

San Francisco Bay Conservation and Development Commission

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April 6, 2018

TO: BCDC Enforcement Committee

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SUBJECT: Executive Director's Recommended Enforcement Decision Regarding Proposed Commission Cease and Desist and Civil Penalty Order No. CDO 2018.02 Issued to the North Coast Rail Authority
(For BCDC Enforcement Committee consideration on April 19, 2018)

Executive Director's Recommendation

I. SUMMARY OF BACKGROUND TO THE ALLEGED VIOLATION

In summary, staff alleges that the North Coast Rail Authority (NCRA) is responsible for the placement of approximately four cubic yards of gravel and dirt fill, and conducting repair work on a retaining wall in or around the spring of 2016 in the Commission's San Francisco Bay jurisdiction at Hunter's Club Road in Novato, Marin County, without obtaining a Commission permit, in violation of Section 66632 of the McAteer-Petris Act. Subsequent to and as an indirect result of these activities, an unknown quantity of road debris was deposited into the Bay and shoreline band jurisdictions when the road was washed out by flood and/or storm waters during the winter of 2016/2017 and the spring of 2017. See Exhibits A through G.

This enforcement action was commenced on March 29, 2016 on the basis of a complaint from a member of the public alleging that an unauthorized retaining wall and gravel road bed had been placed in the Commission's jurisdiction at Hunters Club Road in Novato. The complainant expressed concerns that the retaining wall would block the flow of water through Beattie Marsh and cause flooding.

As a result of its investigation, staff determined that the violation had occurred within the Commission's Bay jurisdiction at the northern end of Hunters Club Road in Novato, Marin County, Assessor's Parcel No. 157-051-09. The parcel is owned by the Sonoma Marin Area Rail Transit Authority (SMART) and operated by NCRA. The site of the violation is where the road crosses an approximately 565-yard-long, unnamed slough that runs through Beattie Marsh, parallel to the Northwestern Pacific railroad line to the north, providing a tidal connection between the marsh and the Petaluma River via a culvert under the road. Prior to 2016, the road provided vehicular access to the Black Point Swing Bridge operator's house located on the other side of the railroad line. A debris field resulting from the violation may extend beyond the parcel limits, but that has yet to be confirmed through a comprehensive survey of the site conducted by or for NCRA.



As detailed in the Violation Report/Complaint for the Imposition of Administrative Civil Penalties (“Violation Report/Complaint”) and evidenced by the administrative record, from May 23, 2016 through August 2, 2017, BCDC staff pursued a resolution of the violation through the standardized administrative fine process pursuant to BCDC Regulation (14 CCR) Section 11386. However, Respondent failed to follow staff’s repeated direction to seek and obtain a Commission permit to authorize the unpermitted Bay fill placed on the road. Standardized fines accrued to the maximum amount of \$30,000 on May 3, 2017.

On September 5, 2017, BCDC staff mailed the Violation Report/Complaint naming NCRA and the Sonoma-Marín Area Rail Transit Authority (SMART) as co-respondents for the violation, after providing sufficient notice pursuant to BCDC Regulation (14 CCR) Section 11386 on June 28, 2017 that they would lose the opportunity to resolve the violation by paying a standardized administrative fine if they failed to resolve the violation within thirty-five days of the date of the notice. SMART was dismissed from the enforcement proceedings without prejudice by the Executive Director on October 16, 2017, making NCRA the sole respondent going forward.

On October 3, 2017, BCDC staff met with NCRA staff to discuss the allegation set forth in the Violation Report/Complaint. NCRA’s representatives agreed to develop and implement a plan for removing gravel and any other unnatural material from the slough to the extent necessary to remediate the damages. NCRA did not submit a formal Statement of Defense. Instead, NCRA submitted a remediation plan on November 22, 2017.

On January 10, 2018, BCDC staff informed NCRA that its plan was insufficient in detail and scope to secure approval from BCDC staff, and that staff would recommend that the proposed Order to the Commission’s Enforcement Committee include conditions requiring NCRA to develop a more comprehensive remediation and mitigation plan for the site to be prepared by a qualified professional at NCRA’s expense. Additionally, staff invited NCRA to engage in negotiations for a stipulated Order but received no response.

On January 11, 2018, BCDC staff visited the site to observe and record the current conditions. Staff’s observations verified that the scope of NCRA’s proposed remediation plan was inadequate. There was more debris in the slough and the marsh than the plan indicated and there was evidence of severe erosion to the banks of the slough and indications of deleterious effects of concentrated deposits of road debris on the hydrology of the system. It is unclear how often the road gets overtopped by bay waters. The visit affirmed staff’s belief that a more rigorous study of the site was needed to enable NCRA to develop and implement an appropriate remediation and mitigation plan.

