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Lawrence Goldzband
Executive Director
San Francisco Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600
San Francisco, CA 94102

Re: Receipt of Acknowledgement regarding In Re: Marks Sanders and Westpoint Harbor, LLC; BCDC Enforcement Investigation No. ER2010.013; Proposed Cease and Desist and Civil Penalty Order No. CDO 2018.01

I hereby acknowledge receipt of twenty-seven copies of the following:

1. Respondents' Objections to Enforcement Committee's Recommended Enforcement Decision and Attachments Respondents' Objections to Executive Director's Modified Recommended Enforcement Decision and Attachments and Respondents' Objections to Violations of Due Process, and Procedural and Evidentiary Protections

regarding Enforcement Investigation No. ER2010.013 and Proposed Cease and Desist and Civil Penalty Order No. CDO 2018.01, hand delivered to the address above.

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SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

IN THE MATTER OF: VIOLATION REPORT/COMPLAINT FOR THE IMPOSITION OF ADMINISTRATIVE CIVIL PENALTIES NO. ER2010.013 PROPOSED CEASE AND DESIST AND CIVIL PENALTY ORDER NO. CDO 2018.01 MARK SANDERS AND WESTPOINT HARBOR, LLC	RESPONDENTS' OBJECTIONS TO ENFORCEMENT COMMITTEE'S RECOMMENDED ENFORCEMENT DECISION AND ATTACHMENTS AND RESPONDENTS' OBJECTIONS TO VIOLATIONS OF DUE PROCESS, AND PROCEDURAL AND EVIDENTIARY PROTECTIONS

Respondents Mark Sanders and Westpoint Harbor, LLC ("Respondents") re-urge, resubmit, and incorporate herein by reference all the factual and legal defenses, objections and responses asserted at the Enforcement Committee hearings held on November 16, 2017, and January 18, 2018, and in the documents listed in the footnote below.[1]

1. Objections to the Enforcement Committee's Recommended Enforcement Decision

The Enforcement Committee adopted the Executive Director's November 6, 2017 *Recommended Enforcement Decision Regarding Proposed Cease and Desist and Civil Penalty Order No. CDO 2017.04* with only minor changes to attachments C (the proposed penalty chart) and E (the proposed order) (now re-numbered CDO 2018.01). All of Respondents' objections made in the earlier written objections filed prior to the Enforcement Committee's hearings on this matter, including objections to the content of the proposed order, remain applicable and are hereby asserted by reference to Attachments A, B, C, D, E, and F (see footnote 1). To the extent earlier objections referred to the Executive Director's proposed order or recommended enforcement decision, Respondents now intend those objections to refer to the Enforcement Committee's proposed *Commission Cease and Desist and Civil Penalty Order No. CDO 2018.01* (the "Proposed Order") and the Enforcement Committee's Recommended Enforcement Decision.

[1] (1) Respondents' Statement of Defense (Oct. 19, 2017) (including here as Attachment A); (2) Respondents' Objections to Executive Director's Recommended Enforcement Decision and Attachments (Nov. 15, 2017) (Attachment B); (3) Respondents' Response to Staff's Objections to Declaration of Mark Sanders (Nov. 15, 2017) (Attachment C); (4) Respondents' Objections to Letter and Attachment from Citizens Committee to Complete the Refuge (Nov. 15, 2017) (Attachment D); (5) Respondents' Objections to Declaration of Matthew Leddy (Nov. 15, 2017) (Attachment E); and (6) Respondents' Objections to Executive Director's Modified Recommended Enforcement Decision and Attachments (Jan. 16, 2018) (Attachment F).

2. Objection to the Executive Director's exclusive reliance on hearsay to support findings

The only proper, sworn testimony in this case is from Mr. Sanders, which he provided as an exhibit to his Statement of Defense and at the Enforcement Committee's November 2017 hearing. But the Proposed Order relies heavily on unverified, untested statements from individuals who were not under oath and who were sometimes not even speaking or writing for themselves. Some of the Proposed Order's findings rely solely on the hearsay of one individual or another. This violates BCDC's regulations, California statute, and the federal and state constitutions.

At the Enforcement Committee hearing on November 16, 2017, Chair Scharff stated that the Executive Director is "not relying on hearsay for the findings of fact, [he is] not relying on the declarations for the findings of fact. Is that clear?" Transcript at 13:16-19 (Nov. 16, 2017). Furthermore, under BCDC's regulations, inadmissible hearsay is not sufficient in itself to support a finding unless Respondents are allowed to cross-examine the hearsay declarant (Respondents' requests to cross-examine declarants have been repeatedly denied). Cal. Code of Regs., tit. 14, § 11329(b). Therefore, the Commission should strike the findings that rely on hearsay from the Proposed Order, and the Commission should reject consideration of the new hearsay that the Executive Director has submitted since the January 18, 2018 Enforcement Committee hearing, including the hearsay discussed below and the hearsay from an additional unnamed "member of the public" cited on page four of the Executive Director's "response to public comments" document, titled *Mark Sanders and Westpoint Harbor, LLC, Proposed Cease and Desist and Civil Penalty Order No. CDO No. 2018.01; Response to Public Comments Made at the January 18th Enforcement Committee Meeting (For Commission consideration on March 15, 2018)* (dated February 23, 2018).

3. Objection to the Enforcement Committee's acceptance of late evidence

At the Enforcement Committee's November 2017 hearing, Respondents objected to the consideration of a declaration of Matthey Leddy and a letter from the Citizens Committee to Complete the Refuge ("CCCR") provided to Respondents just 10 days before the hearing. *See* Attachment E; Transcript at 8-14 (Nov. 16, 2017). Respondents' objections were based on multiple grounds, including under BCDC's Regulations, Section 11328. Over Respondents' objections Enforcement Committee Chair Scharff stated, "I'm going to allow the declarations in[.]" Transcript at 14:16 (Nov. 16, 2017) (misstating that both documents were declarations). This was improper for all the reasons Respondents previously asserted, which are incorporated herein by reference, including that the Leddy declaration and the CCCR letter were impermissible late evidence. BCDC's regulations state:

> [T]he Commission, any hearing officer, and the enforcement committee shall not accept into the record or consider any statement of defense form or any written evidence not filed in a timely manner unless the Commission, hearing officer, or enforcement committee finds that (1) the person seeking to introduce the evidence made all reasonable efforts to obtain and submit the evidence in a timely manner and would be substantially harmed if the evidence were not admitted and (2) no other party would suffer substantial prejudice by its admission.

Cal. Code Regs. tit. 14, § 11328. The Enforcement Commission made no finding that the Executive Director had made all reasonable efforts to obtain and submit the evidence in a timely manner and that the Executive Director would be substantially harmed if the evidence were not admitted. Indeed, there was no basis whatsoever for such a finding. Additionally, the Enforcement Committee made no finding that Respondents would not suffer substantial prejudice by admission of the Leddy declaration and the CCCR letter. Respondents' detailed objections made clear that there was in fact substantial prejudice. Respondents resubmit their

objection to the Enforcement Committee's and, now, this Commission's acceptance and consideration of late evidence.

4. <u>Objection to closed sessions on the Proposed Order</u>

The Enforcement Committee held an improper closed session during the January 18, 2018 meeting. The session was "on pending litigation" regarding the "Recommended Enforcement Decision Involving Proposed Cease and Desist and Civil Penalty Order No. CDO 2018.01, Mark Sanders and Westpoint Harbor, LLC." Likewise, the full Commission is scheduled to hold a closed session "on pending litigation" regarding the Recommended Enforcement Decision and the Proposed Order (Revised March 15, 2018 Commission Meeting, Agenda Item 8A). Respondents object to such closed sessions. There is no "pending litigation" on the Recommended Enforcement Decision and the Proposed Order. Holding a closed session about a pending enforcement matter that is supposed to be the subject of a public hearing is improper procedure, raises the possibility of ex parte communications between enforcement staff and Commissioners, and gives the appearance of an unfair trial. The Enforcement Committee's and the Commission's meetings concerning the Proposed Order must be open meetings, Cal. Gov't Code § 11123, and do not fit within the exceptions allowed for closed sessions, *see* Cal. Gov't Code § 11126. It is particularly egregious that the BCDC's staff acting as prosecutors in this matter, including the Chief Counsel, appeared to participate in the closed session with the Enforcement Committee at its January 2018 meeting, and may be planning to participate in the closed session with the full Commission. Such communications between prosecutors and adjudicators are prohibited ex parte communications under the California Administrative Procedure Act and the McAteer Petris Act, and also violate Respondents' constitutional due process rights.

5. Objection to the submission of late (alleged) evidence in the form of Executive Director's response to comments

Respondents object to the Executive Director's submission of 11th-hour information in the purported form of responding to public comments that appears to be intended to allege evidence. The Executive Director filed a document titled *Mark Sanders and Westpoint Harbor, LLC, Proposed Cease and Desist and Civil Penalty Order No. CDO No. 2018.01; Response to Public Comments Made at the January 18th Enforcement Committee Meeting (For Commission consideration on March 15, 2018)* (dated February 23, 2018) (hereinafter, the "Response to Comments"). Yet again, the Executive Director is flouting statutory, regulatory, and constitutional procedural protections.

The Executive Director prefaces his 17 pages of Response to Comments by stating that the allegations therein are intended to "assist the Commission in considering the proposed Cease and Desist and Civil Penalty Order[.]" The Executive Director does not merely respond to comments with information that is already in the record; he inserts wholly new factual and legal claims. For example, the Executive Director baldly claims, without any citation to the source of the information, "two of the three gates to the guest docks remain locked, preventing public access by pedestrians." Response to Comments at 2. The Response to Comments also includes hearsay and hearsay within hearsay. For example, it states that an unidentified member of the public told BCDC staff that "someone who drove up in a golf cart, apparently a representative of Westpoint Harbor, [told him] that the ramp 'was not for use by kayaks,'" and that he should use the rower's dock instead.

The Response to Comments also contains 11th-hour arguments about facts and interpretations of Permit No. 2002.002 (the "Permit"). For example, it states: "BCDC staff acknowledges that stenciling of public parking spaces is the approach used for the neighboring

Pacific Shores Center. However, BCDC staff approved the signage plan for Pacific Shores Center on November 17, 2000, almost five years prior to publication of the Public Access Signage Guidelines in 2005." Response to Comments at 5. Respondents are compelled to point out that the Executive Director's argument that Westpoint Harbor's Permit requires parking signs on posts, but Pacific Shores Center's permit does not because Pacific Shores Center's signage plan was approved before 2005, is nonsensical: Westpoint Harbor's Permit was approved before 2005. Regardless, it is inappropriate for the Commission to consider the factual and interpretation arguments asserted by the Executive Director in the Response to Comments.

The Response to Comments also contains some patently false assertions that are belied by the Executive Director's own documents. In the span of just one paragraph, the Executive Director claims both that the "enforcement action does not allege a violation, or propose a penalty, for the mooring of the Redwood City police or fire boats" but that "the proposed cease and desist order would simply require Mr. Sanders to [. . .] request authorization to use the guest docks or another location at Westpoint Harbor to moor Redwood City's police and fire boats and any other public agency boats." Response to Comments at 6. Putting aside the fact that the Executive Director continues to assert that a marina cannot be used to moor boats that serve the public, the Response to Comments also highlights the fact that the Executive Director is misinforming the Commission about the allegations that form the basis of the conditions in the Proposed Order (just as he has done with Allegation 23, which was supposedly withdrawn but remains the subject of a cease and desist requirement). If there is no allegation of violation, then due process requires that there be no cease and desist condition imposed upon Respondents.

Another example of a blatant misstatement in the Response to Comments is the claim that the Permit's finding regarding Cargill, Inc.'s use of Pond 10 "does not pertain to mitigation

requirements for the impact of developing Westpoint Harbor[.]" The truth is that the Permit's finding clearly pertains to mitigation requirements for the impact of developing Westpoint Harbor. Why else would it be *in the Westpoint Harbor Permit*? The Response to Comments only quotes half of a sentence from the Permit. *See* Response to Comments at 11. In whole, the Permit sentence states:

> The permit does not contain a condition requiring the permittee to permanently guarantee the shorebird roosting habitat; Cargill will have to provide additional or replacement mitigation for this habitat if it develops the adjacent salt pond.

Permit, Section III, Findings and Declarations, Section F. This is another example of misinforming the Commission.

Under Section 11321(b) of BCDC's regulations, the Violation Report/Complaint must "refer to all documents on which the staff relies to provide a prima facie case[.]" Furthermore, late evidence may not be considered without finding that "(1) the person seeking to introduce the evidence made all reasonable efforts to obtain and submit the evidence in a timely manner and would be substantially harmed if the evidence were not admitted and (2) no other party would suffer substantial prejudice by its admission." Cal. Code of Regs., tit. 14, § 11328. In addition, BCDC's regulations, the Administrative Procedure Act, the McAteer-Petris Act, and the federal and state constitutions require that Respondents be given a fair opportunity to respond. By failing to comply with BCDC's regulations and other law, staff deprives Respondents of the opportunity to adequately respond to the allegations in the Response to Comments. Because BCDC regulations effectively limit Respondents' right to present evidence to the already submitted Statement of Defense, staff cannot now introduce new evidence that Respondents do not have an opportunity to respond to. The only fair (and lawful) avenue open to the Commission is to strike the Response to Comments.

6. Objection to statements at the November 16, 2017 Enforcement Committee hearing ("November 2017 Hearing")

Respondents submit that several statements made by certain Commissioners in the course of the November 16, 2017 hearing reveal improper consideration of matters which demonstrate that Respondents did not receive due process in these proceedings, as guaranteed by the U.S. and California Constitutions. The comments, taken individually, or in totality, demonstrate a personal animus against Respondents and a retaliatory bias against Respondents for defending against the VR/C and filing a lawsuit against BCDC under the California Public Records Act. (Westpoint Harbor ("WPH") November 2017 Hearing Transcript, at 62:24-25; 63:1-9; 72:2-4; 113:20-22; 114:1-8; 114:21-25; 134:17-22; 125:12-16.)

7. Objection to lack of evidence of the amount of time or money spent by BCDC Staff in pursuing their enforcement action

Section 66641.9 of the McAteer-Petris Act also requires BCDC to consider "the cost to the state in pursuing the enforcement action" when imposing fines. Here, the Order states that "Staff estimates that the costs to the state from May 2011 through November 2017 total at least 2,160 hours and a cost of over $165,000." (Order ¶ IV.G.) There is no evidence to support this provision of the Order. Staff offered no testimony and no records on this issue. In argument to the Enforcement Committee, BCDC's lawyer simply declared this as if it were fact but offered no evidence. (WPH November 2017 Hearing Transcript, at 35:11-13.) The Commissioners then relied on this unsupported claim,[2] as shown by the Order text itself and Commissioner statements at the initial Enforcement Committee hearing. (Order ¶ IV.G; see November 2017 Hearing Transcript, at 123:3-10).

Conclusion

For the reasons set forth and incorporated by reference, Respondents object to the Enforcement Committee's Recommended Enforcement Decision and its attachments.

[2] In fact, Chair Scharff first stated that he had "heard we spent $186,000 worth of time on this," before being advised by BCDC's attorney—again, without any supporting evidence—that the time amounted to an "estimated" $165,000. (November 2017 Hearing Transcript, at 123:4-9.)

Respondents request that the Commission dismiss this entire matter by voting not to issue the Proposed Order. Respondents request that the Commission exclude Allegation No. 23 as improperly proposed and strike inclusion of Allegation No. 23 from the Enforcement Committee's Recommended Enforcement Decision, the Proposed Order, and the Revised Penalty Chart; strike the hearsay evidence improperly relied on in Paragraphs R, S, and V of the Proposed Order; strike alleged admissions improperly attributed to Respondents in the Enforcement Committee's Recommended Enforcement Decision; strike unverified factual claims asserted in the Enforcement Committee's Recommended Enforcement Decision and the Proposed Order; strike findings about alleged requirements by other agencies in the Enforcement Committee's Recommended Enforcement Decision and the Proposed Order; strike the Leddy declaration and the CCCR letter; strike the Response to Comments; and strike the statutorily and constitutionally excessive fines from the Proposed Order. Respondents request that the Enforcement Committee disclose all details of the closed session held on January 18, 2018, regarding the Recommended Enforcement Decision. Respondents request that the Commission not conduct a closed session on March 15, 2018, regarding the Recommended Enforcement Decision. Respondents further request that they be given a fair trial as is their right.

Dated: March 14, 2018

Respectfully submitted,

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By: *_/s/ Christopher J. Carr_____*

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ATTACHMENT A

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SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

IN THE MATTER OF: VIOLATION REPORT/COMPLAINT FOR THE IMPOSITION OF ADMINISTRATIVE CIVIL PENALTIES NO. ER2010.013 MARK SANDERS AND WESTPOINT HARBOR, LLC	RESPONDENTS' STATEMENT OF DEFENSE

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PROCEDURAL BACKGROUND

On July 24, 2017, the San Francisco Bay Conservation and Development Commission ("BCDC") mailed a Violation Report/Complaint for the Imposition of Administrative Civil Penalties, No. ER2010.013, (the "VR/C") to Mark Sanders ("Mr. Sanders") and Westpoint Harbor, LLC ("WPH") (collectively, Mr. Sanders and WPH are referred to as "Respondents"). The VR/C proposes a penalty of $504,000 and BCDC staff has made clear that they intend to ask the Commission for a cease and desist order. The proposed terms of such an order are not currently known to Respondents. Respondents file this Statement of Defense (this "Statement") in response to the VR/C.

INTRODUCTION

For the near decade it has been in existence, Westpoint Harbor has been recognized by members of the public, representatives of governmental entities, environmentalists, enthusiasts and experts in the boating community, and even many people working for BCDC, as a successful marina development which adds significant value to the San Francisco Bay Area across a range of dimensions, including not only recreation and public access to the Bay and its shoreline, but also the environment. During the BCDC permitting process, one commissioner even described the project as "manna from heaven." Westpoint Harbor's developer—Mark Sanders—has been lauded for undertaking this "heroic project."

How, then, has it come to this?

- BCDC staff has filed the VR/C against WPH and Mr. Sanders that runs to 41 single-spaced pages, contains hundreds of factual allegations, and purports to rely upon 94 documents amounting to more than 865 pages and covering 16 years, from 2001 through 2017.

- E-mails have been revealed that show some BCDC staff's unjustified targeting of Respondents, including one BCDC staff member telling another that "West Point Marina is going to be a big juicy case for you b/c Mark Sanders, the principal, doesn't think too highly of us. This is one of your top priorities."

- E-mails have been revealed that show BCDC staff's willingness to use dubiously sourced evidence from third parties who have an anti-development agenda.

- Mr. Sanders and Westpoint Harbor have been compelled to file suit in San Francisco Superior Court against BCDC pursuant to the California Public Records Act to force staff to provide all of the public records concerning the allegations in the VR/C so that this Statement of Defense can be prepared.

- Respondents were also forced to allege in the suit that BCDC has failed to comply with California's Trustworthy Electronic Document or Record Preservation Regulations because the agency lacks the electronic records system required by the Regulations, and, instead, has left it to individual staff, such as the individual that told her fellow staffer to pursue the "big juicy" enforcement action now

before this Committee, to decide for themselves which e-mails are retained or deleted "in the discretion of each staff-person or in accordance with their individual practices."

- Respondents have been left no reasonable alternative but to submit this massive Statement of Defense, running more than 125 pages, along with 135 exhibits, including many public records that were not included by BCDC staff in their Administrative Record for this VR/C and that were only obtained after repeatedly pressing BCDC staff to comply with the California Public Records Act.

Enough is enough. The Commission, for its own institutional legitimacy, must end this abuse and persecution by an agency staff run amuck. The Commission has been at this long enough to know the reality, but, if it forces Respondents to go through this exercise, they will do so and see this matter through to the end (and then seek damages and attorney fees against BCDC, and certain individuals). Here is the reality:

Westpoint Harbor serves as a model for turning an environmentally harmful area abutting the Bay into a beautiful setting that promotes both responsible development and responsible conservation of natural resources. Evidence of Westpoint Harbor's positive impact in the South Bay today can be seen in recent accolades. Westpoint Harbor hosts, for example, Stanford University's annual triathlon, the America's Cup electronic test program, the Sea Scouts, activities of the National Oceanic and Atmospheric Administration, the Yacht Racing Association of San Francisco Bay, the U.S. Geological Survey, Pacific Gas & Electric Company, and the Aqua-Terra and Spartina Projects. Also, Westpoint Harbor provides berthing for local fire department and police boats, Santa Clara University Rowing, Norcal Rowing, and a host of other water-oriented organizations, as well as guest berthing for many clubs in the Bay.

The project has been a labor of love for Mr. Sanders, a man who has shown his deep commitment to proper environmental stewardship during the long and at times challenging process of creating one of the world's best marinas for the benefit and enjoyment of the public at large, both boaters and non-boaters alike. Originally conceived to provide a permanent facility for the Marine Science Institute, Stanford Crew, Stanford Sailing and Stanford Master's programs, the project grew as the enormous demand in the South Bay for water-oriented uses became apparent. In order to build and operate Westpoint Harbor, Respondents have spent well over a decade navigating a maze of interconnected and overlapping federal, state and local regulations, and working with the agencies that administer them. During this time, Respondents have demonstrated a record of working diligently to comply with both the letter and spirit of all the regulations to which Westpoint Harbor must adhere, including its BCDC permit (No. 2002.02) (the "Permit"). And, throughout this period, because of Mr. Sanders' experience and expertise in boating, and his commitment to environmental stewardship, Respondents have enjoyed "smooth sailing" with the myriad federal, state, and local agencies regulating the marina's development and operation—except for one.

In trying to work with BCDC, Respondents for years have been confronted by processing delays purportedly due to insufficient staff resources, the challenges of endeavoring to implement imprecise Permit language on the ground and in the water in order to develop and operate a marina consistent with recognized industry standards and customs, yet further delays

due to policy development by agency staff, and egregious lack of responsiveness by some staff. Nonetheless, Respondents patiently persisted in working through numerous matters related to the Permit with BCDC staff. However, Respondents now face what can only be described as a completely unnecessary and unjustified—indeed, vindictive—enforcement proceeding. The nature and substance of the alleged violations reflect an effort to manufacture violations where none exist, to double-count and back-date alleged violations for the sheer purpose of magnifying proposed fines, and to support an enforcement proceeding that has nothing to do with protecting against any supposed harm to the environment or public enjoyment of San Francisco Bay.

