

San Francisco Bay Conservation and Development Commission

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December 9, 2022

TO: Enforcement Committee Members

FROM: Lawrence J. Goldzband, Executive Director, (415/352-3653; larry.goldzband@bcdc.ca.gov)
Adrienne Klein, Principal Enforcement Analyst (415/352-3609; adrienne.klein@bcdc.ca.gov)

SUBJECT: **Executive Director’s Recommended Enforcement Decision and Proposed Cease and Desist and Civil Penalty Order No. CCD2022.006.00 in BCDC Enforcement Matter ER2019.063.00 for Seaplane Investment, LLC, Sausalito, Marin County**
(For Committee consideration on December 21, 2022)

Summary

The Executive Director recommends that the Enforcement Committee adopt this recommended enforcement decision as its recommendation to the full Commission. This recommendation includes issuing proposed Cease and Desist and Civil Penalty Order CCD2022.006.00 to require Seaplane Investment, LLC (“Respondent”) to do the following actions to resolve its six violations: 1. Cease and desist from violating Permit 1973.014.04, Permit M1985.030.01 and the McAteer Petris Act; 2. By July 31, 2023, build and maintain the permit-required public access improvements, and provide new public access in lieu of landscaping, pursuant to plans to be submitted to staff by March 30, 2023, by maintaining the Parepa Street public access, building a public access trail and connection on Yolo Street, installing public shore signage, providing ADA parking on Bolinas Street, and installing and maintaining two ADA picnic tables, (Violations 1 and 2); 3. By December 31, 2023, remove the non-public uses from the filled portions of Yolo Street and remove all unauthorized fill and uses from the Bay and/or the 100-foot shoreline band unless a filed application is submitted by June 30, 2023, and a permit or amendment is obtained by September 30, 2023, consisting of parking, seaplanes, the seaplane fueling tank and elevated asphalt walkway on Yolo Street, both helicopter pads and the raised asphalt walkways to/around them on Block 164, the entire seaplane docking system, and the concrete and rebar seaplane launch ramp (Violation 3, 4, 5 and 6); 4. By December 31, 2023, prepare and submit to BCDC staff for its review a sea level rise and shoreline flooding adaptation plan for the permit-required public access areas, and, within 12 months of its approval, implement this sea level rise and shoreline flooding adaptation plan; and 5. Pay \$180,000 in administrative civil liability within thirty (30) days of Order issuance.



Background

This matter involves Respondent's unpermitted activities on, and adjacent to, two parcels it owns in Sausalito, Marin County. The parcels are separated by Yolo Street. BCDC has authorized certain activities on each parcel in two separate permits.

Permit 1973.014.01, which applies to APNs 052-247-01 (Block 167) and 052-247-02 (Block 164),¹ authorized: in the Bay, fill placement for landscaped public access, landscaping, berm construction around a heliport landing pad, and an eleven-houseboat (11) marina; and in the 100-foot shoreline band, placement of fill to raise the grade over a portion of the site, an office building renovation, and seventeen (17) parking spaces. On September 17, 1974, Marin County recorded a Notice of Restrictions to dedicate the landscaped public access areas, satisfying Special Condition II.C of Permit 1973.014.01 (VR&C Exhibits 6A and 6B and Order Exhibit 2).

Permit M1985.030.01, which applies to APN 052-247-02 (Block 164) provided after-the-fact authorization for: in the Bay, repair of a tidal flap gate; and, in the 100-foot shoreline band, placement of aggregate fill over a 640 square foot area to protect a helicopter landing pad from flooding; installation of a fuel storage tank and fuel containment area; paving of a 1,400 square foot area; and fill of a 2,370 square foot area with eighty-eight (88) cubic yards of fill (VR&C Exhibit 7).

The Violation Report and Complaint issued on July 29, 2022, made six essential allegations as follows:

1. **Violation 1.** Respondent is violating Permit 1973.014.01, Special Condition II.C.1.a. and II.C.1.b. and II.C.4.b. and II.C.4.c., Public Access, by failing to provide some of the required public access improvements including portions of the public shore pathways, all the public shore signage and the public access connection from the site to the Marin County public access west of the site.
2. **Violation 2.** Respondent is violating Permit 1973.014.01, Special Condition II.C.2, Maintenance, by failing to maintain some of the provided public access improvements including the existing public shore pathways and landscaping.
3. **Violation 3.** Respondent is violating McAteer-Petris Act Section 66632(a) by placing unauthorized fill in San Francisco Bay and/or its shoreline band in Yolo Street. Some of this unauthorized fill also violates Permit 1973.014.01, Special Condition II.D, Use of Solid Fill, by using filled areas designated to be used only for landscaping, landscaped public access, and pedestrian and bicycle pathways, for private use. The unauthorized fill includes:

¹ VR&C Exhibit 2 mistakenly identified Block 167, which is between Parepa and Yolo Streets, as Block 164, and mistakenly identified Block 164, which is south of Yolo Street and supports the helicopter port, as Block 167. This error has been corrected.

