



## CITIZENS COMMITTEE TO COMPLETE THE REFUGE

453 Tennessee Lane, Palo Alto, CA 94306

Tel: 650-493-5540

www.cccrefuge.org

cccrefuge@gmail.com

November 3, 2017

Commissioner Scharff and  
Enforcement Committee Members  
Bay Conservation and Development Commission  
455 Golden Gate Avenue, Suite 10600  
San Francisco, CA 94102-7019  
*Via email:* marc.zepetello@bcdc.ca.gov

RE: Enforcement Committee Hearing for BCDC Violation Report/Complaint: Mark Sanders,  
Westpoint Harbor, LLC (ER2010.013), November 16, 2017

Dear Commissioner Scharff and Members of the Enforcement Committee,

Citizens Committee to Complete the Refuge would like to convey our strong support for the proposed BCDC enforcement action (ER2010.013) to ensure that Westpoint Harbor, LLC complies with all permit conditions. Citizens Committee is a non-profit organization of volunteers, dedicated to the protection of the Bay, and particularly concerned with impacts to the Don Edwards San Francisco Bay National Wildlife Refuge, its ecosystem and affected species.

Citizens Committee, on behalf of its membership, originally commented in support of the proposed Westpoint Marina project, based on the strength of the protective measures included in the permit Special Conditions, and the seeming willingness of the permittee to implement these crucial environmental protective measures.

After reviewing the Westpoint Harbor Statement of Defense, we are submitting, under separate cover, a declaration under penalty of perjury from Citizens Committee member, Matthew Leddy, to be certain that the observations and photographs submitted in our previous letters and entered into the Administrative Record will be properly considered by the Enforcement Committee.

Additionally, with this correspondence and through oral testimony, Citizens Committee will offer rebuttal to the Westpoint Harbor Statement of Defense; specifically, to the statements pertaining to permit requirements for protecting Bay resources, wildlife, and mitigation for habitat loss. (See Attached)

In their Statement of Defense, Westpoint Harbor maintains that there has been “no harm to the public or the environment”. We disagree. After outlining required mitigation measures, the USFWS Endangered Species Informal Consultation concludes by stating that provided the Westpoint Marina Project “is implemented as described,” it is not likely to adversely affect the endangered California clapper rail, salt marsh harvest mouse and California least tern found on nearby Greco Island and the adjacent salt pond.

BCDC must assume that it is equally true that Westpoint Harbor's consistent failure to implement the protective measures required in the BCDC permit creates unacceptable risks, and possibly illegal impacts, to these species threatened by extinction and to their sensitive habitats. In granting Westpoint Harbor's permit, BCDC found that the project will result in the protection of Bay resources including wildlife "because Special Conditions ensure the protection of surrounding valuable habitat and require mitigation for any impacts to wildlife or habitat at the project site." Permit 2-02 Findings III.F.

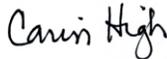
In addition, we support administrative civil penalties which can serve not only as an effective tool for gaining permit compliance, but also for ensuring a level playing field for the Bay Area businesses that are doing everything right. Given the nature, extent and gravity of Westpoint Harbor's permit violations, the proposed administrative civil penalty is appropriate.

However, what really matters with an enforcement action are the subsequent changes that happen on the ground. BCDC's primary responsibility is safeguarding San Francisco Bay habitats and wildlife, and therefore it is imperative that measures outlined in the Special Conditions for the Westpoint Harbor permit are put in place as soon as possible.

Sincerely,



Gail Raabe



Carin High

Co-Chairs, Citizens Committee to Complete the Refuge

Attachment

**I. Failure to Remove Trees To Protect Species from Predation – Violation 2C**

To date, Respondents have failed to remove trees which act as a potential perch for raptors that can then prey upon listed clapper rail, western snowy plover and salt marsh harvest mouse living on nearby Greco Island.

On September 22, 2011, December 22, 2012 and January 29, 2015, BCDC informed Respondents that “the trees bordering the path along Westpoint Slough should be removed due to wildlife concerns.”

The line of Poplars and Monterey Cypress that have been planted along the shoreline edge at the channel ... present a problem for wildlife living in the refuge. **These trees will serve as a perch for raptors that can then prey upon listed species such as clapper rail, western snowy plover and salt marsh harvest mouse living on Greco Island.**

On September 18, 2001, the Manager of the Don Edwards National Wildlife Refuge commented that project landscaping should be of a type that will limit roosting and nesting opportunities of avian predators to impact listed endangered species. Specifically, the number of trees installed in the development should be minimized and placed well back from tidal areas. Plantings should include small shrubs, forbs, and grasses whenever possible instead of trees. (BCDC AR Doc #1)

At a December 8, 2016 BCDC site visit, Adrienne Klein noted that Respondents had conducted additional tree planting, without plan approval, along the marina basin and in the area between the parking lot and the adjacent Cargill salt pond. Further, the Cypress trees along the slough remained in place even though BCDC had asked repeatedly that they be removed to protect species from predation.