The 35 separate claimed violations alleged by BCDC staff all suffer from one or more of the following glaring deficiencies which Respondents will address in detail in this Statement:

1) Claims which reflect BCDC's lack of knowledge of the facts or an absence of any proper evidence that Respondents have violated the letter or spirit of the Permit. For example, Allegation Nos. 13A and 13B contend that Respondents failed to obtain approval to construct a fuel dock, but no such fuel dock has been built; Allegation No. 1B contends that Respondents failed to install public pathways, but the undisputed facts show that such pathways were in fact installed and deemed sufficient by BCDC staff. BCDC also has proposed "findings of fact" which are supported only by inadmissible hearsay statements, with no sworn declaration submitted, or by hearsay statements from persons whose identity BCDC has failed to reveal in this action.

2) Claims based on actions taken by Respondents which Respondents reasonably believed were approved by BCDC staff based on its numerous conversations and course of dealing with staff, including BCDC staff's failure to timely respond to Respondents' proposed plans for numerous aspects of the project. For example, Allegation No. 1A complains of a failure to obtain plan review and approval of public access pathways, but the fact is that Respondents submitted numerous such detailed plans, which BCDC staff failed to respond to in any way, through comments, suggested revisions, rejections or otherwise until Respondents submitted the plans again in 2011.

3) Claims based on an incorrect view of the applicable law or conditions of the Permit. For example, BCDC staff has alleged that Respondents should have placed buoys in Westpoint Slough, but Respondents cannot legally install such buoys without the permission of the U.S. Coast Guard, which has not authorized any such buoy. BCDC staff have also made multiple claims which cannot be the subject of enforcement under Section 11386(e)(2) and (3) of BCDC's own regulations which require a 35-day notice and opportunity to cure the alleged violations, and no such notice or opportunity to cure has been provided.

Respondents urge the BCDC Enforcement Committee and the Commission to reject BCDC staff's unwarranted attack against the Westpoint Harbor project. The VR/C is unlawful, inequitable, and does not advance the public interest. Sustaining all, or any part, of it, while sure to deliver psychic income to certain staff, would only harm BCDC and the public. Prolonging this abuse of process would further tarnish BCDC's reputation and image when it comes to improvident enforcement actions, squander agency (including BCDC program staff and attorney, as well as California Department of Justice attorney) resources, and expose BCDC to liability

(including for attorney fees and costs). Such a course of action would be imprudent and irresponsible, to say the least. Only the Enforcement Committee and the Commission can bring this to an end and restore the trust of the citizens of California that BCDC will deal with them reasonably and fairly.

I. Discussion of the Facts and Law

A. Background Facts

1. History of Development at the Westpoint Harbor Site

Westpoint Harbor occupies approximately 50 acres, located within the jurisdictional boundaries of Redwood City, along a tidal channel known as Westpoint Slough on the west side of the Bay in between the San Mateo and Dumbarton bridges. The site has an industrial history dating back at least 120 years. The site was home to the Portland Shipbuilding Company, which built concrete ships in the late 1800's through circa 1918.[1] The shipbuilders there used cement produced from oyster shells and Bay mud on the area that is now Pacific Shores Center, immediately west of Westpoint Harbor's current site.[2] After use as a shipbuilding yard, the site became a small component of Leslie Salt Company's ("Leslie's") operations in 1947, which were later purchased by Cargill, Inc. ("Cargill").[3] The current Westpoint Harbor site was approximately half of a pond used by Cargill to store "bittern", a toxic by-product of the salt production process. The salt producers, Leslie and Cargill, never used the site for the primary salt-making step of solar evaporation of Bay water.[4]

The following figures are provided to help the Enforcement Committee and the Commission understand the physical and historic landscape underlying the issues in this case.

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[1] Exhibit 1 (Sanders Declaration).
[2] *Id.*
[3] *Id.*; *see* Exhibit 2 at 1 (Ltr from Robert C. Douglass, Cargill Real Property Manager to Andrea Gaut, Coastal Program Analyst, *Portion of Pond 10, Redwood City; Proposed Westpoint Marina Project* (Feb. 24, 2003)).
[4] Exhibit 2 at 3 (Ltr from Robert C. Douglass, Cargill Real Property Manager to Andrea Gaut, Coastal Program Analyst, *Portion of Pond 10, Redwood City; Proposed Westpoint Marina Project* (Feb. 24, 2003)); Exhibit 3 at 11-12 (BCDC Staff Report on Salt Ponds (Oct. 2005)).

Figure 1 - Modern Google Earth Rendering - View Facing North

Figure 2 - Modern Google Earth - Bird's-eye View

In the late 1980's, Mr. Sanders saw the need for a new marina in the South Bay. At the time, the limited boating facilities that had existed in the South Bay were stagnant or declining. Mr. Sanders is a sailor by avocation—a decorated retired U.S. Navy Officer and an avid recreational boater, and, while serving as a director for the Marine Science Institute, he conceived the idea of building a marina and boatyard to help revive boating in the area, including recreational boating, rowing, and kayaking.[5] Mr. Sanders realized that redevelopment of a toxic bittern pond would be a great way to achieve positive land-use impacts along the Bay shore, while simultaneously creating a marina that would benefit the Bay Area economy and the recreational interests of boaters and the general public.[6] Following the spirit that led to adoption of the McAteer-Petris Act, aimed at avoiding use of existing Bay waters, Mr. Sanders determined that the marina would not encroach into the Bay. Instead, he developed a plan to create new Bay surface, with beneficial reuse of excavated materials, and using recycled material for riprap, roads, and buildings.

In the early 1990's, part of the property for the marina was purchased from Cargill. Over the course of the following decade, the necessary permits were obtained from multiple governmental entities. At the urging of former BCDC Executive Director Alan Pendleton, additional property was acquired from Cargill so that the amount of open water in the planned marina basin could be increased. The toxic bittern stored by Cargill on the property was completely removed. Concurrently over this time period, Mr. Sanders worked with Redwood City, the Port of Redwood City, and the Division of Boating and Waterways to remove multiple shipwrecks from Westpoint Slough and improve the channel for navigation.[7] Prior to Mr. Sanders' work, Westpoint Slough was "a channel choked with abandoned and sunken vessels, including a 120 foot tug[.]"[8]

2. Westpoint Harbor was and is viewed as a model project for the local economy and the environment.

Support for this project was wide-spread. In 2003, prior to Commission approval of the initial Permit, BCDC received more than 60 formal, written statements of support for the Westpoint Harbor project.[9] In the written correspondence transmitted to the Commission on August 1, 2003, in advance of the Commission's final consideration of the project, there was not a single word of opposition.[10] Likewise, during the public comment period at the Commission's 2003 meetings, nothing but positive statements came from those that spoke.[11] There were multiple commenters who expressed concern about man-made impacts to the Bay and described their belief that Westpoint Harbor would provide a better environment all around—for people,

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[5] Exhibit 1 (Sanders Declaration).

[6] Exhibit 4 at 2 (Marina Dock Age Magazine *Marina Profile: Mark Sanders' Westpoint Harbor* (Dec. 2015)). As Mr. Sanders told *Marina Dock Age* in 2015, "as a director for Marine Science Institute (a non-profit organization that teaches marine science to school kids), I was on a mission to find a permanent home for the Institute and stem the decline of boating at the same time."

[7] Exhibit 1 (Sanders Declaration).

[8] Exhibit 4 at 2 (Marina Dock Age Magazine Marina Profile: Mark Sanders' Westpoint Harbor (Dec. 2015)).

[9] Exhibit 5 (Memo from Will Travis, Executive Director, BCDC to Commissioners and Alternates, *Comments on Permit Application No. 2-02; Mark Sanders; Westpoint Marina, in the City of Redwood, San Mateo County* (Aug. 1, 2003)).

[10] *Id.*

[11] Exhibit 6.

plants and wildlife.[12] Strong, positive sentiment was universally expressed for Westpoint Harbor and for Mr. Sanders' dedication to making the project happen. Charles Jany of Redwood City informed Respondents that "it is evident that the quality and scale of this waterside project is superlative[.]"[13] Even BCDC staff previously expressed support for the project. During the Design Review Board ("DRB") May 5, 2003 meeting, one member of the DRB "stated he thought the project was a good one," and another "stated his support for the project and explained that it would be a valued contribution to the Bay."[14] In 2006, when recapping another meeting Mr. Sanders had with the DRB, Andrea Gaut, the BCDC Bay Design Analyst ("BDA") working on the Westpoint Harbor project at that time, noted:

> The DRB meeting went very well and the members truly seemed to enjoy hearing about and viewing photos of the construction site. It must be nice to hear, after all your efforts, a comment like what a 'heroic project'![15]

Even BCDC Chief of Enforcement, Adrienne Klein, wrote in 2005 that Westpoint Harbor was an "impressive project[.]"[16] Indeed, the Westpoint Harbor project was described by BCDC Commissioner Clifford Waldeck as "manna from Heaven."[17]

Prior to issuance of several of the needed permits, an environmental review of the proposed project was conducted pursuant to the California Environmental Quality Act ("CEQA"). Redwood City was the lead agency in charge of the environmental review. The CEQA process resulted in a "Negative Declaration" determination, meaning that it was determined that the project, including specified "mitigation measures," would have no significant adverse impact on the environment.[18]

3. Construction and Regulatory Delays at Westpoint Harbor

Construction of Westpoint Harbor began in earnest when Respondents finally received the BCDC Permit in August 2003. At the time, the land that would become Westpoint Harbor consisted of 35-40 feet of saturated mud, unable to support the heavy machinery needed to excavate the marina basin.[19] In order to prepare the land for excavation, Respondents used a process called "wicking" to dry the land.[20] This process took a considerable amount of time and paced the project. Gradually, 26 acres of mud were excavated to create the marina basin. While this excavation was initially expected to take about a year, it took three times longer than planned, finally finishing in 2006.[21] The problem was not the excavation itself but the drying and compacting of the excavated material to create the uplands area. No excavated material was

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[12] *See, e.g.*, Exhibit 5 at 11-12, 13-15, 21, 25-26, 27, 28.
[13] AR Doc. 12 (Ltr from Charles Jany, Principal Planner, Redwood City to Mark Sanders (July 16, 2008)).
[14] Exhibit 7 at 5 (DRB Meeting Minutes (May 5, 2003)).
[15] Exhibit 8 (Andrea Gaut's handwritten notes from DRB meeting (Aug. 7, 2006); email from Andrea Gaut to Mark Sanders (Aug. 10, 2006)).
[16] Exhibit 9 (Email from Adrienne Klein to Mark Sanders (Aug. 12, 2005)).
[17] Exhibit 6 at 18.
[18] AR Doc. 7 (Negative Declaration, Redwood City, San Mateo County, California).
[19] Exhibit 1 (Sanders Declaration).
[20] *Id.*
[21] *Id.*

exported from the site, and drying was only possible in the summer. As the basin got bigger, the drying area got smaller.[22] In August 2006, as construction of the marina basin was just four weeks from completion, the basin experienced a slope failure.[23] All work came to a halt, as Respondents' consultants had to re-engineer the basin. Respondents were not able to flood the basin, and create the actual space that boats would later use, until December 2006.[24] Respondents sought, and received, a Permit amendment (Amendment No. Two) to improve the slope between the Westpoint Harbor and southern Cargill border (*i.e.,* the remainder of Pond 10) in August 2006.

Because the project was already delayed and recognizing that part of the marina could be opened while the remainder was under construction, and that Respondents would be unable to complete all the improvements included as part of Phase 1 of the original Permit, Respondents sought an amendment to more reasonably and practically apportion and sequence activities between Phase 1A and Phase 1B. Additionally, BCDC staff requested that the rowing facility be moved, which required a number of design changes.[25] Respondents received the amendment in November 2006 (Amendment No. Three). This Amendment allowed Respondents to construct three docks and install basic improvements under Phase 1A, while working on more extensive improvements as part of Phase 1B. In 2007 and 2008, Respondents installed the first three docks (docks C, D, and E), as authorized under Phase 1A of Amendment No. Three. Respondents also worked on, and ultimately completed other portions of Phase 1A, such as rocking the parking area, adding rock supporting barriers to slopes ("riprap"), and installing utilities, with the latter two activities taking until 2014.[26]

The construction authorized under Phase 1B began in 2007, but was subject to numerous delays. During Phase 1B, which has still not been entirely completed as of today, Respondents installed the remainder of the docks (including guest berths), built public access pathways, and installed bioswales and drainage systems, among other things.[27] The completion of Phase 1B has been subject to a number of delays. Some of these delays resulted from a much longer than anticipated wicking, drying, compacting, and grading period.[28] Because a large portion of the uplands outside the marina basin was still wet and muddy (drying involved dozing and disking the mud almost continuously), development of the areas required wicking before construction could be completed.[29] In other instances, changing requirements caused delays. For example, an alteration to the stormwater pollution prevention requirements applicable to Westpoint Harbor required larger bioswales near boat wash-down areas, delaying the completion of the Phase 1B boat launch.[30]

Other delays arose from ongoing negotiations with BCDC staff. In the fall of 2011, BCDC staff asked Respondents to stop work, and work on landscaping, irrigation, utilities,

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[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*

bioswales, and pathways was halted.[31] At least one year of construction was lost as Respondents worked to comply with BCDC staff's demands and submit responses to letters from BCDC staff.[32] In addition, during the period of August 16, 2014, to April 18, 2016, Respondents focused on correcting issues with the Permit (*e.g.*, project phasing, buoy placement, and other concerns that sparked BCDC's current enforcement action) and trying to obtain plan review of the Phase 2 area of the project. No construction was performed during this timeframe.[33]

While working to install all of the improvements associated with Phase 1B, Respondents also dealt with the demands of Redwood City officials concerning public safety. In 2008, these officials granted a temporary occupancy permit for the Phase 1A area (*i.e.*, the marina basin and immediate surroundings), but were clear that Respondents were "responsible to insure that public access will not be allowed on the remaining portions of the site until such areas are approved by the City for occupancy" (*i.e.*, the Phase 2 and Phase 3 areas).[34] Again in 2012, these officials reminded Respondents that "areas undergoing construction and installation and/or where construction equipment is located must remain properly secured and posted until these improvements are approved for public access, to the satisfaction of the City and other applicable agencies."[35] This meant that Respondents were required to restrict access to areas to the east and the west of the basin, designated for the boatyard and retail areas. These spaces were still wicking, and were being used for rock-crushing, stockpiling of riprap and base-rock, and the spreading and drying of mud.[36] In particular, the Phase 3 area was, and remains today, an area of open, unimproved dirt and vegetation.[37] Accordingly, the pathways, landscaping, and other amenities in or near Phase 2 and 3 areas could not be completed or opened to the public until these areas were deemed safe by Redwood City. Also, the bittern-laden soil would not support vegetation, and even multiple attempts at growing salt-tolerant grass failed. Multiple years were needed before even the hardiest plants would survive.[38]

Respondents received approval from Redwood City in 2012 and worked with BCDC staff to obtain BCDC approval to install a temporary fence around the Phase 3 area (on the west side of the basin), which was finally authorized by BCDC staff in Amendment No. Seven to the Permit in May 2017.[39] Once Respondents had fencing in place sufficient to ensure public safety, Mr. Sanders requested that Redwood City authorize him to open the public access pathways adjacent to the Phase 2 and Phase 3 areas. Respondents received authorization from Redwood City to open the pathways in July 2017,[40] and Respondents opened them accordingly.

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[31] Exhibit 10 at 2 (Email from Mark Sanders to Brad McCrea, Director of Regulatory Affairs, BCDC (Oct. 16, 2012)).
[32] *Id.*
[33] Exhibit 1 (Sanders Declaration).
[34] AR Doc. 12 (Ltr from Charles Jany, Principal Planner, Redwood City to Mark Sanders (June 16, 2008)).
[35] Exhibit 11 at 2 (Ltr from Charles Jany, Principal Planner, Redwood City to Mark Sanders, *Permit Update* (Feb. 21, 2012)).
[36] Exhibit 1 (Sanders Declaration).
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] Exhibit 12 (Ltr from Steven H. Parker, Redwood City Landscape Architect to Mark Sanders, *Redwood City Safety requirements for Phase 2 and 3 areas, Westpoint Harbor 1529 Seaport Blvd.* (July 15, 2017)).

Respondents have completed most, but not all, of the improvements included in Phase 1B as of today.[41] Some of the improvements, such as the boat launch, were only completed a few months ago, after installing a new bioswale and sedimentation pond, along with proper signage.[42] Other features, such as the landscaping around Phase 1B, can finally be finished now that the restricted areas around Phases 2 and 3 are fenced and public safety is not jeopardized. Construction on the Phase 3 areas, designated as a future retail space, has not yet begun.[43]

4. Difficulties Arising from the Language of the Permit

Very shortly before the final commission vote on the Permit, BCDC staff made major revisions, and, as a result, the Permit contains errors and conflicts. A number of the issues cited in the VR/C arise from the confusing nature of the permit and its terms. Several Permit Special Conditions are based on logistical or physical impossibilities. For example, Special Condition II.G requires the permittee to have non-tidal wetland mitigation plans reviewed and approved by the U.S. Fish and Wildlife Service ("USFWS"). However, obtaining USFWS approval of wetland mitigation plans is not possible. Wetland mitigation is the province of the U.S. Army Corps of Engineers ("USACE"), and the Permit even acknowledges that fact. Section III, Findings and Declarations F, of the Permit states that "[a] total of 0.27 acres of wetlands would be filled in the U.S. Army Corps' jurisdiction . . . ." Simply put, it is impossible for Respondents to obtain plan approval from USFWS. Special Condition II.G should instead have required approval from USACE, which Respondents in fact received.

Additionally, Special Condition II.B.4, which is the subject of Allegation No. 1B, requires a 12- to 15-foot-wide path along the majority of the marina basin and overlooks. Yet anyone who walks the areas running along Westpoint Slough and in front of the Harbormaster's building would see that there simply is not enough space to create paths of such width, so Respondents have put in place 10-foot-wide pathways in those areas.[44] Respondents have installed 12-foot-wide pathways where possible, for example along the east and west sides of the marina basin. This issue with impossible Special Conditions is something well-known to BCDC staff. BCDC's head of enforcement, Adrienne Klein, has acknowledged that "permit organization can make [BCDC's] permits difficult to comply with. The special conditions are not always enforceable."[45]

These Permit deficiencies ultimately led BCDC staff to allege ten different violations of the Permit in a May 4, 2011 letter from staffer Tom Sinclair (the "May 4, 2011 letter"). The May 4, 2011 letter set out what BCDC staff perceived to be violations of the Permit and the steps necessary to resolve these alleged violations. This letter formed the basis for most, if not all, of Respondents' interactions with BCDC staff from 2011 to the present day. Each of the ten violations discussed in the May 4, 2011 letter are also included in the VR/C. Though the May 4, 2011 letter started the long process that resulted in this enforcement process, Respondents have not violated the Permit. Instead, each of the alleged violations were the result of the numerous issues with the Permit, as discussed in more detail in this Statement.

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[41] Exhibit 1 (Sanders Declaration).
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] Exhibit 13 at 114 (Transcript of BCDC Enforcement Committee Meeting (Oct. 20, 2016)).

5. *BCDC Staff Turnover and Lack of Resources and Organization*

High staff turnover, combined with poor records management by BCDC staff, led to serious gaps in BCDC staff's understanding of the project, and made it difficult for Respondents to move forward smoothly with the development of Westpoint Harbor. From 2002 to 2017, at least 12 different BCDC staff members were involved with administration of the Westpoint Harbor Permit. This included Leslie Lacko, Bob Batha, Steve McAdam, Andrea Gaut, Brad McCrea, Jeff Churchill (an intern), Ellen Miramontes, Adrienne Klein, Tom Sinclair, Erik Buehmann, Greg Ogata, and Matthew Trujillo. Many of these individuals have since left BCDC. Some staff members, like Ellen Miramontes, left and returned years apart, missing critical discussions over the course of years.

Staff turnover within any organization will inevitably lead to gaps in knowledge, as new staff does not have the benefit of the experience of prior staff. However, the normal issues associated with staff turnover are exacerbated for BCDC due to BCDC staff's standard practice, as well as staff's poor records management. BCDC has admitted that, "[o]nce permits are issued the permit analysts move on to processing the next application sitting on their desks; they do not continue to own the permit once it's issued."[46] As explained in more detail in the responses to the enumerated allegations below, a number of the alleged violations in the enforcement proceedings are based on staff's misunderstanding of common industry terminology used in the Permit, a misreading of certain Special Conditions, and a lack of background concerning the origin of certain Special Conditions that were tied to the previous CEQA process.

In addition, BCDC has no formal process for cataloguing information relevant to permit compliance, making it easy for key documents to fall through the cracks or for plans to languish, without review, in BCDC staff's files. Once again, BCDC has acknowledged the problem:

> Simple compliance documents like the executed permit, the notice of completion, those things are logged but we don't track them. The more complex compliance documents that actually need to be reviewed and either approved, modified or denied, such as the legal instruments that you heard about this morning, those reviews go on in an uncoordinated manner.[47]

Not only does BCDC have no formal policy to track compliance documents, but BCDC fails to maintain detailed email records:

> BCDC's record retention schedule provides that 'transitory emails'—which are emails that are created primarily for the communication of informal information as opposed to the perpetuation or formalization of knowledge—are to be destroyed when they have served their purpose. As a result, other than emails printed for the hard-copy files, emails are managed by individual staff on their individual work computers and are deleted

[46] Exhibit 13 at 109 (Transcript of BCDC Enforcement Committee Meeting (Oct. 20, 2016)).
[47] *Id.* at 109-110.

or retained in the discretion of each staff-person or in accordance with their individual practices.[48]

The failure to maintain appropriate electronic records likely results from the fact that BCDC has failed to maintain an appropriate and legally-required electronic records retention system, an issue which is the subject of a lawsuit filed by Respondents under the California Public Records Act ("CPRA"), Case No. CPF-17-515880, a file-stamped copy of which is attached as Exhibit 15.

This "uncoordinated" approach to handling complex compliance documents caused BCDC staff to ignore and/or lose plans submitted by Respondents multiple times over the years, as explained more in the enumerated response to Allegation No. 1A below. As staff left, they took any understanding and oral agreements with them, without adequately informing new staff members. For example, notes from Mr. Sanders' wife, Maureen O'Connor, documenting a December 17, 2011 meeting with BCDC staff, state that "Tom [Sinclair] said everything is in order re WPH. That development that's been completed since Sept. [meeting] (harbor house [and] launch ramp) is all part of approved plans" and "Tom said he wanted us to be assured that we are on track and not to worry."[49] These notes show that in 2011, Respondents and BCDC staff were heading toward resolution of the issues raised by BCDC staff in the May 4, 2011 letter. However, Mr. Sinclair left BCDC shortly thereafter, and he appears not to have passed on his understanding of the project and Respondents' compliance to the remaining BCDC staff. As a result, almost six years later, Respondents find themselves facing allegations concerning many of the same issues cited in Mr. Sinclair's May 4, 2011 letter, but without the benefit of a complete record of compliance documents and emails to document staff's thoughts and impressions and the negotiations and discussions between Respondents and BCDC staff.

