

MEMORANDUM

TO: JEE
FROM: Darren K. Indyke, Esq.
RE: Telephone Call with Maria Hodge, Esq. Re ACOE and CZM
DATE: October 21, 2009

Maria Hodge called to advise me about the following relating to conversations she had yesterday with Jose Cedeno of ACOE and J.P. Oriol of CZM:

1. Maria spoke separately with each of Cedeno (ACOE) and Oriol (CZM) yesterday, October 20, 2009, to follow up on the October 8, 2009 ACOE letter withdrawing processing of the after-the-fact permit and rescinding ACOE's Notice of Non-Compliance. Maria told Cedeno that the letter didn't contain everything Cedeno had expressed to Maria in the conversation she had with Cedeno preceding the letter. Maria also told both Cedeno and Oriol that she thought it was appropriate to get clarity about how ACOE and CZM would want us to move forward. Maria said that she also told Cedeno and Oriol that the Client wanted to be respectful and compliant and also did not want to do things that ACOE or CZM thought unnecessary or improper.

2. Cedeno clarified that to do anything, even the remediation previously requested in ACOE's August 12, 2009 letter, would now require a minor permit because the enforcement action had been dropped and the ACOE's Notice of Non-compliance had been rescinded. Oriol also told Maria that remediation work would require a minor CZM permit, though Oriol said that because CZM already stated in Commissioner Mathes' September 10, 2009 letter that remediation work agreed to with the Corps would not require a further CZM permit, CZM's response to a minor permit request for any such remediation (excluding shoreline restoration) would be favorable.

3. According to Maria, and contrary to her prior e-mail (which she said was based on her conversation with Cedeno) that we should proceed with the shoreline restoration, it is now Cedeno's and Oriol's view that shoreline restoration is not necessary and probably not a good idea. Maria said that Cedeno's view is that if we were to do any remediation and wanted to show our attempts to protect the environment and be a good citizen, remediation should focus on the remediation of the wetlands. Maria said that both Cedeno and Oriol noted that we had already done some mangrove planting and should wait and see how those mangroves fared before proceeding further with Mangrove plantings. Maria said that both Cedeno and Oriol specifically mentioned and did not like the rock configuration descending into the small pond (Maria referred to it as a waterfall and surmised that the rock formation's tendency to channel more freshwater into the pond is what Cedeno and Oriol find objectionable), though neither specifically told her that they wanted it removed. Again, neither of them pressed us to do anything at this time, but both said that any remediation we did (though it would require a minor permit) would

have a positive impact on ACOE and CZM receptivity to additional permit requests. Maria's view then is that we should do whatever remediation (excluding shoreline restoration) that we do not think is a major pain to show we are good citizens, but Maria notes that whatever we do, we must first file minor permit applications with ACOE and CZM. Maria also said there is no time pressure to begin any such remediation, but it is something that we should consider. As a reminder, excluding the shoreline restoration, the ACOE's requested remediation included turtle remediation – turtle lighting plan, buffer zone -- and wetlands enhancement -- basically removal of two sediment deltas from big pond and planting of mangroves around both ponds.

4. Maria raised the issue of the possible dock house permit. Maria said that Cedeno said that any improvements to the dock should be filed as applications to amend the existing ACOE and CZM permits (which is contrary to Maria's initial thought in Maria's October 15, 2009 email that we would have to file a new permit application and not an application to amend). Maria also said that if we did file an application to amend, NMFS and FWS would consult about the amendment (remember, Maria told us that ACOE said that NMFS's and FWS's refusal to consult is what caused ACOE to withdraw from consideration the after-the-fact permit and resulted in the October 8, 2009 letter from ACOE), and as part of that consultation might impose conditions flowing from the unpermitted aspects of the existing structures – i.e., the expanded portion of the dock that was permitted by CZM, but not by ACOE, the pilings, the r/o intake line, the barge landing, remaining rip-rap, etc. Again, amendment applications would have to be filed with both CZM and ACOE and Maria noted that Cedeno and Oriol were both clear to Maria that they were making no promises as to any amendment applications.

5. Maria was not sure if the Dock House amendment applications would be major or minor, but she thought it depended on the cost of the proposed improvements. She mentioned above \$75,000 would make it a major, but said that if and when we are ready to move ahead with the dock house, she would get me more definitive info on whether it would be minor or major modification. I recall that whether it is a major or minor depends on more than simple cost analysis; but I will clarify that with Maria.

6. Please note that I did not raise the issue of the restoration of the cliff face below the office pavilion in my call with Maria, but Maria did. She specifically told me that whatever restoration is done, even if she were to conclude that it does not require an additional permit, given (a) the history of our having gone to CZM with the issue in the first place, (b) CZM having taken the trip to the Island to view the cliff face and having consulted with Alan Smith and deJongh about the same, (c) deJongh and Alan Smith having advised CZM that we would send them a proposal of what we intend to do and get confirmation from CZM that it is ok before we do it, and (d) these new developments with ACOE and CZM regarding the remediation of the shoreline and wetlands, Maria would want to run any work we are going to do on the cliff face by CZM before we start that work and get CZM's confirmation that

we could proceed. Maria's concerns that going to CZM about the cliff face without being able to commit to the shoreline restoration do not appear to be an issue given what Maria has now told us regarding ACOE's and CZM's views that we should not do the shoreline restoration. Moreover, Maria, Amy, deJongh are all under the impression that the Island is being closely watched and if machinery is brought down to the beach or other work is obviously being done to the cliff face, CZM will be notified and be asked about that work. If CZM is not told in advance, so that it is prepared for this, Maria is concerned that it could create problems either for the cliff face work or other work desired in the future. I am just relating her views to you.