

DEPARTMENT OF INDUSTRIAL RELATIONS

Katrina S. Hagen, Director

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December 6, 2021

Deborah E.G. Wilder
635 Mariners Island Boulevard, Suite 200
San Mateo, California 94404

Re: Public Works Case No. 2020-018
Bryant Habert/Wait Ecological Restoration Project, Phase II
Resource Conservation District of Santa Cruz

Dear Ms. Wilder:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to California Labor Code section 1773.5¹ and California Code of Regulations, title 8, section 16001, subdivision (a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the second phase (Phase II) of the Bryant Habert/Wait Ecological Restoration Project is subject to prevailing wage requirements.

Facts

Phase II of the Bryant-Habert/Wait Ecological Restoration Project restores approximately 9.9 acres of wetlands previously leveled for agricultural use in the Watsonville Slough Watershed in unincorporated Santa Cruz County. The subject property was used for agricultural production for about 80 years, and has lain fallow for the last decade. Phase II is the second and final phase of implementing the Bryant-Habert/Wait Ecological Restoration Project to enhance ecosystem health and resiliency within the Watsonville Slough system.² The Bryant-Habert/Wait Ecological Restoration Project site is located roughly two miles inland from the Pacific Ocean and approximately two miles west of downtown Watsonville in southwest Santa Cruz County, 1800 feet north of Beach Road and Panabaker Road junction on Watsonville Slough Farms in Watsonville. The site is owned by the Land Trust of Santa Cruz County (Owner).

¹ Unless otherwise indicated, all further statutory references are to the California Labor Code and all subdivision references are to the subdivisions of section 1720.

² The scope of the first and initial phase of the implementation of the Bryant-Habert/Wait Ecological Restoration Project has not been provided to the Department.

According to the Coastal Conservancy Staff Recommendation report dated May 5, 2020, the Bryant-Habert/Wait Ecological Restoration Project is funded by grants from the following sources:

Coastal Conservancy	\$440,620
Wildlife Conservation Board	\$144,775
Land Trust of Santa Cruz County	<u>\$109,942</u>
	\$695,337

The Coastal Conservancy Staff Recommendation report described the Bryant-Habert/Wait Ecological Restoration Project as follows:

The [Resource Conservation District of Santa Cruz County (RCD)] is partnering with the Land Trust of Santa Cruz County (Land Trust) to restore 9.9 acres of Watsonville Slough Farms which was previously leveled and converted to agricultural production. The proposed project consists of earthmoving to restore topographic variation to the property followed by revegetation of native plants. Restoring topographic variation will support the re-establishment of important habitats including seasonal marsh, wet meadow, willow scrub, and native grassland. To create the topographic variation, broad depressions will be graded to depths of up to five feet below existing grade, and the excavated material will be placed in broad deposits serving as topographic islands that support upland habitat.

On August 9, 2020, the Resource Conservation District of Santa Cruz County (District), which requested this coverage determination, contracted with Watsonville Wetlands Watch to perform work on Phase II. The scope of work described in the contract involved three tasks: (1) site preparation; (2) vegetation establishment; and (3) maintenance, vegetation management, and performance monitoring. The contract specifically stated that the Bryant-Habert/Wait Ecological Restoration Project is subject to state prevailing wages. Phase II is scheduled to be completed no later than May 31, 2023, pursuant to permit or grant funding requirements.

Discussion

All workers employed on public works projects must be paid at least the applicable prevailing wage rates. (§ 1771.) Section 1720, subdivision (a)(1) (hereafter section 1720(a)(1)) defines “public works” to mean construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds. It is undisputed that the work is “done under contract” and “paid for in whole or in part out of public funds.” Thus, the only issue presented is whether Phase II involves “maintenance” or “[c]onstruction, alteration, demolition, installation, or repair work.” (§§ 1720, subd. (a)(1), 1771.)

“To ‘alter’ is merely to modify without changing into something else,” and that term applies “to a changed condition of the surface or the below-surface.” (*Priest v. Housing Authority of City of Oxnard* (1969) 275 Cal.App.2d 751, 756 (*Priest*)). “Alter” as defined by Webster’s Third New International Dictionary (2002) at page 63 is “to cause to become different in some particular characteristic (as measure, dimension, course, arrangement or inclination) without changing into something else.” Based on these definitions, prior coverage determinations have reasoned that, with regard to land, to engage in alteration under section 1720(a)(1) is “to modify a particular characteristic of the land in question”. (PW 2008-015, *Land Clearing Project Selma-Kingsburg-Fowler County Sanitation District* (June 11, 2008) (*Land Clearing Project*)).

The first task of Phase II, site preparation, involves the modification of a particular characteristic of land. The land had previously been leveled for agricultural use. It is now being graded to restore topographic variation, to create excavated depressions up to five feet below grade, and to use the excavated material to create topographic islands above grade. The grading of land to create topographic variation is intended to support the re-establishment of important habitats including seasonal marsh, wet meadow, willow scrub, and native grassland for the ecological restoration of the Bryant-Habert/Wait Ecological Restoration Project area, which constitutes a different use of the altered land.³

The facts here are analogous to the facts in *Priest*, where the land was cleared of a burned-down wartime housing development to make it suitable for farming. (*Priest, supra*, 275 Cal.App.2d at p. 755.) The work involved the removal of all surface and sub-surface concrete, blacktop, and debris in the form of pavement, curbs, gutters, sidewalks, foundations, piers, trees, shrubs, and underground pipe, followed by rough-grading. (*Id.* at p. 752, fn. 2.) The court found the work to be both demolition and alteration under the definition of public works in then section 1720(a)(1). (*Id.* at pp. 755-56.) Like *Priest*, this case involves alteration in that the land is being modified. In *Priest*, a former housing development site was made suitable for agriculture. Here, a former agricultural site is now open land made suitable for another different use.