- a. Vehicle parking and/or equipment storage;
 - b. Seaplane storage, repair and maintenance;
 - c. Seaplane fueling tank (in place as of at least 2003); and
 - d. An approximately three-foot-high, elevated asphalt path across Yolo Street to allow for pedestrian access during high tides (in place as of at least 2008).
4. **Violation 4.** Respondent is violating McAteer-Petris Act Section 66632(a) by placing unauthorized fill in San Francisco Bay and/or shoreline band consisting of an unauthorized helicopter landing pad and four paved walkways on Block 164 (in place as of 2008).
 5. **Violation 5.** Respondent is violating McAteer-Petris Act Section 66632(a) by placing unauthorized fill in San Francisco Bay consisting of expansion of an existing u-shaped floating dock during three separate episodes by adding a "cross-beam" dock, and three fingers, one long and two short, two pilings and relocating an on-water fueling station on property owned by Marin County (on or about 2011, 2018 and 2019).
 6. **Violation 6.** Respondent is violating McAteer-Petris Act Section 66632(a) by placing unauthorized fill in San Francisco Bay and/or 100-foot shoreline band, consisting of excavation and fill to construct a new (and apparently expanded) concrete and rebar water access ramp in the Yolo Street right-of-way (in March 2022).

To date, Respondent has failed to resolve any of the six allegations outlined in the Violation Report and Complaint, despite having received an initial contact letter from BCDC on February 18, 2020, more than two and a half (2.5) years ago. Beginning at that time and continuing through all communications, BCDC staff advised and directed Respondent to provide the absent public access, conduct maintenance of the existing public access, seek after-the-fact authorization for unauthorized fill and uses described as Violations 4 and 5. On February 28, 2022, two years after receiving BCDC's initial contact letter, Respondent submitted an incomplete application for after-the-fact authorization of the as-built conditions. BCDC staff identified inadequacies in the application in a letter to Respondent, dated March 30, 2022, but Respondent has not resolved any of the inadequacies to-date.

Further, on March 15, 2022, Respondent undertook a significant construction project in BCDC's Bay and/or 100-foot shoreline band jurisdictions without informing BCDC of its plans and without the necessary BCDC authorization. This resulted in issuance of Executive Director Cease and Desist Order ECD2022.002.00 on March 15, 2022, and its re-issuance as ECD2022.002.01 on June 14, 2022, and to-date Respondent has not complied with the ECD either. Due to expiration of ECD2022.002.01 on September 12, 2022, ECD2022.02.02 was re-issued for a second time on September 13, 2022.

As a result of Respondent's failure to resolve the violations by now and Respondent's actions in March 2022, resulting in a significant new violation, staff determined that the standardized fine process was inadequate to resolve these violations and commenced formal enforcement proceedings.

The required public access is severely eroded and frequently unusable due to tidal inundation and shoreline flooding, resulting in the requirements to: 1. Maintain the Parepa Street public access pursuant to a staff-approved plan no later than July 31, 2023 (Order Section I.B.a); and 2. By December 31, 2023, prepare and submit to BCDC staff for its review a sea level rise and shoreline flooding adaptation plan for the permit-required public access areas, all of which are subject to frequent shoreline flooding and tidal inundation, that is consistent with the SF Bay Plan policies including but not necessarily limited to those pertaining to Climate Change, Shoreline Protection and Public Access and, within 12 months of its approval, implement this sea level rise and shoreline flooding adaptation plan (Order Section I.E).

The permit and plans dating from 1973 (Order Exhibit 1) required landscaping that is not currently provided. Due to the frequency of tidal inundation and flooding and the resulting erosion, it is not feasible to require landscaping at this time. Therefore, in lieu of requiring the absent landscaping, Order Sections I.B.c and I.B.e require posting of new public shore signs and the installation and maintenance of two picnic tables accessible to persons with disabilities.

The SOD contains a "Photo Site Plan of 242 Redwood Highway, Mill Valley, CA 94941" that indicates that the u-shaped, existing seaplane dock has been repaired and, while this same plan contains no parallel note about the helicopter landing pad authorized in 1985, it has clearly also been repaired as its condition matches that of the new unauthorized pad and adjoining walkways (VR&C Exhibit 2 and Order Exhibit 3). The repairs to the u-shaped seaplane docks and to the once authorized landing pad occurred without BCDC authorization, therefore rendering both existing structures unauthorized unless and until Respondent applies for and receives retroactive approval for these unauthorized repairs. Therefore, Order Sections I.D.b and I.D.c of the Order require these once pre-existing structures to be removed by December 31, 2023, unless a filed application is submitted by June 30, 2022, and a permit or permit amendment is issued by September 30, 2022.

On October 7, 2022, Respondent Aaron Singer, Counsel to Respondent John Sharp and BCDC staff Adrienne Klein, Matthew Trujillo and Brent Plater met to consider a possible settlement proposal from Respondent. Respondent offered to install the absent public access improvements and pay no fine. Staff requested that Respondent prepare and submit in writing a comprehensive proposal to address the six violations outlined in the VR&C. As of the date of mailing of the Recommended Enforcement Decision and Proposed Order on October 14, 2022, Respondent had not submitted a written settlement proposal.

As of December 9, 2022, the date of mailing of the Recommended Enforcement Decision to the Enforcement Committee, Respondent has retained the unauthorized concrete ramp it has been twice ordered to remove by BCDC's Executive Director; has not obtained staff approval of a

plan to install the missing required and maintain the deteriorated required public access; has not installed the missing required and maintain the deteriorated required public access, and has not responded to staff's application filing letter, dated March 30, 2022.

