

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

50 California Street • Suite 2600 • San Francisco, California 94111 • (415) 352-3600 • Fax: (415) 352-3606 • www.bcdc.ca.gov

November 19, 2009

TO: All Commission Members

FROM: Will Travis, Executive Director (415/352-3653 travis@bcdc.ca.gov)
Adrienne Klein (415/352-3609 adriennek@bcdc.ca.gov)
John Bowers (415/352-3610 johnb@bcdc.ca.gov)

SUBJECT: Recommended Enforcement Decision Regarding Proposed Cease and Desist and Civil Penalty Order No. CCD 3-09, John M. Asuncion and the Blue Whale Sailing School
(For Commission consideration on December 3, 2009)

Summary

Attached to this memorandum are the following documents: (1) the Committee's Recommended Enforcement Decision (Attachment One); (2) the proposed Order (Attachment Two); and (3) the Violation Report (Attachment Three). The Recommended Enforcement Decision and the proposed order both refer to staff exhibits that are part of the Violation Report.



Making San Francisco Bay Better

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ATTACHMENT ONE (Recommended Enforcement Decision)

November 19, 2009

TO: All Commissioners and Alternates

FROM: BCDC Enforcement Committee

**SUBJECT: Recommended Enforcement Decision Regarding Proposed
Commission Cease and Desist and Civil Penalty Order No. CCD 3-09,
John M. Asuncion and the Blue Whale Sailing School
(For Commission consideration on December 3, 2009)**

Enforcement Committee Recommendation

The Enforcement Committee recommends that the Commission adopt this enforcement decision and issue the proposed Cease and Desist and Civil Penalty Order No. CCD 3-09 (“the proposed order”) to John M. Asuncion and the Blue Whale Sailing School (“the respondent” or “Mr. Asuncion”) for violations located on Assessor Parcel No. 015-01-037, known as the “Catherine Street Dock”; Assessor Parcel Nos. 015-01-013 and 015-02-007; and the State-owned lands in Simonds Canal and Alviso Slough adjacent to and west of the above-referenced parcels, which are all located at the foot of Catherine Street, in a town called Alviso, which is part of the City of San Jose, Santa Clara County and shall hereinafter collectively be referred to as the “Property.” The proposed order would direct Mr. Asuncion to: (1) cease from placing any fill in, extracting any material from, or making any changes in use of the Property; (2) within 90 days of the effective date of the order, or March 4, 2010, remove all of the unauthorized fill and uses from the property or submit a complete, fileable permit application, including but not limited to a lease from the State Lands Commission, an encroachment permit from the Santa Clara Valley Water District and, if required, discretionary approval from the City of San Jose, to the Commission for the existing fill and uses located on the Property; (3) within 136 days of the effective date of the order, or by April 20, 2010, obtain a Commission permit for the existing fill and uses located on the Property; (4) if by March 4, 2010, Mr. Asuncion does not submit a complete, fileable permit application to the Commission for the existing fill and uses located on the Property or, if upon receipt of a fileable application, the Commission denies any portion of the project, Mr. Asuncion shall remove the unauthorized fill and uses from the Property within



30 days of March 4, 2010, or of the date of the Commission's denial; and (5) pay a civil penalty of \$30,000 no later than April 30, 2010, \$15,000 of which would be stayed if Mr. Asuncion complies with all of the terms of the order.

Enforcement Decision

I. Background to the Alleged Violation

Mr. Asuncion owns and has placed fill on and changed the use of two small parcels known as Assessor Parcel Nos. 015-01-013 and 015-02-007, located on a levee adjacent to State-owned lands in Simonds Canal and Alviso Slough, in an unincorporated area of Santa Clara County. Mr. Asuncion's two parcels are encumbered by an easement in favor of the Santa Clara Valley Water District (SCVWD) for channel maintenance and related purposes. Mr. Asuncion has also placed fill on and changed the use of Assessor Parcel No. 015-01-037, known as the "Catherine Street Dock," which is owned in fee by the SCVWD. Mr. Asuncion has also placed fill on and changed the use of the State-owned lands in Simonds Canal and Alviso Slough adjacent to and west of APNs 015-01-037, 015-01-013 and 015-02-007. The above-listed parcels and State owned water property shall hereinafter collectively be referred to as the "Property."

Prior to the date of this report and continuing through the present, Mr. Asuncion conducted the following ongoing activities at the site:

- a. In the Bay and shoreline band, placement of fill consisting of concrete pieces and dirt on dates that include, but are not limited to, March 20, 2000, May 2, 2000, May 22, 2000, May 15, 2000, June 13, 2000, August 2, 2000, September 18, 2000 and on or before December 18, 2000;
- b. In the shoreline band and possibly in the Bay, placement of fill consisting of approximately a total of 60 cubic yards of gravel and in at least three episodes of 20 cubic yards each on or about March 20, 2000, March 7, 2007, and August 8, 2008;
- c. In the shoreline band and possibly in the Bay, placement of an unknown volume of compost on multiple dates including, but not limited to, March 20, 2000, May 22, 2000, and several times during May, 2005;
- d. In the Bay and shoreline band, placement of fill incidental to the operation of commercial boat launching, docking, storage, repair and salvage facility and sailing school consisting of, but not limited to, four concrete slabs, boats, docks, a gangway and other equipment; and
- e. Change in use of the Bay and shoreline band consisting of operation of commercial boat launching, docking, storage, repair and salvage facility and sailing

Since becoming aware of Mr. Asuncion's unauthorized activities at the property, the BCDC staff has made Mr. Asuncion aware of the BCDC jurisdiction and the regulatory requirements. In addition to many site visits, telephone calls and emails, the staff has sent Mr. Asuncion several enforcement letters advising him how to make an application for a permit, what activities the staff believed it could and could not approve, what kind of property interest Mr. Asuncion would require to obtain a BCDC permit for the fill and uses occurring at the property, and informed Mr. Asuncion that if he did not either legalize or remove the fill and

uses, he would be subject to an enforcement proceeding. The primary letters to Mr. Asuncion are dated February 28, 2001, January 13, 2006, June 28, 2006, and January 31, 2007.

During the nine and a half year period since Mr. Asuncion has owned his two parcels and occupied the Property, he has failed to submit an application to BCDC to legalize the fill and uses at the Property. While he has removed some of the fill that he initially placed, such as a fence surrounding the site and an office trailer and flagpole, he has also continued to place new fill at the site, such as approximately six boat docks and gangway in the Bay, which were not originally in place, and repeatedly placed riprap and gravel and mulch in shoreline band. Overall, the intensity of use of the portions of the site located in the shoreline band have diminished while the intensity of use of the portions of the property located in the Bay have increased, especially during the winter hunting months, when Mr. Asuncion rents berth space at the docks to duck hunters.

Mr. Asuncion has had ample opportunity to fully resolve these violations but failed to do so. As such, the staff believes an order is necessary to require Mr. Asuncion to fully and imminently resolve the violation.

The proposed cease and desist order directs Mr. Asuncion to remove the unauthorized fill and uses from the Property. It also affords Mr. Asuncion the opportunity to apply for a permit for fill and uses at the Property, all of which is located within the Commission's jurisdiction. Any forthcoming proposal located on Mr. Asuncion's two parcels would have to be consistent with the provisions of the SCVWD's channel maintenance easement and authorized by an encroachment permit issued to Mr. Asuncion by the SCVWD. Any forthcoming proposal located on the SCVWD's parcel would have to be authorized by an encroachment permit issued to Mr. Asuncion by the SCVWD. Any forthcoming proposal located on the SLC's property would have to be subject to a lease issued to Mr. Asuncion. If local discretionary approval is required by the City of San Jose, such approval is also a necessary filing requirement. These four permit application-filing requirements are among many others listed in the Commission's regulations and outlined in the permit application and instructions.

By letter dated April 10, 2009, the staff of the SLC informed Mr. Asuncion that to obtain a lease for the property on which he has placed boat docks and a gangway, he must submit a signed and completed application, a fee and seven listed items. The letter informed Mr. Asuncion that if he had not done so by June 1, 2009, the Commission would take legal action. Mr. Asuncion did not fully respond to the staff of the SLC's letter. As such, on June 1, 2009, the State Lands Commission authorized its staff to take all legal steps necessary, including litigation, for trespass, ejectment, and removal of the unauthorized docking facilities located in Simonds Canal and Alviso Slough (Exhibit 1 to the Recommended Enforcement Decision). Therefore, it appears unlikely Mr. Asuncion can submit a fileable application to BCDC to legalize the fill and uses in the Bay. Nonetheless, the order affords Mr. Asuncion this opportunity.