On January 19, 2018, BCDC staff sent NCRA a notice of its intent to proceed with a contested Enforcement Committee hearing unless NCRA responded to staff’s request to negotiate a stipulated Order. On January 22, 2018, NCRA responded to staff’s request affirming it desired to pursue a stipulated order, though it did not submit an updated remediation plan.

On February 27, 2018, BCDC staff sent NCRA a draft copy of a proposed Commission Cease and Desist and Civil Penalty Order, requesting that NCRA review the draft document and mark it up with their suggested edits, and schedule a meeting for the following week to possibly negotiate a stipulated order. On March 13, 2018, BCDC staff met with NCRA’s representative

David Anderson and discussed the content of the draft order. At this meeting, Mr. Anderson stated he believed that the site assessment and remediation actions that staff outlined in the draft order were too onerous and expensive for NCRA to comply with.

However, staff explained that the actions NCRA has taken to-date and the actions it proposed in the plan that it submitted on November 22, 2017 were insufficient to reliably assess the damage caused to the slough and marsh as a result of the unauthorized road work. Therefore, NCRA must present a more comprehensive site assessment and evidence-based remediation plan to BCDC that clearly demonstrates that NCRA has thoroughly investigated the environmental conditions at the site, assessed the extent and effects of the debris that originated from the road in the winter of 2016/2017 and spring of 2017 and ever since then, and provides a justification for its proposed remedial actions based on its assessment.

No agreement was reached at the meeting, but staff carefully reviewed the content of the order with Mr. Anderson and provided clarification on all of his questions and concerns. Mr. Anderson agreed to discuss the proposed order with NCRA's board of directors at its meeting the next day.

On March 29, 2018, after two weeks without any follow up from NCRA, staff e-mailed NCRA advising it that a stipulated order must be completed by April 5, 2018 if to be presented to the Enforcement Committee on April 19, 2018. On April 2, 2018, Mr. Anderson submitted a version of the draft order with suggested edits of the order's findings and the scope of the remediation plan. However, staff determined that the requested edits of the findings were redundant, unsupported by the administrative record, and/or inappropriate; and the edits to the scope of the remediation plan, with the exception of one edit, would, if incorporated, limit the scope of the site assessment and remediation of the site to an unacceptably ineffectual degree. Therefore, staff did not accept NCRA's proposed changes to the order, except Mr. Anderson's suggestion to incorporate the use of available historical data to aid in the assessment of the impacts to the habitat and an extension of the deadline to submit its remediation plan from 45 days to 60 days. However, Mr. Anderson's statements are summarized in Section III.

As of the mailing date of this report, Respondent continues to assert its belief that it is responsible for removing no more than five cubic yards of fill, that the scope of any further site assessment or remediation plan should not include the approximately 5-acre section of Beattie Marsh located immediately southwest of Hunter's Club Road and fed by a culvert located under the road, it will seek to demonstrate that the hydrology of the site has not been negatively impacted by the debris in the slough, and that the habitat has not been impacted significantly enough to require mitigations actions. Staff believes that before mitigation measures can be determined and implemented, as needed, NCRA must develop a comprehensive site assessment to understand the full breadth and scope of the debris field in the slough, what, if any, impacts the debris field may have had and may continue to have on the local habitat.

II. SUMMARY OF THE ESSENTIAL ALLEGATIONS IN THE VIOLATION REPORT/COMPLAINT

Respondent is alleged to have violated Section 66632 of the McAteer-Petris Act in or around the spring of 2016 by placing approximately four cubic yards of dirt and gravel, stakes, and wooden boards on Hunters Club Road in the Commission's jurisdiction, which was subsequently redistributed by tidal water flowing through the site during the winter of 2016/2017 and/or spring of 2017, resulting in a large, persistent amount of road debris in the slough and the marsh that may be affecting the local habitat.

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

On October 6, 2016, SMART submitted its statement of defense, in which SMART argued that it took no part in the actions that constituted a violation of the McAteer-Petris Act and, although it is the parcel owner of record, it bears no responsibility for the actions of the easement holder, NCRA. Based on the information contained in its statement of defense, SMART was dismissed from the enforcement proceedings without prejudice by the Executive Director on October 16, 2017.

NCRA was granted an extension of the 35-day deadline to submit its Statement of Defense until November 24, 2017. However, NCRA elected not to submit a Statement of Defense. Therefore, NCRA may not dispute its liability for the alleged violation or assert any defense to such liability. NCRA has stated in meetings that it is underfunded and would not be able to pay a civil penalty; however, it has not produced any records, financial or otherwise, to support this claim.

