



June 22, 2018

BY EMAIL (marc.zeppetello@bcdc.ca.gov)

Marc Zeppetello
Chief Counsel
Bay Conservation and Development Commission
455 Golden Gate Avenue
San Francisco, CA 94102

RE: Westpoint Harbor LLC

Dear Mr. Zeppetello:

I am writing on behalf of Cargill, Incorporated, to follow up on our April 26 conference call regarding BCDC's pending administrative enforcement action against Mark Sanders and Westpoint Harbor LLC (collectively, "Westpoint").

Westpoint operates a marina adjacent to Cargill's salt production facility in Redwood City, California. The marina is located on land that Westpoint purchased from Cargill in phases between 1990 and December 2003. Westpoint's BCDC permit was issued in August 2003 (the "Westpoint BCDC Permit"). Westpoint's BCDC Permit described three phases of the marina project. As we have learned, Special Condition II.F of the permit required Westpoint to provide shorebird roost habitat mitigation before beginning Phase Two of the marina project.¹

BCDC brought an enforcement action against Westpoint in July 2017. Based on my cursory review, it seems to primarily relate to public access. However, we see that Violation No. 9 of the enforcement action alleges that Westpoint "fail[ed] to provide shorebird roost habitation mitigation," pursuant to Special Condition II.F of the permit, for the period of October 2016 to 2017.² Westpoint has claimed that the required mitigation was achieved through "guarantees received from Cargill" in the form of a 2003 memo from Robert Douglass, a Land Property Manager for Cargill, to Westpoint and a Senior Planner at Redwood City (the "November 2003 Memo").³ Westpoint has argued to BCDC that it met its mitigation requirement "[o]nce this

¹ The full text of Special Condition II.F. in the Westpoint BCDC Permit states: "**Shorebird Roost Habitat Mitigation.** Prior to commencement of work authorized under Phase Two, the permittee shall provide mitigation for the 2.3 acres of shorebird roost habitat lost as a result of this project with approximately 3.0 acres of replacement habitat with similar functions and benefits for shorebirds. The habitat creation plans shall be reviewed and approved by or on behalf of the Commission after consultation with the U.S. Fish and Wildlife Service and the California Department of Fish and Wildlife."

² Violation Report/Complaint For Imposition of Administrative Civil Penalties - Exhibit D.

³ Page 70-71 of Respondents' Statement of Defense and AR Document 91. Specifically, Douglass stated in the letter that "a number of ephemeral bird islands and shallow water ponds" are created in the normal course of Cargill's solar salt pond operations "in both the East Bay as well as the Redwood City." He also stated that "in a number of areas throughout [Cargill's] system [in Redwood City] on a seasonal basis, weather permitting, where there are recognized habitats for roosting birds", Cargill then had an established practice of employing "minor modifications in . . . operations" to create similar habitat to that being lost by the development of the marina. For some reason, the 2003 Douglass memorandum submitted by Mr. Sanders' counsel in his defense during the pending enforcement

letter was received,” and that Westpoint’s BCDC permit “places the ongoing responsibility with Cargill.”⁴ Westpoint has also argued that satellite imagery shows Cargill has, in fact, provided roosting habitat.⁵ In early April, Westpoint and BCDC each reached out to Cargill regarding this aspect of the enforcement action.

In our April 26 conference call, I expressed skepticism that Cargill had made any commitment to provide roosting mitigation or that Cargill could demonstrate that it had in, in fact, provided such mitigation through active measures. Cargill agreed to continue its investigation, discuss the issue with Westpoint, and circle back with you. We have now completed our review of internal files, both at Cargill’s regional office in Newark, California, and at our corporate headquarters in Minnesota. We spoke with Mr. Douglass, who left Cargill in 2007, as well as other current and former Cargill employees. We reviewed the documents you and Westpoint each provided, and those contained on BCDC’s website, for the pending enforcement action, including the BCDC permit issued to Westpoint and its subsequent amendments. We also spoke with Westpoint on several occasions.

Obviously, almost fifteen years have passed since the issues underlying this aspect of the larger enforcement action. Nonetheless, based on our investigation of Westpoint’s claims, I have some observations:

1. Westpoint’s BCDC Permit, including the shorebird roosting mitigation requirement in Special Condition II.F, preceded the November 2003 Memo. The permit requires Westpoint to provide for 3.0 acres of habitat prior to Phase Two. The permit’s Findings and Declarations describes that such roosting mitigation would be on Cargill land “or an approved alternative location.”⁶ In both cases, however, the “habitat creation plans” were to be “reviewed and approved by or on behalf of [BCDC] after consultation with the U.S. Fish and Wildlife Service and the California Department of Fish and Wildlife.”⁷
2. We interpret the November 2003 Memo as a description of Cargill’s then-current operations. Mr. Douglass did not make a “contract” or other binding commitment for Cargill to Westpoint to continue operating in a particular way, but instead anticipated that Westpoint—if it desired a commitment—would subsequently negotiate and enter into some form of agreement with Cargill to do so and then would need to go through the consultation requirements of the permit. It was certainly not styled as a “guarantee” and Mr. Douglass was well aware he did not have authority to bind Cargill. The memo was

proceeding

(http://www.bcdc.ca.gov/enforcement/2017/2WPHAdministrativeRecord/91.Email_SmithtoZeppetello_2017.06.29.pdf) differs from the version that was attached to the City’s January 20, 2004 Staff Report in support of the City’s Mitigated Negative Declaration addendum for Sanders’ project. After describing Cargill’s then-current operations, Douglass in the City’s version added that “For the foreseeable future, Pond 10 will remain a multi-purpose pond and will be operated consistent with our recent operational goals and to ensure roosting habitat.”