The order requires Mr. Asuncion to pay \$30,000, one quarter of the total civil penalty that the Commission could seek, and stays \$15,000 for full compliance with the terms of the order. Mr. Asuncion is potentially liable for an administrative penalty of \$120,000 or the maximum administrative penalty of \$30,000 for each of the four parcels on which Mr. Asuncion has placed fill and changed the use of without prior benefit of a Commission permit.

Section 66641.9 of the McAteer-Petris Act 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."

Mr. Asuncion's violation is readily susceptible to resolution and has not caused significant harm to the Bay's resources or to public access. The state has invested significant time meeting with and writing to Mr. Asuncion, coordinating with sister agencies and preparing this report. Mr. Asuncion does not appear to have extensive financial resources. As noted in the violation report, Mr. Asuncion has undertaken some voluntary removal efforts but the majority of the fill and uses are ongoing as of the date of mailing of this report, and he has continued to place fill in the Commission's jurisdiction even though he is aware that he requires and lacks permission to do so. Mr. Asuncion would appear to have economic gain from his use of the property in that he pays no rent to the State Lands Commission to use public land to moor docks, which he rents to boaters and hunters.

Therefore, the Enforcement Committee believes it would not be reasonable to seek the maximum administrative penalty of \$120,000 but that it is reasonable to seek an administrative penalty of \$30,000. Furthermore, Enforcement Committee believes that it is also reasonable to stay half of the \$30,000 penalty to act as an incentive to comply with the order.

The Commission's regulations require that the Violation Report and its exhibits, a Statement of Defense Form and Chapter 13 of the Commission's regulations be sent to the Respondent by certified mail. As explained below, the staff's efforts to serve Mr. Asuncion by certified mail on May 14, 2009, were unsuccessful. Therefore, at the request of the staff, on July 15, 2009, the Santa Clara County Sheriff's Office personally served the Violation Report on Mr. Asuncion.

As of October 15, 2009, Mr. Asuncion had not submitted a permit application to BCDC nor had he removed all of the fill and uses at the site, all of which is unauthorized.

Mr. Asuncion did not submit a Statement of Defense.

The conclusions in this recommendation and the directives of the proposed Order are based on the record in this case including the Violation Report, Enforcement File No. ER 01-19 (John Asuncion and the BWSS), and Permit File Nos. M67-8 (City of Alviso) and 5-02 (SCVWD).

II. Essential Staff Allegations

Based on the staff investigation, the staff alleges as follows:

A. The Commission has jurisdiction pursuant to California Government Code Section 66610 over San Francisco Bay and its shoreline band. Under California Government Code Section 66632, a permit from the Commission must first be obtained for placement of fill and/or

substantial change in use of any land or water area within the Commission's jurisdiction. The term "fill" means earth or any other substance or material, including pilings or structures placed on pilings, and structures floating at some or all times and moored for extended periods, such as houseboats and floating docks.

B. The factual allegations contained in the Violation Report are formally incorporated herein by reference.

C. As described in great detail in the Violation Report, Mr. Asuncion has placed fill in the Bay and in the shoreline band in violation of the requirements of the McAteer-Petris Act that a permit be obtained for such fill.

D. Like the staff of BCDC, the staff of the SLC has been working with Mr. Asuncion to grant him a lease over its property to legalize the fill and uses thereon. However, Mr. Asuncion repeatedly failed to submit a fileable application for a lease to the SLC. At a public hearing on April 9, 2009, the State Lands Commission deferred taking action to eject Mr. Asuncion from its property, as recommended by its staff, and granted Mr. Asuncion until June 1, 2009, to submit a fileable application and other items to the staff to legalize the docking facilities he had placed on its property. (Exhibit 1 to the Recommended Enforcement Decision)

E. On May 14, 2009, the staff sent the Violation Report, the Statement of Defense Form, and a copy of Chapter 13 of the Commission's regulations to Mr. Asuncion and to Rocky Ortega, his attorney, by certified mail as required by the Commission's regulations. (Exhibit 2 to the Recommended Enforcement Decision)

F. As of June 1, 2009, Mr. Asuncion had not met this deadline and the State Lands Commission authorized its staff to take all legal steps necessary, including litigation, for trespass, ejectment, and removal of the unauthorized docking facilities located in Simonds Canal and Alviso Slough. (Exhibit 3 to the Recommended Enforcement Decision)

G. During a conversation with Mr. Ortega on an unknown date in June, 2009, he informed Ms. Klein that he was no longer representing Mr. Asuncion.

H. In early June, the USPS returned as undelivered the certified mail materials that staff had sent to Mr. Asuncion on May 4, 2009.

I. On July 15, 2009, the Santa Clara County Sheriff's Office personally served the Violation Report, the Statement of Defense Form, and a copy of Chapter 13 of the Commission's regulations to Mr. Asuncion along with a cover letter dated July 9, 2009. The cover letter informed Mr. Asuncion that the Commission's Enforcement Committee was scheduled to hold an administrative hearing on the matter on the afternoon of September 24, 2009. (Exhibits 4 and 5 to the Recommended Enforcement Decision)

J. On September 10, 2009, the staff mailed the meeting notice and materials for the public hearing on September 24, 2009, to Mr. Asuncion at his residential address and post office box by regular mail, as required by the Commission's regulations, and by certified mail, as a courtesy.

K. On September 23, 2009, the staff sent Mr. Asuncion an email reminding him that the Enforcement Committee was meeting the following day. Attached to the email was a copy of the meeting notice. (Exhibit 6 to the Recommended Enforcement Decision)

L. On September 23, 2009, Mrs. Asuncion responded to staff alleging that they had not received adequate notice of the meeting on September 24, 2009, stating that Mr. Asuncion was

not available the following day and requesting that the hearing be postponed. (Exhibit 6 to the Recommended Enforcement Decision)

M. On September 23, 2009, the staff informed Mrs. Asuncion that a meeting notice had been mailed to them to two addresses on September 10, 2009, and a copy of their email requesting postponement would be provided to the Enforcement Committee. (Exhibit 7 to the Recommended Enforcement Decision)

N. On September 24, 2009, the Enforcement Committee postponed Mr. Asuncion's agenda item and by email dated September 25, 2009, the staff informed the Asuncions of the Committee's decision. The staff also notified the Asuncions of five dates that the next meeting of the Enforcement Committee would likely occur and that the meeting notice and materials would be mailed to them 10 days in advance of the meeting and would be substantially the same as those already in their possession. (Exhibit 8 to the Recommended Enforcement Decision)

O. On October 5, 2009, the staff notified Mr. and Mrs. Asuncion by email that the Enforcement Committee would meet on October 29, 2009, to consider their enforcement matter. (Exhibit 9 to the Recommended Enforcement Decision)

P. On October 15, 2009, the staff mailed the meeting notice and materials for the public hearing on October 29, 2009, to Mr. Asuncion at his residential address and post office box by regular mail, as required by the Commission's regulations, and by certified mail, as a courtesy.

Q. Also on October 15, 2009, the staff notified Mr. and Mrs. Asuncion by email that it had posted the meeting materials that day. The staff also sent the materials by email with the exception of the Violation Report. (Exhibit 10 to the Recommended Enforcement Decision)

R. On October 28, 2009, Mrs. Asuncion requested by email a postponement of the Enforcement Committee meeting on October 29, 2009. She stated that Mr. Asuncion was out of town and would not be returning for several months and that BCDC should await the outcome of the Asuncion's lawsuit against the South Bay Yacht Club. (Exhibit 11 to the Recommended Enforcement Decision)

S. On October 28, 2009, Ms. Klein informed Mrs. Asuncion by email that the staff intended to proceed with the Enforcement Committee meeting and that she would provide a copy of Mrs. Asuncion's request to the Committee members. (Exhibit 12 to the Recommended Enforcement Decision)

T. On October 29, 2009, Mrs. Asuncion again requested by email that the meeting be postponed. (Exhibit 13 to the Recommended Enforcement Decision)

U. On October 29, 2009, the Enforcement Committee determined not to postpone its meeting. It held a public hearing and voted 3-0 to adopt a modified staff recommendation. The Committee elected to modify Section II-B-1 of the order to require Mr. Asuncion to remove the fill within 90 rather than 30 days of the order, if he should elect to remove the fill rather than to seek authorization, in part or in full, to retain it. The Committee also elected to add Section II-B-3 to the order, which states that the Executive Director may extend any of the deadlines in Section II-B of the order for good cause upon receiving written request for an extension no later than 10 days before the expiration of the deadline. The Committee stated that good cause would constitute only a circumstance that was clearly beyond Mr. Asuncion's control and not one that was within his control. For example, an extension of time might be granted to allow Mr.