In comments submitted by NCRA to staff in a draft proposed Commission Cease and Desist and Civil Penalty Order on April 2, 2018, Respondent claimed:

A. Respondent investigated the complaint upon initial notification by BCDC staff by making a site visit and interviewing the staff of its freight operator and track maintenance contractor, the Northwestern Pacific Railroad Company (NWP). Respondent claimed that unauthorized fill was placed on the road to repair damages that occurred when the road washed out as a result of a combination of a major rain event coupled with a high tide, and that the flooding floated out the existing timber head wall above the culvert, resulting in the loss of approximately 5 (cubic) yards of gravel material that was carried away by the receding flood waters. Respondent's claimed that the headwall was properly replaced and that the culvert was not blocked by road debris. Respondent claims that it made several return site visits to assure that the culvert under the road was not impacted by the event of the flood and the subsequent repair in-kind.

B. Respondent was made aware of the requirements for a permit for the in-kind repair to road and maintained communication with BCDC, and that it hired a wetlands specialist to meet at the site to help with the permit application. Respondent claimed it conducted site visits to understand and verify BCDC staff's claim that the repair had modified the flow of water from the frequent overtopping of the drive during the inflow and outflow of high tides, and it verified that the repaired road profile was high and was changing the normal tidal flow pattern that had existing over the driveway. Respondent claimed it discussed the need for a survey with BCDC staff to determine a regrading plan to bring the over topping tidal flow back to its normal

pattern, and that a survey was completed and a grading plan was designed to correct the drive profile and was submitted to BCDC staff for review. Respondent claimed it had several calls with BCDC staff discussing permit conditions and explaining the complicated relationships between NCRA, SMART, and NWP. Respondent claimed that before the application process was initiated, another major flood event occurred (in or around the winter 2016/2017 or spring 2017) and washed out the repair.

C. A subsequent road repair was not initiated because the road was no longer in use by NCRA/NWP. Respondent contended that the complete removal of the road and the culvert would be the best solution to alleviate the long-standing issues of these structures being impacted by floodwaters and washouts.

D. Respondent mapped the area with a high-resolution camera using a drone to determine the extent of the fill in the immediate area of the embankment erosion and the slough from the eastern side of the road to the Petaluma River, and that it consulted with the environmental scientist it hired to assess the impacts of the events and assist with the development of a proposal to remove the gravel that was observed from the mapping. It claimed that a concept plan was developed that would minimize slough impacts that included a work schedule design to avoid undue impacts to the habitat.

IV. SUMMARY OF UNRESOLVED ISSUES: APPROPRIATE ADMINISTRATIVE CIVIL PENALTY

A. **SMART's Defense.** SMART is not subject to an administrative civil penalty, because it has been dismissed from these proceedings.

B. **NCRA's Defense.** NCRA has proffered no formal defenses or mitigating factors due to its failure to submit a Statement of Defense. NCRA has stated in meetings that it is underfunded and would not be able to pay a civil penalty, however, it has not produced any records to support this claim.

C. **Staff's Analysis.** This case should go before the Enforcement Committee because staff believes Respondent has not dedicated enough effort to addressing this violation or the effects thereof on the marsh and slough. It has been nearly two years since Respondent was notified about its violation, but staff has been unable to elicit a sufficient response from Respondent to enable this case to be resolved at the administrative level. For instance, Respondent claims to have conducted a thorough assessment of the site that it used as a basis for the remediation plan it submitted to staff in November 2017. However, the plan is substantially lacking in detail and scope. It consists of a single page with no indication of the preparer, a scant-to-negligible description of the site-survey methodology, no description of the data collected or used, and no analysis of why and how the proposed work would result in the removal of the debris, secure the road from further erosion into the Bay and maintains the tidal connection between the marsh and the Petaluma River. The lack of these characteristics and any contextual information about the tidal flows, storm effects, and condition of the culvert makes it impossible for staff to assess the rigor of survey and, therefore, of the proposed remediation measures, making it infeasible to approve the plan.

For example, the plan fails to provide a comprehensive assessment of the extent and volume of the gravel and other material deposited in the Bay. Whereas, in July 2017, BCDC staff observed road debris as far as approximately 120 feet from the road, staff believes that the debris field may extend much further bayward of the road than is represented by NCRA in its remediation plan. Therefore, a comprehensive survey of the debris field by a qualified professional should be necessary. Furthermore, the plan fails to provide any assessment of the effects of the debris on the natural characteristics and dynamics of the marsh, slough or bay, such as the hydrology of the slough, unnatural accretion and/or erosion along the banks, and deleterious effects on the health of the plants and animals that are endemic to the marsh.