6. BCDC staff did not always work cooperatively with Respondents.

Before BCDC staff began the chain of events that would result in this enforcement action, certain staff members had already determined they were unwilling to work cooperatively with Respondents. Administrative Record ("AR") Doc. 14, as originally provided to Respondents, contained a redacted portion marked "attorney-client privilege."[50] After Respondents pointed out to BCDC Chief Counsel, Marc Zeppetello, that there appeared to be no basis to claim privilege for this document, Mr. Zeppetello admitted that "[t]he redacted portion of this email chain is not privileged."[51] Mr. Zeppetello then provided an unredacted copy, which revealed a note from Adrienne Klein to Tom Sinclair:

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[48] Exhibit 14 at 32-33 (Email from Marc Zeppetello, Chief Counsel, BCDC to Chris Carr, *Re: Public Records Request - Enforcement Investigation No. ER2010.013* (Aug. 14, 2017)).

[49] Exhibit 16 at 1-2 (Meeting Notes of Maureen O'Connor from meeting with BCDC staff (Dec. 17, 2011)).

[50] Exhibit 17 (original version of AR Doc. 14 provided by BCDC staff to Respondents).

[51] Exhibit 18 at 2 (Ltr from Marc Zeppetello, Chief Counsel, BCDC to Christopher J. Carr, *Public Records Act Request Re: Westpoint Harbor* (Sept. 12, 2017)).

> Tom, West Point Marina is going to be a big and juicy case for you b/c Mark Sanders, the principal, doesn't think too highly of us. This is one of your top priorities.[52]

This email, sent in July 2010, well before BCDC staff issued the May 4, 2011 letter citing to alleged violations and requesting compliance, reveals that Ms. Klein had determined to penalize Respondents before even providing the opportunity to come into compliance. Furthermore, long before that, in 2004, other BCDC staff adopted an unsubstantiated and unjustly negative opinion of Respondents. This is shown in BCDC staffer Andrea Gaut's email to her colleagues, in which she states, "As I have said many times, I don't trust this guy."[53] Such animosity against Respondents, hardly a year after the Permit was issued and before the marina basin was even excavated, was completely uncalled for.

After receiving Mr. Sinclair's May 4, 2011 letter, Respondents prepared and sent to BCDC numerous letters addressing each allegation and demonstrating that each was the product of flawed language in the Permit. In an August 21, 2013 meeting with BCDC staff, Mr. Sanders brought up the fact that he "wrote 18 letters two years ago, and none of them have been answered. I've answered every allegation . . . ."[54] Brad McCrea replied "You wrote those letters to Tom, and of course Tom's no longer with BCDC."[55] When Mr. Sanders asked whether that meant these letters were just sitting on Mr. Sinclair's desk, Mr. McCrea replied "No, so our responsibility is to get back to you."[56] BCDC staff's delay is also clear from the documents provided in the Administrative Record. Responses to Respondents' letters are few and far between. The few responses provided include AR Doc. 60, which purports to respond to 11 different letters from Respondents and their prior attorney, sent over more than a two year period.[57]

In an attempt to correct the errors and inconsistencies in the Permit and resolve the alleged violations based on these errors and inconsistencies, Respondents submitted an application to amend the Permit on July 18, 2012.[58] As explained in the VR/C, staff provided a draft of Amendment No. Five to the Permit and transmitted it to Respondents on September 19, 2012. Respondents reviewed this draft and provided a list of suggested corrections to BCDC staff in October 2012.[59] These suggested corrections pointed out errors and changes in Amendment No. Five, as well as errors from the original 2003 Permit, that needed to be corrected. If all of these corrections had been made and the Amendment executed, this would have resolved at least Allegation Nos. 1B, 1C, 1D, 2B, 3B, 4B, 5A, 5B, 6B, 7A, 7B, and 19 in the VR/C.

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[52] AR Doc. 14 (Email from Adrienne Klein, BCDC to Tom Sinclair, BCDC (July 12, 2010); also attached as Exhibit 19).
[53] Exhibit 20 (Email from Andrea Gaut, BCDC to BCDC Staff (Aug. 30, 2004)).
[54] Exhibit 21 at 130 (Transcript of meeting between Mark Sanders and BCDC staff (Aug. 21, 2013)).
[55] *Id.* at 131.
[56] *Id.* at 132
[57] AR. Doc. 60 at 1 (Ltr from Adrienne Klein, Chief of Enforcement, BCDC, to Doug Aikins, Hopkins & Carley (Sept. 4, 2014)).
[58] VR/C Section VI.¶Z.
[59] Exhibit 22 at 4.

BCDC staff's internal records, not provided in the AR and made available only after Respondents submitted a CPRA request, show that BCDC staff were skeptical of Respondents and wary of compromise from the start of negotiations around Amendment No. Five. Despite the fact that Respondent provided a reasoned explanation for each and every required correction, BCDC staff immediately were dismissive of Respondents concerns:

> In this heaping list of corrections that Mark has prepared, is there even one item that is worth spending our time on? We can't allow Mark to get us to spin our wheels. I'm tempted to tell Mark that the permit is the permit -- sign it or we'll elevate the enforcement. On the other hand, if there is something in this list that makes sense, which I doubt, let me know.[60]

However, after actually reading Respondents' list of corrections, BCDC staff agreed with many of them, telling Respondents on October 18, 2012, that "[w]e have looked over your 'list of problems' and agree with you that many of the changes make sense and can be accommodated."[61] Yet the proposed draft amendment failed to address many of the changes which BCDC admitted were changes "that make sense and can be accommodated." Handwritten notes from Ms. Klein, provided in response to Respondents' CPRA request, show that BCDC staff was unwilling to take an objective approach to resolving issues with the Permit. These notes, written just days after BCDC staff's October 18, 2012 correspondence, state "I need to respond to each detail he raises in all his letters. We need to be more nitpicking than Mark. We can do it better than he can."[62] Though BCDC staff paints a picture of Respondents as uncompromising and unwilling to sign Amendment No. Five, BCDC staff's communications make it clear that they were unwilling to work cooperatively with Respondents.

The VR/C also states that Respondents "found fault with various provisions or specific language in each version [of the Amendment], and raised additional issues upon review of each subsequent version . . . ."[63] However, BCDC staff previously acknowledged that many of the faults with the drafts of Amendment No. Five were due to errors by BCDC staff. In a May 23, 2013 meeting, shortly after version two of Amendment No. Five was issued, Erik Buehmann stated, "we've talked about the overlook, and it looks like I just made an error . . . ."[64] At another point during this meeting, Ms. Klein confessed "[w]e didn't really quite draft it right."[65] After BCDC staff issued version three of Amendment No. Five, Respondents and BCDC staff met again to discuss the issues that remained. While discussing the changes that still needed to be made, and the time that the negotiation process had dragged on, Mr. Buehmann apologized to

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[60] Exhibit 22 at 4 (Email from Brad McCrea, BCDC to Adrienne Klein, Ellen Miramontes, and Steve Goldbeck, BCDC (Oct. 12, 2012)).
[61] Exhibit 22 at 2 (Email from Brad McCrea, BCDC to Mark Sanders (Oct. 18, 2012)).
[62] Exhibit 23 (Handwritten notes from Adrienne Klein discussing responding to letters from Mark Sanders (Oct. 24, 2012)).
[63] VR/C Section VI.¶Z.
[64] Exhibit 24 at 19 (Transcript of meeting between Mark Sanders and BCDC staff (May 23, 2013)).
[65] *Id.* at 96.

Respondents, stating that "I did a lot of work at the last minute, and I'm sorry that it wasn't up to snuff."[66]

In addition, BCDC staff proposed new and unacceptable conditions into iterations of Amendment No. Five. For example, BCDC staff proposed a new requirement that would have mandated allowing swimming in the marina basin.[67] This is unacceptable in marinas because of the well-known problem that electric-current leakage from boats and docks can lead to electrocution of swimmers and the fatal occurrence of "electric shock drowning."[68] Despite the clear, well-documented risks to swimmers, it took Respondents approximately a year to convince BCDC staff to withdraw the demand.[69]

Due to BCDC staff's inability, or unwillingness, to make all of the corrections required for Respondents to be comfortable signing Amendment No. Five, Amendment No. Five was never signed. While Respondents were open to continue working with BCDC to resolve issues, as evidenced by the subsequent correspondence sent by Respondents and amendments signed by Respondents, BCDC staff has not been cooperative in reaching a resolution. This is clear from the numerous references to the failed negotiations surrounding Amendment No. Five in the VR/C, and staff's close-out statement in the VR/C that "[f]rom September 2012 until after September 2015, Sanders refused to cooperate with staff to resolve certain violations at the Site by agreeing to any of the five different versions of proposed Amendment Five prepared by staff, at Sanders' request, causing staff to waste considerable limited public resources on the Site."[70]

B. Response to BCDC Staff Allegations

Notwithstanding the complexity of the Westpoint Harbor project, the challenges brought on by site conditions, construction delays, confusion over Permit conditions and BCDC staff turnover, Respondents have worked tirelessly to make Westpoint Harbor an economic and environmental success story. It is in that light that Respondents believe it is unjustified and unwarranted for BCDC staff to bring this enforcement proceeding, not to prevent or correct any harm to the environment or public access, but to try to make a case based on alleged paperwork problems, isolated issues which could easily be addressed by permit amendment, and circumstances in which Respondents endeavored to comply with the spirit and intent of the Permit when literal compliance was not possible. There is simply no good reason to bring a case based on violations which BCDC staff itself has described as "silly."[71]

Nevertheless, Respondents set forth below their legal and factual defenses to BCDC staff's claims, and respectfully submit that none of staff's allegations has merit. Except as otherwise stated in this Statement, Respondents deny the truth of all purported facts or

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[66] Exhibit 21 at 139 (Transcript of meeting between Mark Sanders and BCDC staff (Aug. 21, 2013)).
[67] Exhibit 1 (Sanders Declaration).
[68] *See, e.g.*, Gowrie Safety and Loss Prevention, *Gowrie Group Safety Report: Understanding Electric Shock Drowning* (available online at http://www.ussailing.org/racing/regattamanagement/regatta-safety/electric-shock-drowning/). While the problem is worse in freshwater, electric shock drowning can occur in salt water environments. *Id.*
[69] Exhibit 1 (Sanders Declaration).
[70] VR/C Section IX.
[71] Exhibit 24 at 172 (Transcript of meeting between Mark Sanders and BCDC staff (May 23, 2013)).

allegations contained in the VR/C. Respondents limit their specific admission of the truth of facts to those facts that Respondents assert are true in their Statement set forth below.

1. Allegations not Subject to Enforcement because BCDC Staff has Failed to Comply with its Own Regulations

BCDC staff assert nine specific allegations that are not legally subject to enforcement at this time:

i. Allegation No. 2C – "Failure to remove trees adjacent to slough that present problem for wildlife per director [sic] of Bay Design Analyst[,] Unauthorized fill[,] Government Code § 66632(a)[,]"[72]

ii. Allegation No. 9 – "Failure to provide shorebird roost habitat mitigation[,] Special Condition II.F[,]"[73]

iii. Allegation No. 10 – "Failure to provide non-tidal wetland mitigation[,] Special Condition II.G[,]"[74]

iv. Allegation No. 11A – "Unauthorized construction of rower's dock on west side of marina basin. Unauthorized fill and substantial change in use[,] Government Code § 66632(a)[,]"[75]

v. Allegation No. 11B – "101 Surf Sports use of unauthorized rower's dock, storage of kayaks in required Phase 1B public access area, and use of parking lot for storage container, a wood-enclosed changing or storage area placed over designated public parking spaces, picnic tables, and portable toilet[,] Substantial change in use[,] Government Code § 66632(a)[,]"[76]

vi. Allegation No. 12 – "Three unauthorized floating docks supporting large srorage [sic] tents on the east side of the marina basin[,] [u]nauthorized fill[,] Government Code § 66632(a)[,]"[77]

vii. Allegation No. 13A – "Failure to obtain plan review approval to construct fuel dock[,] Special Condition II.A.1[,]"[78]

viii. Allegation No. 13B – "Unauthorized construction of substantially larger fuel dock than authorized[,]"[79]

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[72] VR/C Exhibit D at 1.
[73] VR/C Exhibit D at 2.
[74] VR/C Exhibit D at 2.
[75] VR/C Exhibit D at 2.
[76] VR/C Exhibit D at 2.
[77] VR/C Exhibit D at 2.
[78] VR/C Exhibit D at 3.
[79] VR/C Exhibit D at 3.

ix. Allegation No. 14 – "Numerous instances of unauthorized placement of fill and/or substantial change in use

- Fence and gate blocking public access from Pacific Shores Property
- Fire suppression equipment and utility structure on public access pathway
- Two P&E transformers in public access area near boatyard
- Solar and wind powered container in east end of parking lot
- Storage container, wood-enclosed changing or storage area, and portable toilet, all in parking lot
- Fenced area south of parking lot that contains a garden and may be used for storage
- A wooden storage shed, numerous planters, and stored construction material south of the parking lot
- An asphalt pad of unknown purpose in a dedicated public access area."[80]

Respondents submit that these allegations are factually without merit, for the reasons detailed in this Statement. Furthermore, by asserting these violations in the VR/C without first providing a letter informing Respondents of the supposed violations and providing an opportunity to correct them, BCDC staff has violated BCDC's regulations. Section 11386 of Title 14 of the California Code of Regulations applies to an enforcement action if it is the case:

> (1) that the alleged violation is one of the types identified in subsection 11386(e); (2) that the alleged violation has not resulted in significant harm to the Bay's resources or to existing or future public access; and (3) that the alleged violation can be corrected in a manner consistent with the Commission's laws and policies."[81]

If Section 11386 applies to an alleged violation, "the Executive Director **shall** mail a written notice to the person(s) believed to be responsible for the alleged violation[.]"[82] The notice must include "the fact that if the alleged violation is fully **corrected within 35 days** of the mailing of the notice, the Commission **shall not impose any civil penalty**."[83] Here, each of these alleged violations fits within: Section 11386(e)(2), covering the failure to submit any document other than an executed Commission permit in the form, manner or time required by a Commission permit; Section 11386(e)(3), which applies to "the failure to comply with any condition required by a Commission permit not covered by subsections (e)(1) and (e)(2)[;]" or Section 11386(e)(4), which applies to "failure to obtain a Commission permit prior to undertaking any activity that can be authorized by an administrative permit[.]" Additionally, each of the alleged violations has not resulted in significant harm, or indeed any harm, and, even if proved true, could be corrected in a manner consistent with the Commission's laws and policies.

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[80] VR/C Exhibit D at 3.
[81] Cal. Code Regs. tit. 14, § 11386(a).
[82] *Id.* (emphasis added).
[83] *Id.* § 11386(b) (emphasis added).

BCDC staff failed to send a 35-day notice letter to Respondents and provide them with the opportunity to correct these alleged violations. Until BCDC submits the 35-day letter, these alleged violations cannot legally be the subject of an enforcement action.

2. BCDC staff has improperly fractured two alleged violations concerning plan approval and public access improvements into fifteen different alleged violations.

BCDC staff has asserted six different allegations concerning Respondents' supposed failure to obtain plan approval. Each of these allegations (Allegation Nos. 1A, 2A, 3A, 4A, 6A, and 13A) is based on the same Permit condition, Special Condition II.A.1. Similarly, BCDC staff has asserted nine different allegations concerning Respondents' supposed failure to install public access improvements. Each of these allegations (Allegation Nos. 1B, 1C, 1D, 2B, 3B, 4B, 5A, 5B, and 6B) is based on Special Condition II.B.4.

Respondents object to BCDC staff's attempt to split two alleged Permit violations into fifteen and circumvent the limitations of the McAteer-Petris Act, which governs BCDC's authority to impose administrative penalties. Section 66641.5(e) of the McAteer-Petris Act limits the potential administrative penalty to $30,000 per "single violation."[84] Here, BCDC staff has sought to bypass the $30,000 limit by artificially and illogically asserting that Special Condition II.A.1 has been violated six times, and Special Condition II.B.1 violated nine times. This conflicts with the Permit's terms, Legislative intent, and even BCDC staff's own position on the number of violations.

The Permit does not require that a different plan be submitted for each individual improvement. In fact, the listed plan aspects—site, engineering, grading, architectural, public access, and landscaping—are overlapping. A single site plan could contain the "engineering, grading, architectural, public access, and landscaping[.]" The assertion in the VR/C that plan approval is separate for public access pathways, landscaping, site furnishing, lighting and irrigation, public access signs, public boat launch, and a fuel dock is completely arbitrary. For example, there is no reasonable basis for concluding that plan approval for the public boat launch is necessarily distinct from plan approval for the fuel dock (which is intended for use by all boats needing fuel). There is just one Permit condition at issue here. Taken to its logical conclusion, BCDC's arbitrary position could support hundreds of violations stemming from just one permit condition—for example, one for each dock installed, one for each bench installed, one for each shrub or tree planted, etc. The Legislature could not have intended that the $30,000 maximum penalty could easily be circumvented by dividing the violation of a single permit condition into multiple arbitrary subparts.

BCDC staff itself has previously taken the position that a failure to obtain plan approval constitutes a single violation. In BCDC staff's May 4, 2011 letter, Mr. Sinclair listed ten violations. Violation number two, titled "Plan Review," covered all of the plans Mr. Sinclair believed were outstanding as just a single violation.[85] Similarly, violation number three, titled "Public Access Improvements," included all of the improvements required by Special Condition

[84] Cal. Gov't Code § 66641.5(e).
[85] AR Doc. 17 at 2 (Ltr from Tom Sinclair, Coastal Program Analyst, BCDC to Mark Sanders (May 4, 2011)).

II.B.4.[86] Adrienne Klein, Chief of Enforcement for BCDC, later confirmed this count of violations in a September 4, 2014 letter to Respondents, repeatedly referring to all the alleged violations of the permit as "10 violations." Specifically, Ms. Klein stated "[f]irst and foremost we would like to reiterate that all ten violations of Permit No. 2002.002.03 cited by BCDC in our initial violation notice to Mr. Sanders dated May 4, 2011, were and remain valid . . ." and further explained that "Mr. Sanders resolved the three following of the ten total violations within 65 days of May 4, 2011."[87] Ms. Klein left no doubt that plan approval and public access improvements were each a single allegation, through her use of the heading "Staff Allegation No. Two: Commencement of Construction, Including the Shoreline Access Pathways, without first Obtaining Plan Review and Approval[,]" and "Staff Allegation No. Three: Failure to Install the Public Access Improvements Required by Special Condition No. II-B-2 and II-B-4 Including Removal of Privatizing Signage, Completion of Trail and Landscaping, Posting of Public Shore Parking Signs, Connection to Pacific Shores Center, and Public Access on Guest Docks."[88] BCDC staff's sudden change in approach is entirely arbitrary and illogical. To the extent that there was any failure to obtain plan review or install public access improvements, this should be one instance of failure to obtain review or install public access improvements, as BCDC previously acknowledged multiple times in the past.

The law of California is clear that an agency cannot fracture alleged violations in order to inflate the penalties it wishes to impose, as BCDC staff has attempted to do here.[89] In a similar situation, a California court considered a statute which provided that "Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation[.]"[90] The Court determined that "to interpret the words 'each violation' to authorize a $2,500 sanction for *each* and every failure to keep adequate patient records (over 1,000 in the penalty year) or for each day of 'over bond' on patient deposits (364) would result in an unreasonable or oppressive statutory penalty."[91] BCDC staff's approach is in conflict with these decisions, as staff has sought to count each and every plan review and each and every alleged failure to install a specific improvement as a separate violation. The BCDC Enforcement Committee should reject BCDC staff's position that it can arbitrarily multiply alleged violations in order to avoid the statutory maximum penalty allowed for proven violations of a Permit condition.

C. <u>Specific Responses to the Enumerated Alleged Violations</u>

Respondents here present their rebuttal to the Allegations as enumerated by BCDC staff in Exhibit D of the VR/C ("Summary of Violations and Proposed Administrative Civil Penalties"). Instead of providing a clear statement of the alleged facts and allegations, BCDC staff has presented a lengthy and winding narrative without directly tying most of their factual

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[86] *Id.*

[87] AR Doc. 60 at 1 (Ltr from Adrienne Klein, Chief of Enforcement, BCDC to Doug Aikins, Hopkins & Carley (Sept. 4, 2014)).

[88] *Id.* at 7.

[89] *See People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal. App. 3d 509, 534-35 (1984); *see also Walnut Creek Manor v. Fair Employment & Hous. Comm'n.*, 54 Cal. 3d 245, 270 (1991) (finding that multiple "acts" of discrimination "constituted one violation of the act or one unlawful practice," where each additional act "serves merely as proof of the alleged practice.").

[90] Cal. Bus. & Prof. Code § 17536.

[91] *Casa Blanca Convalescent Homes, Inc.*, 159 Cal. App. at 534-535 (emphasis in original).

assertions to any particular alleged Permit violation. BCDC staff also violated BCDC regulations that require the VR/C to "refer to all documents on which staff relies to provide a prima facie case and give notice that the documents may be inspected at the Commission's office and that copies will be provided with five days prior notice[.]"[92] In part due to BCDC staff's failure to comply with the regulations, Respondents submitted a request for access to public records in accordance with the CPRA. Some of the documents cited by Respondents were obtained through that CPRA request.[93]

1. Allegation No. 1A

BCDC staff alleges: "Failure to obtain plan review approval to construct public access pathways[,] Special Condition II.A.1[,]" for the period from May 2011 to July 2017.[94]

This allegation and the other plan-approval allegations in the VR/C ignore important Permit language that requires BCDC staff to actually review plans that are submitted. In short, Respondents submitted plans for review over and over again, including extremely detailed plans for public access pathways. After most plan submittals, BCDC staff did absolutely nothing. Respondent would submit plans, and BCDC staff would remain silent; BCDC staff did not provide rejection letters; BCDC staff did not suggest revisions to plans; BCDC staff simply did not respond.

a) The Permit requires BCDC staff to tell respondents what specific drawings and information are required.

While Special Condition II.A.1 requires the permittee to submit final precise plans and any other relevant plan information, it also states the following:

> The specific drawings and information required will be determined by the staff. To save time, preliminary drawings should be submitted and approved prior to final drawings.

This language in Special Condition II.A.1 makes it clear that plan approval is a collaborative process, one that necessarily requires considerable feedback and involvement from BCDC staff. However, BCDC staff almost always ignored this responsibility, leaving Respondents to submit plan after plan without any direction from staff, or even any indication that staff had received the plans.

b) Respondent submitted plans, but BCDC staff never fulfilled its obligation.