This matter was originally scheduled to be heard by the Enforcement Committee on October 26, 2022, then rescheduled to November 16, 2022, and again rescheduled to December 21, 2022. Following staff's initial request for an extension of the sixty (60) days to bring the matter forward to the Enforcement Committee to conduct settlement negotiations that failed, Respondent twice requested, and staff twice consented, to the two additional delays to accommodate health issues encountered by John Sharp, Respondent's initial counsel in this matter. On December 7, 2022, Respondent's current Counsel Jillian Blanchard requested another settlement conference. As of the mailing date of this RED, staff is willing to attempt another settlement conference prior to the hearing date for this matter.

A. Admitted and Contested Essential Allegations. Respondent timely filed a Statement of Defense (SOD #1) on September 2, 2022, responsive to the allegations outlined in the VR&C, dated July 29, 2022 (VR&C #1). Respondent filed a second SOD on December 1, 2022 (SOD #2), responsive to both VR&C #1 and to a separate Complaint for Administrative Penalties for three resolved violations, dated October 27, 2022 (Complaint #2). The defenses to the allegations outlined in VR&C #1 that are raised in SOD #2 constitute late submitted evidence (LSE). This RED addresses the timely-submitted statements of defense submitted on September 1, 2022 (SOD #1). This RED does not address the LSE, though many of the defenses are duplicative and therefore herein addressed.

Respondent admits to owning the property subject to the complaint (Section I of the VR&C).

Respondent's SOD is silent regarding Violation 1, the failure to provide some of the required public access improvements including portions of the public shore pathways all the public shore signage and the public access connection from the site to the County public access west of the site, as required by Special Condition II.C.1.a, II.C.1.b, II.C.4.b, and II.C.4.c, Public Access, of Permit 1973.014.01 (Section II.A of the VR&C).

Respondent partially admits Violation 2, that some public access, including public shore pathways, requires additional maintenance. Respondent's SOD is silent regarding the landscaping maintenance issues (Section II.B of the VR&C).

Respondent partially admits Violation 3, that, due to activities of multiple predecessors in interest to Seaplane Investment LLC, some fill has been placed in the shoreline band. Respondent's SOD states that it reserves the right to further present to the Commission evidence, as found in its SOD accompanying documents, about whether fill has been placed in the Bay and whether Respondent has used, or is using, areas designated to be used only for landscaping, landscaped public access, and pedestrian and bicycle pathways for private uses, such as vehicle parking and/or equipment

storage, repair and maintenance, seaplane fueling tank, and an elevated asphalt path across Yolo Street.²

Respondent admits Violation 4, the existence of helicopter landing pad and paved walkways (Section II.D of the VR&C) but denies installing them and refers to the permit history contained in the attachments.³

Respondent admits Violation 5, reconfiguring the dock, as a matter of responding to emergency storm and flooding events of 2011, 2017 and 2019, as part of Seaplane's ongoing duty to repair and maintain the site in accordance with permits dating back to 1953. Respondent denies "constructing a new" concrete and rebar water access ramp in March 2022 and admits to "repairing an existing" ramp. Respondent believes it has a duty and right to conduct repairs as part of its "mandate" pursuant to the Federal Aviation Act and original permitting (Violation 6, Section II.F of the VR&C).

BCDC staff identified four permit violations and two distinct violations of the MPA in this matter because the provision of public access benefits (Permit Violation 1) is distinct from the maintenance of public access benefits, which are present but deteriorated (Permit Violation 2), which is again distinct from using an area designated for public access for other purposes such as parking, equipment storage, etc. (Permit Violation 3). The placement of unauthorized fill consisting of an asphalt helicopter landing pad and four asphalt walkways beginning in 2008 (MPA Violation 4) is distinct from placing, on three occasions beginning in 2011, fill in SF Bay for docks (MPA Violation 5). Which is again distinct from constructing or reconstructing a concrete and rebar water access ramp in 2022 (MPA Violation 6).

Since assuming ownership of the property on July 21, 2021, Respondent became responsible for the five 'inherited' violations and the one it undertook on March 15, 2022, which have existed for between 19 years (6,935 days) and 137 days. After considering the factors required by McAteer-Petris Act § 66641.9, BCDC staff recommends a \$30,000 penalty for each violation, totaling \$180,000 in administrative liability.

The nature and extent of harm caused by these violations is extensive. The public has been deprived of a required public access since at least January 31, 2020, and the Bay resources impacted by the multiple events of Bay fill for docks, raised walkways, heliport landing pad, fuel tank, and the new concrete ramp construction cannot be quantified or mitigated and are

² Respondent's SOD Exhibit C8 Use Permit Renewal, page 249 contains a Site Plan dated October 19, 1995, that shows the second fuel tank in the Yolo Street ROW, eight (8) years earlier than alleged in BCDC staff's VR&C. Therefore, Respondent's SOD contains a record that the fuel tank was placed in BCDC jurisdiction, not confirmed as shoreline band as asserted by Respondent, after passage of the McAteer-Petris Act and therefore requires a BCDC permit.

³ Respondent's SOD Exhibit C8 UP Renewal, page 249 contains a site plan dated October 19, 1995, that shows that as of this date, APN 052-247-002 contained one helicopter landing pad and one fuel tank. Therefore, Respondent's SOD contains a record that the second helicopter landing pad, walkways and fuel tank were placed in BCDC jurisdiction after passage of the McAteer-Petris Act and therefore require a BCDC permit.

unknown. Work in Richardson Bay is prevented during winter months to protect the Pacific herring and other species.