Also, the proposed scope and work window of the plan fail to account for additional debris that could be deposited into the slough in the interim, when the road is overtopped by storm, flood, and, possibly, tidal waters in the future. Finally, the plan does not include any measures to secure, maintain, or remove the road, culvert, or what remains of the retaining wall to ensure that these abandoned structures will not pose any further threat to the bay or the marsh habitat in the future. This is an important consideration given the fact that NCRA has stated that the road will no longer be used, and, therefore, it has no intention to repair or continue maintaining it.

D. Executive Director's Recommended Civil Penalty. The Executive Director recommends that the Respondent be assessed a civil penalty of \$30,000, pursuant to Government Code Sections 66641.5(e) and 66641.9, to satisfy its liability for civil penalties for the alleged violation, through the date of the Order.

The total civil penalty of \$30,000 includes the following:

1. Respondent should be assessed a penalty of \$4,000 for its failure to seek and obtain a Commission permit to place fill in the Commission's jurisdiction in or around the spring of 2016, which is presumed to have taken place over at least two days at a rate of \$2,000 per day.
2. Respondent should be assessed a penalty of \$100 per day for its failure to seek and obtain a Commission permit to authorize the unpermitted road work after-the-fact from the date BCDC staff first notified Respondent of the violation on May 23, 2016, through the date Respondent lost the opportunity to resolve the enforcement action by paying a standardized administrative fine on August 2, 2017. At \$100/day, the penalty for this 436-day-long period would be assessed a penalty \$24,000.
3. Respondent should be assessed \$20 per day for the period from September 5, 2017, the date of issuance of the Violation Report/Complaint, through the date of issuance of this Order (May 17, 2018) for the unpermitted placement of fill. At \$20/day, the penalty for this approximately 255-day-long period, though totaling \$5,100, would be capped at \$2,000.

The amount of the penalty is reasonable and appropriate, given the nature, extent, and gravity of the violation, particularly its indirect effects on the slough and the marsh, and the cost to the state in pursuing this enforcement action from May 23, 2016 through the date of issuance of this Order. This effort was shared by one Enforcement Analyst, the Chief of Enforcement, the Staff Counsel, the Chief Counsel, two administrative support staff, the Staff Engineer, and one Permit Analyst, with additional support by the Regulatory Director and the Executive Director.

With respect to Respondent, the amount of the daily civil penalties from May 23, 2016 through August 2, 2017 and September 5, 2017, through the date of issuance of this Order, respectively, take into account its claimed limited ability to pay (alleged, but unsubstantiated), its degree of culpability, and its voluntary resolution efforts undertaken to-date. Respondent is a purportedly underfunded public entity that, as a lessee of the parcel, is limited in its authority to conduct intensive work on the road without the assent of the lessor (i.e., SMART). In the interests of resolving the violation, Respondent has made a limited effort to conduct a site survey and formulate a remediation plan. However, its efforts have been insufficient thus far, and those efforts are far outweighed by the significant damage to the nature of the site, as observed by BCDC staff, and the cost to the State in pursuing this enforcement action. Therefore, based on consideration of all relevant factors an assessment of total penalty of \$30,000, determined as described above, is warranted.

However, in light of NCRA's alleged, but unsubstantiated, claim that it is an underfunded state agency, staff believes that given the choice between requiring NCRA to allocate its limited resources to pay the full penalty of \$30,000, which may adversely affect its ability to comply with the conditions of this order, versus allocating its resources to do its utmost to remediate the marsh and slough and secure Hunters Club Road against future wash-outs, it is in the best interests of the natural resource and the Bay Area community to allow Respondent to be entitled to a waiver of 50% of the total penalty amount if the Executive Director determines that NCRA has substantially complied with the terms of this Order. The Executive Director shall notify Respondent in writing of his determination as to whether or not Respondent has substantially complied with this Order, and therefore, whether or not Respondent shall be entitled to a waiver of 50% of the total penalty within 30 days of receiving Respondent's written notice of completion of the remediation work submitted pursuant to Condition IV.E.

Pursuant to Government Code Section 66647, Respondent shall remit payment to the Commission, in the form of cashier's checks payable to the San Francisco Bay Conservation and Development Commission - Bay Fill Clean-Up and Abatement Fund, as follows: (1) within thirty days of the issuance of this order, a payment of \$15,000; and (2) unless the Executive Director has determined, in accordance with the preceding paragraph, that Respondent is entitled to a waiver of 50% of the total penalty amount, within thirty days of the Executive Director's request for remittance of the remaining balance of the penalty, a payment of \$15,000.