*Respondents falsely claim (SOD 44:22-31) that the trees are permitted because they have a High Landscaping Suitability Index rating (low potential for nest and roost sites) and exhibit at least two of the following characteristics at tree maturity: Less than 20 to 25 feet in height; columnar shape; fine limbs, or closed, dense crown structure.*

Rebuttal

The Monterey cypress does not exhibit any of the three characteristics required for High Suitability. The height at maturity is “80 feet”, well over the 25-foot limit (<http://dendro.cnre.vt.edu/dendrology/syllabus/factsheet.cfm?ID=191>), the shape is not columnar, but “generally broadly spreading,” ([http://www.conifers.org/cu/Cupressus\\_macrocarpa.php](http://www.conifers.org/cu/Cupressus_macrocarpa.php)), and this species does not have fine limbs or closed, dense crown structure, but rather, “fairly sparse, often composed of few major limbs from near ground.” ([http://www.conifers.org/cu/Cupressus\\_macrocarpa.php](http://www.conifers.org/cu/Cupressus_macrocarpa.php)).

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*Respondents falsely claim (SOD 44:32-33) that the Poplar trees conform with the plant palette at Pacific Shores Center and meet the criteria for "High Suitability" under the Landscape Tree Suitability Index.*

Rebuttal

The Pacific Shores Center Landscape Tree Suitability Index contradicts Respondents' assertions:

**Pacific Shores Center  
 Suitability Analysis for Preliminary Landscape Palette  
 Relative to Minimizing Raptor and Raven Nesting Suitability**

Tree Species	Tree Characteristics <sup>1</sup>	Landscaping Suitability Index <sup>2</sup>
<i>Populus nigra</i> Lombardy poplar	40 to 100 feet; dense columnar shape with upward reaching branches	Poor to Very Poor

*Respondents falsely claim (SOD 45:12-13) that there is no basis for a conclusion that the trees serve as perching sites for raptors.*

Rebuttal

There is ample evidence that Monterey cypress may be used by predatory raptors. For example, see:

1. The County of San Mateo Planning and Building Department, Consideration of a Coastal Development Permit, p. 2, County File Number: PLN 2012-00126 (San Mateo County Parks Department). Available at:  
[https://planning.smcgov.org/sites/planning.smcgov.org/files/events/20140528\\_Item\\_6.pdf](https://planning.smcgov.org/sites/planning.smcgov.org/files/events/20140528_Item_6.pdf)

“The property also provides potential foraging habitat for a variety of birds, including raptors, and bats that may forage or nest/roost within the adjacent Monterey cypress (*Hesperocyparis macrocarpa*) trees on site...”

2. The Biotic Resources Assessment for Seaside Senior Living Assisted Living and Memory Care Facility (CEQA APPENDIX G, SECTION IV, p. 12) prepared by Thompson Wildland Management available at:  
<http://www.ci.seaside.ca.us/DocumentCenter/Home/View/2178>

“Furthermore, raptors such as the Ferruginous hawk (*Buteo regalis*) and Northern harrier (*Circus cyaneus*) are known to winter in the Monterey area. The grove of Monterey cypress trees would be suitable for stopover or winter roosting for raptors.”

3. Mendocino Coast Audubon Newsletter, p. 4 (May 2017) available at:  
<http://www.mendocinocoastaudubon.org/newsletter/MCAS%20Newsletter%2005012017.pdf>

“Peregrine Falcons nest in the Monterey cypress trees around the Hearn farm house.”

Therefore, Citizens Committee urges BCDC to order Respondents to remove trees which act as potential perch for raptors.

**II. Failure to Install Buoys In Slough To Identify "No Wake" Zone**  
– **Violation 7A**

The Westpoint Marina has been operational since 2008. Yet, today Respondents have not installed and maintained a buoy system adjacent to the navigation channel of Westpoint Slough to identify the "No Wake" speed zone, delineate the center of the channel for adequate draw, and discourage boaters from deviating out of the navigable channel. Permit 2-02, Section II. H.. The channel markers in Westpoint Slough from the main Redwood Channel to the entrance of Westpoint Marina must notify boaters of the “no wake zone.” Permit 2-02, Section I. A. 18. The importance of this “no wake” requirement was reflected in comments submitted by Jan Knight, Chief of the Endangered Species Division of the U.S. Fish and Wildlife Service to the Army Corps as far back as 2002. Because of concerns about erosion of existing marsh and mud-flats at Greco Island, the U.S. Fish and Wildlife Service commented that a “no wake policy should be a “permanent part of any present or future operation of this site.” (BCDC AR #4, p. 4) It is an important requirement for the protection of endangered clapper rail habitat. Id.

Installation and maintenance of the required signs, buoys and channel markers were required as part of Phase I of the Westpoint Marina. These signs, buoys and channel markers were required to “commence” prior to August 15, 2004 or the permit lapses and becomes null and void. Further, all signs must be permanently maintained by, and at the expense of, Respondents. Permit 2-02, Section II. B. 5.