Respondents first submitted final "Site Preparation Plans," covering grading, wicking, riprap, and shoreline protection, in October of 2003.[95] In an attempt to facilitate plan review,

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[92] Cal. Code Regs. tit. 14, § 11321(b).
[93] *See* Exhibit 15.
[94] VR/C Exhibit D at 1.
[95] See Exhibit 1 (Sanders Declaration); Exhibit 25 (Ltr from Mark Sanders to Andrea Gaut, BCDC, *BCDC Permit Number 2-02* (Oct. 15, 2003) (transmitting "final engineering and construction plans for Site Preparation of the project").

Respondents intended to have their engineers coordinate directly with BCDC's engineers on staff. However, when Respondents called BCDC, Andrea Gaut, the BCDC Coastal Program Analyst, informed Respondents that "there is no longer an engineer on staff, so Brad McCrea (landscape architect) would probably look at it."[96] Respondents did actually receive some feedback from Ms. Gaut in response to those plans.[97] Respondents addressed Ms. Gaut's comments and submitted a related request for a Permit amendment on October 28, 2003.[98] Respondents then followed up with updated Site Preparation Plans prepared in December 2003 and hand-delivered in early 2004.[99] Respondents did not receive any feedback from BCDC upon submittal of those updated Site Preparation Plans.

Then in 2005, Respondents assembled a set of plans with Bohley Consulting, referred to as the "Phase 1 Construction Drawings." The Phase 1 Construction Drawings were detailed drawings of the entire Westpoint Harbor site, showing public access pathways, the boat launch ramp, the Harbormaster's office, and docks.[100] The Phase 1 Construction Drawings were submitted in early 2005 to both BCDC and Redwood City.[101] Mr. Sanders himself delivered these plans by hand to BCDC's offices.[102] BCDC staff never provided Respondents with received-stamped receipts,[103] and Mr. Sanders made the mistake of trusting that BCDC staff properly reviewed and filed the plans. As discussed previously in this Statement, BCDC staff has since admitted to the Enforcement Committee that "[t]he more complex compliance documents that actually need to be reviewed and either approved, modified or denied . . . those reviews go on in an uncoordinated manner."[104]

After submitting the Phase 1 Construction Drawings, Respondents heard nothing from BCDC regarding plans for months. Then, in August 2005, a BCDC intern named Jeff Churchill sent Mr. Sanders a letter stating that BCDC had received the Site Preparation Plans from Redwood City and that "BCDC should not have to obtain final plans from third parties."[105] Respondents did not understand the basis for the BCDC intern's claim that BCDC had not previously received the Site Preparation Plans, which had been hand-delivered in 2004. Nonetheless, Respondents requested Bohley Consulting to re-send those same (December 2003) Site Preparation Plans to BCDC staff, and Bohley Consulting did so in October 2005.[106] Separately, in late August 2005, Bohley Consulting updated the Phase 1 Construction Drawings

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[96] Exhibit 26 (Email from Mark Sanders to Kent Mitchell and Pete Bohley (Oct. 16, 2003)).
[97] Exhibit 27 (Email from Andrea Gaut, BCDC to Mark Sanders, *Westpoint Marina--Site Preparation and entrances into project site* (Oct. 21, 2003)).
[98] Exhibit 28 (Ltr from Mark Sanders to Andrea Gaut, BCDC, *BCDC Permit number 2-02* (Oct. 28, 2003)).
[99] Exhibit 29 (Email from Mark Sanders to Andrea Gaut, BCDC (Aug. 28, 2005)).
[100] Exhibit 1 (Sanders Declaration).
[101] Exhibit 1 (Sanders Declaration). Note that Redwood City had requested to review these plans for compliance with the Redwood City Conditional Use Permit.
[102] Exhibit 1 (Sanders Declaration).
[103] Exhibit 1 (Sanders Declaration).
[104] Exhibit 13 at 110 (Transcript of BCDC Enforcement Committee Meeting (Oct. 20, 2016)).
[105] Exhibit 30 at 1 (Ltr from Jeffrey D. Churchill, Coastal Program Intern, BCDC to Mark Sanders (Aug. 19, 2005)).
[106] Exhibit 1 (Sanders Declaration).

at the behest of Redwood City planners and emailed with BCDC staff Andrea Gaut about those updated drawings.[107]

The next communication Respondents received from BCDC staff directly relating to review of plans was a November 3, 2005 letter from Brad McCrea, stating:

> I am writing with regard to your transmittal, dated October 21, 2005, and one set of Site Preparation Plans. These plans were received in our office on October 24, 2005. **Please be advised that, due to current budget cuts, the Commission does not currently have a licensed engineer on its staff and that we do not currently have the staff expertise to adequately review the above mentioned plans**. We have reviewed the plans for consistency with the BCDC permit to the extent possible, but have not reviewed them for compliance with engineering specifications, design criteria and/ or all applicable codes and standards. **The work that is authorized by the permit may commence, but the responsibility for permit compliance ultimately lies with Mr. Mark Sanders.**[108]

Despite the Permit's requirement that BCDC staff provide guidance and review of preliminary plans, Respondents did not receive any feedback from BCDC staff referencing the updated Phase 1 Construction Drawings that were provided to BCDC.[109] In contrast, Respondents received considerable guidance from Redwood City. In 2006 and 2007, Redwood City provided feedback on the plans submitted, and Respondents again altered the Phase 1 Construction Drawings accordingly.[110] This included specific requirements for underground utilities, separating parts of the plan into multiple building permits for tracking by the City,[111] and making other changes requested by Redwood City officials.[112] Respondents arrived at a final permit set of plans with Redwood City in July 2007,[113] but completed additional minor

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[107] Exhibit 29 (Email from Mark Sanders to Andrea Gaut, BCDC (Aug. 28, 2005)). Here, Mr. Sanders informed Andrea Gaut that "[t]here is a new set of drawings for the Redwood City Use Permit, and includes utilities for all development phases and shows slightly modified building positions. (We set aside 10% of the building footprints for landscaping as requested by BCDC, and the boat house is moved and much bigger to accommodate various rowing groups.) As I mentioned to you at the site, as soon as Redwood City OK's them I will send a set to you." Ms. Gaut responded that "[Adrienne Klein] will let you know if she needs any plans in addition to those that you recently sent to Redwood City."

[108] AR Doc. 8 (Ltr from Brad McCrea, Bay Design Analyst, BCDC to Pete Bohley, Bohley Consulting (Nov. 3, 2005)) (emphasis added).

[109] Exhibit 1 (Sanders Declaration).

[110] Exhibit 1 (Sanders Declaration); Exhibit 31 (Ltr from Jon K. Lynch, City Engineer, Redwood City to Pete Bohley, Bohley Consulting, *Westpoint Marina & Boatyard, Phase 1* (July 11, 2006)).

[111] Exhibit 32 (Email from Fred Shehabi, Redwood City to Mark Sanders, *Launching ramp @ Westpoint Marina/Bo6-2063* (Nov. 8, 2006)).

[112] Exhibit 1 (Sanders Declaration).

[113] Exhibit 33 (Ltr from Mark Sanders to Jon Lynch, Redwood City Engineering, *Revised Phase 1 Drawing Package* (July 23, 2007)).

changes to the Phase 1 Construction Drawings in 2009 and 2011 at the direction of Redwood City.[114]

Respondents delivered multiple copies of the Phase 1 Construction Drawings to BCDC staff, including original and as-built versions after receiving feedback from Redwood City officials.[115] As noted above, BCDC staff did not provide proof of receipt of plans. However, because Mr. Sanders hand-delivered plans to BCDC offices, Respondents know that BCDC staff received plans. Additionally, some evidence of plan receipt is contained in contemporaneous communications. For example, BCDC staff records, obtained only through Respondents' CPRA request, show that BCDC staff received a letter from Respondents in June 2006, wherein Respondents noted that they had forwarded to BCDC staff the Bohley Consulting Phase 1 Construction Drawings as submitted to Redwood City.[116] Throughout this process, BCDC staff declined to provide any feedback.

The Permit unambiguously requires active engagement from BCDC staff to guide the permittee on the types of plans that must be submitted, and obligates staff to review and approve preliminary drawings. As Respondents continued to deliver iteration after iteration of the Phase 1 Construction Drawings, BCDC staff ignored its obligations. Respondents could only turn to the single letter from Mr. McCrea, which unequivocally stated that BCDC staff was unable to review plans. The plain language of Mr. McCrea's letter would lead a reasonable person to conclude that (1) BCDC staff had no capability or intention to review the plans previously submitted, and (2) work authorized by the Permit could commence.

In the May 4, 2011 letter, BCDC staff finally communicated with Respondents about plans, claiming that Respondents had not received plan approval for the public access pathways, as well as a number of other improvements at Westpoint Harbor. Despite reasonably believing that they already had plan approval, and knowing that BCDC staff had already received these plans, Respondents submitted the most recent version of the Phase 1 Construction Drawings to BCDC staff on June 27, 2011.[117] Following this submittal, Respondents received BCDC staff Ellen Miramontes's letter dated September 8, 2011 (included in the AR as Document 26). This letter stated that Ms. Miramontes was providing "conditional plan approval" for the "twenty-six sheets prepared by Bohley Consulting, which are mostly dated March 12, 2007 and are labeled as Construction Details, Utilities, Lighting, Signing, Striping and Dimensioning Plans."[118] This was the most recent version of the Phase 1 Construction Drawings, updated November 29, 2010. Respondents note that if Ms. Miramontes had looked closely at the bottom left-hand corner of select sheets or the right-hand margin that shows the printing date and time of construction plans, she would have noticed that the Phase 1 Construction Drawings were revised November 29, 2010.[119] Sheets 8 and 9 of the twenty-six sheets, labeled "Bay Trail Spur Grading Plan," are

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[114] Exhibit 1 (Sanders Declaration).
[115] Exhibit 1 (Sanders Declaration).
[116] Exhibit 34 at 2 (Ltr from Mark Sanders to Andrea Gaut and Brad McCrea, BCDC, *Architectural Review Board Items* (May 29, 2006)).
[117] Exhibit 35 (Email from Mark Sanders to Tom Sinclair, BCDC, *Electronic Files* (June 14, 2011)).
[118] AR Doc. 26 at 1 (Ltr from Ellen Miramontes, Bay Design Analyst, BCDC to Mark Sanders (Sept. 8, 2011)).
[119] Exhibit 36 is a copy of the Construction Drawings reviewed by Ms. Miramontes that Respondents' attorney obtained from BCDC's files in response to a CPRA request.

detailed drawings of the public access pathways around Westpoint Harbor.[120] The precise details concerning each pathway are also included in "Detail 1" on Sheet 2.[121] If Respondents did not have approval for public access pathways prior to this point in time, Ms. Miramontes's comments on these plans and her "conditional approval" make it clear that Respondents obtained plan approval no later than September 8, 2011.

Respondents revised the Phase 1 Construction Drawings on September 13, 2011.[122] Exactly as Ms. Miramontes requested, the revisions "provide[d] a new as-built detail [showing the path] to supersede this one [from the November 29, 2010, version] that depicts how the path was actually constructed."[123] These revisions clearly illustrated the public access pathways as 10-foot decomposed granite paths (decomposed granite had been recommended by the Design Review Board). Respondents then promptly resubmitted those revised plans to BCDC.[124] Respondents note that BCDC staff failed to include these revised Phase 1 Construction Drawings as part of the AR. However, Respondents' review of BCDC staff records, provided only after Respondents lodged their CPRA request, confirmed that Ellen Miramontes received the revised Phase 1 Construction Drawings and that current BCDC staff has access to these plans.[125] Once the September 13, 2011 Phase 1 Construction Drawings were delivered, Respondents had full approval of the public access pathways.

c) The Permit requires BCDC staff to complete plan review within 45 days of receipt of plans.

After plans are submitted, Special Condition II.A requires that "[p]lan review shall be completed by or on behalf of the Commission within 45 days after receipt of the plans to be reviewed." However, even Ms. Miramontes's "conditional approval" took over 70 days to be completed, as shown by AR Document 26, written September 8, 2011, responding to plans received by BCDC staff on June 27, 2011. The 45-day deadline is included in the Permit in order to impose a reasonable limit on BCDC staff's delay. A permittee cannot seriously be expected to wait months, or even years (in Respondents' case), for plan approval while BCDC staff misplaces or ignores plans and the permittee's project falls into disrepair. And yet, it appears that BCDC staff believes that is exactly what should happen. In those cases where BCDC staff took longer than the 45 day deadline to respond to plans, Respondents have deemed approval to conduct work covered by the plans.

For these reasons, Respondents deny that they failed to obtain plan review approval to construct public access pathways. Accordingly, Respondents deny all of the assertions in the VR/C, including Section II.¶C (page 2), Section II (page 4), Section VI.¶M.2, Section VI.¶M.3, Section VI.¶CC, Section VI.¶EE.2, Section VI.¶EE.3, Section IX, and the Summary of

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[120] *Id.*
[121] *Id.*
[122] Exhibit 37 (Construction Drawings for Westpoint Marina and Boatyard Phase 1).
[123] AR Doc. 26 at 1 (Ltr from Ellen Miramontes, Bay Design Analyst, BCDC, to Mark Sanders (Sept. 8, 2011)).
[124] Exhibit 1 (Sanders Declaration).
[125] These revised Phase 1 Construction Drawings were found by Respondents in Andrea Gaffney's "staff folder" in a subfolder titled "FROM ELLEN." Ms. Gaffney's "staff folder" was provided to Respondents as part of their CPRA request.

Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents violated Special Condition II.A.1.

2. *Allegation No. 1B*

BCDC staff alleges: "Failure to install and/or make available public access pathways[,] Special Condition II.B.4.d[,]" for the period of September 2008 to July 2017.[126]

BCDC staff's allegation is inconsistent with previous statements and deliberately ignores a number of obvious facts. BCDC staff plainly acknowledges in the VR/C that Respondents provided public access pathways, and even provides photographic evidence of this point.[127] Thus, any suggestion that the public access pathways have not been installed is entirely unfounded.

a) BCDC staff has previously acknowledged that 10-foot-wide paths are sufficient.

Though the VR/C is ambiguous and vague, it is possible that BCDC staff's allegation arises from the fact that Respondents have installed 10-foot-wide paths at certain segments, rather than the 12- to 15-foot-wide paths referenced by Special Condition II.B.4.d. There are 12-foot-wide paths in place on the east and west sides of Westpoint Harbor, but 10-foot-wide paths are in place on the south side (in front of the Harbormaster's office) and on the two peninsular portions along Westpoint Slough leading to the boat entrance to the harbor.[128] The 12- to 15-foot-wide path measurement came from early documentation discussing the public boardwalk ultimately planned for the Phase 3 area of Westpoint Harbor, and was inadvertently added to the Permit in a way that suggests it applies to the decomposed granite paths around the site, including the temporary path that will eventually be replaced by the boardwalk.[129]

As Respondents have explained to BCDC staff at length, the 10-foot-wide paths at Westpoint Harbor are there only because a 12-foot-wide path would be physically impossible to create. On the south side of Westpoint Harbor, the parking lot, bioswale, and Cargill boundary simply do not provide enough space for a 12-foot-wide path. Similarly, there is not, and never has been, sufficient space to place a 12-foot-wide path on the peninsular portions of the public access trail. The peninsular portions are formed from the old Leslie levees.[130] BCDC staff appeared to understand these physical limitations each time Respondents explained them to staff in the past. For example, in a December 2012 meeting, Ellen Miramontes stated "I think what happened is we had a misunderstanding. We talked about you've got 10 feet out there now, and we think that's sufficient for the time being."[131] In a May 2013 meeting, Adrienne Klein acknowledged that "we have a decomposed granite pathway here. And it was to have been at least 12 feet, but it's 10 feet. And we've agreed to intermittently allow it to stay at 10 feet."[132]

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[126] VR/C Exhibit D at 1.
[127] VR/C Exhibit C at 1-3.
[128] Exhibit 1 (Sanders Declaration)
[129] *Id.*
[130] *Id.*
[131] Exhibit 38 at 43 (Transcript of meeting between Mark Sanders and BCDC staff (Dec. 13, 2012)).
[132] Exhibit 24 at 83 (Transcript of meeting between Mark Sanders and BCDC staff (May 23, 2013)).

Ms. Miramontes also stated "we knew what we wanted, dimensionally, we--it was going to be the 12 [UNINTEL] and we agreed to the 10."[133]

b) 10-foot-wide pathways are consistent with the Bay Trail Design Guidelines and Toolkit and the neighboring Pacific Shores Center and do not restrict public access.

Although the Permit references 12- to 15-foot-wide paths, the current 10-foot-wide pathways are entirely consistent with the applicable Bay Trail Design Guidelines and Toolkit.[134] That document states that Bay Trails to destinations (*i.e.*, connections to ferry terminals, a visitor center, marinas, or wildlife overlooks), also known as point access trails, are only required to be 8 feet in width and may be built with decomposed granite. In fact, the Bay Trail Design Guidelines and Toolkit depictions of these sorts of paths show that the Westpoint Harbor paths are undoubtedly point access trails, as is clear in the Figures below:

Figure 3 - Point Access Depiction from Bay Trail Guidelines and Toolkit.[135]

[133] *Id.* at 86.
[134] Exhibit 39 at 40 (San Francisco Bay Trail Design Guidelines and Toolkit (June 2016)).
[135] *Id.*

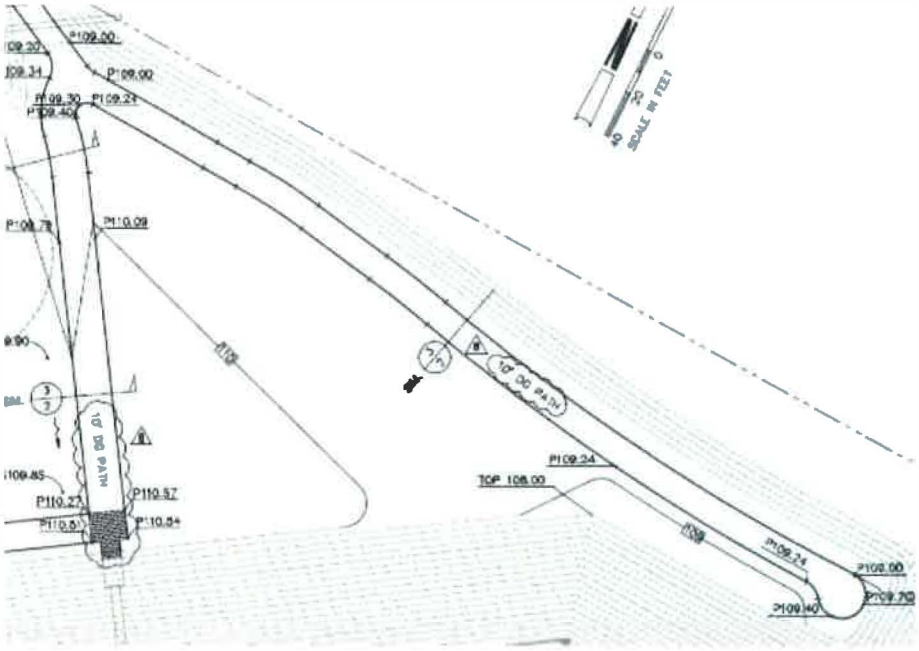

Figure 4 - Excerpt from Phase 1 Construction Drawings[136]

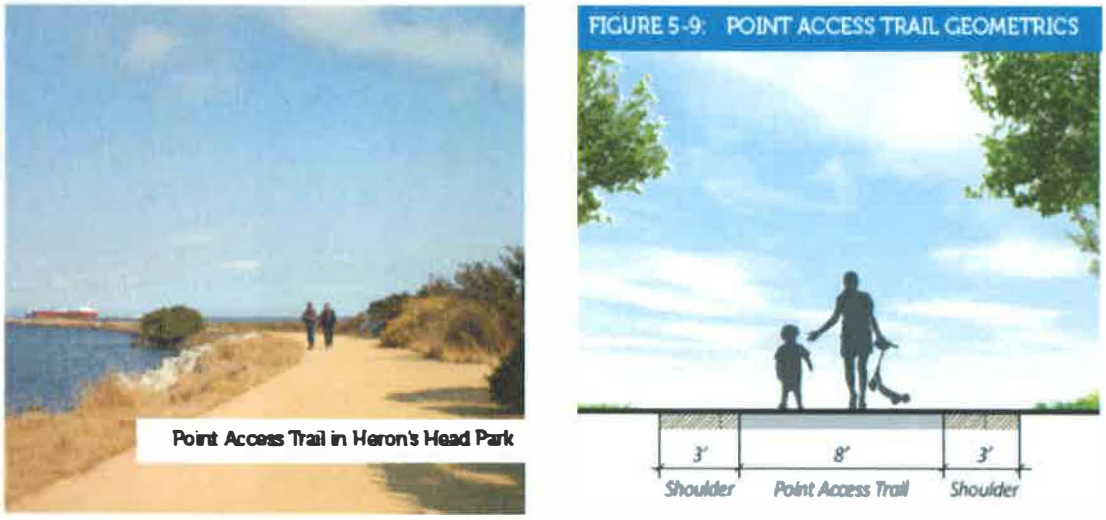

Figure 5 - Point Access Trails from Bay Trail Guidelines and Toolkit.[137]

Not only are the 10-foot-wide pathways consistent with the Bay Trail Guidelines and Toolkit, but they are also consistent with the pathways installed at the neighboring Pacific Shores Center.[138] Westpoint Harbor's paths connect to Pacific Shores Center's paths, and given that

[136] Exhibit 37 at 8 (Construction Drawings for Westpoint Marina and Boatyard Phase 1).
[137] Exhibit 39 at 40 (San Francisco Bay Trail Design Guidelines and Toolkit (June 2016)).
[138] Special Condition II.D.4.a of the Pacific Shores Center permit requires "[a] 10-foot-wide pathway along 2,315 linear feet of shoreline and adjacent to the salt crystallization beds and bittern ponds along the north, east, and south perimeter of the project site connecting with Seaport Boulevard with occasional benches and trash containers." Exhibit 40 (Pacific Shores Center BCDC Permit).

Pacific Shores Center pathways are 10-foot wide and run 2,000 feet along Westpoint Slough, it makes little sense for Respondents to connect to them with 12-foot-wide paths for a short 600-foot path along the Slough.

c) All restrictions on public access were imposed to ensure public safety and at the demand of Redwood City.

Though the public access pathways are in place, BCDC staff alleges that Respondents have not made these pathways accessible.

Respondents made public paths around *completed* areas of Westpoint Harbor freely available to members of the public. However, Respondents chose not to jeopardize public safety and, thus, took the reasonable and responsible approach of prohibiting access to areas that were under construction and thereby unsafe for members of the public.