V. RECOMMENDED COMMISSION ACTION

The Executive Director recommends that the Enforcement Committee adopt the Recommended Enforcement Decision and proposed Cease and Desist and Civil Penalty Order to require NCRA to:

- A. On and after the Effective Date of this Order, cease and desist from all activity in violation of the McAteer-Petris Act.
- B. By March 30, 2018, submit a comprehensive plan acceptable to the Executive Director for the remediation and mitigation of the site. The plan must be prepared by a qualified professional or professionals at NCRA's expense (or that of a third party or third parties), in consultation with all relevant local, state and federal agencies, that includes, but is not limited to:
 1. An assessment of the full extent of the road debris in the marsh and slough and all impacts to the habitat, including, but not limited to the hydrology of the slough and the marsh, erosion, plant and animal health.
 2. Provisions for the removal of all debris originating from the road as a direct or indirect result of the unpermitted roadwork that is believed to have taken place in or around the spring of 2016, including road debris that will likely be deposited into the slough and marsh as a result of subsequent storm and flood events during the intervening time period ranging from the last time the road was flooded in 2016/2017 through the date(s) that the remediation and mitigation work will be completed in 2018 or later.
 3. Provisions to ensure that the road will not continue to pose a hazard to the marsh, slough, shoreline or bay.
- C. Require NCRA to commence the approved remediation and mitigation plan no later than May 31, 2018.
- D. Seek and obtain an extension of time from the Executive Director to comply with any deadline prescribed in the Order, as needed.
- E. To ensure that sufficient progress is maintained, submit periodic (not less than quarterly) progress reports to BCDC staff summarizing the progress of the project, accompanied by photographic evidence.
- F. Pay a civil penalty of \$30,000 to resolve its civil liability for violating the law. \$15,000 shall be due within thirty days of the issuance of the Order, but 50% of the penalty shall be waived if the Executive Director determines, in writing, that Respondent has substantially complied with the terms of the Order.

VI. RECOMMENDATION

For all the foregoing reasons, the Executive Director recommends that the Enforcement Committee adopt the accompanying proposed Commission Cease and Desist and Civil Penalty Order No. CDO 2018.02 to the North Coast Rail Authority.

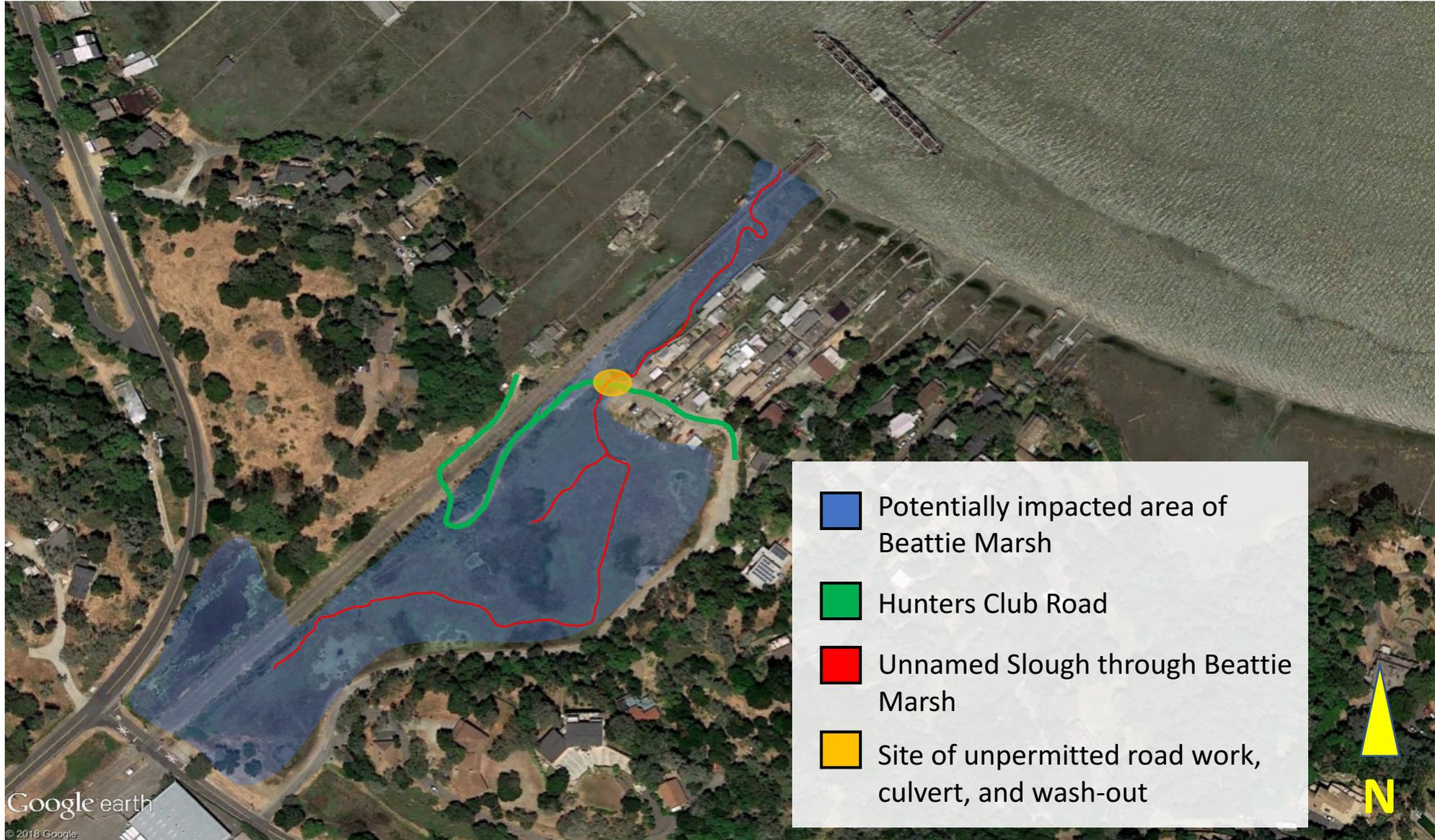
Attached to the Executive Director's Recommended Enforcement Decision is the Executive Director's Proposed Cease and Desist and Civil Penalty Order No. CDO 2018.02.