Asuncion to complete the submittal of an otherwise fileable application to BCDC to legalize the fill and uses at the property while he awaited the SCVWD, the SLC or another agency to take action on a fileable application from Mr. Asuncion to that agency. However, an extension of time would not be granted to allow Mr. Asuncion to complete the submittal of an application to the SCVWD, the SLC or to any other agency that Mr. Asuncion might require a permit from to submit a fileable application to BCDC to legalize the fill and uses at the property.

V. On October 29, 2009, Ms. Klein informed Mr. and Mrs. Asuncion by email of the outcome of its meeting that afternoon. Ms. Klein also stated that the Commission would consider the matter on December 3, 2009. (Exhibit 14 to the Recommended Enforcement Decision)

W. Mr. Asuncion has negligently and, later, knowingly and intentionally, violated the McAteer-Petris Act by placing fill and other materials within the Commission's jurisdiction beginning in 2001 and continuing through the present. Mr. Asuncion has studiously avoided submitting an application and leaves the Commission with no option but to issue the attached cease and desist and civil penalty order.

III. Essential Allegations Admitted or Not Contested by the Respondent

Mr. Asuncion did not submit a Statement of Defense.

IV. Allegations Denied by the Respondents

Mr. Asuncion did not submit a Statement of Defense.

V. Allegations of which the Respondents have no personal knowledge

Mr. Asuncion did not submit a Statement of Defense.

VI. Respondent's Defenses and Mitigating Factors

Mr. Asuncion did not submit a Statement of Defense.

VII. Staff Rebuttals to the Allegations Denied by the Respondents

Mr. Asuncion did not submit a Statement of Defense.

VIII. Summary and Analysis of Unresolved Issues

Mr. Asuncion did not submit a Statement of Defense.

IX. Statement of Whether the Executive Director Has Issued a Cease and Desist Order

The Executive Director has not issued a cease and desist order.

X. Proposed Order

A copy of the proposed order is attached to, and included as part of, this enforcement decision.



Making San Francisco Bay Better

**ATTACHMENT TWO
(Proposed Order)**

December 3, 2009

Mr. John M. Asuncion
1299 Lennon Way
San Jose, California 95125-3419

AND

Blue Whale Sailing School, Inc.
c/o Mr. John M. Asuncion, President and Founder
P. O. Box 7435
San Jose, California 95150

SUBJECT: Commission Cease and Desist and Civil Penalty Order No. CCD 3-09;
John M. Asuncion and the Blue Whale Sailing School, Inc.
Effective Date: _____, 2009

Ladies and Gentlemen:

I. Cease and Desist and Civil Penalty Order

A. Name of Person Subject to this Order and Description of the Activity. On January 31, 2001, the San Francisco Bay Conservation and Development Commission (“the Commission”) commenced an enforcement action against John M. Asuncion (“Mr. Asuncion”), and the Blue Whale Sailing School, Inc. (“the BWSS”), of which John M. Asuncion is the President and Founder, concerning the unauthorized change in use of the Bay and shoreline band consisting of the operation of commercial boat launching, docking, storage, repair and salvage facility and sailing school including the placement of fill consisting of concrete slabs, boats, docks, a gangway and other equipment, dirt, concrete, gravel and compost.

B. Identification of the Property where the Activity has been undertaken. Mr. Asuncion changed the use of, and placed this fill on, property located at the foot of Catherine Street, in a town called Alviso, which is part of the City of San Jose, Santa Clara County and specifically identified as Assessor Parcel No. 015-01-037, known as the “Catherine Street Dock,” Assessor Parcel Nos. 015-01-013 and 015-02-007, and the State-owned lands in Simonds Canal and Alviso Slough adjacent to and west of the above-

**Commission Cease and Desist
and Civil Penalty Order No. CCD 3-09**
John M. Asuncion, Blue Whale Sailing School
December 3, 2009
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referenced parcels. The above-listed parcels shall hereinafter collectively be referred to as the "Property."

Pursuant to California Government Code Section 66638 et. seq., the Commission orders Mr. Asuncion, all of his agents, and any other person/s acting in concert with him, and any and all of their successors and assigns to cease and desist all activity in violation of the McAteer-Petris Act (California Government Code Sections 66600 through 66677) and to comply fully with Sections II and III of this order.

II. Cease and Desist Order

A. **Cease and Desist.** Cease from placing any fill in, extracting any material from, or making any changes in use of the Property; and

B. Remove Unauthorized Fill or Legalize the Unauthorized Fill and Uses

1. **Remove Unauthorized Fill.** Within 90 days of the effective date of the order, or by March 4, 2010, remove all of the unauthorized fill and uses from the Property consisting of, but not necessarily limited to, the operation of commercial boat launching, docking, storage, repair and salvage facility and sailing school including the placement of fill consisting of concrete slabs, boats, docks, a gangway and other equipment, dirt, concrete, gravel and compost;

OR

2. a. **Submit a Fileable After-the-Fact Permit Application.** Within 90 days of the effective date of the order, or by March 4, 2010, submit a complete, fileable permit application to the Commission as defined by the Commission's Regulations (14 CCR §10610, Applications for Minor Permits, and 14 CCR §10310, Summary of Prerequisites for Filing a major Permit Application), including but not limited to a lease from the State Lands Commission, an encroachment permit or other documentation from the Santa Clara Valley Water District and, if required, discretionary approval from the City of San Jose, to the Commission for the existing fill and uses located on the Property consisting of, but not necessarily limited to, the operation of commercial boat launching, docking, storage, repair and salvage facility and sailing school including the placement of fill consisting of concrete slabs, boats, docks, a gangway and other equipment, dirt, concrete, gravel and compost; and

b. **Obtain a Commission Permit.** Within 136 days of the effective date of the order, or by April 20, 2010, obtain a Commission permit for the existing fill and uses located on the Property; and

c. **Failure to Submit or Denial of the After-the-Fact Permit Application and Removal of Unauthorized Fill.** If by March 4, 2010, a complete, fileable permit application for the existing fill and uses located on the Property is not submitted to the Commission or, if upon receipt of a fileable application, the Commission denies the project or any portion thereof,

remove the unauthorized fill and uses from the Property within 30 days of failure to submit a complete, fileable permit application to the Commission for the existing fill and uses located on the Property or of the date of the Commission's denial, whichever is earlier.

- 3. Extension of Time Limits for Good Cause.** The Executive Director has the discretion to extend any of the deadlines in Section II-B of the cease and desist order for good cause upon receiving written request for an extension no later than 10 days before the expiration of the deadline.

III. Civil Penalty Order

Pursuant to California Government Code Sections 66641.5 through 66641.9, the Commission hereby orders Mr. Asuncion to pay a civil penalty of \$30,000 no later than April 30, 2010, \$15,000 of which would be stayed if Mr. Asuncion complies with all of the terms of the order:

A. For the placement of fill on and change in use of Assessor Parcel No. 015-01-013, located on a levee adjacent to State-owned lands in Simonds Canal and Alviso Slough, the Commission has determined that it is reasonable to seek a penalty of \$20.547 per day for 365 days for a total of \$7,500. This time period is based on the number of days the unauthorized fill remained in the Commission's jurisdiction for any one-year-long period since the inception of the violation on March 20, 2000.

B. For the placement of fill on and change in use of Assessor Parcel No. 015-02-007, located on a levee adjacent to State-owned lands in Simonds Canal and Alviso Slough, the Commission has determined that it is reasonable to seek a penalty of \$20.547 per day for 365 days for a total of \$7,500. This time period is based on the number of days the unauthorized fill remained in the Commission's jurisdiction for any one-year-long period since the inception of the violation on March 20, 2000.

C. For the placement of fill on and change in use of Assessor Parcel No. 015-01-037, known as the "Catherine Street Dock," which is owned in fee by the SCVWD, the Commission has determined that it is reasonable to seek a penalty of \$20.547 per day for 365 days for a total of \$7,500. This time period is based on the number of days the unauthorized fill remained in the Commission's jurisdiction for any one-year-long period since the inception of the violation on March 20, 2000.