*Respondents falsely claim (SOD 60:31) that “no wake” buoys are installed at the entrance to Westpoint Slough and at the entrance to the Marina.*

Rebuttal

Respondents provide no evidence for this assertion. In fact, there is undisputed testimony under penalty of perjury by Matthew Leddy that no buoys stating “no wake” exist anywhere in Westpoint Slough and recent photographs attesting to that fact. See also BCDC AR #85. Clearly, Redwood City’s single “10 MPH” buoy does not state “no wake” or identify the "No Wake" speed zone.

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*Respondents claim that “no wake” buoys could not be installed in Westpoint Slough as a result of meetings with various agencies, and Coast Guard regulations.*

Rebuttal

Respondents are arguing with the BCDC permit terms, not demonstrating permit compliance. The validity of the permit is not at issue here, Respondents' non-compliance is the reason for this enforcement proceeding.

BCDC has the power and jurisdiction to regulate the waterway markers that will be required.

Respondents claim – based solely on the Sanders assertion - that meetings prior to issuance of the BCDC permit resulted in an agreement that buoys could not be installed. There is no evidence from government agencies, including the Coast Guard, about this Sanders claimed “agreement.” BCDC included the buoy requirements in the permit in 2006 – so clearly no such non-buoy agreement had been reached. The permit is the permit and it is time Respondents complied with it.

Further, Respondents provide no evidence that they applied to the Coast Guard to install buoys and were denied. Citizens Committee sent a FOIA to the Coast Guard for all records regarding placement of buoys in Westpoint Slough, and records regarding buoys/signs near Greco Island. After a thorough search the Coast Guard Commander responded on October 17, 2017 that it had no records regarding Sanders, West Point Harbor Marina, or buoys in Westpoint Slough or near Greco Island for the period 2001 to the present.

*Respondents falsely claim (SOD 62:6-8) that photographs of a ferry in the Slough generating a substantial wake is irrelevant and misleading.*

Rebuttal

The evidence submitted on the PROP high speed private ferry service is highly relevant as it shows that the existing red/green buoys, and single “10 MPH” buoy, is not working in refraining boats from creating substantial wakes. Not only have Respondents failed to ensure the installation and maintenance of required buoys identifying Westpoint Slough as a No Wake speed zone, they have allowed a commercial high-speed ferry service to operate at a harbor that was specifically approved for recreational boating.

Concerns about the wake from these boats are not just hypothetical. As stated in the March 10, 2017 correspondence (AR Doc 77), the Bair Island Aquatic Center in Redwood City posted the following on their website: “High speed passenger ferry service to Westpoint marina has been operating for a few months and there have been some problems with small boats, including swamping large rowing shells and flipping smaller sculling boats. These issues were discussed in a meeting of port users on Mar 8, 2016 and some actions agreed on to improve safety.” Last year, PROP's high-speed catamarans were making four round trips/day during the work week, generating a significant wake

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from excessive speeds as they traversed a mile of Westpoint Slough along the shoreline of Greco Island between Redwood Creek and the harbor.

*Respondents assertion that they have no control over, or should be responsible for, the wake caused by boats (SOD 62:11-12) is baseless.*

The Mitigated Negative Declaration and Redwood City's Use Permit for Westpoint Marina actually charges Mr. Sanders with the **enforcement** of the speed zone: "A no wake policy shall be adopted by the developer and enforced at all times by the designated project manager (Harbor master) for the marina as well as for Westpoint Slough." (BCDC AR #7 and #9)

Therefore, Citizens Committee urges BCDC to order Respondents to install and maintain buoys adjacent to the navigation channel of Westpoint Slough from the main Redwood Channel to the entrance of Westpoint Marina to identify the "No Wake" speed zone.

**III. Failure To Install Buoys Informing Public Of Access Restrictions On Greco Island And Other Protected Marshlands – Violation 7B**

Respondents have failed to install and maintain buoys along Greco Island with signage prohibiting public access into the marshlands of the Refuge.

Respondents were required to install and permanently maintain a buoy system 100 feet from the salt marsh on Greco Island along the Westpoint Slough up to its confluence with Redwood Creek. These buoys were required to contain signs that public access into the marshlands of the San Francisco Bay National Wildlife Refuge is prohibited. Permit 2-02, Section II. H.

On September 18, 2001, the Manager of the Don Edwards SF Bay National Wildlife Refuge commented that:

The Refuge's Greco Island is approximately 500 feet across Westpoint Slough from the project site. The island is one of the most valuable remaining salt water marshes in South San Francisco Bay. In part because of its isolation from human disturbance, the island is one of the few remaining strongholds for the endangered California Clapper Rail and Salt Marsh Harvest Mouse as well as a great diversity of other wildlife.

We are concerned that the marina will increase human presence in westpoint Slough and disturbance on the Refuge's Greco Island and the project's site's tidal marsh... (AR Doc.1)

In the absence of posted "sensitive habitat" and "access restrictions" signs on buoys, endangered species, including nesting Clapper Rail on Greco Island are at risk of being

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disturbed and harassed. Nests can be present from mid-March through August when many people are out on the Bay, and rails will abandon nests if disturbed by noise or other human activities.