North Coast Railroad Authority

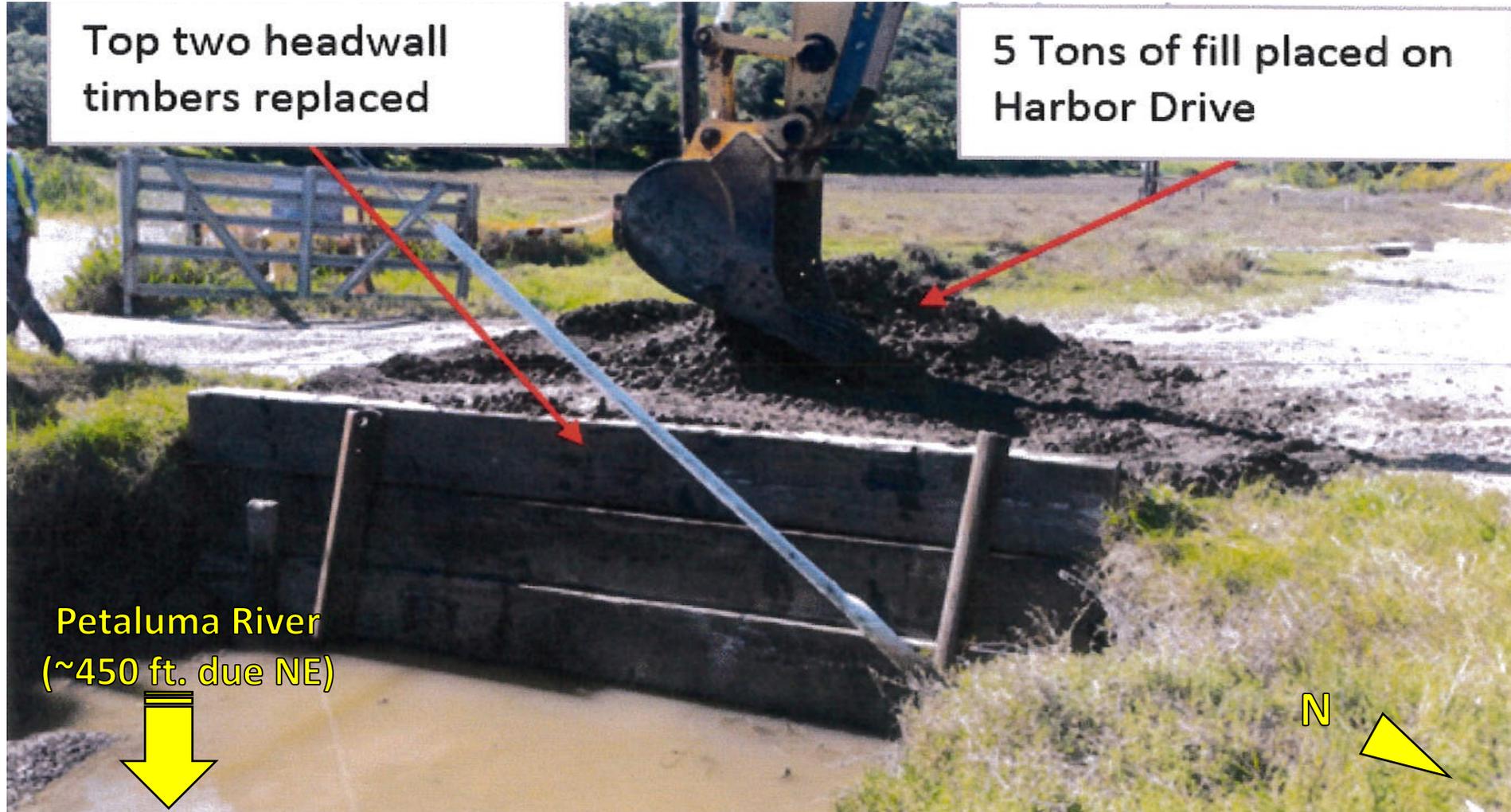
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Exhibit A: Vicinity Map