Prior determinations have found work modifying the land surface and below-surface to be public work. (See PW Case No. 2001-066, *Excavation Work at Willow Lake Water Treatment Facility* (Mar. 29, 2002) (*Willow Lake*); PW 2000-036, *Carlson Property Site Lead Affected Soil Removal and Disposal Project* (May 31, 2000) (*Carlson*)). In *Willow Lake*, the excavation, clearing, and grading of land was done in preparation for construction. Likewise, in *Carlson*, the excavation of soil and placement of fill were necessary to prepare the land for other use. In *Land Clearing Project, supra*, PW 2008-

³ The District may contend that the actual grading work was performed by a separate grading contractor, and Watsonville Wetlands Watch’s scope of work included only pre-grading site preparation work, work “during final compaction of all fill areas, in order to ensure soil compaction and soil conditions are left in a manner conducive to establishment of native vegetation,” and post-grading work to “scarify or till the soil surface where needed to enhance conditions for native seed establishment.” However, all this work was essential to the grading, and thus, constituted alteration of the land.

015, the determination found that a particular characteristic of the land is modified when the land is cleared for other, different uses.

The District relies on an informal letter dated February 9, 2015 regarding the Removal of *Spartina* from Marsh Land for the California Wildlife Foundation. In that informal letter, an attorney from the Department concluded that the treatment and removal of nonnative, invasive *Spartina* plant species from marsh lands for the purpose of salt marsh restoration through mowing, grinding, rototilling, and spraying, did not constitute an alteration of the land because the land remained a salt marsh both before and after the work performed, and did not constitute maintenance because the work was not done on a routine, recurring, or regular basis. The informal letter is therefore inapposite to the work performed in Phase II, which involves the restoration of wetlands from prior agricultural use.

The second task of Phase II, the establishment of vegetation for restoration of land from agricultural use back to wetlands, is also subject to the payment of prevailing wages. On-site planting work has previously been found to be covered work. (See PW Case No. 2009-055, *Ecosystem Restoration and Flood Attenuation Project, San Joaquin River* (Oct. 5, 2010) (*San Joaquin River*). In *San Joaquin River*, the planting of native plants for habitat restoration was found to be an alteration of the land under section 1720 (a)(1) because restoring the habitat by way of planting modified “a particular characteristic of the land.”⁴

The third task in Phase II consists broadly of “maintenance, vegetation management and performance monitoring.” Separate from “[c]onstruction, alteration, demolition, installation, or repair work” in section 1720(a)(1), maintenance work is independently subject to prevailing requirements under section 1771. (*Reliable Tree Experts v. Baker* (2011) 200 Cal.App.4th 785, 795.) “Maintenance” is defined as including, in relevant part: “[r]outine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired,” and “[l]andscape maintenance,” which is further defined as “including mowing, watering, trimming, pruning, planting, replacement of plants, and

⁴ See also PW Case No. 2002-096, *Request for Proposals: Planting, Operation, Maintenance and Monitoring of Owens Lake Southern Zones Managed Vegetation Project – Los Angeles Department of Water and Power* (Dec. 16, 2005/June 1, 2005) [“The transplantation of the salt grass plugs will modify the land, creating an area of vegetation where previously there was none. A particular characteristic - the salt grass plugs - will be added so that the land no longer is a dry lakebed and a constant source of dust pollution. Therefore, the transplantation of the salt grass plugs, including soil reclamation, constitutes alteration within the meaning of section 1720(a)(1).”]

servicing of irrigation and sprinkler systems.” (Cal. Code Regs., tit. 8, § 16000, Pub. Cont. Code, § 22002.⁵)

The scope of work mentions annual mowing, periodic weeding, and the establishment of an irrigation system, among other activities, all of which would constitute “landscape maintenance.” (Pub. Cont. Code, § 22002.) The scope also describes the third task as including “maintenance of plantings,” annual and more frequent monitoring to carry out the vegetation management plan, and “other practices to support development of high quality native habitat.” These maintenance activities described as part of the third task appear to constitute routine, recurring and usual work for the preservation of the ecological restoration work performed in Phase II and the overall Bryant-Habert/Wait Ecological Restoration Project site for its intended uses as wetlands, in a safe and continually usable condition for which the site was restored. Accordingly, the activities described in the third task of Phase II are subject to prevailing wage requirements.⁶

Conclusion

For the foregoing reasons, the second phase of the Bryant Habert/Wait Ecological Restoration Project is subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Katrina S. Hagen
Director of Industrial Relations

⁵ California Code of Regulations, title 8, section 16000 refers to the definition of landscape maintenance in “Public Contract Code Section 21002.” Section 21002 was renumbered section 22002. (Stats. 1986, ch. 1019, § 39.) The regulation, however, has not been amended to reflect the renumbering of the statute.

⁶ To the extent the work involved in the third task of Phase II falls outside the definition of maintenance in California Code of Regulations, title 8, section 16000, such work would not be subject to prevailing wage requirements. (§ 1771.) Unlike the extensive work described here, *San Joaquin River* found that a specific type of one-time post-planting monitoring work was not covered under section 1771.