

CALENDAR ITEM

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E. Milstein

M. Hays

**CONSIDER AUTHORIZATION OF
LITIGATION FOR TRESPASS AND EJECTMENT**

PARTY:

Blue Whale Sailing School, Inc.
PO Box 7435
San Jose, CA 95150

AREA, LAND TYPE, AND LOCATION:

State-owned in Simonds Canal and Alviso Slough, adjacent to 1490 Hope Street
in the town of Alviso, Santa Clara County.

UNAUTHORIZED USE:

Facilities used to dock vessels.

BACKGROUND INFORMATION:

This item involves the Blue Whale Sailing School, Inc. (BWSS), and various docking facilities and vessels that have been placed on State-owned lands in Simonds Canal and Alviso Slough, without a lease from the Commission. It is Commission staff's understanding that the two upland parcels, identified as Assessor's Parcel No. (APN) 015-01-013 and 015-02-007 which are adjacent to the State -owned lands, were acquired by BWSS in June 2000. An additional parcel (APN 015-01-37) located at the terminus of Catherine Street between the parcels owned by BWSS, is owned by the Santa Clara Valley Water District (SCVWD).

While conducting a site visit at a nearby property in the Guadalupe River in 2003, Commission staff became aware that BWSS was docking sail boats in Alviso Slough and Simonds Canal without a lease from the Commission. Between 2003 and 2007, Commission staff sent numerous letters and had many conversations with BWSS representatives to advise that BWSS was occupying the State's lands without authorization and that a lease was required in order to continue operations.

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On October 27, 2007, BWSS finally submitted a lease application, but incomplete and inadequate information was provided and neither the statutory filing fee or the minimum expense deposit to process the application were provided as required. Since receiving the application in 2007, staff has sent several letters to BWSS outlining the additional information that needs to be provided in order for staff to process the application, as well as requesting the filing fee and minimum expense deposit, but a response has not been received. As is outlined in the Commission's application, should an applicant fail to provide a complete application within a reasonable period of time, the file may be closed. Additionally, the application also states that submittal of the application will not be considered an application unless it is accompanied by the filing fee and appropriate minimum expense deposit.

On March 14, 2008, BWSS was notified that a reply to staff's incomplete letters must be provided no later than April 2, 2008 or the application would effectively be withdrawn. Due to the lack of response of BWSS by the deadline, another letter, dated May 22, 2008, was sent to BWSS serving formal notification that the application had been withdrawn and that the unauthorized docking facilities and vessels continue to be in trespass. The May 22nd letter advised that BWSS must contact Commission staff prior to May 30, 2008, or staff would make a recommendation to the Commission to take legal action to eject BWSS from State-owned lands. Another letter was sent, dated July 1, 2008, again advising that BWSS to contact Commission staff before July 11, 2008, but with no response.

On December 21, 2008, BWSS sent an electronic message to Commission staff requesting a lease of lands lying in the Alviso Slough, Simonds Canal and the Guadalupe River, including both those occupied by the BWSS and those to the south, which are under lease from the Commission to the South Bay Yacht Club (SBYC); however no application was submitted by BWSS. Staff responded by letter on February 4, 2009, with a final request to BWSS to submit an application for those State-owned lands adjacent to BWSS with a deadline of March 1, 2009 to comply.

On April 9, 2009, Mr. John Asuncion, President of the BWSS, appeared before the Commission in response to staff recommendation to the Commission to take enforcement action against the BWSS for the unauthorized use of State sovereign land. At the meeting, the Commission granted the BWSS an additional opportunity to submit a complete lease application by the next meeting of the Commission on June 1, 2009. On April 10, 2009, staff sent the BWSS another application with instructions in order to assist the BWSS in meeting the deadline. On May 1, 2009 an application had not been received and staff sent a reminder letter, however, as of May 12, 2009, no response had been received.

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However, on May 13th, staff received an e-mail from Mr. Asuncion indicating he intended to submit an application and fees in the next week or so.

Since as of the date of the posting of the meeting agenda for the June 1st Commission meeting and finalization of this calendar item, no application has been received from BWSS to the Commission's direct request and after many years and attempts by Commission staff to bring the BWSS under lease, staff is requesting that the Commission consider authorizing Commission staff and/or the Office of the Attorney General to take all necessary legal actions, including litigation, for trespass, ejection, and to seek removal of all unauthorized facilities and improvements.

OTHER PERTINENT INFORMATION:

1. It is staff's understanding that BWSS has placed fill and other improvements on State-owned lands and the adjacent uplands without permits from other required public agencies. On January 13, 2006, the San Francisco Bay Conservation and Development Commission (BCDC) sent BWSS an enforcement letter with several items but no application for a permit was received by BCDC. On May 14, 2009, BCDC issued a violation report to the BWSS for unauthorized docks and fill in Alviso Slough. The BCDC Enforcement Committee will hear the action at its meeting on July 19, 2009 in San Francisco.
2. Pursuant to the Commission's delegation of authority and the State CEQA Guidelines [Title 14, California Code of Regulations, section 15060(c)(3)], the staff has determined that this activity is not subject to the provisions of the CEQA because it is not a "project" as defined by the CEQA and the State CEQA Guidelines.

Authority: Public Resources Code section 21065 and Title 14, California Code of Regulations, sections 15060 (c)(3) and 15378.

EXHIBIT:

- A. Location Map

RECOMMENDED ACTION:

IT IS RECOMMENDED THAT THE COMMISSION:

CEQA FINDING:

FIND THAT THE ACTIVITY IS NOT SUBJECT TO THE REQUIREMENTS OF THE CEQA PURSUANT TO TITLE 14, CALIFORNIA CODE OF REGULATIONS, SECTION 15060(c)(3) BECAUSE THE ACTIVITY IS NOT A PROJECT AS DEFINED BY

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PUBLIC RESOURCES CODE SECTION 21065 AND TITLE 14,
CALIFORNIA CODE OF REGULATIONS, SECTION 15378.

AUTHORIZATION:

1. FIND THAT BLUE WHALE SAILING SCHOOL, INC., IS UNLAWFULLY OCCUPYING AND IN TRESPASS ON STATE-OWNED LAND LOCATED IN SIMONDS CANAL AND ALVISO SLOUGH AS SHOWN ON THE ATTACHED EXHIBIT A.

2. AUTHORIZE STAFF OF THE STATE LANDS COMMISSION AND THE OFFICE OF THE ATTORNEY GENERAL TO TAKE ALL NECESSARY LEGAL ACTION, INCLUDING LITIGATION, TO 1) EJECT BLUE WHALE SAILING SCHOOL, INC.; 2) SEEK REMOVAL OF THE DOCKING FACILITIES AND OTHER IMPROVEMENTS FROM STATE LANDS IN THE BED OF ALVISO SLOUGH AND SIMONDS CANAL AS SHOWN ON THE ATTACHED EXHIBIT A (FOR REFERENCE PURPOSES ONLY) AND LYING ADJACENT TO ASSESSOR'S PARCEL NOS. 015-01-013, 015-01-037 AND 015-02-007, IN THE TOWN OF ALVISO, SANTA CLARA COUNTY; 3) SEEK RESTORATION OF THE STATE-OWNED LANDS AT THESE LOCATIONS TO THEIR CONDITION PRIOR TO PLACEMENT OF DOCKING FACILITIES; AND 4) TO RECOVER THE COMMISSION'S DAMAGES AND COSTS.