The staff finds that while the public access violations are susceptible to resolution, the public has been deprived of the use of the public access since at least January 31, 2020, and cannot regain benefits of the shoreline access that has been absent or blocked. The staff finds that while the fill violations are also susceptible to resolution, any impacts to Bay resources that occurred on the multiple events of Bay fill placement for docks, raised walkways, heliport landing pad, second fuel tank, and the new concrete ramp construction, which also involved material extraction in addition to fill placement, cannot be quantified and are unknown.

The staff finds the cost to the state in pursuing this case since 2019 was high. Staff invested time in no fewer than three meetings with Respondent to ensure that Respondent understood its permit requirements, the McAteer-Petris Act and how to resolve the violations; staff issued a 35-day enforcement letter, which failed to result in resolution of the violations; staff issued a Violation Report and Complaint, which failed to result in resolution of the violations or even to cause an additional application submittal that has been pending since March 30, 2022. Respondent's actions resulted in preparation and issuance (and two re-issuances) of an Executive Director's Cease and Desist Order to cause removal of the unauthorized concrete ramp. If the Commission votes to adopt and issue an order, staff will invest additional time to compliance monitor Respondent's actions with the terms of the order.

The staff finds that Respondent is culpable for the violations due to the failure to operate and maintain the site in a permit and McAteer-Petris Act compliant manner. Respondent freely admits that it is the underlying landowner. Respondent completed two permit assignments on January 3, 2022 (VR&C Exhibit 22), affirmatively assuming the rights and obligations of each permit, even though each permit runs with the land. Though the property transferred from Commodore Seaplane LLC to Seaplane Investment LLC, on July 21, 2021, Aaron Singer operated Seaplane Adventures before this date and is to date still involved with the business. Staff's initial contact letter, dated February 18, 2020 (VR&C Exhibit 19), and its 35-day enforcement letter, dated October 8, 2021 (VR&C Exhibit 21), were issued to the former owner and also to Aaron and Tiffany Singer, Seaplane Adventures LLC. Due to the fact that Seaplane Adventures was known to be MR. Singer's business, staff sent him a copy of its letter to former owners, dated September 15, 2020 (VR&C Exhibit 20). Respondent would be culpable even if this continuity of personage did not exist. Prior to the transfer, Respondent did not contact BCDC to request a due diligence review of the properties. At the time of transfer, the enforcement action was well under way and Respondent was or should have been aware of the BCDC staff allegations and the actions necessary to resolve them. At the time of purchase of both parcels on July 21, 2021, Respondent inherited all past violations and the rights and obligations of both BCDC permits, regardless of whether Respondent, or one or more of Respondent's predecessors in interest, was responsible for initiating the violations. The property conditions and applicable regulatory obligations run with the land. As property owner and permittee, Respondent is responsible for managing and operating

the properties in a permit compliant and McAteer-Petris Act compliant manner and for resolving all permit violations and violations of the McAteer-Petris Act.

The staff finds the Respondent's inferred inability to pay is not substantiated by any evidence. Furthermore, staff finds that Respondent had sufficient resources to construct a new concrete ramp in BCDC's Bay and/or shoreline band jurisdictions.

Based on these penalty factors the staff finds that daily penalties of \$1,500 for Violation 1 is appropriate, of \$1,000 for Violations 2, 4 and 5 are appropriate and of \$2,000 for Violations 3 and 6 are appropriate.

B. Defenses and Mitigating Factors. Respondent filed a Statement of Defense on September 2, 2022. Respondent makes the following eight (8) affirmative arguments:

1. Current owners did not conduct majority of the violations alleged.
2. Respondent's quibble with VR&C's claim that they initiated new construction on March 15, 2022, and argue the unauthorized fill constitutes reconstruction of an existing ramp and this therefore exempts the action from the need for a BCDC permit.
3. The site uses are exempt from the requirement to obtain BCDC authorization because they were in operation prior to BCDC.
4. BCDC's regulatory authority is pre-empted by existing approvals issued by the FAA and/or Marin County. Permits for various operations at the subject property have been in existence since at least 1953, as identified in SOD Attachment 6, which refers to supporting documentation included with the SOD such as a 3-page site plan, dated September 2, 2022, hundreds of pages of Marin County planning records and permitting history, and two declarations stating that the Seaplanes meet FAA flight requirements.
5. Pursuant to Civil Code Sections 831 and 1112, Respondent Owns a Fee Interest in the Portion of the Streets Bordering Its Lots (Yolo, Bolinas and Parepa) and it has Private Easement Rights to Use the Streets.
6. Administrative civil penalties are inappropriate "under the circumstances." Due to the COVID-19 pandemic, Seaplane's business was shut down during its most revenue-intensive time of year and lost over one million dollars (\$1,000,000) in revenue and it continues to apply revenue to remediate the site in conformance with BCDC direction. The imposition of fines will cripple Seaplane's ability to continue its remediation efforts. Seaplane proposes to use resources to resolve the violations, such as to retain CRKW, Inc. Architects who have developed the plans submitted with the SOD.
7. In June and July 2020, Seaplane was engaged in constructive discussions with BCDC's representatives, but those discussions were interrupted and postponed due to the effects of COVID-19.

C. Staff Rebuttal

- 1. Current owners did not conduct majority of the violations alleged.** Staff concedes that this is true; however, this fact is irrelevant.