D. For the State-owned lands in Simonds Canal and Alviso Slough adjacent to and west of APNs 015-01-037, 015-01-013 and 015-02-007, the Commission has determined that it is reasonable to seek a penalty of \$20.547 per day for 365 days for a total of \$7,500. This time period is based on the number of days the unauthorized fill remained in the Commission's jurisdiction for any one-year-long period since the inception of the violation on March 20, 2000.

E. If Mr. Asuncion fully complies with Section II of this order, the Commission will stay all but \$15,000 of the total civil penalty. Therefore, the Commission hereby orders

Mr. Asuncion to submit, by April 30, 2010, a cashier's check in the amount of \$15,000. The cashier's check shall be made payable to the San Francisco Bay Conservation and Development Commission - Bay Fill Cleanup and Abatement Fund.

F. If Mr. Asuncion fails to fully comply with Section II of this order, the Commission hereby orders Mr. Asuncion to submit to the Commission, within 30 days of the date of written notice from the Commission staff that he has failed to fully comply with Section II of this order, a second cashier's check in the amount of \$15,000. The cashier's check shall be made payable to the San Francisco Bay Conservation and Development - Bay Fill Cleanup and Abatement Fund. The Commission staff shall be responsible for determining whether or not Mr. Asuncion has fully complied with Section II of this order.

IV. Findings

This order is issued based on the following findings and the relevant Commission files including BCDC Permit File Nos. M67-8 and 5-02, BCDC Enforcement File No. ER 01-19, the Violation Report, each of which is incorporated herein by reference. The Staff Exhibits (SE) referenced in this order are attached to the Violation Report.

A. Under California Government Code Section 66610(a), the Commission has "San Francisco Bay" and "shoreline band" jurisdictions at this location (SE 1 of the Violation Report).

B. Under California Government Code Section 66632(a), a permit from the Commission must first be obtained before one places fill, extracts materials worth \$20 or more, or makes any substantial change in use of any water, land or structure within the area of the Commission's jurisdiction. Failure to obtain a Commission permit before undertaking any of the foregoing work constitutes a violation of California Government Code Section 66632. "Fill" is defined in this section to include "earth or any substance or material, including pilings or structures placed on pilings, and structures floating at some or all times and moored for extended periods, such as houseboats and floating docks."

C. On July 15, 2009, the Santa Clara County Sheriff's Office personally served the Violation Report, the Statement of Defense Form, and a copy of Chapter 13 of the Commission's regulations to Mr. Asuncion along with a cover letter dated July 9, 2009. (Exhibits 4 and 5 to the Recommended Enforcement Decision)

D. Between the date of service and the date of mailing of this report, Mr. Asuncion did not submit a Statement of Defense. The facts support the staff's allegation that Mr. Asuncion placed fill in, and undertook changes in the use of the Property, which is entirely located within the Commission's Bay and shoreline band jurisdiction without obtaining the Commission's prior authorization.

E. An administrative penalty is justified to resolve this matter because Mr. Asuncion has:

1. Placed fill in, and undertaken changes in use of the Commission's Bay and shoreline band jurisdiction on his property, the SCVWD's property and the SLC's property without obtaining the Commission's prior authorization;
2. Negligently and knowingly and intentionally violated the McAteer-Petris Act by continuing to place fill in, and undertaken changes in use of the Commission's Bay and shoreline band jurisdiction without first obtaining a BCDC permit;
3. Failed to either remove or obtain authorization for the unauthorized fill that he has placed in the Commission's Bay and shoreline band jurisdictions after being notified of the alleged violation;
4. Failed to respond to the violation noticed sent by the staff by either fully removing all of the fill and uses within the Commission's jurisdiction or submitting a fileable permit application and subsequently obtaining a BCDC permit to make legal use of any portion of the Property; and
5. Caused the staff to spend a significant amount of its limited resources to resolve these violations of law.

F. The Commission is seeking a total administratively penalty of \$30,000; that is an administrative penalty of \$7,500 per parcel. Furthermore, the Commission is willing to stay half of the penalty for full compliance with the terms and conditions of this order.

V. Disclaimer of Effect of Order on Private Rights of Public Regulation

This order shall have no effect on any duties, rights, or obligations established by private agreement or by the laws and regulations of other governmental bodies.

VI. Disclaimer of Recognition of Property Rights

This order shall not constitute any recognition of property rights.

VII. Respondent's Right to Seek Judicial Review of this Order

Pursuant to the McAteer-Petris Act, Sections 66639 and 66641.7(a), within 30 days after service of this order issued under Sections 66638 and 66641.6, the respondent may file with the superior court a petition for writ of mandate for review thereof pursuant to Section 1094.5 of the Code of Civil Procedure.

VIII. Strict Compliance Obligation and Possible Court Action for Noncompliance

Strict compliance with this order is required. Pursuant to the McAteer-Petris Act, Sections 66640 and 66641.7(b), failure to comply with the terms of this order or to pay all applicable administrative civil penalties may result in the Commission filing a lawsuit against the parties who fail to comply with this order. Pursuant to the McAteer-Petris Act, Section 66641, any person who intentionally or negligently violates a Commission cease and desist order may be liable civilly for up to \$6,000 for each day in which such violation persists.

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

50 California Street • Suite 2600 • San Francisco, California 94111 • (415) 352-3600 • Fax: (415) 352-3606 • www.bcdc.ca.gov

File:	ER01-19
Date Mailed to Office of the Sherriff:	July 9, 2009
35th Day After Mailing to Office of the Sherriff:	August 13, 2009
45th Day After Mailing to Office of the Sherriff:	August 24, 2009
60th Day After Mailing to Office of the Sherriff:	September 7, 2009
Hearing Date:	September 24, 2009

**VIOLATION REPORT/COMPLAINT
FOR THE IMPOSITION OF ADMINISTRATIVE CIVIL PENALTIES
ENFORCEMENT INVESTIGATION NO. ER01-19,
JOHN M. ASUNCION AND THE BLUE WHALE SAILING SCHOOL**

FAILURE TO RESPOND TO THIS VIOLATION REPORT/COMPLAINT FOR THE ADMINISTRATIVE IMPOSITION OF CIVIL PENALTIES BY COMPLETING THE ENCLOSED STATEMENT OF DEFENSE FORM AND ENCLOSING ALL PERTINENT DECLARATIONS UNDER PENALTY OF PERJURY, PHOTOGRAPHS, LETTERS, AND OTHER WRITTEN DOCUMENTS COULD RESULT IN A CEASE AND DESIST ORDER, A PERMIT REVOCATION ORDER, OR A CIVIL PENALTY ORDER BEING ISSUED TO YOU OR A SUBSTANTIAL ADMINISTRATIVE CIVIL PENALTY BEING IMPOSED ON YOU WITHOUT YOUR HAVING AN OPPORTUNITY TO CONTEST THEM OR TO INTRODUCE ANY EVIDENCE.

The San Francisco Bay Conservation and Development Commission is issuing this violation report/complaint for the administrative imposition of civil penalties and statement of defense form because the Commission's staff believes that you may be responsible for or involved with a possible violation of either the Commission's laws or a Commission permit. The report contains a brief summary of all the pertinent information that staff currently has concerning the possible violation and reference to all the pertinent evidence on which the staff currently relies. All the evidence to which this report refers to is available in the enforcement file for this matter located at the Commission's office. You can review these materials at the Commission's office or to have copies made at your expense or both by contacting Adrienne Klein or John Bowers of the Commission's staff at telephone number (415) 352-3600. This report also informs you of the nature of the possible violation so that you can fill out the enclosed statement of defense form and otherwise be prepared for Commission enforcement proceedings.

Issuance of this report and the enclosed statement of defense form is the first step in formal Commission enforcement proceedings. Subsequently, either the Commission or its enforcement committee may hold an enforcement hearing and the Commission will determine what, if any, enforcement action to take.



Making San Francisco Bay Better

Careful reading and a timely response to these materials is essential to allow you to present your side of the case to the Commission. A copy of the Commission's enforcement regulations is also included so that you can fully understand the Commission's enforcement procedures. If you have any questions concerning either the staff violation report, the enclosed statement of defense form, the procedures that the Commission and its enforcement committee follow, or anything else pertinent to this matter, you should contact, as quickly as possible, Adrienne Klein or John Bowers of the Commission's staff at telephone number (415) 352-3600. Thank you for your cooperation.

