contact BCDC or any other agencies to seek approval for placing fill before he began the unauthorized activities.

Mr. Dhillon has also stated that the City of Vallejo Public Works Department informed him that no permit was required to place up to 55 yards of dirt on private property. Mr. Dhillon has produced no written record of this conversation with City of Vallejo staff. More importantly, even if the City had incorrectly informed Mr. Dhillon that he could place fill on private property that is not zoned to allow development, this does not excuse the fact that his activities violate Section 66681(b) of the White Slough Protection and Development Act, which clearly prohibits



the placement of fill or the making of any substantial change in the use of an area within White Slough without obtaining a permit from BCDC.

As this action has progressed, Respondent Param Dhillon has also stated that he disputes BCDC's assertions that BCDC has jurisdiction over the property. Mr. Dhillon has argued that BCDC's jurisdiction applies only to the Bay and the 100-foot shoreline band, as set forth on a portion of BCDC's website, and he notes that the property is wet for only a portion of the year, during the rainy season, and is not within the Bay. In rebuttal, staff has noted that the White Slough Protection and Development Act and White Slough Specific Area Plan clearly establish that BCDC has jurisdiction over the five acres comprising East Lagoon. Staff note that the nature of the property, particularly the fact that it receives fluvial flow during the rainy season and becomes dry during the summer, was known to the Legislature when it directed the agencies that developed the final White Slough Specific Area Plan to negotiate a final plan that would be jointly adopted by the City of Vallejo and County of Solano and approved by BCDC. By their express terms, the White Slough Specific Area Plan and the White Slough Protection and Development Act include East Lagoon within BCDC's jurisdiction. Respondents' interpretation of BCDC's jurisdiction is inconsistent with the express provisions of the laws that BCDC's administers.

V. SUMMARY OF UNRESOLVED ISSUES

There are no significant unresolved issues at this time. The facts are largely undisputed. Respondents admit that they placed at least 55 cubic yards of dirt on the property and conducted grading activities in order to fill holes and mow the parcel, including the five-acre portion comprising East Lagoon. The only unresolved issues relate to the amount of fill placed on the property and the activities that would be necessary to restore the property.

Respondents state that the road that allowed trucks to enter the property from Sonoma Boulevard was a pre-existing dirt path that was covered with weeds. Observations of the site indicate that even if a dirt path was present where the trucks entered on the northwestern portion of the property, the activities the Respondents undertook significantly changed this path and removed vegetation that would have obscured it from view. As noted above, Respondents do not dispute that trucks and other equipment entered the property from this location repeatedly for several weeks, thus substantially changing the use of the area.

The White Slough Protection and Development Act states that any person placing fill or making any substantial change in use of any area within White Slough, including East Lagoon, must obtain a permit from BCDC. Respondents did not obtain a permit from BCDC before they conducted the activities. This is not disputed.

VI. ADDITIONAL ENFORCEMENT ACTIONS RELATED TO THE VIOLATIONS

A. Regional Water Quality Control Board

On November 18, 2019, San Francisco Regional Water Quality Control Board staff issued a Notice of Violations to Respondents alleging unauthorized discharges and requiring the Respondents to cease and desist activities and contact staff to seek guidance from the Regional Water Board.



On February 7, 2020, Regional Water Board staff issued an Order pursuant to Water Code Section 13267 requiring Respondents to produce technical reports related to the discharges that occurred at the property. The Order required Respondents to, among other things, obtain coverage under the Construction General Permit immediately and submit the first of several technical reports on February 21, 2020.

On April 30, 2020, Regional Water Board staff notified Respondents of ongoing violations and the referral of the matter to enforcement.

The Regional Water Board issued an Administrative Civil Liability Complaint on August 28, 2020, and on November 18, 2020, the Regional Water Board held a public hearing on the complaint. After hearing all the testimony and reviewing the evidence, the Regional Water Board determined that Respondents are subject to civil liability for failing to submit the required technical reports under the Water Code Section 13267 Order.

The Regional Water Board issued Order No. R2-2020-0030 on November 23, 2020. This Order requires Respondents to pay an administrative penalty of \$61,374 for the failure to submit the required technical reports.

B. City of Vallejo

On October 29, 2019, a member of the public notified City staff of activities on the Property, including the placement of soil and grading. On November 18, 2019, the City issued an "Administrative Notice – Warning" to Respondents instructing them to cease unauthorized grading, depositing of soil, and construction work without implementing minimum best management practices. This notice informed Respondents that the property abuts wetlands and East Lagoon.

On December 9, 2019, after observing continued work on the property, the City of Vallejo issued an Administrative Citation. This citation required Respondents to stop filling in the dirt piles on the property and obtain a grading permit.

C. U.S. Army Corps of Engineers

On November 29, 2019, the San Francisco District of the U.S. Army Corps of Engineers issued a Notice of Alleged Violation to Respondents. This notice advised Respondents to cease any ongoing work that may be occurring in waters of the United States until the completion of an inspection.

VII. RECOMMENDATION

The Executive Director recommends that the Enforcement Committee adopt the accompanying proposed Cease and Desist and Civil Penalty Order No. CCD2020.002.00 requiring Param and Amandeep Dhillon to cease and desist from placing fill, extracting materials, or making any substantial change in use of any area of the property comprising East Lagoon within obtaining a permit from BCDC. The proposed Order further requires Respondents to prepare a report describing the extent of the unauthorized activities on the property and the prepare and submit for approval a plan for corrective actions necessary to restore the property.



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