Violations 1-3 are permit violations and indeed occurred prior to July 21, 2021, when Respondent took ownership. BCDC's permits run with the land. Respondent is responsible for the site conditions as they existed at time of transfer and must not only operate the site in a permit compliant manner but must also resolve Violations 1 through 3 that it knowingly inherited.

Violations 4 and 5 are violations of the McAteer-Petris Act and also occurred prior to July 21, 2021. In *Leslie Salt Co. v. BCDC*, 153 Cal.App.3d 605 (1984), the California Court of Appeals found that the McAteer-Petris Act holds landowners strictly liable for unauthorized fill placed by third persons on their property. The court determined that strict liability "is an appropriate and traditional consequence of the possession and control of land," *id.* at 611, and more than justified because of important public policy objectives the McAteer-Petris Act is designed to achieve. Respondent is responsible for the site conditions as they existed at time of transfer and must not only operate the site in a McAteer-Petris Act compliant manner but must also resolve Violations 4 and 5 that it knowingly inherited.

In March 2022, Respondent conducted Violation 6, unauthorized extraction of materials and place of fill in the Bay and shoreline band. Respondent must resolve Violation 6 that it knowingly conducted.

In more than 14 months that Respondent has owned the property, it has failed to resolve the permit and the McAteer-Petris Act violations or even to make meaningful steps toward resolving them.

- 2. Respondent's quibble with VR&C's claim that they initiated new construction on March 15, 2022, and argue the unauthorized fill constitutes reconstructing of an existing, ramp and this therefore exempts action from the need for a BCDC permit.** This is a distinction without merit pursuant to Section 66632(a) of the McAteer-Petris Act, which states, "Any person or governmental agency wishing to place fill, to extract materials, 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." Whatever Respondent wishes to call the project, the materials excavation and fill placement undertaken to execute it triggered the requirement for a BCDC permit or amendment pursuant to Section 66632(a) of the MPA.

Further, Commission Regulations 10601(a)(6) and 10601(b)(5) define minor repairs and improvements in the Bay and shoreline band as: "routine repairs, reconstruction,

replacement, removal or maintenance of a structure that do not involve any substantial enlargement or changes in use.” This regulation makes clear that Respondent’s actions required a permit. Staff does not concur that said actions constitute a reconstruction or routine repair; as that determination would be made as part of a permit application, and none has been submitted. As shown in VR&C Exhibit 24A, the water access ramp conditions prior to March 15, 2022, show a sloping shoreline with a Trex ramp atop a substrate of unknown material that does not appear to be concrete, whereas VR&C Exhibits 24B-24E depict a major construction project involving extensive materials excavation and fill placement. Further, in the site plans, dated July 16, 1973, called “Existing Conditions,” a concrete ramp is depicted north of the location of the newly constructed ramp, and much narrower in width than the size of the newly constructed ramp (Pages 2 and 3 of Order Exhibit 1). This project does not constitute a patch or a repair, it consists of a full-fledged construction project, which requires analysis under the MPA and SF Bay Plan and permit approval.

Further, both of Respondent’s permits lack any provisions that authorized repair and maintenance of existing facilities. Had Respondent sought a permit amendment from BCDC to conduct repair and maintenance upon existing facilities, it is likely that staff would have updated Respondent’s permits to include repair and maintenance authorization.

3. The site uses are exempt from the requirement to obtain BCDC authorization because they were in operation prior to BCDC.

On February 6, 1950, Marin County appears to have issued a Use Permit to permit construction, maintenance and operation of Sea Plane Base, Hangers, Office and Yacht Harbor and accessory buildings thereto in accordance with two special conditions that the authorization is valid for five years only unless a further application is made and granted by the Planning Commission and the Board of Supervisors and all building plans are submitted to the Planning Commission for approval (SOD Exhibit C3, page 79).

On November 10, 1953, Marin County appears to have issued a Revocable Use Permit to construct, operate and maintain a Sea Plane Base, Flight School Maintenance and Repair of Aircraft (Lot 1-16, block 164, 167, (SOD Exhibit C3, page 76).

In spite of these approvals, the site plan dated July 16, 1973, called “Existing Conditions,” shows no Seaplane facilities (Pages 2 and 3 of Order Exhibit 1).

Use Permit Condition 4 states “Use and operation of the seaplane base is permitted subject to the terms of the UP approvals of 1953 and 1981. Use and operation of the heliport is permitted subject to the terms of UP 96-003 (Resolution 96-016). Use of houseboat marina shall be governed by the provisions contained in Chapter 22.78 (Nonconforming Uses) of the Marin County Code (SOD Exhibit C3, page 19).

While the uses described above in the Marin County authorizations appear to have been in existence as of September 17, 1965, the date the McAteer-Petris Act was effectuated, all work following that date undertaken to maintain, repair, reconstruct and/or expand any of the existing uses was subject to the provisions of Section 66632(a) of the MPA because as of that date, the extraction of materials and placement of fill, as well as a substantial change in use, required BCDC authorization.

At time of enactment, Sections 66654 and 66656 of the McAteer-Petris Act provided owners of property that became subject to BCDC jurisdiction and regulatory requirements, an opportunity to apply for a claim of exemption from the McAteer-Petris Act requirements, which may have allowed for the completion or expansion of an existing project. No claim of exemption was ever filed for this property or the uses on it. Therefore, only the uses as they existed onsite as of Jan 1, 1974, are grandfathered. As stated above, all maintenance, repair, reconstruction and/or expansion any of the existing uses must occur in accordance with the MPA. In other words, no substantial change in use, placement of fill or extraction of materials may occur onsite except in accordance with the MPA. There is clear evidence that all of the existing facilities have been maintained, repaired, reconstructed and/or expanded without the requisite approval.