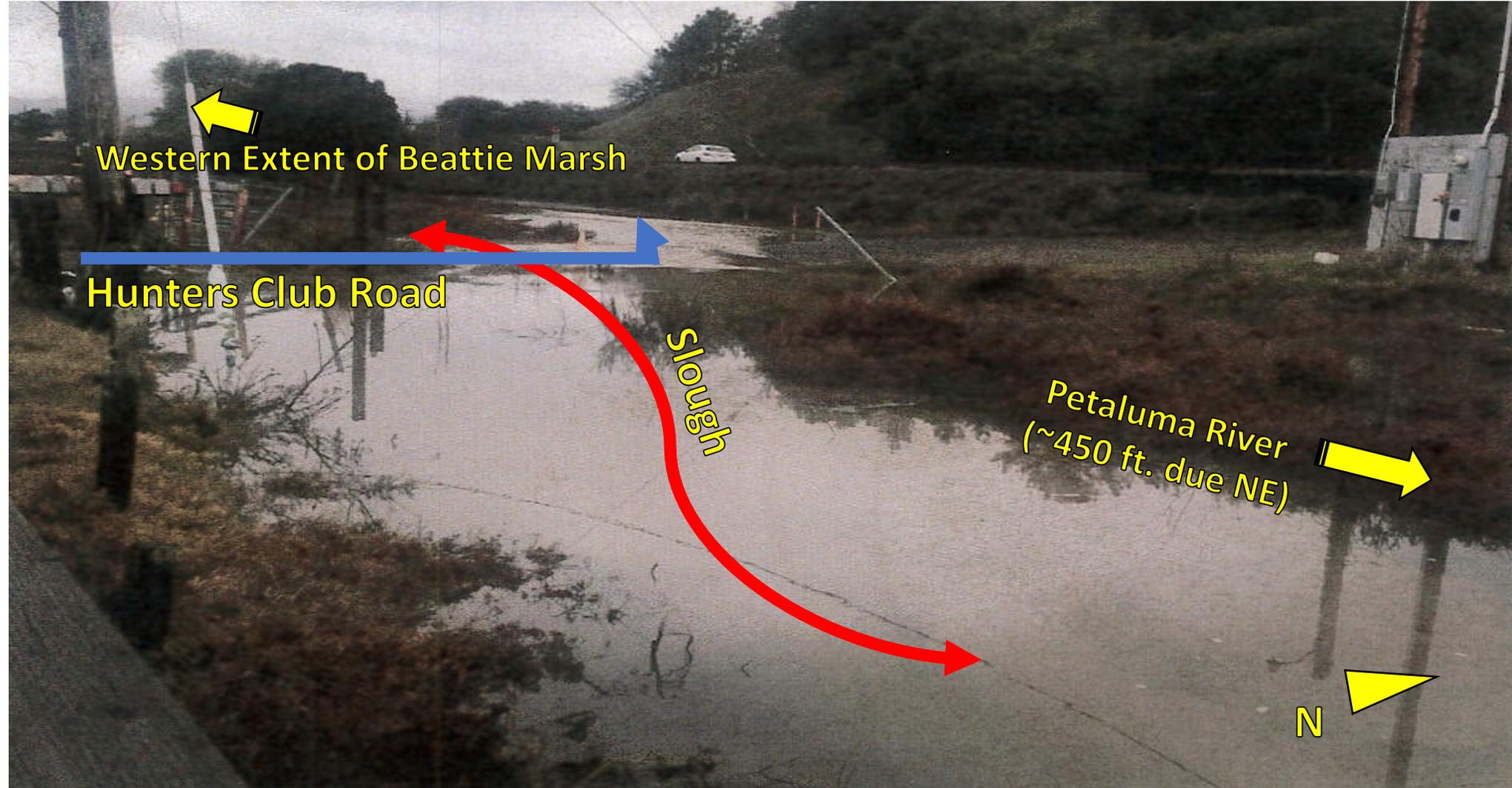
North Coast Railroad Authority
CDO 2018.02
Exhibit C: Unauthorized Road Work