1. Person or persons believed responsible for illegal activity:

Name: Mr. John M. Asuncion, President and Founder,
Blue Whale Sailing School
Address: P. O. Box 7435
San Jose, California 95150
Telephone: (408) 979-1537

2. Brief description of the nature of the illegal activity:

Ongoing Activities:

- a. In the Bay and shoreline band, placement of fill consisting of concrete pieces and dirt on dates that include, but are not limited to, March 20, 2000, May 2, 2000, May 22, 2000, May 15, 2000, June 13, 2000, August 2, 2000, September 18, 2000 and on or before December 18, 2000;
- b. In the shoreline band and possibly in the Bay, placement of fill consisting of approximately a total of 60 cubic yards of gravel and in at least three episodes of 20 cubic yards each on or about March 20, 2000, March 7, 2007, and August 8, 2008;
- c. In the shoreline band and possibly in the Bay, placement of an unknown volume of compost on multiple dates including, but not limited to, March 20, 2000, May 22, 2000, and several times during May, 2005;
- d. In the Bay and shoreline band, placement of fill incidental to the operation of commercial boat launching, docking, storage, repair and salvage facility and sailing school consisting of, but not limited to, four concrete slabs, boats, docks, a gangway and other equipment; and
- g. Change in use of the Bay and shoreline band consisting of operation of commercial boat launching, docking, storage, repair and salvage facility and sailing school.

Resolved Activities:

- a. In the Bay and shoreline band, placement of fill consisting of a fence surrounding the Property, an office trailer, boats and assorted equipment.

3. Description of and location of property on which illegal activity occurred:

At the foot of Catherine Street, in a town called Alviso, which is part of the City of San Jose, Santa Clara County (SE 1):

Assessor Parcel No. 015-01-037 and known as the "Catherine Street Dock";

Assessor Parcel Nos. 015-01-013 and 015-02-007; and
The State-owned lands in Simonds Canal and Alviso Slough adjacent to and west of the
above-referenced parcels.

The above-listed parcels shall hereinafter collectively be referred to as the "Property."

4. Name of owner, lessee (if any), and other person(s) (if any) who controls property on which illegal activity occurred:

Property: Assessor Parcel Nos. 015-01-013 and 015-02-007
Name: Mr. John M. Asuncion, President and Founder,
Blue Whale Sailing School (holder of fee ownership interest)
Address: P. O. Box 7435
San Jose, California 95150
Telephone: (408) 979-1537

AND

Name: Santa Clara Valley Water District (SCVWD) (holder of easement for
channel maintenance and related purposes)
Address: 5750 Almaden Expressway
San Jose, California 95118-3614
Telephone: (408) 265-2607

Property: Assessor Parcel No. 015-01-037 and known as the "Catherine Street
Dock
Name: Santa Clara Valley Water District (SCVWD)
Address: 5750 Almaden Expressway
San Jose, California 95118-3614
Telephone: (408) 265-2607

AND

Property: The State-owned lands in Simonds Canal and Alviso Slough
adjacent to and west of APNs 015-01-037, 015-01-013 and 015-02-007
Name: State Lands Commission (SLC)
Address: 100 Howe Ave Suite 100 South
Sacramento, CA 95825-8202
Telephone: (916) 574-1900

5. Approximate date (and time if pertinent and known) illegal activity occurred:

Beginning on or about March 20, 2000, and continuing through the present.

6. Summary of all pertinent information currently known to the staff in the form of proposed findings with references to all pertinent supporting evidence contained in the staff's enforcement file (the file is available at the Commission's office for your review; you should call the above listed staff enforcement officer to arrange to the review the file):

- a. On February 21, 1967, the Commission issued BCDC Permit No. M67-8 to the City of Alviso to construct a small loading dock, consisting of interlaced pilings, at the end of Catherine Street. (SE 2)
- b. On October 4, 1993, the Blue Whale Sailing School (BWSS) registered as a business with the California Secretary of State. John M. Asuncion is listed as the Agent for Service of Process. (SE 3)
- c. Sometime between May 17, and June 11, 1999, Adrienne Klein, BCDC enforcement staff analyst, conducted a site visit to the Property (in relation to allegations against Kay Bell, the former owner of APNs 015-01-013 and 015-02-007), and took a series of photographs, two of which are attached, in now relevant part, depicting the loading dock at the end of Catherine Street from two different directions. (SE 4)
- d. On March 20, 2000, three members of the Santa Clara Valley Water District's (SCVWD) staff conducted a site visit to the Property and observed that Mr. Asuncion had placed some boats in the shoreline band and in the Bay, among other fill and activities, as shown in the attached photos numbered 7 and 8. (SE 5)
- e. On March 20, 2000, Adrienne Klein and Mr. Asuncion spoke by telephone. During the conversation, Mr. Asuncion informed Ms. Klein that he was in the process of purchasing some parcels in Alviso, that he had placed approximately 15-20 cubic yards of gravel, imported concrete blocks to build a garden and that he intended to use the Property to run a sailing school and would be bringing in a trailer, boats and other equipment related to the business operation. (SE 6)
- f. On March 23, 2000, Jon A. Adamson, Officer, U.S. Fish and Wildlife Service, observed that Mr. Asuncion had imported broken concrete pieces to the shoreline band, among other fill placement, as shown in the attached photographs of the Property. (SE 7)
- g. On May 2, 2000, the SCVWD staff conducted a site visit and observed that the broken concrete pieces and cut brush had been placed in the Bay at the northwest corner of the Catherine Street Dock, that concrete pieces had been placed the shoreline band to construct a retaining wall on the east side of the Catherine Street Dock landing, and that compost and boats had been placed in the shoreline band, among other fill placement, as shown in the attached photographs of the Property. (SE 5)
- h. On May 22, 2000, Ms. Moss or a colleague, SCVWD, observed the importation and placement of varied sizes of concrete pieces and compost in the Bay and shoreline band at the southwest and southeast ends of the Catherine Street Dock landing as shown in the attached photograph of APN 015-02-007 (which she mislabeled as APN 015-02-000). On a note attached to the photograph, Ms. Moss states that dirt, rocks, concrete and brush are being shoved into the water. (SE 8)
- i. On May 25, 2000, Ms. Moss or a colleague, SCVWD, observed the continued importation and placement of concrete debris, compost and concrete blocks in the Bay and shoreline band at the northwest, southwest and southeast ends of the Catherine Street Dock landing as shown in the attached photographs of the

- Property. On a note attached to the photographs, she states that dirt, rocks, concrete and brush are being shoved into the water from the Catherine Street Dock parcel. (SE 8)
- j. On June 1, 2000, a grant deed indicating that Kell Bell, Jr. had transferred APNs 015-01-013 and 015-02-007 to the Blue Whale Sailing School, Inc., a California non-profit corporation, was recorded in Santa Clara County. Records indicate that the price of sale for each parcel was \$150,000. (SE 9)
 - k. On June 13, 2000, Ms. Moss or a colleague, SCVWD, observed that dirt had been placed on the concrete pieces in the Bay at the northwest corner of the Catherine Street Dock, among other fill placement, as shown in the attached photograph of APN 015-02-007. (SE 8)
 - l. On June 25, 2000, Mr. Asuncion submitted a “worksheet” to BCDC stating that he wished to conduct dredging, build boat docks, an office, a lighthouse and a caretaker home to run a sailing program and improve public access. He asked if he could install new fences, cut weeds and tuelles. He stated that he had already removed weeds, imported 12 cubic yards of gravel and placed fencing. He stated that he had removed weeds, concrete, car engines, wood and engine blocks. (SE 10)
 - m. On August 2, 2000, Ms. Moss or a colleague, SCVWD, observed that the concrete pieces had been nearly covered with dirt, among other fill placement, as shown in the attached photographs of the Property (SE 8)
 - n. On September 18, 2000, Ms. Moss or a colleague, SCVWD, observed a substantial amount of concrete rubble and dirt located at the southeast, southwest and northwest ends of the Catherine Street Dock, among other fill placement, as shown in the attached photographs of the Property. (SE 8)
 - o. On October 24, 2000, Ms. Moss informed Mr. McAdam, BCDC Deputy Director, that Mr. Asuncion had placed fill material in now relevant part consisting of boats and equipment in the Bay and shoreline band. (SE 11)
 - p. On December 18, 2000, Ms. Moss or a colleague, SCVWD, observed what appears to be a series of docks and several sailboats in the shoreline band, the ongoing use of the property as previously depicted and five sailboats moored adjacent to the shoreline as shown in the attached photographs of the Property. (SE 8)
 - q. On January 31, 2001, BCDC assigned the number ER01-19 to its enforcement investigation. (SE 12)
 - r. On February 14, 2001, Allen Brooks, BCDC enforcement staff analyst, and Ms. Klein conducted a site visit and observed in now relevant part at least one boat on structures for repair, BWSS signs, gravel, four concrete slabs and wooden support structures in the shoreline band and at least two boats moored in Alviso Slough for an extended period of time. (SE 13)
 - s. On February 28, 2001, Mr. Brooks informed Mr. Asuncion by letter of the observations that he had made during his recent site visit on February 14, 2001 and that he must remove the fill and uses from the Catherine Street Dock parcel and

either submit a fileable application or remove the fill and uses from the two privately owned parcels within 35 days to avoid civil penalties. (SE 13)