Based on Marin County's and BCDC's records, the office, houseboat marina and seaplane and helicopter operations were in use prior to adoption of the McAteer-Petris Act.

The 1974 permit authorizes placement of clean earth fill on 6,600 square feet of Block 167 and on Yolo and Parepa Streets for landscaped public access and landscaping and the construction of a berm on the northeast and southeast edge of the (existing) Marin County Heliport landing pad. The permit also authorizes renovation of an existing office building for continued office use (Order Exhibit 1).

Renovations to the existing houseboat marina require and secured at least some BCDC authorization as the original 1973 permit and all four amendments to it pertain to the operations of the existing houseboat marina. Likewise, renovation of the existing office building requires and secured at least some BCDC authorization as part of the original 1973 permit. Therefore, the record is clear that renovation of the other existing uses, i.e., the heliport and/or seaplane operations, consisting of repairs to and expansions of the seaplane docks, installation of a square fuel tank, and construction of a second heliport landing pad and raised asphalt walkways also require BCDC approval.

The same is true upon review of the 1985 BCDC permit that authorized placing fill to repair a heliport landing pad and installation of a single, fuel storage tank and fuel containment area, paving a 1,400 square foot area and filling 2,370 area with 88 cubic yards of fill. The permit states that the project will not result in an expansion of the helipad. Again, this authorization, even more than the prior one, is explicit about the

fact that the placement of fill to maintain an existing structure, the heliport pad, is required, and that expansion of the pad is not authorized. As the permit explicitly authorizes installation of a fuel tank, the BCDC record is clear that a second one would also require BCDC approval.

Therefore, the violations cited in BCDC's VR&C did not exist in 1965 when the McAteer-Petris Act was adopted and are, therefore, not exempt from the requirement to have obtained BCDC authorization. Neither are the repair and maintenance operations conducted at the seaplane docks between that date and the present.

- 4. BCDC's regulatory authority is pre-empted by existing approvals issued by the FAA and/or Marin County. Permits for various operations at the subject property have been in existence since at least 1953, as identified in SOD Attachment 6, which refers to supporting documentation included with the SOD such as a 3-page site plan, dated September 2, 2022, hundreds of pages of Marin County planning records and permitting history, and two declarations stating that the Seaplanes meet FAA flight requirements.**

FAA: The FAA approvals merely state that the Seaplanes themselves are authorized to fly (SOD Exhibits C2 and C4). BCDC is not seeking to regulate the seaplane or helicopter flights. The regulatory requirements of the FAA do not pre-empt BCDC's authority to regulate the six violations cited in BCDC's VR&C including the repair and maintenance operations conducted at the seaplane docks between 1965 and the present.

Marin County: There are many Marin County records:

- Some pertain to requests to change the heliport flight frequency and hours of operation (SOD Exhibits C5 and C7).
- MCCDA Design Review Clearance Determination, dated April 19, 2005, grants permission to repave existing paved areas on the subject property (APN 052-274-02) and replace an existing fence around the heliport landing area with a new fence of the same height. The approval states "Please be advised that the proposed work is located within the jurisdiction of the SF BCDC. Accordingly, you must contact BCDC staff to determine whether any permits are required for the work." (SOD Exhibit C3, page 23).

In granting approval of the Commodore Center's proposal for a five-year-long extension of a 2002 Use Permit (UP) approval to allow for the: Continuation of a 1,200 sf children's recreation center and day camp; A maximum of 8 artist studios totaling 7,067 square feet of building area; A 1,240 square foot onsite property management office; Parking for uses including 17 onsite parking spaces, 3 on street handicapped spaces and up to 47 on street parking spaces, Marin County found in relevant part that "...the proposed uses are consistent with the Countywide Plan

because...proposed UP extension would not affect shoreline or tideland resources, public access, water quality, or wildlife and plant habitat areas on or surrounding the property..." (SOD Exhibit C3 Pages 14-16). (BCDC was mentioned during the public hearing in relation to the Bay Trail.)

- In 2000 and 2001, Respondent applied for and received permits from Marin County to "retrofit damaged dock" (SOD Exhibit C3, page 3). Therefore, Respondent ceded that Marin County permits are required to repair existing onsite structures and should have also sought repair permits from BCDC. This same SOD exhibit lists the Marin County code enforcement history, including a violation from 2009 described as "dock, unsafe piling and *unprotected* aviation fuel tanks (SOD Exhibit C3, page 2).
- The findings associated with Resolution PC17-007, Seaplane Adventures Use Permit Modification, dated August 28, 2017, state "In 1983, the BFC (Bayfront Conservation) overlay zone was applied to the property. While this did not change the underlying uses allowable, it did heighten the priority of environmental protection in recognition of the natural resources and habitats that shorelines and tidelands provide" (SOD Exhibit C3, page 2). The staff report also states "The regulatory circumstances have changed in...important respects since approval of the 1981 Use Permit...applying the BFC overlay zone to better protect the Bayshore environment..." (SOD Exhibit C3, page 7).
- The entirely irrelevant 1996 request from Pacific Bell to install wireless telephone communication equipment onsite (SOD Exhibit C8).