Restricting access to unsafe areas was not only the responsible thing for Respondents to do, it was also required by law. Redwood City prohibited Respondents from opening areas under construction to public access. As Charles Jany of Redwood City stated to Mr. Sanders on February 21, 2012:

> Also, per our last memorandum to you regarding public access to some water-fronting sections of your project and with pedestrian safety a key concern, areas undergoing construction and installation and/ or where construction equipment is located must remain properly secured and posted until these improvements are completed and approved for public access, to the satisfaction of the City and other applicable agencies. This includes the Phase 2 and 3 areas (future boatyard and retail areas).[139]

BCDC staff cites to previous correspondence between Mr. Jany and Tom Sinclair of BCDC in Section VI.¶O of the VR/C, but conveniently leaves out critical portions of the email. In his May 6, 2011 email to Tom Sinclair, Mr. Jany also stated "[t]he reported and observed presence of construction equipment, piles of landscaping material, building materials and open trenches would obviously not be safe beyond the barricaded areas (recent site photos will be sent under separate email)."[140] The site photos sent by Mr. Jany clearly show heavy construction equipment on a site that was obviously still under construction.[141]

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[139] Exhibit 11 at 2 (Ltr from Charles Jany, Redwood City Principal Planner, to Mark Sanders, *Permit Update* (Feb. 21, 2012)).

[140] Exhibit 41 at 1 (Email from Charles Jany, Redwood City to Tom Sinclair, BCDC, *Westpoint Marina Letter to Mark Sanders* (May 6, 2011)).

[141] Respondents note that they only received these documents after requesting that BCDC staff correct the erroneous AR.

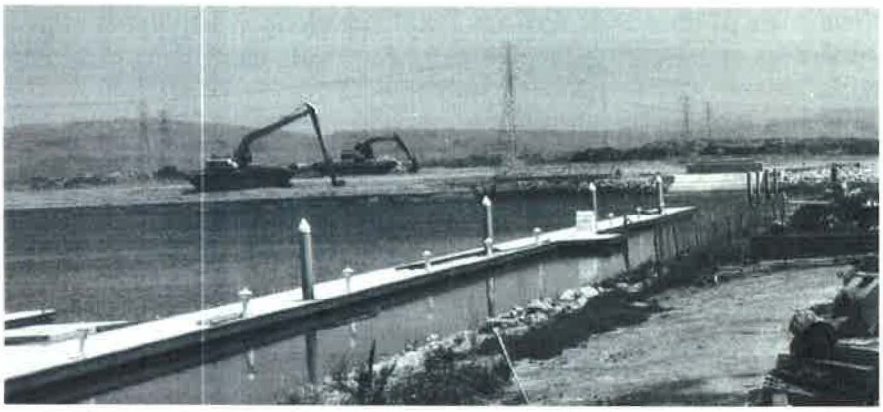

Figure 6 - Photo from Charles Jany Email[142]

Any objective observer visiting Westpoint Harbor could see that certain areas of the property should remain closed due to safety concerns. A photo taken as recently as February 2017 and excerpted below, shows heavy construction equipment in use (for installing storm water underground piping and irrigation water control lines).

Figure 7 - Google Maps Street View Photo of Equipment at Westpoint Harbor

Respondents kept Redwood City officials informed of the exact language used on the signs posted near pathways, which included reference to Westpoint Harbor's Redwood City Conditional Use Permit, with text stating "RWC UP 2005-08."[143] Despite BCDC Chief Counsel Marc Zeppetello's concern that this language "misleadingly cit[ed] Redwood City's Use Permit to prohibit public access to the required Phase 1B public access areas,"[144] this was in fact a good

[142] Exhibit 41 at 7 (Email from Charles Jany, Redwood City to Tom Sinclair, BCDC, *Westpoint Marina Letter to Mark Sanders* (May 6, 2011)).
[143] Exhibit 42 at 1-2 (Email from Mark Sanders to Terence Kyaw, Redwood City (Nov. 26, 2012)).
[144] VR/C Section VI.¶NN.

faith effort by Respondents to comply with the safety-related limitations imposed by Redwood City. Redwood City refers to the Conditional Use Permit as UP 2005-08.[145] Respondents were required to prohibit access to areas under construction by Redwood City officials, under the authority of the Conditional Use Permit.

Respondents obtained approval from Redwood City in 2012 to install a temporary fence to safely close off undeveloped areas, but BCDC staff refused to authorize this fence for years.[146] After finally receiving BCDC staff approval for a temporary fence as part of Permit Amendment No. Seven, in June 2017, Respondents requested that Redwood City lift the condition prohibiting public access to those portions of pathways adjacent to undeveloped areas.[147] Redwood City finally permitted Respondents to open these areas to public access on July 15, 2017, after learning that the temporary fence was installed.[148]

Regarding the fence and gate located between the Pacific Shores Center and Westpoint Harbor, this fence and gate are maintained pursuant to an agreement with Pacific Shores Center.[149] At the request of Pacific Shores Center management, Westpoint Harbor agreed to maintain the fence until the property and the path connection between Pacific Shores Center and Westpoint Harbor were safe.[150] Respondents note that their easement with Pacific Shores Center states that "[a]ll construction work in connection with the development of the Sanders Property shall be undertaken in compliance with the regulations of all state and federal agencies having jurisdiction over the development of the Sanders Property. This requirement shall be construed to include, but not be limited to, noise and dust control regulations contained in the Redwood City building regulations."[151] Pacific Shores Center has repeatedly stated that its interpretation of the easement required that the path connection be closed until deemed safe by both Redwood City and Pacific Shores Center,[152] and as discussed above, Redwood City required the area to be restricted until very recently. Respondents' BCDC Permit requires only that "[t]he permittee shall continue to make a good faith effort to acquire easements from Pacific Shores Center, LLC, to increase the vehicular and pedestrian connections into the site."[153] Respondents in fact made good faith efforts, which in turn required them to comply with the safety-related conditions imposed by the easement and keep the fence in place.

In Respondents' June 2017 request to Redwood City to lift the condition prohibiting public access to certain segments of pathways, Respondents also asked Redwood City to inform

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[145] Exhibit 11 at 1 (Ltr from Charles Jany, Redwood City Principal Planner, to Mark Sanders, *Permit Update* (Feb. 21, 2012)).
[146] Exhibit 1 (Sanders Declaration).
[147] Exhibit 43 (Ltr from Mark Sanders to Steven Parker, Redwood City, *Request to allow opening the Phase 3 paths in Westpoint Harbor* (June 28, 2017)); *see* Exhibit 44 (BCDC Permit No. 2002.002.07 (Amendment No. Seven)).
[148] Exhibit 12 (Ltr from Steven H. Parker, Redwood City Landscape Architect, to Mark Sanders, *Redwood City Safety requirements for Phase 2 and 3 areas, Westpoint Harbor 1529 Seaport Blvd.* (July 15, 2017)).
[149] Exhibit 1 (Sanders Declaration).
[150] Exhibit 45 (Email from Bill Moyer, General Manager, Pacific Shores Center, to Mark Sanders, *Public Access* (Mar. 14, 2012)).
[151] Exhibit 46 at 4 (Agreement Regarding Easement between Mark Sanders and Pacific Shores Investors, LLC).
[152] *See* Exhibit 45 (Email from Bill Moyer, General Manager, Pacific Shores Center, to Mark Sanders, *Public Access* (Mar. 14, 2012)).
[153] Permit Special Condition II.B.11.

Pacific Shores Center so that the gate between the properties may be opened.[154] In accordance with the Permit's requirement to use good faith efforts to obtain an easement, and the easement's binding restrictions on Respondents, the requirement to open the connection between Westpoint Harbor and Pacific Shores Center was triggered, at the earliest, when Redwood City and Pacific Shores Center agreed that the connection could be opened. After obtaining approval from Redwood City, Respondents immediately opened the gate in the fence to provide for public access from Pacific Shores Center.

d) BCDC staff was aware of the ongoing construction, and the need for reasonable restrictions to protect public safety.

The VR/C makes it clear that BCDC staff saw firsthand that construction was still continuing at Westpoint Harbor during staff's December 8, 2016 visit. Specifically, the VR/C states that "[c]onstruction was in progress (although not during the site visit) in the Phase 2 boatyard areas, precluding access to these areas."[155]

In addition, text added by BCDC staff to Amendment No. Six of the Permit shows that BCDC staff knew and understood that the Permit allows Respondents to restrict access prior to the completion of construction, while the areas are still unsafe for public access. This is a common sense interpretation, consistent with the Permit, and protective of public safety. Amendment No. Six adds Special Condition II.GG, which states "[t]he public access required herein may not be closed to the public or otherwise blocked by the construction activities associated with the Phase 2 boatyard area and facilities unless absolutely necessary for a limited period of time . . . ."[156] The use of heavy construction equipment, open trenches, or the like would reasonably make it "absolutely necessary" to restrict access in the interest of public safety.

e) Signs posted around Westpoint Harbor do not discourage public access.

BCDC staff also appears to base Allegation No. 1B on the presence of signs marked "MEMBERS AND GUESTS ONLY," "PRIVATE PROPERTY / NO TRESPASSING / VIOLATORS WILL BE PROSECUTED," "WEST POINT HARBOR / PRIVATE FACILITY / MEMBERS AND GUESTS ONLY," and "NO TRESPASSING."[157] Respondents have explained each and every sign located at Westpoint Harbor in detail to BCDC staff, as evidenced in AR Document 21. Many of the "NO TRESPASSING" signs were Cargill signs placed on Cargill property and not within the control of Respondents. However, "NO TRESPASSING" signs on Westpoint Harbor property were spaced around the undeveloped Phase 3 area to prevent members of the public from wandering into active construction areas, as discussed above. Respondents attempted to remove any other signs potentially offensive to BCDC staff, with the exception of signs necessary for safety reasons, as already discussed. The VR/C appears to acknowledge this point, stating:

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[154] Exhibit 43 (Ltr from Mark Sanders to Steven Parker, Redwood City, *Request to allow opening the Phase 3 paths in Westpoint Harbor* (June 28, 2017)).
[155] VR/C Section VI.¶QQ.9.
[156] Exhibit 47 at 25 (BCDC Permit No. 2002.002.06 (Amendment No. Six)).
[157] VR/C Section VI.¶M.3.

> While Sanders removed certain signs at staff's direction, he continued to maintain numerous unauthorized signs prohibiting public access, including two "Members and Guests Only" signs that were present at the marina entrance until early 2017 and numerous "Restricted Access" signs were present at various locations around the Site until July 5, 2017.[158]

As Respondents have already explained in this response, the "Restricted Access" signs were in place to ensure public safety. As it concerns the signs near the Harbormaster's office in particular, at the time these signs were observed by BCDC, as recorded in Exhibit C of the VR/C, the Phase 2 area was still under construction.[159]

The purpose of the "Restricted Access" signs was not to discourage public access, but rather to maintain safety by ensuring members of the public were adequately informed of the potential hazards in construction areas by Westpoint Harbor staff. Respondents were justifiably concerned about public safety at Westpoint Harbor during construction activities and met with a safety consultant to advise them on the proper measures to implement. Based on the advice of the consultant, Respondents ensured that signs were placed just beyond the Harbormaster's office to show that areas under construction were closed. Here, the Harbormaster's office serves as the last location with active restriction after a person would have entered the site but before a person would reach the active-construction Phase 2 area. In practice, the signage placed after the Harbormaster's office was used to stop individuals from heading towards the Phase 2 construction area without having first been checked by the Harbormaster to confirm that they understood which unsafe areas to avoid. In this way, the signs did not prevent public access, but rather ensured that individuals were adequately informed before traveling through construction areas. In fact, BCDC Chief Counsel Marc Zeppetello experienced this firsthand, when, while standing near the Harbormaster's building in front of the "Restricted Area" sign, he was approached by Mr. Sanders, who asked: "Can I help you?"[160] Mr. Sanders' actions were consistent with this screening method to ensure public safety. Due to fencing now installed to protect the public from activities in the Phase 2 and Phase 3 areas, these screening procedures are no longer necessary.

With regard to the remaining "Members and Guests Only" signs, these signs were accompanied by public shore signs. Specifically, the signage at the entrance to Westpoint Harbor on Seaport Boulevard had a public shore sign placed right below it. The multiple signs were meant to indicate to members of the public that Westpoint Harbor is a private facility, but that public access to the shore is also available. Nobody contests the fact that Westpoint Harbor is a private facility, and it should be able to properly advertise itself as such. Respondents placed public shore signs to ensure that members of the public were not dissuaded from entering and taking advantage of the public access provided. BCDC staff left a current photo of these signs out of the VR/C. While BCDC staff included July 2017 photos of the rower's dock and other features, photos of the Westpoint Harbor entrance are dated October 22, 2016.[161] A simple review of the site on Google Maps shows that a public shore sign was in place as of February

[158] VR/C Section II, page 3.
[159] Exhibit 1 (Sanders Declaration).
[160] VR/C Section VI.¶MM.
[161] VR/C Exhibit C at 1.

2017. By installing these signs, Respondents have complied with Special Condition II.B.4.d. In addition, "Members and Guests" signs are commonplace in marinas, both public and private.[162]

The "Members and Guests Only" sign at the entryway to Westpoint Harbor has now been removed, while the "Public Shore" sign there has been left in place. Respondents took this action to further address the concerns BCDC staff expressed regarding signage, even though Respondents believe that the BCDC staff concerns were unfounded.

The logic of the suggestion by BCDC staff that Respondents have failed to allow public access is difficult to understand because Respondent believe that the success of the harbor depends on robust public access and an inflow of visitors to enjoy the site. Public access mutually benefits the public and Respondents by creating a positive atmosphere and encouraging commerce. For example, users of 101 Surf Sports and boaters that rent slips from WPH can get their first introduction to the harbor by enjoying the public access there. Furthermore, in the future, when the Phase 3 retail spaces are finished, public access will be instrumental in making those spaces commercially profitable.

Figure 8 - Google Maps Photo Showing Public Shores Sign (in blue).

f) <u>The VR/C contains a number of illogical assertions concerning this allegation.</u>

BCDC staff incorrectly calculated the September 2008 start date of this alleged violation based on activities done under Phase 1A. BCDC staff's error appears to be based on the following incorrect statement in the VR/C:

[162] Exhibit 1 (Sanders Declaration).

> The permit requires Sanders to make available to the public an approximately 298,000 - square-foot area, referred to as the Phase 1B public access area, and to provide specified public access improvements, including 85,300 square feet of walkways and 170,500 square feet of landscaping, prior to the use of any authorized structure, including the marina berths, which occurred in September 2008.[163]

The assertion that improvements related to Phase 1B should have been in place in September 2008 is one that BCDC staff repeats numerous times throughout the VR/C. And yet, the clear language of the Permit provides otherwise. Special Condition II.B.4.d requires that specific improvements be in place "prior to the use of any structure authorized herein (including the marina berths) **under Phase 1B of the project**" (emphasis added). BCDC staff appears to have assumed that all marina berths were authorized under Phase 1B, even though the Permit explicitly states otherwise. Amendment No. Three of the Permit split Phase 1 into Phase 1A and Phase 1B. The construction of 145 slips is authorized under Phase 1A. Phase 1B authorizes the construction of the remaining docks/slips at the marina. Boats began using the 145 slips authorized under Phase 1A in 2008, but the Phase 1B slips had not even been installed at that time.[164] Because the slips used in 2008 were part of Phase 1A, Respondents could use any of those 145 slips without triggering the requirements of Special Condition II.B.4.d, which are plainly tied to structures authorized under Phase 1B. Thus, BCDC staff has misread the Permit and erroneously asserted that public access improvements associated with Phase 1B were required by use of structures authorized and completed under Phase 1A. In sum, there is no reasonable basis, and no evidence presented by BCDC staff, to support the allegation that a violation of Special Condition II.B.4.d began in September 2008.

In alleging a 2008 start date, BCDC staff also contradicts its earlier statements, in which it informed Respondents that they must take action by 2011 and 2012. Specifically, as set out in the VR/C:

> Staff stated that completion of the public access pathway along the southern portion of the marina, beginning at the harbormaster's building and continuing west and north along the perimeter of the marina basin, and connecting to the Pacific Shores pathway, should be completed and open to the public by no later than December 31, 2011 pursuant to BCDC staff-approved plans. Staff also indicated that the fence blocking access along the border between Pacific Shores and Westpoint Marina may remain in place until, and should be removed by, no later than December 31, 2011.[165]
>
> Staff noted that the second significant section of the public access pathway to be completed under Phase 1B and opened for public

[163] VR/C Section II, page 3.
[164] Exhibit 1 (Sanders Declaration).
[165] VR/C Section VI.¶T.5.f.

> use is the pathway east of the harbormaster's building. Staff indicated that this section of the public access pathway, as well as the public boat launch and parking area, with 15 signed vehicle and boat trailer public parking spaces, was to be completed by no later than April 1, 2012.[166]

Here, BCDC staff has attempted to backdate the alleged violation, despite clearly informing Respondents that they had additional time to come into what BCDC staff considered to be compliance with the Permit.

Finally, BCDC staff claims that the alleged failure to install and make available the public access pathways began in September 2008. However, as discussed in the response to Allegation No. 1A, BCDC staff asserts that Respondents' alleged failure to obtain plan approval for these pathways began in May 2011.[167] BCDC staff's assertion that Respondents should have completed and made pathways available almost three years prior to obtaining plan approval is illogical and unfounded.

For these reasons, Respondents deny that they"[f]ail[ed] to install and/or make available public access pathways[,] Special Condition II.B.4.d." Accordingly, Respondents deny the allegations in VR/C Section II (page 4), Section VI.¶T.5, Section VI.¶CC, Section VI.¶EE.3, Section VI.¶QQ.5, Section VI.QQ.10, Section VI.¶GGG.3, Section VI.¶HHH.1, Section VI.¶SSS, Section VI.¶TTT, Section VI.E.2, Section VI.F.5, Section VI.EE.3, Section VI.HH.9, Section VI.SSS, Section IX, Exhibit C (pages 1-3), and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents violated Special Condition II.B.4.d.

3. Allegation No. 1C

BCDC staff alleges: "Failure to make available for public access 10 guest berths[,] Special Condition II.B.4.e[,]" for the period of September 2008 to July 2017.[168]

BCDC staff appears to be unfamiliar with common marina terminology and misunderstands how modern marinas operate. Unfortunately, BCDC staff's lack of familiarity with marinas is evident in a number of allegations in the VR/C. Respondents provide guest berths, in the form of guest docks on the western side of the marina basin, capable of accommodating 40 boats near the Phase 3 area of Westpoint Harbor. These are docks P and N, shown on the public access maps submitted to BCDC and recorded in the legal instrument included as AR Document 11. Docks P and N are also shown on the detailed dock plans submitted to BCDC multiple times (as discussed elsewhere in this Statement).[169] To the extent that BCDC staff's allegations arise from a perceived failure to provide the guest berths, BCDC staff is clearly wrong, and Respondents are clearly in compliance.

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[166] VR/C Section VI.¶T.5.g.
[167] VR/C Exhibit D at 1.
[168] VR/C Exhibit D at 1.
[169] Exhibit 48 at 3 (dock plans submitted to BCDC staff in March 2007; copy of which was obtained in response to CPRA request).

a) Guest berths provide access from the seaward side, consistent with industry standard practice.

To the extent that BCDC staff's allegations instead arise from a perceived deficiency in access to these guest berths, BCDC staff misstate what a guest berth is. The term "guest berths" as used in the Permit must be defined in reference to the ordinary meaning of that term in the boating industry. By industry definition, guest berths (also known as "transient berths") are berths open for members of the public to tie-up their boats.[170] These are not berths/docks that are left open from the landward side for individuals to walk along. In fact, there is no plausible reason for guest berths to be open to the public from the landward side, as you cannot launch any craft from the landward side of a guest dock. Kayaks and other small craft are launched from the rower's dock, while larger trailerable boats are launched from the designated boat launch.[171] Physically, the guest docks are far too high out of the water to safely launch kayaks and personal watercraft (the height between the water and the dock or freeboard is over 18 inches), and a swimmer cannot easily climb out of the water at this height.[172] The sole purpose of guest berths is to provide access for members of the public visiting the marina in boats.

BCDC staff's misunderstanding about how guest berths work is surprising, because staff at the California Division of Boating and Waterways ("DBW") explained the concept to BCDC staff in 2012. Respondents have previously informed BCDC staff that the guest docks at Westpoint Harbor are funded in part by a grant from the DBW, which in accordance with standard industry practice, requires public access from the water, and restricts it from land.[173] In a May 9, 2012 email to Adrienne Klein, Brad McCrea, and John Bowers of BCDC, Kevin Atkinson of the DBW confirmed this common understanding of guest dock public access, stating:

> I believe part of this confusion is the definition of "public" that you are using vs. what "public" access is in terms of the Boating Infrastructure Grant (BIG) contracts. "Public" in terms of the BIG grant funded improvements refers to the recreational vessels and their occupants that want to use the BIG funded facilities (i.e. docks, etc) (Note: only a small portion of the docks at the Westpoint Marina were funded with BIG funds). In order for the recreational vessel to get to the facility they would typically arrive by water - not land access. The Grantee must also allow public (the recreational boater) access to the shore and to other basic facilities such as fuel, restrooms, etc. if the facility has them.[174]

In response to this email, and voicing his frustration with the limits imposed by common industry understanding of guest docks, Mr. McCrea sent an internal email to Adrienne Klein

[170] Exhibit 1 (Sanders Declaration).
[171] Exhibit 1 (Sanders Declaration).
[172] Exhibit 1 (Sanders Declaration).
[173] *See* Exhibit 1 (Sanders Declaration).
[174] Exhibit 49 at 2 (Email from Kevin Atkinson, California Division of Boating and Waterways to Adrienne Klein, BCDC, *West Point Marina, Redwood City, San Mateo County* (May 9, 2012)).

stating: "Aaarrrgh. Okay."[175] Of course, rather than accepting Mr. Atkinson's explanation, properly interpreting the Permit, and adjusting expectations accordingly, BCDC staff continued to press Respondents to open the guest dock from the landward side. This is counter to the Permit, which uses the trade term "guest berths" and must be interpreted in context.