- t. On March 27, 2001, Mr. Brooks and Mr. Asuncion spoke by telephone. During the conversation, Mr. Asuncion contested Mr. Brooks' assertion that he did not own the Property and stated that he would submit evidence of ownership. (SE 14)
- u. On April 18, 2001, Mr. Brooks informed Mr. Asuncion by letter that he had not received any evidence of property ownership for the Property from Mr. Asuncion. (SE 14)
- v. On an unknown date in April 2001, the SCVWD retained an unknown contractor to take an aerial photograph of the site. (SE 15)
- w. On May 3, 2001, Mr. Brooks informed Mr. Asuncion by letter that he had not received any evidence of property ownership for the Property from Mr. Asuncion or an application to legalize the ongoing activities, that fines were accruing and that if Mr. Asuncion did not resolve the allegations soon, BCDC staff may commence a formal enforcement proceeding. (SE 16)
- x. On July 31, 2001, Mr. Asuncion informed Mr. Brooks by letter that he had removed debris and boats from Alviso Slough and would send photographs to show this work and that he would like to restore two docks so his students could start using them for small sailboats. (SE 17)
- y. On December 18, 2003, an unknown staff member of the California State Lands Commission (SLC) observed many boats in the Bay and the shoreline band and the presence of compost in the Bay as shown in the attached photographs of the Property. (SE 18)
- z. In late March, 2004, the Property was occupied with nine vessels and a makeshift dock in the Bay, a gangway straddling the shoreline band and Bay and two vessels, a port-o-let, an office trailer and fencing in the shoreline band as shown in the attached aerial image submitted by Bart Laine and received on May 24, 2005. (SE 19)
- aa. On August 4, 2004, Mr. Asuncion had a gangway and a dock-like structure in Alviso Slough and at least 11 boats at the Property, in now relevant part, as shown in the attached photograph of the Property taken on February 23, 2006 and attached to a letter to the BWSS from Mr. Fiedler, dated February 23, 2006. (SE 20)
- bb. On December 14, 2004, unknown staff at the SCVWD observed a trailer on a platform and at least five boats and three docks in the Bay, as shown in the attached photographs of the Property. (SE 21)
- cc. On January 7, 2005, Dave Chesterman, SCVWD, submitted two photographs of the Property taken on the same date that show a trailer, boats and stored materials on the site. (SE 22)
- dd. On March 26, 2005, Mr. Chesterman informed Ms. Bennett, BCDC, that as of the date of his letter, there were approximately 14 abandoned, sunken or improperly moored vessels located in the channel adjacent to the Property along with two

makeshift docks that had recently been brought in and tied up. Mr. Chesterman stated that together these boats and structures present a flood risk. (SE 23)

- ee. On April 7, 2005, an unknown staff member of the SCVWD observed at least three boats and a dock in the Bay and stored materials located in the shoreline band as shown in the attached photograph. (SE 24)
- ff. In the month preceding May 10, 2005, San Jose Police Department Officer John West observed Mr. Asuncion receiving multiple deliveries of compost, which he left stored on top of the levee for up to a week at a time and which he subsequently spread in the Bay across the areas of land that he mows and on the Catherine Street Dock. Mr. West also observed that Mr. Asuncion left a boat stored on the levee top for a week. (SE 25)
- gg. On July 14, 2005, Ms. Yeung conducted a site visit and, in now relevant part, observed boats, docks and equipment at the Property as shown in the attached photographs. (SE 26)
- hh. On September 22, 2005, staff conducted a site visit and, in now relevant part, observed: at least seven boats and several docks in the Bay, a gangway in the Bay and shoreline band, and gravel, compost and a trailer and boats in the shoreline band. (SE 27)
- ii. On January 13, 2006, Ms. Yeung informed Mr. Asuncion that the violations brought to his attention in letters dated February 28, April 18, and May 3, 2001, respectively, persisted and must be immediately resolved. On APN 015-01-037 (formerly APN 015-01-000), the Catherine Street Dock, Ms. Yeung alleged, in now relevant part, that Mr. Asuncion had placed at least one boat on structures for repair, west of the Catherine Street Dock and in Alviso Slough and wooden support structures. On APNs 015-01-013 and 015-02-007, the parcels that flank the Catherine Street Dock, Ms. Yeung alleged that Mr. Asuncion had placed a number of boats and unauthorized fill. On the water parcels owned by the SLC and located west of the other three parcels, Ms. Yeung stated that Mr. Asuncion had placed a floating dock and several boats.

Ms. Yeung stated that these activities on all three parcels constituted the unauthorized placement of fill and/or a substantial change in use that required a permit from BCDC for which no permit had been obtained; as part of an application to BCDC to legalize the work on the parcels not owned by Mr. Asuncion or on the parcels that he owned and which were subject to an easement, some form of underlying property interest from the SCVWD and the SLC, respectively, would be required; in light of the provisions of the Order for Quiet Title, Ejection and Injunctive Relief issued on May 4, 2004, it appeared unlikely that he could obtain the necessary interest from the SCVWD to enable him to submit a fileable application to BCDC for any project on APN 015-01-037 (formerly APN 015-01-000) (the Catherine Street Dock) or on those portions of APNs 015-01-013 and 015-02-007 (Mr. Asuncion's two parcels) subject to the SCVWD easement; and the ongoing operations of the BWSS appeared to be inconsistent with the provisions of the McAteer-Petris Act and the policies of the *San Francisco Bay Plan*.

Ms. Yeung advised Mr. Asuncion to submit and gain staff approval of a work plan to remove all of the fill and uses from the Property; outlined the standardized fines to which Mr. Asuncion would be liable depending on how long he took to remove the fill and uses from the Property; and informed Mr. Asuncion that if he had not corrected the allegation within 125 days of her letter, that he may forfeit his opportunity to resolve the penalty aspect of the violation using standardized fines and that he may be subject to an enforcement proceeding that could lead to the issuance of a cease and desist and civil penalty order with a requirement to remove the illegal structures and uses and fines of between \$10 and \$2,000 per day up to a maximum of \$30,000 per alleged violation.

Ms. Yeung co-addressed this letter to Mr. Fiedler of the SCVWD and Mr. Hannon of the City of San Jose and sent a copy of it to Dave Plummer, SLC. The letter to Mr. Asuncion was addressed to P.O. Box 60301 in Palo Alto. (SE 28)

- jj. On January 25, 2006, Ms. Yeung and Mr. Asuncion spoke by telephone. Ms. Yeung discussed BCDC's allegations with Mr. Asuncion on his parcels, the Catherine Street Dock parcel and the SLC property. Mr. Asuncion responded by stating that he had not received a letter from BCDC dated January 13, 2006, providing Ms. Yeung with a new mailing address (P.O. Box 7435, San Jose, 95150) and stating that he would respond promptly. (SE 29)
- kk. On January 25, 2006, at 4:00 p.m., by facsimile Ms. Yeung sent Mr. Asuncion a copy of her letter dated January 13, 2006. (SE 30)
- ll. On January 25, 2006, at 4:58 pm, Ms. Yeung received confirmation that her facsimile was successfully sent. (SE 30)
- mm. On January 26, 2006, Ms. Yeung resent the letter dated January 13, 2006 to P.O. Box 7435, San Jose, 95150. (SE 31)
- nn. On February 2, 2006, the USPS returned as unclaimed the certified copy of the letter, dated January 13, 2006 to Mr. Asuncion at the newly provided P.O. Box in San Jose. (SE 32)
- oo. Sometime between January 25 and February 14, 2006, Mr. Asuncion left Ms. Yeung a telephone message in which he stated that he was cleaning up the Property in response to BCDC's letter dated January 13, 2006, and working to come into compliance. (SE 33)
- pp. On February 3, 2006, the City of San Jose Code Enforcement staff conducted a site visit to the Catherine Street Dock to take stock of the items owned by Mr. Asuncion that he had located on City property. The City observed a chain link fence, a blue and white trailer with a sign reading "Blue Whale Sailing School," at least one boat on structures for repair, a floating dock and several boats west of the Catherine Street Dock and in Alviso Slough and therefore located on SLC property, wooden support structures located on SLC property, black plastic flexible fencing with stakes, a port-o-let, a gray storage container with a mast stored on top of it, a rusted keel from a sailboat, a large plastic duck decoy, several gray garbage cans, a wooden bench, miscellaneous lumber, wood and cement blocks, plywood panels, a blue canoe with a white interior, wooden steps, white steps to the trailer with carpet

underneath, a brown and silver boat, a small white container, surface pontoons, yellow bumpers and a white buoy and a small blue boat with white interior and no motor. (SE 34)