The regulatory requirements of Marin County do not pre-empt BCDC's regulatory authority. In fact, they refer the permittee to the need for BCDC permits for County-authorized actions and to the extra protection afforded the Bay and tidal zone. The construction of the new Seaplane docks (and repair of the existing Seaplane dock), the second fuel, the second helicopter pad and walkways, and of the concrete water access ramp, as shown in VR&C Exhibits 8-15, are all activities that constitute the placement of fill in BCDC jurisdiction and which, therefore, require a BCDC permit and are not exempt from the MPA authority because they are or may be also subject to local Marin County regulatory authority.

5. Pursuant to Civil Code Sections 831 and 1112, Respondent Owns a Fee Interest in the Portion of the Streets Bordering Its Lots (Yolo, Bolinas and Parepa) and it has Private Easement Rights to Use the Streets.

Marin County has confirmed Respondent's position that owns in fee the one-half portion of the streets that border its property. Additionally, Respondent states that it has easement rights over all of these streets for ingress, egress and any other proper use and, as such, Respondent sees no reason to file a quiet title action.

Citing California Code of Civil Procedures §831 and §1112 and California case law (*Safwenberg v. Marquez* (1975) 50 Cal.App. 3rd 301, 306) as evidence of this legal interest does not satisfy the requirements of Section 66605(g) of the MPA, which states fill should be authorized when an applicant has valid title to the properties in question. Commission Regulation Appendix F, Application Exhibits, defines the types of information that constitute adequate proof of legal interest such as a fee interest, a sufficient interest, a leasehold, and an enforceable option. Respondent has not provided adequate evidence of legal interest.

If Respondent wishes to pursue after-the-fact authorization for any activities that are occurring on Yolo Street, such as the second fuel tank, Seaplane storage and repairs, water access ramp, as well as on the Parepa and Bolinas Streets, Respondent must provide adequate evidence of legal interest pursuant to Commission Regulation Appendix F, Application Exhibits, as part of a permit application.⁴

Respondent's SOD contradicts itself. On the one hand, Respondent states that it is in the process of filing a quiet title action and on the other hand it states this is unnecessary. The communications from BCDC to Respondent have directed Respondent and predecessor owner (who have, by the way, retained the same counsel, John Sharp) to file a quiet title action since sometime in 2020. Absent this documentation, Respondent may hamper its options to resolve the violations occurring on Yolo Street with after the fact approval.

- 6. Administrative civil penalties against Respondent are inappropriate "under the circumstances." Due to the Covid-19 pandemic, Seaplane's business was shut down during its most revenue-intensive time of year and lost over one million dollars (\$1,000,000) in revenue and continue to apply as much of said revenue to remediation of the site, in conformance with BCDC direction. The imposition of fines will cripple Seaplane's ability to continue its remediation efforts. Seaplane proposes to use resources to resolve the violations, such as to retain CRKW, Inc. Architects who have developed plans.**

Respondent's SOD does not initially state what "circumstances" render penalties inappropriate. Staff understands (one of) the circumstances to which Respondent refers is its recent ownership and that it did not undertake/commit five of the six violations.

Staff does not admit or concede that it agrees with Respondent's position that penalties are inappropriate for the inherited violations. Respondent has had two years

⁴ Staff notes that Respondent parks cars on the west side of Bolinas Street, which is the half of Bolinas Street adjacent to County property and therefore legal interest from Marin County would likely be necessary if and when Respondent pursues a permit or amendment for repair, maintenance or other work in this area (if confirmed to be within the BCDC Bay or shoreline band jurisdiction).

since staff's September 15, 2020, letter and 12 months since staff's October 8, 2021, letter to resolve the inherited violations and has failed to do so or to make meaningful progress toward resolution.

Respondence could have resolve the violations between July 21, 2021, the date Respondent took ownership of both parcels, and July 29, 2022, the date staff mailed its Violation Report, but Respondent failed to do so. Instead, Respondent created a new violation. At the same daily penalty rates outlined in staff's VR&C for the period Respondent owned the property, Respondent is still liable for the maximum penalty of \$30,000 for each of the six allegations outlined therein as follows.

Regarding Violation 6, Respondent itself undertook an unauthorized material extraction and fill project on March 15, 2022. At the staff recommended maximum penalty of \$2,000/day for this egregious violation, it caps out at the \$30,000 administrative maximum within 15 days of March 15, 2022. The penalty for Violation 6 is appropriate.

For Violation 3, the permit is clear that the areas where fill was placed may only be used for public access purposes. As shown in Order Exhibit 1, the filled area includes Yolo Street where the record shows Respondent stores and repairs Seaplanes, has installed a fuel tank, a raised asphalt walkway, and parks (or parked) cars, none of which are public uses. At the staff recommended maximum penalty of \$2,000/day for this violation, it caps out at the \$30,000 administrative maximum within 15 days of July 21, 2021. The penalty for Violation 3 is appropriate.

For Violations 2, 4 and 5, at a daily rate of \$1,000/day/violation, the penalty caps out at the \$30,000 administrative maximum within 30 days of July 21, 2021. However, between purchasing the property and the present, Respondent submitted an incomplete permit application, which it has since then not updated with a single additional submission. Respondent has taken zero to nominal steps to resolve any of these three violations. The penalties for Violations 2, 4 and 5 are appropriate.

For Violation 1, at a daily rate of \$1,500, the total caps out at the \$30,000 administrative maximum within 20 days of July 21, 2021. However, between that date and the present, Respondent submitted an incomplete permit application, which it has since then not updated with a single additional submission. Respondent has taken zero to nominal steps to resolve Violation 1 and penalty is appropriate. The same is true for Violation 3 at a rate of \$2,000/ day.