Mr. Atkinson's explanation is backed by countless real-world examples. First, the clear language of Westpoint Harbor's DBW grant explains the public access requirements. Article VI.C states:

> The GRANTEE shall allow reasonable access to the project by all recreational vessels for the useful life of the facilities constructed with the GRANT funds. The GRANTEE shall insure that the facilities are accessible to the public. "Accessible to the public" means located where the public can reasonably reach the facility; where boats typical to that facility can easily use it; where only reasonable fees, as defined in ARTICLE VI, Paragraph G, are charged; and that are open for reasonable periods as determined and approved by the DEPARTMENT. The GRANTEE shall allow public access to the shore and basic features such as fuel and restrooms in facilities that have them.[176]

In addition, as shown in Exhibit 51,[177] "guest berths" at other harbors are designated for boat tie-ins and routinely require reservations and payment of a small fee.[178] Respondents have repeatedly explained this to BCDC staff, and obtained letters from both security experts[179] and a marina insurance expert that confirm that these types of docks are traditionally locked from the landward side.[180] The letter from the insurance expert speaks more broadly to the idea of securing docks, stating "[a] lack of security on docks would be a major issue" and "[i]n my 34 years in the insurance industry, I don't think I have ever seen it mandated that a company cannot secure their facilities and limit their liability."[181]

In addition to the plain meaning of the Permit's term "guest berths," the Permit contains additional plain language that shows that the guest berths were not intended to be accessible to the public from the landward side. Special Condition II.B.2 states that "[p]rior to the installation

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[175] *Id.* at 1 (Email from Brad McCrea, BCDC to Adrienne Klein, BCDC (May 9, 2012)).
[176] Exhibit 50 at 9 (California Division of Boating and Waterways Grant (Oct. 30, 2007)).
[177] Exhibit 51 (pages from selected marina websites concerning guest docking fees and reservation requirements).
[178] In 2012, Respondents also conducted an informal survey of other marinas to prove the Respondents' interpretation of the Permit is consistent with the approach used by other marinas. This survey showed that almost none of the 39 marinas surveyed provide open public access to guest docks from the land. Only six marinas reported having guest berths which are not gated and locked. Four of these marinas were over fifty years old and had no gates at all, while the other two have public retail activities (*e.g.*, tour boats and sailing schools) using the guest docks which require them to be open from the land. Exhibit 52 (Email from Mark Sanders to Silvia Robertson and Kevin Stephens, KSDG (Aug. 23, 2012)). In contrast, Westpoint Harbor is a modern marina with no public retail activities requiring land-side access to the guest docks.
[179] Exhibit 53 (Ltr from Alex Francis, ALX Technology, to Mark Sanders (June 11, 2012)).
[180] Exhibit 54 at 1 (Ltr from Cathy Hammer, Division Vice President, Great American Insurance Co. to Mark Sanders (June 13, 2012)).
[181] *Id.*

of the boat slips, the permittee shall, by instrument or instruments acceptable to counsel for the Commission, dedicate to a public agency or otherwise permanently guarantee such rights for the public to the new, approximately 298,000 square-foot public access area (excluding the vehicle and boat trailer parking, as well as the guest berths)." The fact that the Permit excludes guest berths from this public access guarantee is evidence that the guest berths were never intended to be opened to public access from the landward side.

The guest berths are accessible to members of the public from the seaward side, and are signed appropriately with three signs. Photos of the signs are included in Exhibit 55.[182] These signs were provided and required by the DBW and were placed facing the water so that members of the public wishing to dock could easily identify the space.[183] In addition to the fact that the Permit does not require landward-side access to the guest berths, such access is unnecessary for members of the non-boating public to enjoy Westpoint Harbor. Westpoint Harbor's public access amenities include benches facing the marina basin, view decks with safety rails overlooking the basin, and paths all around the basin. These and other features allow members of the public to enjoy the area from the land, without having to walk directly on the guest berths.

b) The VR/C contains numerous inaccuracies.

BCDC staff also disregarded the facts when assigning a violation start date for this allegation. As already explained in the response to Allegation No. 1B, Special Condition II.B is explicitly tied to Phase 1B, and not Phase 1A. There is simply no basis to allege that the guest berths were required to be available in 2008. In addition, as evidenced by AR Document 57, BCDC staff never really believed that the violation began in 2008. Brad McCrea stated "[a]fter meeting with you on May 23rd, BCDC staff decided to postpone until October 10, 2013 the requirement that the guest berths be opened to the public to provide you with ample time to apply for a material amendment to remove the requirement."[184] In fact, Westpoint Harbor provided guest berthing from the day it opened, using available and unassigned berths. There has never been an instance when Westpoint Harbor failed to provide guest berthing when requested.[185]

For these reasons, Respondents deny that they "fail[ed] to make available for public access 10 guest berths." Accordingly, Respondents deny the allegations in VR/C Section II.B (page 2), Section II (page 4), Section VI.E.2, Section VI.F.5, Section VI.EE.3, Section VI.HH.9, Section VI.QQ.10, Section VI.SSS, Section IX, Exhibit C (page 2), and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents violated Special Condition II.B.4.e.

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[182] Exhibit 55 (photos of signs at guest berths).
[183] Exhibit 1 (Sanders Declaration).
[184] AR Doc. 57 at 2 (Ltr from Brad McCrea, Regulatory Program Director to Mark Sanders (July 16, 2013)).
[185] Exhibit 1 (Sanders Declaration).

4. *Allegation No. 1D*

BCDC staff alleges: "Failure to make available public restrooms within the harbormaster's building[,] Special Condition II.B.4.f[,]" for the period of May 2011 to July 2017.[186]

Special Condition II.B.4.f requires "[o]ne public restroom, provided within the Harbormaster's building . . . ." Any neutral observer can confirm that Respondents have met this condition. The Harbormaster building restrooms are signed as restrooms (one for males, another for females) and open to the public seven days per week.

a) The current restroom signage meets Permit requirements.

BCDC staff appears to take issue with the fact that a sign stating "public" is not located immediately adjacent to the restroom doors. However, the permit requires only that Respondents install the public restroom. There is no requirement that this restroom must "be clearly designated with BCDC staff-approved signs indicating that they are open for public use."[187] Respondents in fact use the standard restroom signage that is found in any number of public accommodations, such as restaurants, hotels, and other venues with public restrooms.[188] Nonetheless, Respondents have also provided signage informing members of the public that restrooms are available at the Harbormaster's office. This is evident in BCDC staff's own VR/C, which contains a photo that shows a post on which a sign is installed with the universal graphic for male and female restrooms.[189] Additionally, the restroom doors are adjacent to the public access path that runs between the Harbormaster building and the marina basin.[190] Any member of the public walking on that path would see the obvious restroom signs. For a photo of the sign on the men's restroom, see Exhibit.[191]

b) Restrooms were previously locked to ensure public safety, and are readily accessible to members of the public.

BCDC staff also appears to take issue with the fact that these women's and men's restrooms have sometimes been locked. However, the restrooms are not currently locked during daylight hours, and the restrooms have only been locked in the past for purposes of protecting the safety of the public and property at Westpoint Harbor. Unfortunately, vandalism and other illegal behavior is a repeat problem.[192] For example, recently, Redwood City police were needed to respond to two incidents at two separate times involving a man who was outside at Westpoint Harbor while not wearing pants. Before police were on site, the man entered the restroom and used the shower facilities within. Redwood City police specifically advised Westpoint Harbor

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[186] VR/C Exhibit D at 1.
[187] VR/C Section VI.¶T.5.d.
[188] Exhibit 1 (Sanders Declaration).
[189] VR/C Exhibit C at 2.
[190] Exhibit 1 (Sanders Declaration); Exhibit 56 (Photographs of restrooms taken from public access pathways).
[191] Exhibit 57 (Photo of men's restroom taken by BCDC staff on October 22, 2016 visit).
[192] Exhibit 1 (Sanders Declaration).

employees to "start locking the restrooms and gangways[.]" The man left Westpoint Harbor property but returned later that day, drunk, and had to be hand-cuffed and removed by police.[193]

As illustrated by the recent incident cited above, it is important to note that these restrooms contain showers as well as toilets. Unfettered access raises the possibility of public harm.[194] Mr. Sanders has notified BCDC staff of the problem with unfettered access to the public restrooms, including in an October 2011 communication to BCDC staff in which he notes:

> Restroom signs have been in place since the building was completed. As you know the women's restroom and showers are open, and the men's are accessed is by pushbutton controlled by the harbormaster every day to minimize vandalism. Some problems continue as men sometimes enter the women's restroom (especially after hours) and many women want their facilities locked also.[195]

In fact, BCDC staff agreed, as early as April 2012, that the restrooms should be locked for safety purposes and that public access can be ensured by making a key available to members of the public during the Harbormaster building office hours. This is evidenced by BCDC staff's own writing, in which BCDC staff states, "Restrooms – Place two signs stating 'access key is available in the harbormaster's office' on the glass next to the main entrance door of HM office and other between the two restrooms."[196] BCDC staff even provided the design of such signage to Mr. Sanders.[197] Note that the Permit does not require such signage, but Respondents have provided one such sign to ensure that members of the public have access. On a glass window, prominently located at the entryway to the Harbormaster building, there is signage that states that a key to the restrooms is available in the Harbormaster's office.[198]

In sum, although the restrooms are not currently locked during daylight hours, there have been times in the past when the restrooms were locked for public and property safety purposes. This was acceptable to BCDC staff in the past. There is no defensible reason for BCDC staff to now seek a $30,000 penalty.

For these reasons, Respondents deny that they "[f]ail[ed] to make available public restrooms within the harbormaster's building[,] Special Condition II.B.4.f." Accordingly, Respondents deny all assertions in the Violation Report/Complaint, including Section II (page 4), Section VI.¶F.6, Section VI.¶M.3, Section VI.¶T.5, Section VI.¶EE.3, Section VI.¶LL.5, Section VI.¶QQ.7, Section VI.¶GGG.5, Section VI.HHH.3, and the Summary of Violations and Proposed Civil Penalties, to the extent these assertions suggest that Respondents violated Special Condition II.B.4.f.

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[193] Exhibit 58 (Email from Sonya Boggs, Westpoint Harbor to Harbormaster, Westpoint Harbor (July 25, 2017)).
[194] Exhibit 1 (Sanders Declaration).
[195] Exhibit 59 at 2 (Ltr from Mark Sanders to Tom Sinclair and Ellen Miramontes, BCDC, *Your letter of September 1, 2011, regarding Westpoint Harbor* (Oct. 18, 2011)).
[196] AR Doc. 36 at 2 (Memorandum from Adrienne Klein (Apr. 25, 2012)).
[197] Exhibit 1 (Sanders Declaration).
[198] Exhibit 1 (Sanders Declaration); Exhibit 60 (photograph of restroom sign stating that a key is available in the Harbormaster's office).

5. *Allegation No. 2A*

BCDC staff alleges: "Failure to obtain plan review prior approval to install landscaping[,] Special Condition II.A.1[,]" for the period of May 2011 to July 2017.[199]

a) Respondents provided detailed plans to the Design Review Board.

Respondents provided detailed landscaping plans sufficient to satisfy Special Condition II.A.1 over a decade ago, as part of their submittal to the BCDC Design Review Board ("DRB"). The Phase 1 Planting & Furnishing Plan included in the DRB submittal outlines all of the planting expected around Westpoint Harbor.[200] While Respondents received approval from the DRB, as made clear in the permit checklist filled out by BCDC staff, Respondents never received any feedback from BCDC staff.[201] Because BCDC staff did not provide any review of those plans within 45 days and the DRB stated it was satisfied, Respondents justifiably relied on Mr. McCrea's November 3, 2005 letter indicating that BCDC staff could not review plans, in believing they had deemed approval to proceed.

b) Respondents attempted to settle on approved final plans in 2011 and 2012.

When BCDC staff informed Respondents in 2011 that they still needed to obtain plan approval, Respondents attempted to engage with BCDC staff to produce new landscaping plans. However, discussions of landscaping plans took over a year, as demonstrated by documents 27 and 48 in the AR. The plan approval process was never intended to take this long, and much of the delay can be attributed to a lack of organization by BCDC staff. In fact, Respondents' consultant, Kevin Stephens Design Group ("KSDG"), submitted a set of final landscaping plans for review in August 2012.[202] Ms. Miramontes provided feedback on these plans on September 10, 2012,[203] and on September 26, 2012, KSDG provided an updated landscaping set that addressed Ms. Miramontes's feedback.[204] Ms. Miramontes provided her September 10, 2012, comments a second time on October 26, 2012.[205] Realizing that for whatever reason, Ms. Miramontes had not looked at the September 26, 2012, submittal, KSDG provided these plans yet again on October 26, 2012.[206] KSDG attempted to get further feedback from Ms. Miramontes over the weeks that followed, and multiple calls and emails to Ms. Miramontes went unreturned.[207] When Respondents finally heard back from Ms. Miramontes on November 15, 2012, she stated "I don't see anything that stands out," but complained that "it is hard to read the

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[199] VR/C Exhibit D at 1.
[200] Exhibit 61 at 9 (Westpoint Harbor Plans (Aug. 7, 2006)).
[201] Exhibit 62 at 1 (BCDC Permit Checklist completed by BCDC staff (Nov. 1, 2006)).
[202] Exhibit 63 at 2 (Email from Kevin Stephens, KSDG to Brad McCrea, BCDC (Nov. 15, 2012)).
[203] Exhibit 64 at 1-2 (Email from Ellen Miramontes, BCDC to Kevin Stephens, KSDG, *Westpoiont - two questions and drawing comments* (Sept. 10, 2012)).
[204] Exhibit 65 at 1 (Emails between Kevin Stephens, KSDG and Ellen Miramontes, BCDC (Nov. 16, 2012)).
[205] Exhibit 64 (Email from Ellen Miramontes, BCDC to Kevin Stephens, KSDG, *Westpoint - two questions and drawing comments* (Oct. 26, 2012)).
[206] Exhibit 65.
[207] AR Doc. 48 at 1 (Email from Ellen Miramontes to Kevin Stephens and Silvia Robertson, KSDG (Nov. 15, 2012)) (Ms. Miramontes states, "I am sorry I have not been able to respond sooner to your calls and emails.").

plans on my small computer screen."[208] Respondents believe Ms. Miramontes was referring to the "Existing and Proposed Public Access Plans" (which contained 31 pages of plans, including landscaping and irrigation) with sheets dated August 19th, September 11th, and October 9th of 2012.[209] As Kevin Stephens aptly put it, "[t]his is silly. It took her [two] months to tell us she can't read her computer screen? Redwood city had no problem reviewing a PDF."[210]

Ms. Miramontes's statements that "[r]egarding the other drawings, I don't see anything that stands out,"[211] after almost three months of discussing the landscaping plans with KSDG, constitutes plan approval for the landscaping plan. The fact that Ms. Miramontes provided additional comments in December 2012 does not negate the fact that she approved the plans in her November 15, 2012 email. The prolonged exchange with Ms. Miramontes, which ultimately resulted in her complaint that it was hard to read plans on her small computer screen, is another example of BCDC staff failing to reasonably cooperate with Respondents. In the event that Ms. Miramontes's statements did not constitute approval, Respondents submitted a set of landscaping and irrigation as-built drawings, in May 2014.[212] Consistent with BCDC staff's standard practice, Respondents received no feedback.

Finally, the VR/C contains numerous inaccuracies concerning landscaping plans and their approval. Section VI.¶BB states that "on November 30, 2012, KSDG submitted a set of plans entitled 'Westpoint Harbor Marina, Existing and Proposed Public Access Plans,' which included landscaping plans, and also submitted a set of irrigation plans." The VR/C conveniently ignores Ellen Miramontes's November 15, 2012 email discussed above responding to prior plan submittals. BCDC staff's selective recollection of plan discussion appears designed to make it impossible for Respondents to appropriately respond to these allegations.

For these reasons, Respondents deny that they failed to obtain plan review prior approval to install landscaping. Accordingly, Respondents deny all assertions in the VR/C, including Section II.¶C (page 2), Section II (page 4), Section VI.¶M.2, Section VI.¶S.2, Section VI.¶T.4, Section VI.¶BB, Section VI.¶CC, Section VI.¶EE.3, Section VI.¶HH.2, Section VI.¶DDD, Section IX, and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents violated Special Condition II.A.1.

6. Allegation No. 2B

BCDC staff alleges "Failure to complete installation of and make available 170,500 square feet of landscaped areas[,] Special Condition II.B.4.g[,]" for the period of September 2008 to July 2017.[213]

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[208] *Id.*
[209] Exhibit 66 (KSDG, *Westpoint Harbor Marina Existing and Proposed Public Access Plans*) (electronic PDF file of these plans was obtained from BCDC in response to Respondents' CPRA request; metadata of electronic file shows that the file was created October 11, 2012, and last modified November 1, 2012).
[210] Exhibit 63 at 4 (Email from Kevin Stephens, KSDG to Mark Sanders (Nov. 16, 2012)).
[211] AR Doc. 48 (Email from Ellen Miramontes to Kevin Stephens and Silvia Robertson, KSDG (Nov. 15, 2012)).
[212] Exhibit 67 (*Westpoint Harbor Marina Planting and Irrigation As-Built May 1, 2014* (May 1, 2014)).
[213] VR/C Exhibit D at 1.

a) Proportionate landscaping has been completed for areas where construction has been completed.

Although the Permit requires 170,500 square feet of landscaped areas under Special Condition II.B.4.g, that landscaping covers the entire Westpoint Harbor project area, including some Phase 2 and Phase 3 areas. Respondents have completed the landscaping present in the Phase 1B area, but as Respondents have made clear to BCDC staff, portions of Phase 2 and Phase 3 are not completed and are still under construction.[214] There is no logical reason to provide, nor is there a practical means to provide, landscaping for areas currently under construction or planned for future construction. For example, the landscaping layout in the Phase 3 area cannot even be known at this time because the building design and layout have not even started.[215] These areas under construction or awaiting future construction still have rough terrain with construction materials and equipment, open trenches, and thick muddy surfaces.[216] Underground work must be completed before landscaping can be completed and maintained. BCDC staff apparently thinks that landscaping should be installed before buildings are built. Of course, that is inappropriate and would result in nothing but bushes run over by construction equipment and wasted time and money. It is also impractical to install landscaping while the land is still being brought to the correct elevation (*i.e.*, mud from the basin is still being dried and compacted). Respondents are currently working to install landscaping in Phase 2, as practical realities allow.

b) BCDC staff explicitly told Respondents to halt landscaping work.

In addition to the logistical problems associated with installing all 170,500 square feet of landscaping, Respondents were explicitly told by BCDC staff to place landscaping work on hold. As AR Document 24 makes clear, Ms. Miramontes told Respondents in August 2011 "[n]ote: all landscaping work should be stopped until plans can be developed, reviewed and approved." Maureen O'Connor, Mr. Sanders' wife, confirmed in a November 21, 2011, email to BCDC staff that landscaping was on hold, as requested.[217] BCDC staff cannot legitimately take both positions—directing Respondents to halt landscaping installation and then allege a violation for failing to complete landscaping. Similarly, Allegation No. 2B is unnecessarily repetitive of Allegation No. 2A, in that BCDC staff attempts to cite Respondents both for a supposed failure to obtain plan approval, and a supposed failure to complete the improvement covered by the plan.

Finally, BCDC staff alleges that Allegation No. 2B began in September 2008. As previously explained in the response to Allegation No. 1B, there is no basis for staff to allege that a requirement tied to Phase 1B structures began in 2008, during the construction of Phase 1A. In addition, as explained in the response to Allegation No. 1B, BCDC staff asserts that Respondents' alleged failure to obtain plan approval for landscaping began in May 2011. Yet, BCDC staff claims that the alleged failure to actually complete the landscaping began almost three years prior in September 2008. It is illogical for BCDC staff to allege that Respondents

[214] Exhibit 1 (Sanders Declaration).
[215] *Id.*
[216] *Id.*
[217] Exhibit 68 (Email from Maureen O'Connor, Westpoint Harbor to Tom Sinclair, BCDC, *Short Westpoint Harbor Update* (Nov. 21, 2011)).

failed to complete a plan three years prior to the time they allegedly failed to obtain approval for the plan in the first place.

For these reasons, Respondents deny that they have failed to complete the installation of and make available 170,500 square feet of landscaped areas as required by Special Condition II.B.4.g. Accordingly, Respondents deny all assertions in the Violation Report/Complaint, including Section II.B (page 2), Section II (pages 3-4), Section VI.¶E.6, Section VI.¶F.7, Section VI.¶M.3, Section VI.¶EE.3, Section VI.¶HH.5, Section VI.¶FFF, Section VI.¶KKK, Section IX, and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents violated Special Condition II.B.4.g.

7. Allegation No. 2C

BCDC staff alleges "Failure to remove trees adjacent to slough that present problem for wildlife per director [sic] of Bay Design Analyst[,] Unauthorized fill[,] Government Code § 66632(a)[,]" for the period of December 2012 to July 2017.[218]

BCDC staff's assertion that Monterey Cypress and Poplar trees planted at Westpoint Harbor constitute unauthorized fill is wrong. These trees were shown in landscaping plans submitted to BCDC, described above in response to Allegation No. 2A.[219] Additionally, the reasons BCDC staff have presented for the removal of Poplars are contrary to established CEQA requirements.

Detailed planting plans provided by Respondents to BCDC staff in 2012, as well as as-built plans submitted in 2014, show the Monterey Cypress and Poplar trees planted along Westpoint Slough. Additionally, the Poplar trees were planted along Westpoint Slough consistent with the requirements of the BCDC and Redwood City permits. Specifically, the Negative Declaration relied on by both BCDC and Redwood City in issuing their permits states:

> Trees and shrubs shall utilize the Landscape Tree Suitability Index developed for the Pacific Shores Center project. Only trees and shrubs with a High Landscaping Suitability Index rating (low potential for nest and roost sites) shall be used for general landscaping. High Suitability Index trees shall 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.[220]

The Poplar trees conform with the plant palette at Pacific Shores Center[221] and meet the criteria for "High Suitability" under the Landscape Tree Suitability Index. Monterey Cypress were also included in the landscaping plan approved by the DRB on August 7, 2006.[222]

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[218] VR/C Exhibit D at 1.

[219] Exhibit 66 at 4 (KSDG, *Westpoint Harbor Marina Existing and Proposed Public Access Plans*) (electronic PDF file of these plans was obtained from BCDC in response to Respondents' CPRA request (2012)); Exhibit 67 (*Westpoint Harbor Marina Planting and Irrigation As-Built May 1, 2014* (May 1, 2014)).

[220] AR Doc. 2 at 14 (EA - 10913-00 Negative Declaration, Redwood City, San Mateo County, California).

For confirmation that these trees were consistent with authorized plans, BCDC staff need look no further than Document 32 of the AR, in which Redwood City officials inspecting the property in 2012 stated that the "current improvements are in substantial compliance with the improvements on record with the City (for example, site plan dated August 7, 2006) . . . ." These officials also confirmed that the on-site landscape was consistent with City permit approvals, which required Respondents to "tie into and relate to the adjoining plant palette and pedestrian improvements which are currently installed at the adjoining Pacific Shores Center project . . . ."[223] To the extent that BCDC staff asserts that these trees constitute unauthorized fill because they were not previously approved by BCDC, this allegation is unnecessarily repetitive of Allegation No. 2A. This amounts to another attempt by BCDC staff to multiply alleged violations in order to seek a penalty in excess of the maximum authorized by statute.