- qq. On February 14, 2006, during a telephone conversation, Ms. Yeung informed Mr. Asuncion that he needed to prepare a work plan indicating what structures will be moved, how and where. Mr. Asuncion stated in response that he was putting together a packet that Ms. Yeung would receive the following week. (SE 33)
- rr. On February 24, 2006, the City of San Jose Code Enforcement staff conducted a site visit to the Catherine Street Dock to take stock of the items owned by Mr. Asuncion that he had located on City property. The City observed all of the same items it had seen during its two previous site visits on February 3 and 9, 2006 except the boat on structures for repair, the large plastic duck decoy, the brown and silver boat, the small white container and the surface pontoons, yellow bumpers and white buoy. (SE 34)
- ss. On February 27, 2006, Mr. Hannon of the City of San Jose informed Mr. Asuncion that the City intended to comply with the directive to Mr. Asuncion to remove any illegally placed fill and uses from APN 015-01-037 (formerly APN 015-01-000) within 35 days of January 13, 2006 to avoid civil penalties. Mr. Hannon's letter listed the items observed on APN 015-01-037 (formerly APN 015-01-000) during site visits conducted by his staff on February 3, 9 and 24, 2006, and ordered Mr. Asuncion to remove these items from the premises no later than 5:00 p.m. on March 3, 2006 to avoid legal action. (SE 34)
- tt. On March 21, 2006, Ms. Yeung resent her letter dated January 31, 2006, to Mr. Asuncion. (SE 31)
- uu. On May 5, 2006, Al Gurevich, SCVWD, met with Mr. Asuncion and discussed the contents of the letter sent by Ms. Yeung to Mr. Asuncion dated January 13, 2006. Mr. Asuncion referred to the contents of the letter and Mr. Gurevich provided him with a copy, which he took with him. (SE 35)
- vv. On June 5, 2006, Ms. Yeung and Ms. Klein, BCDC, and various staff members from the SCVWD and the SLC met with Mr. Asuncion at his property and on the Catherine Street Dock parcel. Ms. Yeung observed the following structures on or adjacent to the Catherine Street Dock parcel: the BWSS trailer, three docks (two of which were floating and one of which was being used as the base for a patio), two sailboats, three rowboats, one large steel boat on land, a gangway with a gate and "Keep Out" sign providing access to the floating docks, a tank and assorted garbage as depicted in the attached photographs. Ms. Yeung asked Mr. Asuncion when he would be removing the items from the Property or applying for permission to retain them. He told Ms. Yeung to discuss this with his lawyer. Ms. Yeung provided Mr. Asuncion with a copy of her letter dated January 13, 2006. (SE 36)
- ww. On June 20, 2006, Mr. Asuncion contacted Ms. Yeung by telephone during which they had a general conversation about the Property and the need for cleanup. Ms. Yeung stated that she was in the process of preparing a letter to him based on the results of the Property visit on June 5, 2006 to which Mr. Asuncion responded that he was planning to remove the blue trailer and the docks and would prepare and submit a work plan in response to her letter. (SE 37)

- xx. On June 28, 2006, Ms. Yeung sent Mr. Asuncion a letter that outlined the items observed during her site visit on June 5, 2006; reiterated the allegations outlined in the letter dated January 13, 2006, that these items constitute a violation of the McAteer-Petris Act, are subject to potential penalties and must be resolved; stated that BCDC had received neither a work plan for the removal of these items and uses nor an application to legalize and retain them; and stated that if Mr. Asuncion had not submitted a work plan to remove these structures and uses within 20 days, the BCDC staff would consider moving towards a more formal enforcement proceeding. (SE 38)
- yy. On December 7, 2006, Ms. Klein informed Mr. Asuncion by email that she had replaced Ms. Yeung as the lead for the project. She stated that she would like to schedule a site visit with Mr. Asuncion and other agency members to confirm the removal efforts since June 5, 2006, and to discuss his progress on the remaining items. (SE 39)
- zz. On December 10, 2006, Mr. Asuncion informed Ms. Klein by email that he was not available on December 14, 2006, he required at least three weeks to make any scheduling commitments, the SLC was a vital participant in the meeting, and he would not meet with the SCVWD or the City of San Jose. (SE 40)
- aaa. On December 11, 2006, Ms. Klein informed Mr. Asuncion that she would conduct a site visit in his absence. (SE 40)
- bbb. On an unknown date in 2006, the SCVWD retained an unknown contractor to take an aerial photograph of the site. (SE 41)
- ccc. On December 14, 2006, Ms. Klein conducted a site visit and observed that Mr. Asuncion had removed some of the items observed by Ms. Yeung during her site visit on June 5, 2006. However, still or newly in place, Ms. Klein observed in now relevant part several boats and a section of dock; a gated gangway, three floating docks, a picnic table and chairs, ten hunting skiffs in the water west of the Catherine Street Dock parcel and APN 015-01-013. (SE 42)
- ddd. On January 31, 2007, by letter Ms. Klein thanked Mr. Asuncion for the removal efforts he had undertaken between June 5 and December 14, 2006; outlined the structures and uses that were in place as of December 14; stated that these structures and uses constitute the unauthorized placement of fill or a substantial change in use that appear not to qualify for BCDC approval; stated that Mr. Asuncion had yet to submit a fill removal plan or apply for a permit to legalize the fill and uses; reminded Mr. Asuncion he was still subject to the penalties outlined in Ms. Yeung's letter dated January 13, 2006; stated that the staff would consider commencing a formal enforcement proceeding if he had not resolved the matter by April 30, 2007; and affirmed BCDC's position that the SCVWD and not Mr. Asuncion own the Catherine Street Dock parcel. (SE 43)
- eee. On or before March 7, 2007, Mr. Asuncion placed an unknown quantity of gravel across his two parcels and the Catherine Street Dock parcel. While the fill was placed in the shoreline band, some of it spilled over the edge of the Catherine Street Dock and into the Bay. (SE 44)

- fff. On April 9, 2007, Al Gurevich, SCVWD, informed Ms. Klein by email that Mr. Asuncion had recently placed between two and five cubic yards of gravel at the Property. (SE 45)
- ggg. On July 12, 2007, Ms. Klein conducted a site visit and observed gravel, rock and a gangway in the Bay and shoreline band and multiple boat docks in the Bay. (SE 46)
- hhh. On or before August 5, 2008, Mr. Asuncion placed an unknown quantity of gravel across his two parcels and the Catherine Street Dock parcel. While the fill was placed in the shoreline band, some of it spilled over the edge of the Catherine Street Dock and into the Bay. (SE 44)
- iii. On September 17, 2008, Ms. Klein conducted a site visit and observed that Mr. Asuncion had removed the BWSS trailer, the large steel boat and other items from the Property. She also observed that still or newly in place were three docks with boats on top of and moored adjacent to them in the Slough, the gangway and gate (the "Keep Out" sign had been removed) straddling the shoreline band and Bay, and a fresh layer of gravel, at least one large boat, a trailer full of debris and a "gravel spreader" located on the upland portions of the three parcels. (SE 47)
- jjj. On December 3, 2008, Ms. Klein conducted a site visit and observed that Mr. Asuncion had essentially cleared the Catherine Street Dock parcel of fill and uses (with the exception of the gangway, four concrete pads, concrete pieces, dirt and gravel placement) and that he had added two more docks to the three docks that were already in place in the Slough for a total of five docks. (SE 48)
- kkk. On April 6, 2009, Mary Hays, SLC, took photographs that depict four concrete pads, gravel, rock, a gangway, boat docks and boats and other miscellaneous material in place at the site as shown in the attached photographs. (SE 49)
- lll. On May 6, 2009, Ms. Klein contacted Mr. Asuncion by phone to inform him that she wished to deliver an enforcement report to him as the next step in the BCDC enforcement process and that there would be a hearing on July 9, 2009. Ms. Klein and Mr. Asuncion agreed to meet at the Property at 10:00 a.m. on Thursday, May 14, 2009. Mr. Asuncion requested that Ms. Klein confirm the dates in writing. (SE 50)
- mmm. Also on May 6, 2009, Ms. Klein sent Mr. Asuncion an email confirming that she would meet him on Thursday, May 14, 2009 at the Property to give him a Violation Report. She also asked him to save Thursday, July 9, 2009, for a hearing with the Enforcement Committee. (SE 50)
- nnn. On May 13, 2009, Ms. Klein sent Mr. Asuncion an email affirming her plan to meet him at the site at 10:00 a.m. the following day. (SE 51)
- ooo. Also on May 13, 2009, Mr. Asuncion responded by email stating that he had consulted with his attorney, Rocky Ortega, who advised Mr. Asuncion from China not to meet with the BCDC staff without Mr. Ortega. (SE 52)
- ppp. On May 14, 2009, the staff cancelled its plans to go to the Property and Ms. Klein informed Mr. Asuncion and Mr. Ortega by email that she would be mailing a copy of the Violation Report to each of them on May 14, 2009. (SE 53)