In a January 2, 2002 letter to Respondents, Refuge Manager Clyde Morris reiterated the need for a buoy system off Greco Island. (SOD Doc. 81:1)

*Respondents claim that 35 restricted access wildlife signs were in place all around Greco Island and on the wetlands next to the marina by July 19, 2006. Signs were placed "on non-metallic posts facing Westpoint Slough and First Slough." (SOD 64:14-26).*

Rebuttal

On April 9, 2017, photographs were taken from the water on Westpoint Slough, and these have been submitted to BCDC as testimony under penalty of perjury by Matthew Leddy. These photographs and a summary of specific photo locations demonstrate that no buoys contain signs about restricted access or sensitive habitat; and there is only a single sign stating Sensitive Wildlife Habitat / Do Not Enter – but this sign is so faded that it is almost illegible, and thus has not been properly maintained as required by Permit 2-02. (AR Doc.85).

Therefore, Citizens Committee urges BCDC to order Respondents to 1) install and maintain buoys along Greco Island with signage prohibiting public access into the marshlands of the Refuge, informing the public of the access restrictions on Greco Island and other wetlands in the San Francisco Bay National Wildlife Refuge.

**IV. Failure To Provide Visual Barriers Between the Marina Parking Lot and the Adjacent Salt Pond – Violation 8**

To date, Respondents have failed to install and maintain visual barriers to protect waterbirds from disturbance, and have failed to obtain plan approval for a visual barrier.

Respondents were required to provide visual barriers between the active marina areas and the adjacent salt pond to reduce disturbance to water birds using the salt pond. The visual screening was to be achieved through setbacks (85 to 90 feet in width) or through a combination of reduced setbacks combined with landscaping or other visual barriers (fence slats) that would obscure near range views of the salt ponds (less than 100 feet from the human use areas). Permit No. 2-02, Section II.K.

On May 4, 2011, BCDC alerted Respondents that:

Portions of the marina facilities, including much of the parking lot areas, are located closer than 85 feet to the salt pond, which adjoins the Westpoint Marina along the entire southern boundary. Therefore, visual barriers are required in these locations, as indicated in Special Condition II-K. The marina is clearly "active" and intrudes into the required 90-foot

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setback area; therefore, the absence of required visual barriers is in violation of this requirement of your permit.

On September 4, 2014, BCDC rejected Respondents' claim that the distance between the active marina area and the salt pond is 85 feet. BCDC informed Respondents that there is no distance between the active marina area and the salt pond as the parking lot, which is an active marina area, abuts the property line with the adjacent salt pond.

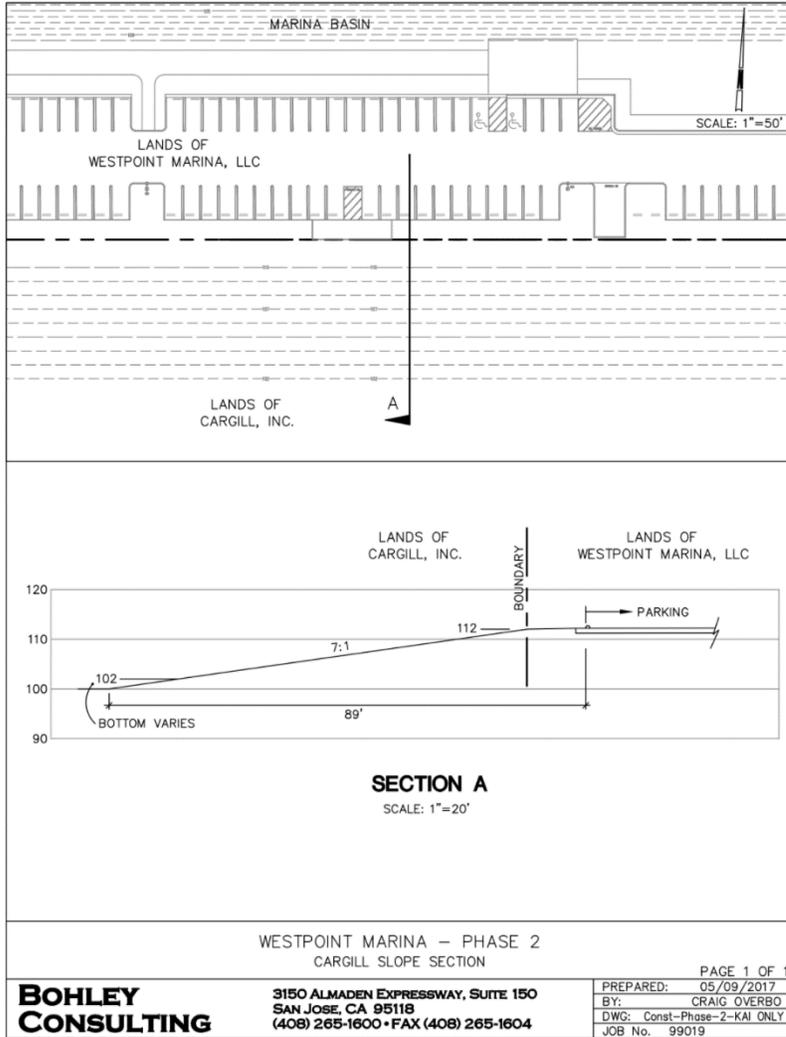
Citizens Committee is concerned that failure to implement this Permit condition has resulted in the degradation of the adjacent shorebird habitat, including the area that was supposed to be set aside as mitigation for the loss of roosting habitat from project construction.