BCDC staff has provided no basis for its conclusion that the trees serve as perching sites for raptors beyond Ms. Miramontes's assertions. For these reasons, Respondents deny that they failed to remove trees adjacent to the slough that present a problem for wildlife in violation of Government Code § 66632(a). Accordingly, Respondents deny all assertions in the VR/C, including Section II.¶D (page 5), Section VI.¶U, Section VI.¶BB, Section VI.¶QQ.6, Exhibit C (page 3), and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents violated Government Code § 66632(a).

8. Allegation No. 3A

BCDC staff alleges: "Failure to obtain plan review approval to install site furniture, lighting and irrigation[,] Special Condition II.A.1[,]" for the period of May 2011 to July 2017.[224]

a) Respondents previously submitted detailed plans to the DRB.

In this instance, as with many of the plan review allegations, BCDC staff has attempted to punish Respondents for BCDC staff's own delay. The Phase 1 Planting & Furnishing Plan included in the 2006 DRB submittal outlines all of the furnishings for Westpoint Harbor and is sufficient to meet the requirements of Special Condition II.A.1.[225] This plan included the exact design, color, manufacturer, model numbers and locations of benches, lights, and trash containers. There is simply no other relevant information on site furnishings beyond what was in this plan. In fact, Ms. Miramontes previously confirmed that this plan controls for furnishing, stating "[f]or additional benches, please follow approximately what is shown on the 8/7/06 DRB Planting and Furnishing Plan."[226] Based on this deference to the DRB plan, Respondents justifiably believed they had obtained plan approval. In addition, BCDC staff failed to provide any review of the DRB Planting & Furnishing Plan within 45 days.

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[221] *See* Exhibit 69 (excerpt from Pacific Shores Center plans, showing "Plant Legend," including Theves Poplar (2000)).
[222] Exhibit 61 at 9 (Westpoint Harbor Plans (Aug. 7, 2006)).
[223] Exhibit 11 at 2 (Ltr from Charles Jany, Redwood City Principal Planner, to Mark Sanders, *Permit Update* (Feb. 21, 2012)).
[224] VR/C Exhibit D at 1.
[225] Exhibit 61 at 9 (Westpoint Harbor Plans (Aug. 7, 2006)).
[226] AR Doc. 30 at 1 (Email from Ellen Miramontes, BCDC to Valerie Conant, BMS Design Group, and Mark Sanders (Feb. 24, 2012)).

b) Respondents previously submitted irrigation and lighting plans as part of the Phase 1 Construction Drawings.

As it concerns irrigation plans, Respondents refer back to the response to Allegation No. 2A above. The irrigation plans were submitted in 2012 and as-built plans were submitted in 2014, as already discussed. In addition, irrigation and lighting were both addressed as part of the Phase 1 Construction Drawings discussed in the response to Allegation No. 1A.[227] As previously explained, BCDC staff's failure to complete plan review within the 45-day period required by the Permit, along with Mr. McCrea's November 3, 2005 assertion that BCDC did not have staff to review plans, left Respondents with the justifiable understanding that the plans were approved.

For these reasons, Respondents deny that they failed to obtain plan review approval to install site furniture, lighting, and irrigation. Accordingly, Respondents deny all assertions in the VR/C, including Section II.¶C (page 2), Section II (page 4), Section VI.¶M.2, Section VI.¶EE.2, Section VI.¶HH.2, Section IX, and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents violated Special Condition II.A.1.

9. Allegation No. 3B

BCDC staff alleges: "Failure to complete installation of and make available all required site furnishings[,] Special Condition II.B.4.h[,]" for the period of September 2008 to July 2017.[228]

a) Respondents have provided site furnishings appropriate for the areas of Westpoint Harbor where construction has been completed.

Respondents acknowledge that Special Condition II.B.4.h requires "not less than 20 benches" and "not less than 10 trash containers." Respondents have ensured that the appropriate number of benches and trash containers are present in the Phase 1A and Phase 1B areas, consistent with the Phase 1 Planting and Furnishing Plan approved by the DRB. However, the Phase 1 Planting and Furnishing Plan clearly shows that a number of the benches and trash containers will be located in Phase 2 and Phase 3 areas. As Respondents have made clear to BCDC staff, portions of Phase 2 and Phase 3 are not completed and are still under construction.[229] There is no logical reason to provide benches and trash containers in areas where construction is occurring and where it is unsafe for pedestrians to venture. Only on July 15, 2017, did Redwood City finally permit Respondents to open portions of these areas to public access.[230] As the pathways around Phase 2 and Phase 3 have now been opened for public access, Respondents have installed additional benches and trash containers in these areas.[231] The current furnishings in place are appropriate to meet the needs of pedestrians in the Phase 1A, Phase 1B,

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[227] Exhibit 36 (Phase 1 Construction Drawings Conditionally Approved September 9, 2011). Page 12 of the Phase 1 Construction Drawings shows irrigation lines marked as "IRR." Page 16 shows the streetlights to the electrolier, with streetlights marked as "SL" and the electrolier marked as "ELECTROLIER."
[228] VR/C Exhibit D at 1.
[229] *See* Exhibit 1 (Sanders Declaration).
[230] Exhibit 43 (Ltr from Mark Sanders to Steven Parker, Redwood City, *Request to allow opening the Phase 3 paths in Westpoint Harbor* (June 28, 2017)).
[231] Exhibit 1 (Sanders Declaration).

and now Phase 2 and Phase 3 areas. BCDC staff asserts that the site furnishings should have been installed by September 2008, yet simultaneously alleges that the failure to obtain plan review of the site furnishing plan began in May 2011. Again, there is no factual basis to allege that an improvement should be installed prior to its approval.

For these reasons, Respondents deny that they failed to complete installation of and make available all required site furnishings. Accordingly, Respondents deny all assertions in the VR/C, including Section II.¶B (page 2), Section II (page 4), Section VI.¶M.3, Section VI.¶CC, Section VI.¶EE.3, Section VI.¶HH.5, Section IX, and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents violated Special Condition II.B.4.h.

10. Allegation No. 4A

BCDC staff alleges: "Failure to obtain plan review approval to install public access signs[,] Special Condition II.A.1[,]" for the period of May 2011 to July 2017.[232]

a) Respondents submitted plans, but BCDC staff did not fulfill their obligations within the required deadlines.

Respondents provided proposed public access signage plans in 2012, and engaged in discussions with Ms. Miramontes in an attempt to obtain approval. These signage plans were submitted along with the landscaping plans discussed in response to Allegation No. 2A above. Respondents' consultant, KSDG, provided the signage plans to BCDC on August 24, 2012.[233] Although Ms. Miramontes informed KSDG on September 10, 2012, that she had "comments regarding the signage,"[234] she did not provide these comments until November 15, 2012, well beyond the 45-day deadline for BCDC staff review.[235]

In addition, the comments Ms. Miramontes ultimately provided on November 15, 2012 were dated October 29, 2012,[236] indicating that they sat on her desk until KSDG followed up with multiple calls and emails in November, as Ms. Miramontes readily confessed in her email included in AR Document 48. Even if Ms. Miramontes had submitted these comments on October 29, 2012, she would have violated her 45-day deadline. Her decision to keep them on her desk for another two weeks while KSDG attempted to contact her shows just how cavalier BCDC staff's approach to plan approval was.

Because BCDC staff failed to complete plan review within 45 days, these plans should have been deemed approved, even before Ms. Miramontes finally provided her comments on November 15, 2012, and another set of comments on December 22, 2012. Respondents also provided as-built signage plans to BCDC staff in May 2014, but unsurprisingly heard nothing

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[232] VR/C Exhibit D at 1.
[233] AR Doc. 46 at 1 (Email from Ellen Miramontes to Kevin Stephens, KSDG (Sept. 10, 2012)).
[234] *Id.*
[235] AR Doc. 48 (Email from Ellen Miramontes to Kevin Stephens and Silvia Robertson, KSDG (Nov. 15, 2012)).
[236] *Id.* at 2.

from BCDC in response.[237] BCDC staff simply cannot neglect its plan review duties and then later allege that Respondents failed to obtain plan approval.

b) BCDC staff has given conflicting mandates concerning the signage plan, making it functionally impossible to obtain plan approval.

Even when BCDC staff reviewed the signage plans in November 2012, this review included facially conflicting mandates regarding public signage. As Kevin Stephens explained in a November 16, 2012 email to Ms. Miramontes:

> You are asking us to change the wording of the public access sign from 'public access area hours: open sunrise to sunset' to 'public access: sunrise to sunset'. The sign we used here was taken directly from your website and was what Adrienne told us to use. Do you want us to make this change and not use the sign you currently provide on your website that Adrienne wanted here?[238]

Ms. Miramontes replied that "we would prefer that the 'hours' sign be simplified although that is fine to keep the original language for this sign if you prefer and as you pointed out is shown within our sign guidelines."[239] While at other times BCDC staff has claimed (incorrectly) that Respondents must comply with the BCDC Public Access Signage Guidelines, in this particular exchange, Ms. Miramontes took the opposite position. BCDC staff's habit of providing minor edits at each turn, sometimes directly conflicting with direction previously given, makes obtaining plan approval practically impossible. Finally, Respondents note that BCDC staff provided the Public Shores signs to Respondents for installation.[240] By providing these signs to Respondents, staff necessarily approved the signage, without any need for further approval in writing.

Although Respondents continued to believe they had plan approval for their signage plans, Respondents submitted revised signage plans on June 7, 2017, when requested by BCDC staff. These plans incorporated Ms. Miramontes's December 22, 2012 comments and added the additional launch ramp sign to improve public access. For unknown reasons that were not explained, Mr. Zeppetello claimed that this plan was "facially inadequate," and failed to comply with BCDC's Public Access Signage Guidelines.[241] First, Respondents note that the BCDC Public Access Signage Guidelines is an advisory document established in 2005, well after Respondents obtained their Permit in 2003.[242] The Permit does not require adherence to these guidelines, and in fact, as discussed above, Ms. Miramontes previously informed KSDG that she preferred signage content that was different from that included in the Public Access Signage Guidelines. Second, even if Respondents were required to comply with the Public Access Signage Guidelines, the signs in the plans submitted June 7, 2017, are substantially the same as

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[237] Exhibit 1 (Sanders Declaration).
[238] AR Doc. 50 (Email from Kevin Stephens, KSDG to Ellen Miramontes, BCDC (Nov. 16, 2012)).
[239] *Id.* (Email from Ellen Miramontes, BCDC to Kevin Stephens, KSDG (Nov. 20, 2012)).
[240] *See* Exhibit 1 (Sanders Declaration).
[241] VR/C Section VI.¶OOO.
[242] Exhibit 70 at 1 (Shoreline Signs Public Access Signage Guidelines).

those in the Public Access Signage Guidelines. Any objective viewer, looking at the signs excerpted below, would see that these signs are more than adequate.

Figure 9 - Signs Used in June 7, 2017 Submittal[243]

Figure 10 - Signs in the Public Access Signage Guidelines[244]

Mr. Zeppetello also requested that Respondents have a new plan prepared by a professional.[245] This appears to be another arbitrary requirement created by BCDC staff. Simply put, the Permit says nothing about who must produce the signage plan. It certainly does not require Respondents to employ a professional design firm. There is no basis for BCDC staff to suggest that plans prepared by Respondents are inadequate for no other reason than that they were prepared by Respondents. Mr. Zeppetello also appears to suggest in the VR/C that the signage plan was facially inadequate because "Sanders had prepared the proposed signage plan without first consulting with the BDA."[246] This assertion ignores all of the consultations with Ms. Miramontes, the former BDA, in 2011 and 2012. Respondents based the updated signage plan on this previous consultation. There is no reason for Respondents to start this entire process over from square one, especially when considering BCDC staff's purported concern that public access needed to be improved at the site as soon as possible.

For these reasons, Respondents deny that they failed to obtain plan review approval to install public access signs. Accordingly, Respondents deny all assertions in the Violation Report/Complaint, including Section II (page 4), Section VI.¶M.2, Section VI.¶BB, Section VI.¶CC, Section VI.¶EE.2, Section VI.¶HH.2, Section VI.¶GGG.4, Section VI.¶HHH.2, Section VI.¶MMM, Section VI.¶OOO, Section VI.¶PPP, Section VI.¶QQQ, Section IX, and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents violated Special Condition IIA.1.

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[243] Exhibit 71 (Revised Signage Plan Submittal (June 5, 2017)).
[244] Exhibit 70 (Shoreline Signs Public Access Signage Guidelines).
[245] VR/C Section VI.¶OOO.
[246] VR/C Section VI.¶OOO.

11. Allegation No. 4B

BCDC staff alleges "Failure to provide required public access and Bay Trail signs[,] Special Condition II.B.4.i[,]" for the period of September 2008 to July 2017.[247]

a) There was no logical reason for Respondents to install signs in areas closed for construction.

Special Condition II.B.4.i. requires "[n]o fewer than fifteen public access and, when appropriate, Bay Trail signs, one at the beginning of each path on the site." As explained previously in this response, Respondents were required by Redwood City to keep Phase 2 and Phase 3 areas closed to public access while under construction. There was no logical reason to install public access signs while these areas were under construction, as such signs would only invite members of the public to enter unsafe areas. Although Respondents could not place signs by these areas, Respondents ensured that a public shore sign was located near the Harbormaster's office, where it was safe for public access. Respondents also installed "future extension of the Bay Trail" signs in multiple locations, in order to inform members of the public that these areas would be open in the future.[248] As explained in the response to Allegation No. 1B, even BCDC staff acknowledged, through the addition of Special Condition II.GG, that areas under construction could be restricted for public access.

Although Respondents did not want to invite members of the public into unsafe areas by placing signs, Respondents did want to inform members of the public that public access would be available in the future. In order to accomplish this, Respondents placed "Area Closed, Future Extension of the San Francisco Bay Trail" signs near the restricted areas. Respondents informed the Bay Trail Project Manager for the Association of Bay Area Governments that they were putting these signs in place, and provided a photo of the signs. In a January 2015 correspondence with the Bay Trail Project Manager, Mr. Sanders explained the reason for placing these signs, stating:

> You may recall we've completed all of the Bay Trail in Westpoint Harbor, but some sections in construction areas are required to be closed to public access by the city of Redwood City for Safety Reasons. We already have "Restricted Access" signs in these areas, but it helps when people know the trail will be open in the future. Attached is a photo of signs we made up for this-I hope you like it.[249]

Respondents note that the signs provided to the Bay Trail Project Manager are the same signs Mr. Zeppetello confirmed seeing during his October 22, 2016 site visit.[250]

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[247] VR/C Exhibit D at 1.
[248] *See* Exhibit 1 (Sanders Declaration).
[249] Exhibit 72 (Email from Mark Sanders to Laura Thompson, Bay Trail Project Manager, Association of Bay Area Governments (Jan. 12, 2015)).
[250] VR/C Section VI.¶LL.2 and LL.7.

Now that portions of Phase 2 are safe to open, Respondents have been able to increase the number of public access signs, as any objective observer can see. In fact, BCDC staff's VR/C itself demonstrates that several of these signs are now in place. Exhibit C of the VR/C contains multiple photos showing signs marked "public shore" and "future extension of the Bay Trail." Respondents promptly installed public access and Bay Trail signs around the Phase 3 area after Redwood City authorized Respondents to open the pathways in the area in July 2017.[251] Respondents now have four Bay Trail signs and eleven public shore signs in place around Westpoint Harbor, exceeding the requirements of the Permit.[252]

b) BCDC staff acknowledged that fewer than 15 signs were required.

There is no logical reason to place 15 public access signs around Westpoint Harbor. Even if a sign were placed at the start of each path and at every path crossing, only 7 signs would be required. Fifteen signs necessarily mean multiple identical signs at each location. Moreover, Adrienne Klein's handwritten notes dated April 25, 2012, and received in response to Respondents' CPRA request, states "Public shore/Bay Trail/Hours of operation seems as 15 signs is too many. We're okay."[253] Respondents note that the typed memorandum version of these notes, included as Document 36 of the AR, adds "Amendment needed" to this concession, after the fact. BCDC staff made it clear in the meeting and the notes prepared contemporaneously, that having fewer than 15 signs was simply not an issue. It is arbitrary for BCDC staff to now directly contradict prior statements and propose to punish Respondents for something staff previously acknowledged was not a problem.

For these reasons, Respondents deny that they failed to provide required public access and Bay Trail signs. Accordingly, Respondents deny all assertions in the VR/C, including Section II (page 4), Section VI.¶M.3, Section VI.¶EE.3, Section VI.¶HH.10, and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents violated Special Condition II.B.4.i.

12. Allegation No. 5A

BCDC staff alleges: "Failure to make available 12 signed public parking spaces[,] Special Condition II.B.4.c[,]" for the period of September 2008 to July 2017.[254]

Special Condition II.B.4.c requires that prior to the use of any structure authorized under Phase 1B of the project, permittee shall install "[t]welve signed public parking spaces at various locations around the marina basin, although the entire, approximately 600-space parking lot is open to public parking."

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[251] Exhibit 1 (Sanders Declaration).
[252] *Id.*
[253] Exhibit 73 at 1 (Handwritten notes of Adrienne Klein (Apr. 25, 2012)).
[254] VR/C Exhibit D at 1.

a) Four of the twelve parking spaces are located in the Phase 3 area, which is still under construction.

As explained earlier in this Statement, the development of Westpoint Harbor has taken a long time, and Phase 3 of the project has not been started. Currently, eight public parking spaces are available in the Phase 1 area of Westpoint Harbor. The four remaining spaces are, and always have been, scheduled to be included in the Phase 3 retail area. This is evident in the legal instrument, included as AR Document 11. The instrument clearly shows the last four public access parking spaces in the Phase 3 area.[255] In addition, the errata sheet provided to the Commissioners by Will Travis and Andrea Gaut of BCDC in 2003 unquestionably shows that four of the twelve parking spaces were scheduled for the Phase 3 area.[256] Additionally, communications to Jonathan Smith of BCDC on February 28 and June 21, 2007 show the four parking spaces within the Phase 3 area.[257] Mandating that Respondents have these spots available now, when Phase 3 of the project is not started, means that BCDC staff expects Respondents to do the impossible—create parking spaces without a parking lot to stripe or even a road to get there. Given that the retail spaces have not been built, there is not even a need for the additional parking lot at this time.

Respondents have repeatedly, and unequivocally, demonstrated to BCDC staff that these parking spaces were intended for Phase 3, and BCDC staff reiterated their understanding of the phased nature of the parking spaces as early as 2007. In an April 4, 2007, email to Mr. Sanders, BCDC's Jonathan Smith stated:

> The permit requires that 12 public parking spaces, three groups of four places each as shown on Exhibit A to the permit, be provided. The earlier version of the maps showing the public access legal descriptions also showed these public parking spaces, although one group of 4 spaces needed to be moved because of the relocation of a building.[258]

BCDC staff appears to have forgotten or ignored these previous communications. There is simply no basis for BCDC staff to assert that Respondents should make signed parking spaces available in an area that is under construction and has no parking lot. This also conflicts with BCDC staff's acknowledgement through Special Condition II.GG, that restrictions on public access can still be imposed on Phase 3 areas.

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[255] These spaces can be viewed in the May 5, 2007 BCDC Public Access maps at page 45 of AR Doc. 11 (Notice of Conditions, Covenants, and Restrictions Affecting San Mateo County Assessor Parcel No. 054-300-620, and a portion of 054-300-600 (Aug. 20, 2007)).

[256] Exhibit 74 at 5 (Errata Sheet from Will Travis and Andrea Gaut to Commissioners and Alternates, *Revisions to the Staff Recommendation on BCDC Permit Application No. 2-02; Mark Sanders; Westpoint Marina, City of Redwood City, San Mateo* (Aug. 7, 2003)).

[257] Exhibit 75 (Ltr from Kent Mitchell to Jonathan Smith, Chief Counsel, BCDC, *Permit No. 2-02, Mark Sanders (Westpoint Marina)* (June 21, 2007)) (Fax from Mark Sanders to Jonathan Smith, Chief Counsel, BCDC *Your letter dated February 8, 2007* (Feb. 28, 2007)).

[258] Exhibit 75 at 2 (Email from Jonathan Smith, Chief Counsel, BCDC to Kent Mitchell, *Permit No. 2-02, Mark Sanders (Westpoint Marina)* (Apr. 5, 2007)).

b) The Permit only requires the spaces to be "signed" and does not require signage to be on posts.

The remaining eight signed parking spots are available and have been since the existing parking lot was constructed. In the VR/C, BCDC staff states that "upright signs, clearly visible to the public, were need[ed] for the required public parking spaces that Sanders had marked with paint on pavement"[259] and "stenciling does not meet the permit requirements to install BCDC public shore signage pursuant to staff approved plans."[260] However, these statements are incorrect, and BCDC staff appears to be attempting to create new requirements that are not actually in the Permit. The Permit does not require "upright signs." And the Permit does not forbid stenciled signage on the pavement to indicate the specific public parking spots. In fact, the Permit, combined with the CEQA mitigation measures from the Negative Declaration, indicate that stenciled signage is appropriate. Special Condition II.B.4.c states that the spaces be "signed." The CEQA mitigation measures require Respondents to implement best management practices to limit roosting sites for non-native and urban adapted predators.[261] Signs on posts should be minimized as they are potential roosting sites for predatory birds that can use posts as perches. Excessive numbers of posts is not consistent with best management practices. This is a serious concern for Respondents, who strive to operate the marina in an environmentally friendly manner, and this is the primary reason Respondents used stenciled signage on the pavement rather than signage on posts.

Because BCDC staff has a personal preference for signs on posts, staff has decided, again without any basis in the Permit, that "[t]here was not a single public shore sign or a public parking sign anywhere along the entrance road, at or along the parking lot, or at or along any of the paths in the Phase 1B public access area"[262] and "there were no signs designating those as public parking spaces."[263] Respondents have signed these spaces by providing appropriate markings on the pavement, which is easily visible to the public and can be clearly seen in photos attached to this response.[264] Moreover, stenciled signage is identical to the approach used for the neighboring Pacific Shores Center, as shown in the following figures.

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[259] VR/C Section VI.¶T.5.
[260] VR/C Section VI.¶EE.3.
[261] AR Doc. 7 at 5 (Negative Declaration, Redwood City, San Mateo County, California).
[262] VR/C Section VI.¶LL.1.
[263] VR/C Section VI.¶LL.6.
[264] Exhibit 76 (photographs of public parking signage taken by BCDC staff during visits in 2016 and 2017).

Figure 11 - Photograph of Westpoint Harbor Public Parking Signage[265]

Figure 12 - Photograph of Pacific Shores Center Public Parking Signage[266]

[265] *Id.* at 2.
[266] Exhibit 77 (photograph of Pacific Shores Center parking).

For the reasons stated here, Respondents deny that they failed to make available 12 signed public parking spaces as required by Special Condition II.B.4.c. Accordingly, Respondents deny all assertions in the VR/C, including Section II.¶B (page 2), Section II (page 4), Section VI.¶M.3, Section VI.¶T.5, Section VI.¶EE.3, Section VI.¶HH.8, Section VI.¶LL.1, Section VI.¶LL.6, and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents did not comply with Special Condition II.B.4.c.