7. Provisions of law or Commission permit that the staff alleges has been violated:

Section 66632. Permit for Fill, Extraction of Materials or Substantial Change in Use of Land, Water or Structure; Application for Permits.

8. If the staff is proposing that the Commission impose an administrative penalty as part of this enforcement proceeding, the amount of the proposed penalty:

Potentially, this violation could result in a maximum fine of \$120,000 (\$30,000 per parcel of which there are four) under Section 66641.5(e) of the McAteer-Petris Act.

9. Any other statement or information that the staff believes is either pertinent to the alleged violation or important to a full understanding of the alleged violations:

As of the date of issuance of this report, the alleged violations are ongoing and Mr. Asuncion has neither submitted an application to BCDC to legalize the fill and uses at the Property nor responded in a satisfactory manner to the many communications BCDC staff has delivered to Mr. Asuncion in the course of its extensive efforts to resolve the violations.

10. List of staff exhibits:

- Staff Exhibit #1: Site Map depicting location of the BWSS in the Town of Alviso
- Staff Exhibit #2: BCDC Permit No. M67-8, issued on February 21, 1967
- Staff Exhibit #3: Record of the BWSS's registration as a business with the Secretary of State on October 4, 1993
- Staff Exhibit #4: Photographs taken by Adrienne Klein, BCDC, between May 17 and June 11, 1999
- Staff Exhibit #5: Memo with photographs prepared by Kay Moss, SCVWD, dated March 21, 2000
- Staff Exhibit #6: Memo prepared by Adrienne Klein, dated March 20, 2000
- Staff Exhibit #7: Note with photographs prepared by Jon Adamson, USFWS, dated March 23, 2000
- Staff Exhibit #8: Memo to Allen Brooks with photographs prepared by Kay Moss, dated April 17, 2001
- Staff Exhibit #9: Grant Deed for transfer of APN Nos. 015-01-013 and 015-02-007
- Staff Exhibit #10: Letter from John Asuncion to BCDC, dated June 25, 2000
- Staff Exhibit #11: Letter from Kay Moss to Steve McAdam, dated October 24, 2000 and letter to Mr. Asuncion from the SCVWD dated January 9 2001
- Staff Exhibit #12: BCDC Violation Report Form for Enforcement Case No. ER01-19
- Staff Exhibit #13: Letter from Allen Brooks to John Asuncion, dated February 28, 2001
- Staff Exhibit #14: Letter from Allen Brooks to John Asuncion, dated April 18, 2001
- Staff Exhibit #15: Aerial photograph of the Property taken by a contractor for the SCVWD in April 2001
- Staff Exhibit #16: Letter from Allen Brooks to John Asuncion, dated May 3, 2001

- Staff Exhibit #17: Letter from John Asuncion to Allen Brooks, dated July 31, 2001
- Staff Exhibit #18: Photographs of the Property taken by the staff of the SLC on December 18, 2003
- Staff Exhibit #19: Aerial photograph of the Property, dated March 2004 and submitted by Bart to BCDC by Bart Laine on May 24, 2005
- Staff Exhibit #20: Aerial photograph of the Property, dated August 2004, and anonymously submitted to BCDC on August 13, 2008
- Staff Exhibit #21: Photographs of the Property taken by SCVWD staff on December 14, 2004, and submitted to BCDC by email on February 8, 2005
- Staff Exhibit #22: Photographs of the Property taken by SCVWD staff on January 7, 2005, and submitted to BCDC by email on the same date.
- Staff Exhibit #23: Letter from Dave Chesterman, SCVWD, to Ande Bennett, BCDC, dated March 28, 2005
- Staff Exhibit #24: Photographs of the Property taken by SCVWD staff on April 7, 2005, and submitted to BCDC by email on the same date.
- Staff Exhibit #25: Email from Ande Bennett to Adrienne Klein, dated May 10, 2005
- Staff Exhibit #26: Photographs taken by Ming Yeung on July 17, 2005
- Staff Exhibit #27: Memo with photographs summarizing a site visit to the Property on September 22, 2005, prepared by Ming Yeung on September 23, 2005
- Staff Exhibit #28: Letter from Ming Yeung to John Asuncion, the SCVWD and the City of San Jose, dated January 13, 2006
- Staff Exhibit #29: Memo summarizing a conversation with John Asuncion on January 25, 2006, prepared by Ming Yeung on the same date.
- Staff Exhibit #30: Confirmation of successful transmission of a facsimile from BCDC to John Asuncion of a letter dated January 13, 2006
- Staff Exhibit #31: Letter from Ming Yeung to John Asuncion, dated March 21, 2006
- Staff Exhibit #32: Evidence that a letter sent to John Asuncion by certified mail was not claimed.
- Staff Exhibit #33: Memo summarizing a conversation with John Asuncion on February 14, 2006, prepared by Ming Yeung on the same date.
- Staff Exhibit #34: Letter from Michael Hannon, City of San Jose, to John Asuncion, dated February 27 2009
- Staff Exhibit #35: Declaration of Alberto Gurevich, SCVWD, executed on May 5, 2006 and received by BCDC on May 15, 2006.
- Staff Exhibit #36: Memo with photographs summarizing a site visit on June 5, 2008, prepared by Ming Yeung on June 8, 2009
- Staff Exhibit #37: Memo summarizing a conversation with John Asuncion on June 20, 2006, prepared by Ming Yeung on the same date.
- Staff Exhibit #38: Letter with attachments from Ming Yeung to John Asuncion, dated June 28, 2006

- Staff Exhibit #39: Email from Adrienne Klein to John Asuncion, dated December 7, 2006
- Staff Exhibit #40: Email from John Asuncion to Adrienne Klein, dated December 10, 2006, and Ms. Klein's reply to Mr. Asuncion, dated December 11, 2006
- Staff Exhibit #41: Aerial photograph of the Property taken by a contractor for the SCVWD on an unknown date in 2006
- Staff Exhibit #42: Memo prepared by Adrienne Klein on December 14, 2006 summarizing the observations made during a site visit to the Property on the same date.
- Staff Exhibit #43: Letter from Adrienne Klein to John Asuncion, dated January 31, 2007
- Staff Exhibit #44: Photographs of the Property taken on March 7, 2007, and August 5, 2008, submitted to BCDC on August 13, 2008 by an anonymous concerned citizen.
- Staff Exhibit #45: Email exchange between Alberto Gurevich and Adrienne Klein on April 9, 2007
- Staff Exhibit #46: Photographs of the Property taken by Adrienne Klein on July 12, 2007
- Staff Exhibit #47: Photographs of the Property taken by Adrienne Klein on September 17, 2008
- Staff Exhibit #48: Memo dated December 10, 2008, with photographs of the Property taken by Adrienne Klein and Caitlin Smith summarizing the results of a site visit on December 3, 2008
- Staff Exhibit #49: Photographs of the Property taken by Mary Hays, SLC on April 6, 2009
- Staff Exhibit #50: Email from Adrienne Klein to John Asuncion, dated May 6, 2009
- Staff Exhibit #51: Email from Adrienne Klein to John Asuncion, dated May 13, 2009
- Staff Exhibit #52: Email from John Asuncion to Adrienne Klein, dated May 13, 2009
- Staff Exhibit #53: Email from Adrienne Klein to John Asuncion, dated May 14, 2009