Respondent cites financial hardship due to the pandemic and associated financial losses but submits no documentation to verify these statements nor evidence that it did or did not secure loans from the federal government to help overcome these challenges.

Respondent failed to resolve the violations voluntarily with staff between February 18, 2020, the date staff issued an initial contact letter to Commodore Marina, LLC, and to Aaron and Tiffany Singer, Seaplane Adventures, and July 29, 2022, the date of issuance of the VR&C. Voluntary resolution during this two and a half year time-period would have been the most economical way to proceed as would have the avoidance of undertaking in that time new unauthorized work (concrete and rebar ramp construction). Respondent should have earlier considered these factors.

Respondent's failure to voluntarily resolve the violations by now has cost the state valuable resources to prepare this formal enforcement proceeding.

Respondent states it wishes to invest resources in resolving the violations but staff's application filing letter, dated March 30, 2022, remains entirely unanswered, Respondent has not submitted a comprehensive plan set for staff review and approval to install the missing public access and maintain the existing public access⁵ and, as mentioned, Respondent created a new violation during its tenure necessitating issuance, and two re-issuances, of an Executive Director cease and desist order, to which Respondent has also not responded. Therefore, Respondent's statements of intent to comply are plainly betrayed by its behavior.

Respondent's SOD Exhibit C1, a 3-page architectural plan dated September 2, 2022, appears to duplicate Order Exhibit 3. If it is intended to be responsive to staff's application filing letter, dated March 30, 2022, it should be separately submitted and identified as such. It delineates the ADA parking on Bolinas Street. It incorrectly maps the mean high tide line rather delineating the edge of SF Bay at the inner edge of the tidal marsh vegetation up to the tidal elevation of plus five feet (+5 feet) mean sea level. The correlating 100-foot-shoreline band is also absent.

- 7. In June and July 2020, at the onset of COVID, Seaplane was engaged in constructive discussions with BCDC's representatives, but, as was the case with many businesses and government agencies, those discussions were variously interrupted and postponed due to the effects of COVID.**

There was no interruption of communication as reflected in the record. This is an excuse without merit. Respondent has had ample time and direction from BCDC staff to address these matters. For unknown reasons, Respondent has elected to ignore BCDC and its regulatory requirements.

Unresolved Issues

There are no unresolved issues.

⁵ Order Exhibit 3 is an incomplete, conceptual public access proposal.

Previous Enforcement Actions

No prior enforcement actions have been taken in this matter.

Recommendation

The Executive Director recommends that the Enforcement Committee adopt this Recommended Enforcement Decision and recommend that the full Commission issue the proposed Cease and Desist and Civil Penalty Order CCD2022.006.00.

Proposed Order CCD2022.006.00

A proposed Order consistent with this recommendation is attached (Exhibit A), along with the Violation Report and Complaint (Exhibit B) and Respondent's Statement of Defense (Exhibit C).

Exhibit List

- Exhibit A: Proposed Cease and Desist and Civil Penalty Order CCD2022.006.00 with three exhibits
- Exhibit B: Violation Report and Complaint #1, dated July 29, 2022 with its exhibits including corrected Exhibit 2 (*to correct the reversed identification of Lots 164 and 167*) and Corrected Exhibit 21 (*i.e., without Attachments 1 and 4 and with Attachments 2 and 3*) ER2019.063.00
- Exhibit C: Respondent's Statement of Defense (SOD), dated September 2, 2022, 9 pages, including the exhibits listed below
 - Exhibit C1: SOD CRKW drawings and plans 9.2.22, 3 pages
 - Exhibit C2: Declaration of Thorpe, 5 pages
 - Exhibit C3: Assembled Planning Information Packet (PIP)_P2981, 84 pages
 - Exhibit C4: Declaration of Temprosa, 8 pages
 - Exhibit C5: Marin County Community Development Agency (MCCADA) Planning Record, 17 pages
 - Exhibit C6: Pre-Application 1995, 37 pages
 - Exhibit C7: Use Permit Renewal Heliport, 17 pages
 - Exhibit C8: Use Permit Renewal Wireless, 249 pages
 - Exhibit C9: 2012 Use Permit Renewal UP 13-5, 2012, Valid until November 30, 2022, Condition of Approval established in UP 07-24 are incorporated into UP 13-5, 4 pages

Enforcement Committee Recommendation to the Full Commission:

Please check one of the three boxes indicating your decision, then sign and return the memorandum to BCDC Staff:

By a vote of ___ yeses, ___ noes, and ___ abstentions, the Enforcement Committee adopts the Executive Director's Recommended Enforcement Decision as its recommendation to the full Commission.

By a vote of ___ yeses, ___ noes, and ___ abstentions, the Enforcement Committee conditionally adopts the Executive Director's Recommended Enforcement Decision as its recommendation to the full Commission as specified in the attached memorandum.

By a vote of ___ yeses, ___ noes, and ___ abstentions, the Enforcement Committee declines to adopt the Executive Director's Recommended Enforcement Decision and recommends that the full Commission decline to issue the proposed Cease and Desist and Civil Penalty Order for the reasons specified in the attached memorandum.

MARIE GILMORE, Chair
Enforcement Committee
San Francisco Bay Conservation and Development Commission

Date