⁴ *Id.*

⁵ *Id.*

⁶ Westpoint BCDC Permit Section III.F., p. 27.

⁷ *Id.*

not executed by the leader of Cargill's California Land Management business, William Britt, who at the same time was himself in the midst of negotiating the sale of a final parcel of Cargill land to Westpoint (through a purchase and sale agreement signed by Mr. Sanders and Mr. Britt, on behalf of Cargill) and had executed the prior binding agreements between Cargill and Westpoint. Indeed, Mr. Britt was unaware of the memo and Mr. Douglass did not recall discussing it with him. Westpoint would have known that Mr. Britt was the Cargill representative needed to provide the authority necessary to bind the company, yet I am unaware of any attempt to negotiate an agreement for Cargill to provide mitigation for Westpoint. No doubt Westpoint would have wanted to define the scope of the mitigation and Cargill would have expected compensation and defined expectations for the consultation process. None of this happened.

3. The November 2003 Memo was not incorporated into the November 2003 purchase and sale agreement for the final parcel of Cargill land, which purchase closed in December 2003. The sales agreement is fully integrated and superseded any other actual or potential agreements between the parties regarding the land. If Cargill had agreed to provide shorebird roosting mitigation as part of the transaction, the parties would have needed to include the requirement in the agreement.
4. We have found no indication that Westpoint ever followed up with Cargill to review any proposed habitat mitigation plans with the natural resource agencies, including prior to the start of Phase Two, which I understand began around 2015. Similarly, we cannot find any record of BCDC staff directly discussing with Cargill this prospect of habitat mitigation for Westpoint on Cargill property, or that any government agency requested confirmation of any commitment by Cargill to do so. It is surprising, to say the least, that *almost fifteen years* would pass without Westpoint or any other interested party contacting Cargill to confirm the details of any mitigation Cargill might provide.
5. Likewise, we have not found any indication that Westpoint or any other interested party reached out to Cargill before April 2018 to inquire whether Cargill was providing roosting mitigation.⁸
6. To be clear, we have not found any evidence to suggest anyone at Cargill was aware of an agreement or commitment to operate Pond 10 in any particular way, either before or after the 2015 start of Westpoint's Phase Two. We have no reason to doubt Westpoint's claims regarding satellite imagery, but I cannot confirm them or represent to BCDC that they were an intended result of Cargill's operations.

As we discussed in the April 26 conference call, the sole permittee and party bound under the BCDC Permit is Westpoint. The enforceable conditions of Westpoint's BCDC Permit required the *permittee* to provide for 3.0 acres of shorebird roost habitat mitigation. Based on our understanding of the facts, I don't see any reasonable basis for Westpoint to claim that the November 2003 Memo was a "guarantee" of Westpoint's mitigation requirements or that it

⁸ While Westpoint did reach out to Mr. Douglass and another former Cargill employee in 2017 and early 2018, it did not contact Cargill until April 2018.

Marc Zeppetello

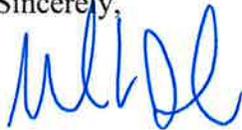
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otherwise reasonably relied on Mr. Douglass's letter to the Redwood City planner. Furthermore, Westpoint, as the permittee, was also the party required to go through the consultation process for any proposed mitigation. As discussed above, no one followed up with Cargill about creating or confirming a Cargill contractual commitment to create habitat prior to the planning period for Phase Two (which was the trigger for the mitigation requirement). Further, no one could reasonably believe that habitat mitigation might have been lawfully created without a consultation with the U.S. Fish and Wildlife Service and California Department of Fish and Wildlife, which by necessity would have involved at least Westpoint and Cargill, if not also other agencies. Such consultation was not only required in the Westpoint BCDC Permit but also in the Regional Water Quality Control Board's May 16, 2003 Water Quality Certification requirements for habitat mitigation issued to Westpoint; it was Westpoint's responsibility to do so.⁹

As indicated above, the historical record is imperfect. As I sit here in Minnesota, I can't pretend to understand everything that has happened relating to this issue over the past fifteen years. If I had to guess, I would tell you that the requirement imposed on Westpoint to provide habitat mitigation according to the terms of the permit was simply overlooked by Westpoint. This is an unfortunate situation, but not one for which Cargill is responsible.

Sincerely,



Michael Skoglund

⁹ Specifically, the Water Quality Certification issued to Sanders provides: "To mitigate for this impact approximately 3.0 acres of replacement roost habitat with similar functions and benefits for the birds will be created pursuant to plans approved by U.S. Fish and Wildlife Service and the California Department of Fish and Game on Cargill property on the south side of the levee separating it from the marina." (pp. 2-3).