*Respondents falsely claim (SOD p. 68:16) that an engineering drawing by Bohley Consulting shows that an 89-foot setback has been achieved, when properly accounting for the slope of the levee on the Cargill property.*

Rebuttal

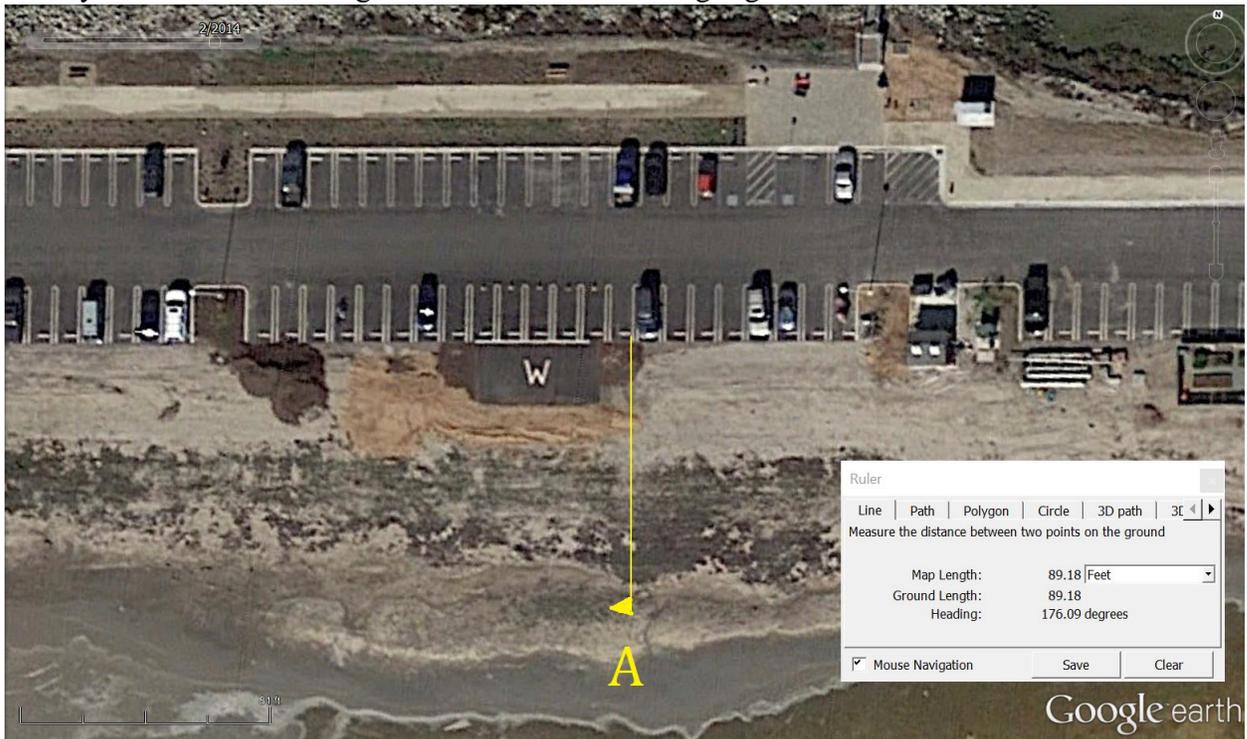
The image Respondents cite to shows this:

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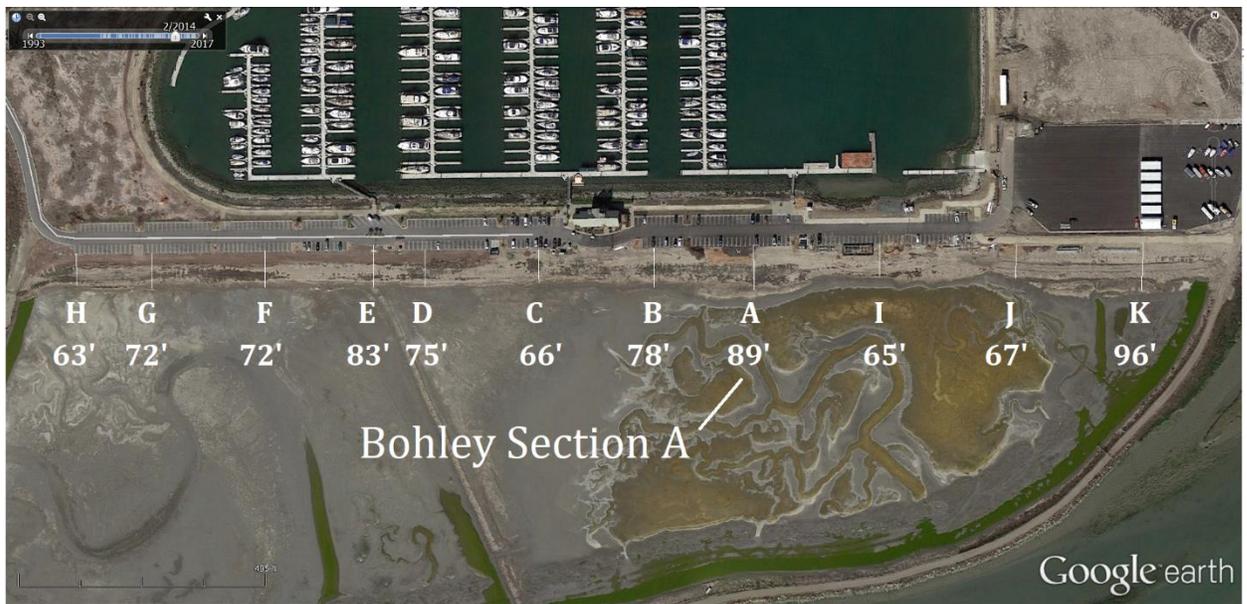


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However, the only place in the marina where this particular parking pattern matches Bohley's Section A on Google earth is marked A in highlight below:



The measurement on Google Earth confirms the 89-foot distance measured by Bohley at Location A. However, Bohley apparently measured the distance from the edge of the parking lot to the salt pond bottom **where the levee is at its widest** in the active Marina area. The Marina does not meet the 85-foot requirement at Locations B, C, D, E, F, G, H, I or J below. Here are other measurements using the same methods in Google earth:



BCDC Special Condition II.K of an 85-90 foot setback has not been met.

Therefore, Citizens Committee urges BCDC to immediately require that Respondents install and maintain a six-foot tall fence with slats to provide a visual barrier to reduce disturbance to water birds currently using the salt pond. Such a fence is already contemplated under BCDC permit section I.B.8 along the southern property line with the Cargill salt pond as part of Phase 1B of the project.

#### **V. Failure to Provide Shorebird Roost Habitat Mitigation – Violation 9**

To date, Respondents have not provided 3 acres of shorebird roost habitat with similar functions and benefits.

Prior to beginning any work authorized under Phase Two, Respondents were required to provide approximately 3.0 acres of replacement habitat with similar functions and benefits for shorebirds.

The August 17, 2001 LSA Biotic Resources Report prepared for the Westpoint Marina project stated that during a March, 2001 site inspection over 1,000 birds were observed roosting on the high ground in the southwest corner of the site and that shorebird use of the salt ponds had been documented since late 1980. The 3.0 acres of roost habitat was to be recreated on the south side of the levee separating the marina from the remaining bittern pond. The recreated roost habitat was to be high ground remaining exposed year-round, provide isolation and limited disturbance, and serve as an island, surrounded by open water, to provide shorebirds and other waterfowl with a protected roost.

In addition, the habitat creation plans were to be reviewed and approved by BCDC after consultation with the U.S. Fish and Wildlife Service and the California Department of Fish and Wildlife. Respondents never created the required habitat plans, BCDC did not approve such plans, nor did Respondents consult about such plans with the U.S. Fish and Wildlife Service and the California Department of Fish and Wildlife to ensure that the replacement habitat maintained similar functions and benefits for shorebirds.

Three acres of replacement shorebird roost habitat **with similar functions and benefits** has not been provided on the south side of the levee separating the marina from the remaining bittern pond, or in an alternate location. The “replacement” habitat which has been provided - **without consultation with the resource agencies** – does not have similar functions and benefits as the original habitat. This is in part because the required consultation and approval of habitat plans never occurred.

Also, Respondents’ “replacement habitat” is at a lower elevation than the original habitat. During the winter as water levels rise the acreage of the replacement habitat shrinks and at certain times of year there is **zero** roosting habitat. For example, this year as winter rains filled the former bittern pond lying south of the project site, by early spring roosting shorebirds were limited to the levee along the southern edge of Westpoint Marina. By mid-spring, during peak migration, shorebirds had abandoned this now-submerged pond altogether because of the absence of roosting habitat. Thus, Respondents have not

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provided the 3.0 acres of replacement habitat with similar functions and benefits for shorebirds as neither the levee nor the submerged pond serve as an island of high ground remaining exposed year-round.

*Respondents falsely claim (SOD p. 70:1-12) that agencies agreed, as part of the CEQA review, that Cargill would be responsible for maintaining roost habitat.*

Rebuttal

Respondents provide no evidence that BCDC agreed that Cargill would be responsible for creating and maintaining the roosting habitat. Respondents only state (SOD 70:4) that other agencies were “involved” in the CEQA process. Moreover, there is no legal authority that BCDC permit conditions under the McAteer-Petris Act are preempted by a city’s CEQA process or by a Mitigation Plan that Respondents submitted to the Army Corps. BCDC had full authority to craft its own project conditions irrespective of how other city, state and federal agencies reviewed the project.