Annotated photograph of the unauthorized road repair work (ca. Spring 2016) submitted to Adrienne Klein by David Anderson on May 28, 2016. Photo and annotations by Northwestern Pacific Railroad Company.



Repaired road and retaining wall after the completion of the unauthorized repair work in March 2016. Debris from the prior road damage episode(s) was left in the slough. (Photo credit: BCDC staff, June 24, 2016)

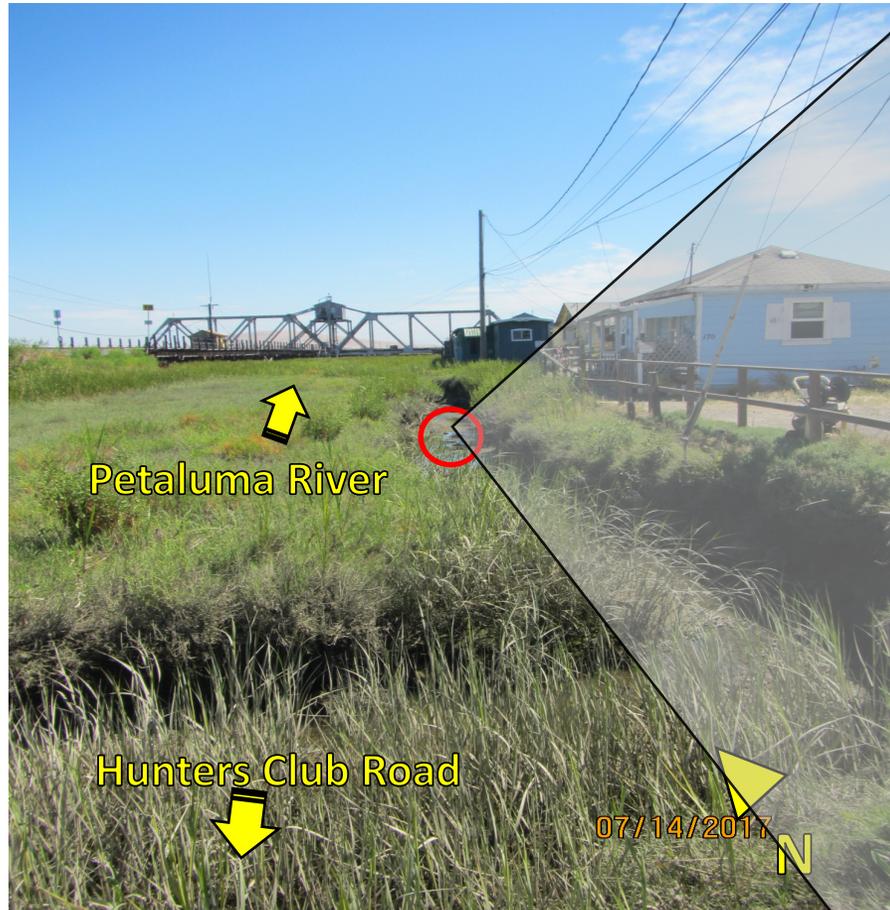


Photograph of tidal waters inundating Hunters Club Road and the access road to the bridge operators house, ca. March 2016, submitted by a private party to BCDC staff on June 24, 2016.



Water damaged the surface of Hunters Club Road and retaining wall, and distributed road debris in the foreground during Winter 2017. Tidal water is pooling at the culvert (submerged) with unknown effects on the hydrology of the western extent of Beattie Marsh consisting of approximately 237,000 square feet. (Photo credit: BCDC staff, July 14, 2017)

North Coast Railroad Authority
CDO 2018.02
Exhibit G: Road Debris in the Slough



Road debris is dispersed at least 100 feet bayward into the slough, as photographed from the road. The full extent of the debris field is unknown. (Photo credit: BCDC staff, July 14, 2017)