Also, there is no evidence that Cargill developed the adjacent salt pond in order to trigger the need for additional or replacement habitat mitigation.

Likewise, Respondents have provided no evidence that habitat creation plans for replacement habitat with similar functions and benefits proposed by Cargill were submitted to BCDC to allow for consultation with the U.S. Fish and Wildlife Service and California Department of Fish and Wildlife, and eventual review and approval by BCDC.

*Respondents falsely claim (SOD 70:24 – 71:22) that mitigation was completed in 2003 through guarantees from Cargill.*

Rebuttal

Respondents have provided no evidence that Cargill’s proposed approach was reviewed or approved by the U.S. Fish and Wildlife Service, the California Department of Fish and Wildlife, or BCDC. Further, Respondents have failed to prove that 3 acres of replacement habitat with similar functions and benefits for shorebirds was achieved in 2003 (or maintained by Cargill through “modifications in operations” over the past 14 years).

*Respondents falsely claim (SOD 71:28-36) that the Manager of the Don Edwards San Francisco Bay National Wildlife Refuge could relieve Respondents of their shorebird roost habitat mitigation obligations.*

Rebuttal

The Don Edwards San Francisco Bay National Wildlife Refuge is only responsible for lands within the Refuge boundary, thus it is entirely reasonable for the Manager to state the Refuge does not monitor lands outside the Refuge. Given that Respondents did not create the habitat, nor consult with the required agencies about habitat plans, the Manager’s response does not change that Respondents are responsible for this mitigation and have failed to implement and maintain the shorebird roosting habitat.

Therefore, Citizens urges BCDC to require Respondents to provide 3 acres of shorebird roost habitat with similar functions and benefits.

**VI. Failure to Provide Non-Tidal Wetland Mitigation – Violation 10**

To date, Respondents have not “enhanced and enlarged wetlands” in the remainder of the drainage ditch or on isolated fringes of the project site at a replacement ratio of at least 1:1. Also, Respondents have not prepared habitat plans or had such plans approved by state and federal agencies.

Respondents were required to provide mitigation for the loss of 0.27 acres of non-tidal wetlands located in the channel adjacent to the Pacific Shores Center property by enhancing and enlarging the wetlands in the remainder of the drainage ditch and by creating additional wetlands on isolated fringes of the project site for a replacement ratio of at least 1:1. Permit Section II.G. The Regional Board's water quality certification required this mitigation prior to construction of the marina basin.

Further, the habitat enhancement plans were required to be reviewed and approved by the U.S. Fish and Wildlife Service, by the California Department of Fish and Wildlife, and by BCDC. Ibid.

BCDC reviewed the Site Preparation Plans that Respondents claimed showed implementation of the non-tidal wetlands mitigation, and BCDC found no indication of any such mitigation on those plans.

*Respondents falsely claim (SOD 73:1-10) that grading to create a wider soil saturation gradient to a slope of approximately of 3:1 was sufficient.*

**Rebuttal**

Again, there is no legal authority that BCDC permit conditions under the McAtter-Petris Act are preempted by a city's CEQA process or by the Army Corps. BCDC had full authority to craft its own project conditions irrespective of how other city, state and federal agencies reviewed the project.

Further, even if the Army Corps permit preempted BCDC's permit, creating a 3:1 slope was only part of the required mitigation plan to ensure the soil would be saturated enough to support enhanced and enlarged wetland vegetation. Another critical component included in the plan approved by the Army Corps was the installation of a 10-inch PVC pipe running from the marina basin into the ditch. There is no evidence that this 10-inch PVC pipe was ever installed. The Wetland Mitigation and Monitoring Plan (SOD Exhibit 93, page 13) states:

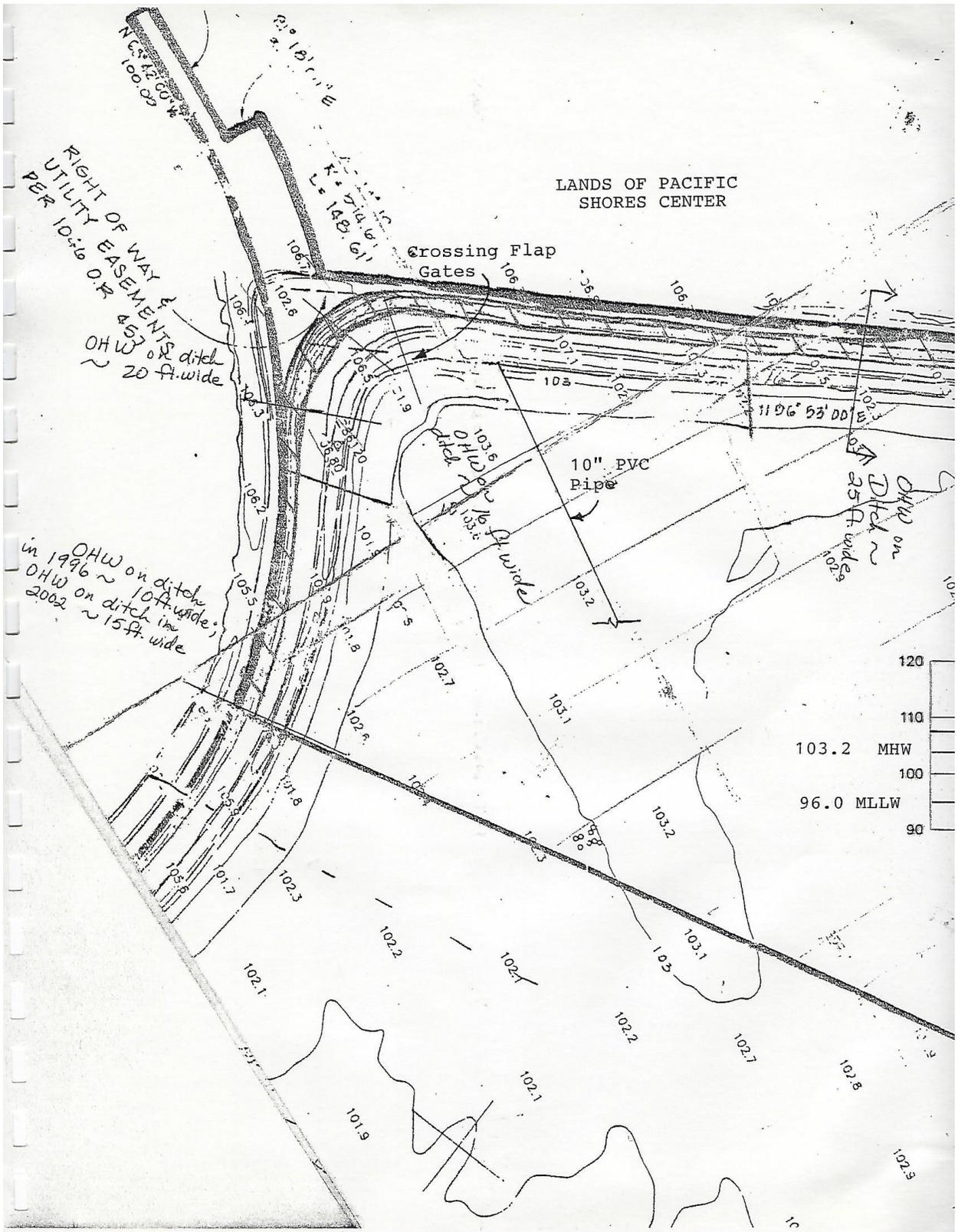
“A hydrologic connection in the form of a 10-inch PVC pipe with a control valve will connect the marina basin with the ditch just downstream of the primary access crossing. This pipe will be placed at approximately 1-foot below MHW. This will allow controlled tidal water to enter the ditch below the primary access

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road gated culverts and flow out through the lower ditch and into Westpoint Slough through the outlet gate. Management of the valved connection will allow tidal water to be introduced into the ditch during the dry season. The controlled tidal influence will extend the duration and area of soil saturation and/or inundation within the mitigation wetland. This, along with the grading of the southwest bank would provide suitable hydrologic gradients to support the enlarged wetland species within the mitigation site.”

The 10-inch pipe is clearly identified in Figure 3 of the Mitigation Site on page 11 of the Wetland Mitigation and Monitoring Plan (WMMP). This Figure 3 is missing from SOD Exhibit 93 submitted by Respondents, but Citizens Committee has a copy as a result of a FOIA response from the Army Corp. Figure 3 is reprinted below.

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*Respondents falsely claim (SOD 73:22) that a Site Preparation Plan, included as Exhibit 98 and 99, shows the location of the mitigation.*

Rebuttal

As mentioned above, BCDC reviewed the Site Preparation Plans that Respondents claimed showed implementation of the non-tidal wetlands mitigation, and BCDC found no indication of any such mitigation on those plans.

Further, neither SOD Exhibit 98 nor 99 include any plans for the installation of the 10-inch pipe and control valve that are required in the WMMP. As such, the wetland mitigation has not been completed.

Also, Permit Special Condition II G states: "The habitat enhancement plans shall be reviewed and approved...by or on behalf of the Commission." Respondents did not submit copies to BCDC of the *complete* plans for the wetland mitigation approved by the Army Corps, or any site preparation or construction plans detailing the installation and location of this required pipe.

*Respondents falsely claim (SOD 75:15-16) that an October 2, 2017 report confirms that mitigation has been achieved.*

Rebuttal

The report conclusion is not supported by any evidence. The Wetland Mitigation and Monitoring Plan was never fully implemented as required because the infrastructure was not put in place, and therefore the "success criteria" for the Target Hydrological Regime (WMMP page 9) cannot be met.

Therefore, Citizens Committee urges BCDC to require Respondents to enhance and enlarge wetlands in the remainder of the drainage ditch or on isolated fringes of the project site at a replacement ratio of at least 1:1.