13. Allegation No. 5B

BCDC staff alleges: "[f]ailure to make available 15 signed public parking spaces for vehicle and boat trailer parking[,] Special Condition II.B.4.b[,]" for the period of September 2008 to July 2017.[267]

Special Condition II.B.4.b requires that prior to the use of any structure authorized under Phase 1B of the project, permittee shall install "[f]ifteen signed public parking spaces for vehicle and boat trailer parking."

a) Fifteen signed parking spaces are available at Westpoint Harbor and were made available as soon as infrastructure was in place.

Respondents currently have fifteen signed spaces available for vehicle and boat trailer parking and many more that are also intended and available for public use. These spaces were completed and marked as public during the summer of 2015. Before that date, the roads and other infrastructure necessary to provide the parking spots were not completed.[268] BCDC staff's own VR/C shows staff understood that public parking is inextricably tied to access infrastructure. Despite alleging that the violation began in 2008, VR/C Section VI.¶T.5 states that BCDC staff informed Respondents that "the public boat launch and parking area, with 15 signed vehicle and boat trailer public parking spaces, was to be completed by no later than April 1, 2012." BCDC staff's statement indicates that staff was aware of the obvious fact that the fifteen signed spaces could not be provided prior to construction of the parking area. It also demonstrates the inconsistency present throughout the VR/C, as BCDC staff alleges that this violation began in 2008, yet told Respondents that they were required to complete the activity by 2012. Like Allegation No. 5A, BCDC staff also incorrectly assesses the start date of this allegation as September 2008, before Phase 1B began.

In addition, BCDC staff has cited Respondents for a failure to have boat trailer parking spaces available without considering the broader context. The sole purpose of boat trailer parking is to provide parking for individuals launching boats from the boat launch. Although Respondents had constructed and signed the parking spots by the summer of 2015, as discussed in more detail in the response to Allegation No. 6B, the boat launch ramp was not completed until 2017. Thus, BCDC staff asserts that Respondents should have had signed parking at the boat launch ramp two years before the boat launch ramp was actually operational. There was no logical reason to have public parking for access to an improvement that was not yet completed. Special Condition II.GG, discussed previously, also indicates that BCDC staff understood that

[267] VR/C Exhibit D at 1.
[268] Exhibit 1 (Sanders Declaration).

construction of the boatyard area, in which the boat trailer parking is located, was continuing well beyond 2008, seeing as the Special Condition was added to the Permit in Amendment No. Six in April 2016.

b) The Permit only requires the spaces to be "signed" and does not require signage to be on posts.

As already explained in the response to Allegation No. 5A, there is nothing in the Permit to suggest that "signed" spaces require a sign on a post. Thus, any of BCDC's statements referenced in the response to Allegation No. 5A are similarly incorrect as they concern the 15 vehicle and boat trailer parking spaces. Further, along with obvious predator perching concerns discussed in the response to Allegation No. 5A, signs on posts would also make the 15 vehicle and boat trailer parking spaces, which are necessarily drive-through spaces, non-functional. There is no reasonable basis for BCDC staff to require signage on posts for these parking spots. Vehicles with boats on trailers require pull-through parking spaces (as backing up with a trailer from a conventional parking space is difficult). BCDC staff's desire to have signs on posts is not only not required by the Permit, it also creates a traffic hazard, endangers boaters and boats, and renders the parking spots unusable.

For the reasons stated here, Respondents deny that they failed to make available 15 signed public parking spaces as required by Special Condition II.B.4.b. Accordingly, Respondents deny all assertions in the VR/C including Section II.¶B (page 2), Section II (page 4), Section VI.¶M.3, Section VI.¶T.5, Section VI.¶EE.3, Section VI.¶HH.7, Section VI.¶LL.1, and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents did not comply with Special Conditions II.B.4.b.

14. Allegation No. 6A

BCDC staff alleges: "Failure to obtain plan review approval to construct public boat launch[,] Special Condition II.A.1[,]" for the period of May 2011 to July 2017.[269]

This allegation arises from staff's lack of understanding of what a boat launch is. There is no single "boat launch plan." Rather, the plans that address the boat launch are comprised of the ramp construction plans, landing dock and piling construction plans, and utilities and lighting and apron/parking/turning area plans, all submitted to BCDC staff.

a) Respondents submitted plans years ago and never received any feedback from BCDC staff.

The surrounding features associated with and necessary for the boat launch ramp were included in the Phase 1 Construction Drawings, originally submitted in 2005, and submitted multiple times thereafter, as explained in the response to Allegation No. 1A. The Phase 1 Construction Drawings also showed the location of the boat launch, but the detailed ramp construction plans were later separated from the Phase 1 Construction Drawings at the request of Redwood City officials, who wanted to issue separate building permits for the ramp and boat

[269] VR/C Exhibit D at 2.

launch separately under the Redwood City Conditional Use Permit.[270] The detailed ramp construction plans, prepared on October 23, 2006, illustrate the concrete ramp and abutments to be installed as part of the boat launch.[271] These plans were delivered to Andrea Gaut on October 24, 2006.[272] The landing dock component (floats, pilings, and abutments) of the boat launch was included in the extremely detailed dock plans Respondents submitted to BCDC staff in October 2005, and discussed in more detail in the response to Allegation No. 11A below.[273]

As previously discussed in the response to Allegation No. 1A, Redwood City provided considerable feedback on the plans submitted by Respondents, while BCDC staff remained silent. For the Phase 1 Construction Drawings, the separate ramp construction plans, and the dock plans, BCDC staff failed to meet the Permit obligation that staff review preliminary drawings and provide guidance on the plans to be submitted.

BCDC staff's failure to provide any review concerning the plans also violated staff's 45-day-review deadline in the Permit. Without any feedback from BCDC staff, let alone a complete plan review, Respondents had no choice but to rely on Brad McCrea's November 3, 2005 letter informing Respondents that BCDC staff could not review engineering plans. As a result, these plans should be deemed approved.

To the extent that these plans were not approved prior to September 8, 2011, Ms. Miramontes provided "conditional approval" of the Phase 1 Construction Drawings on September 8, 2011. Because the Phase 1 Construction Drawings included the boat launch ramp, this Ms. Miramontes's approval on behalf of BCDC confirms that Respondents received plan approval for the boat launch ramp.

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[270] Exhibit 31 (Ltr from Jon K. Lynch, City Engineer, Redwood City, to Pete Bohley, Bohley Consulting, *Westpoint Marina & Boatyard, Phase 1* (July 11, 2006)); Exhibit 32 (Email from Fred Shehabi, Redwood City to Mark Sanders, *Launching ramp @ Westpoint Marina/Bo6-2063* (Nov. 8, 2006)).
[271] Exhibit 78 at 2 (Construction Drawings for Westpoint Marina & Boatyard Launching Ramp (Oct. 23, 2006)).
[272] Exhibit 1 (Sanders Declaration).
[273] Exhibit 1 (Sanders Declaration).

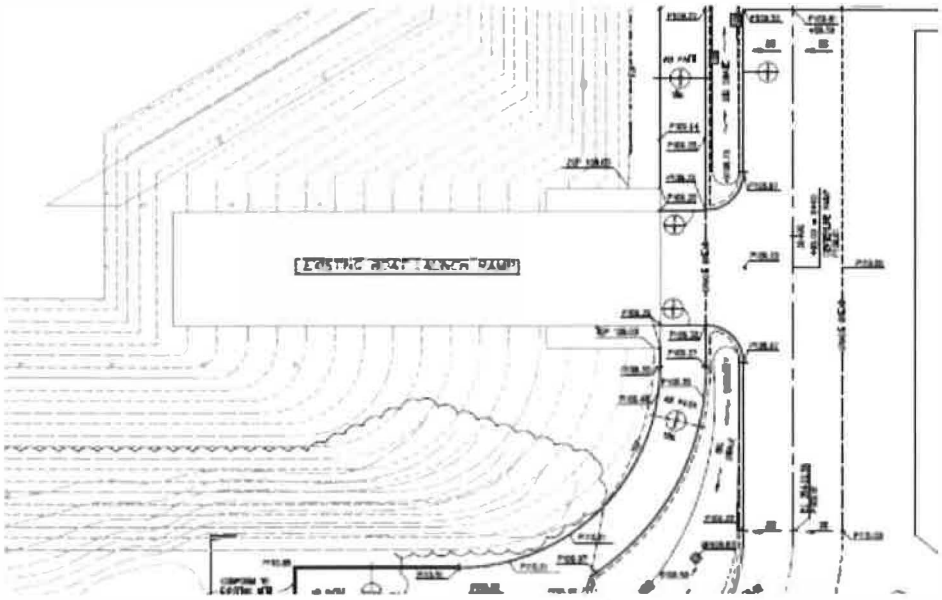

Figure 13 - Excerpt from Phase 1 Construction Drawings[274]

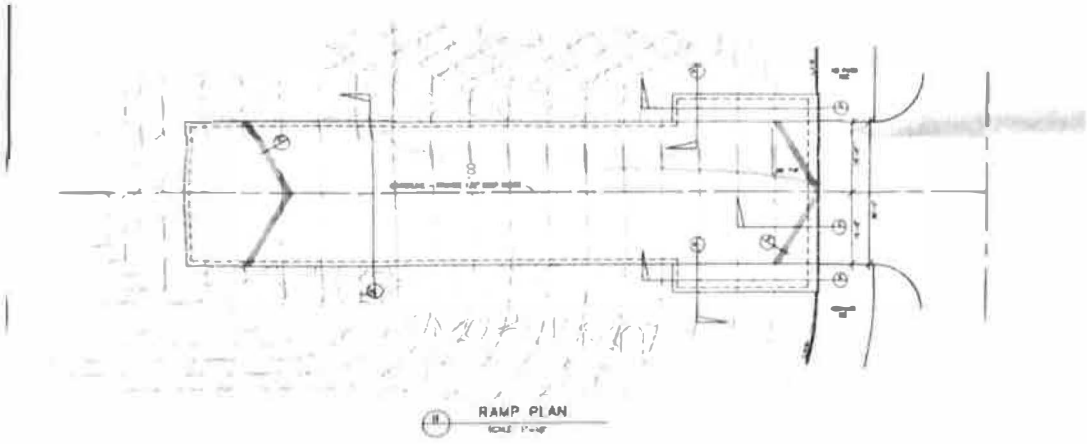

Figure 14 - Detailed Ramp Construction Drawing from October 2006 Submittal[275]

Respondents also note that the 2006 DRB plans clearly show the location of the launch ramp.[276] The DRB plans also specifically call out the phasing considerations for the launch ramp, stating: "[l]aunch ramp installed in Phase 1a, but not operational until Phase 1b."[277] BCDC staff failed to review these plans within 45 days as well, which should constitute deemed approval.

For these reasons, Respondents deny that they failed to obtain plan review approval to construct a public boat launch as required under Special Condition II.A.1. Accordingly,

[274] Exhibit 36 at 6 (Phase 1 Construction Drawings Conditionally Approved September 9, 2011).
[275] Exhibit 78 at 2 (Construction Drawings for Westpoint Marina & Boatyard Launching Ramp (Oct. 23, 2006)).
[276] Exhibit 61 at 6 (Westpoint Harbor Plans (Aug. 7, 2006)).
[277] *Id.* at 5.

Respondents deny all assertions in the VR/C, including Section VI.¶M.2, Section VI.¶EE.2, and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents did not comply with Special Conditions II.A.1.

15. Allegation No. 6B

BCDC staff alleges: "Failure to make available signed public boat launch[,] Special Condition II.B.4.a[,]" for the period of September 2008 to July 2017.[278]

As discussed above, this alleged violation arises from staff's lack of understanding concerning what is required to complete a boat launch. Respondents provided access as soon as the boat launch was complete and safe for public use, as explained more below.

Special Condition II.B.4.a requires that prior to the use of any structure authorized under Phase 1B of the project, permittee shall install "a 3,600-square-foot, two-lane, signed, public boat launch ramp[.]"

a) The boat launch could not be made available before it was completed.

The ramp of the boat launch was built prior to the marina being flooded in December 2006, but a boat launch is not simply a concrete ramp. A number of additional elements needed to be completed before the launch was fit for public use. Among other things, Respondents needed to construct the road to the boat launch, the apron (*i.e.*, the turn-around area for automobiles and trailers), boat launch parking, pull-through spaces, and street lights. Respondents also needed to install water, power, and a bioswale and sedimentation basin to manage boat-wash water. Once all of these essential elements were completed, the boat launch was opened to the public in June 2017. The VR/C asserts that a member of the public was refused access to the boat launch to launch a kayak in 2012, as supposed evidence that Respondents failed to meet their obligations.[279] However, Respondents could not justifiably open the boat launch to the public in June 2012, because it was still under construction. While the boat launch was under construction, Respondents also experienced issues with intruders and vandals attempting to use the partially complete structure.[280] Opening this structure before it was entirely complete would only invite injury. In fact, Respondents were specifically prohibited from opening the space in 2012 by Redwood City. BCDC staff was obviously aware of this, as Adrienne Klein's April 25, 2012 notes state "[p]er Redwood City, prior to opening the boat launch ramp, the parking, emergency vehicle turn around, fresh water for boat wash downs and lighting must be in place."[281] This is also consistent with Special Condition II.GG, relating to public access to the boatyard area and facilities, which was not added to the Permit until April 2016.

In addition, as previously explained in the response to Allegation No. 1C, boat launches are used for boats on trailers to be backed into the water. This is why boat trailer parking, and

[278] VR/C Exhibit D at 2.
[279] VR/C Section VI.¶Y.
[280] Exhibit 1 (Sanders Declaration).
[281] AR Doc. 36 at 1 (Memorandum from Adrienne Klein (Apr. 25, 2012)).

not kayak storage, is located adjacent to the boat launch. This is the industry standard understanding of boat launches, as launching a kayak next to a motorboat or a sailboat would be unsafe for all participants. Instead of launching from the boat launch, individuals with personal watercraft, such as kayaks, may use the rower's dock, which is specifically designed for that purpose. Even if the boat launch were complete in 2012, it would be inappropriate and unsafe to launch a kayak from that location.

b) The VR/C contains numerous inaccuracies.

BCDC staff claims that the failure to obtain plan review approval to construct the public boat launch began in May 2011. In contrast, staff claims that the failure to make said boat launch available began in September 2008. As has already been explained at length, there is no logic to BCDC staff's assertion that an improvement should be available before the plans for the improvement were approved. Respondents also deny that any violation spanned from September 2008 to July 2017, as BCDC staff has alleged.[282] Per the Permit, boat launch construction was always planned for completion as part of Phase 1B, not Phase 1A. As discussed above, this is evident in the plans submitted to the DRB, which stated "[l]aunch ramp installed in Phase 1a, but not operational until Phase 1b." Thus, staff's allegation that access "remained overdue since the date of marina occupancy"[283] is wrong.

For these reasons, Respondents deny that they failed to make available a signed public boat launch as required under Special Condition II.B.4.a. Accordingly, Respondents deny all assertions in the VR/C, including Section II.¶B (page 2), Section II (page 4), Section VI.¶E.3, Section VI.¶F.1, Section VI.¶M.3, Section VI.¶T.5, Section VI.¶Y, Section VI.¶EE.3, Section VI.¶HH.6, and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents did not comply with Special Condition II.B.4.a.

16. Allegation No. 7A

BCDC staff alleges: "Failure to install buoys in slough to identify 'no wake' zone[,] Special Condition II.H[,]" for the period of May 2011 to July 2017.[284]

a) Installing additional no-wake buoys in Westpoint Slough would be contrary to law and an unsafe navigational hazard.

Special Condition II.H provides that "permittee shall install and maintain buoys adjacent to the navigation channel of Westpoint Slough to identify the 'No Wake' speed zone[.]" A no-wake buoy is installed at the entrance to Westpoint Slough and additional no-wake markers are installed at the entrance to the marina. However, Respondents cannot legally comply with a demand to install additional no-wake buoys over the length of the short Westpoint Slough channel,[285] and even if Respondents could, such buoys would represent a serious navigational

[282] VR/C Exhibit D at 2.
[283] VR/C Section VI.¶EE.3.
[284] VR/C Exhibit D at 2.
[285] *See* Cal. Code Regs. tit. 14, § 7003 ("No waterway marker shall be placed on, in or near the waters of the State unless such placement is authorized by the agency or political subdivision of the State having power to give such authorization, except that the provisions of this section shall not apply to private aids to navigation under the jurisdiction of the U.S. Coast Guard."). In turn, U.S. Coast Guard regulations require approval from the Coast

hazard. Westpoint Harbor first applied for a permit from the USACE in 1993.[286] During a series of interagency meetings conducted by the USACE and including Steve McAdam and Richard Cooper from BCDC, the agencies discussed what navigational aids are required, which agency has jurisdiction, and who would be responsible for installing these aids.[287] Based on these meetings, and prior to the issuance of the permit, all agencies agreed that mid-channel buoys could not be put in place by Respondents and that the existing buoy at the start of the channel and additional markers at the entrance to the harbor were sufficient.[288] Federal regulations make it clear that Respondents cannot place private aids to navigation without approval of the U.S. Coast Guard.[289] The aforementioned interagency meetings established that Respondents did not have approval from the U.S. Coast Guard, and so they cannot legally place the buoys.

Buoys in Westpoint Slough as described by BCDC staff would also confuse boaters and pose a considerable safety hazard. Respondents have repeatedly explained the issue with placing buoys to BCDC staff, but to no avail.[290] Respondents discussed these issues with the Coast Guard, who indicated it would not permit these buoys, since they would constitute navigational hazards.[291]

b) Respondents placed "no wake" signs, which BCDC staff has acknowledged satisfies the Permit.

As a result of the meetings with the U.S. Coast Guard, NOAA, and the Port of Redwood City, Respondents placed three "no wake" signs at the entrance to Westpoint Harbor. These signs are situated such that boats can see them entering and departing, both port and starboard in accordance with U.S. Coast Guard requirements (signs must be within the harbor boundaries).[292] The beginning of Westpoint Slough is under the control of the Port of Redwood City. Redwood City maintains a "no wake" buoy at the entrance, and has done so for decades.[293] Redwood City officials have previously acknowledged the city's responsibility for maintaining this buoy.[294]

Further, BCDC staff has admitted that the signs installed by Respondents "partially satisf[ied] Special Condition II.H," yet claimed that Respondents must "obtain after-the-fact approval of the existing buoys and signs."[295] This was more than partial satisfaction. It was

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Guard or State Administrator to establish private aids to navigation. 33 C.F.R. § 66.01-1 ("No person, public body, or instrumentality not under the control of the Commandant, exclusive of the Armed Forces, will establish and maintain, discontinue, change or transfer ownership of any aid to maritime navigation, without first obtaining permission to do so from the Commandant.").

[286] *See* Exhibit 1 (Sanders Declaration).

[287] *See* Exhibit 1 (Sanders Declaration).

[288] *See* Exhibit 1 (Sanders Declaration).

[289] *See* 33 C.F.R. § 66.01-1.

[290] AR Doc. 21 at 7 (Ltr from Mark Sanders to Tom Sinclair, Coastal Program Analyst, BCDC (May 26, 2011)); AR Doc. 29 at 3 (Email from Mark Sanders to Tom Sinclair and Ellen Miramontes, BCDC (Oct. 6, 2011)).

[291] Exhibit 1 (Sanders Declaration).

[292] Exhibit 1 (Sanders Declaration).

[293] Exhibit 1 (Sanders Declaration).

[294] Exhibit 79 (Email from Don Snaman, Manager of Operations, Port of Redwood City to Mark Sanders (printed Sept. 9, 2011)).

[295] VR/C Section VI.¶T.1.

complete satisfaction of the requirement, as buoys simply cannot be placed by Respondents in Westpoint Slough. No "after-the-fact" approval was required.[296]

Figure 15 - One of the No Wake Signs Present at Westpoint Harbor[297]

The "evidence" cited in the VR/C in support of this alleged violation include "photographs taken on June 5, 2016 and April 9, 2017, and recently provided to staff, show a buoy in the Slough marked 'Slow 10 MPH,' and two photographs taken on June 6, 2016, show a ferry in the Slough generating a substantial wake[.]"[298] Such evidence is irrelevant and misleading. As already explained, that buoy was not placed by Respondents, as they do not have the legal authority to do so. Instead, the no-wake buoy in Westpoint Slough is maintained by Redwood City, as evidenced by the correspondence from Redwood City cited above. Further, any assertion that Respondents have control over, or should be responsible for, the wake caused by boats in the area is baseless.

For these reasons, Respondents deny that they failed to comply with Special Condition II.H. Accordingly, Respondents deny all assertions in the VR/C, including Section II.¶E (page 2), Section II.¶B (page 5), Section VI.¶M.5, Section VI.¶T.1, Section VI.¶EE.4, Section VI.¶HH.11, Section VI.¶YY.1, Section VI.¶ZZ, Section VI.¶LLL, Section VI.¶OOO.2, Section VI.¶PPP, Section IX (page 41), and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents did not comply with Special Condition II.H.

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[296] Respondents also note that the authorization section of the Permit provides authorization for the permittee to "install, use and maintain channel markers in Westpoint Slough from the main Redwood Channel to the entrance of Westpoint Marina notifying boaters of the 'no wake zone' (in cooperation with the State Lands Commission, as property owner)," yet Special Condition II.H requires coordination with the San Francisco Bay National Wildlife Refuge. This is yet another example of the ambiguity present in the poorly drafted Permit.

[297] Exhibit 80 (Photograph of "no wake" sign at Westpoint Harbor).

[298] VR/C Section II.¶B (page 5), Section VI.¶ZZ, and Section VI.¶LLL.

17. Allegation No. 7B

BCDC staff alleges: "Failure to install buoys informing public of access restrictions on Greco Island and other protected marshlands[,] Special Condition II.H[,]" for the period of May 2011 to July 2017.[299]

Special Condition II.H requires that "[t]he permittee shall also 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. The buoys shall contain signs informing the public that public access into the marshlands of the San Francisco Bay National Wildlife Refuge is prohibited."

a) As already explained, Respondents could not install buoys, and such buoys would be ineffective in accomplishing the intent.

Respondents have explained to BCDC staff on numerous occasions that the USFWS and the U.S. Coast Guard were opposed to the placement of buoys in the navigable channel (except channel markers). Moreover, buoys in the shallow water 100 feet from the island would be useless as they could only float at extreme high tides (spring tides), and Respondents did not have the authority to place such buoys.[300] In order to satisfy the intent of the CEQA mitigation measure (even before it became a BCDC Permit condition), Respondents worked with the USFWS and developed a plan to place more than 35 signs on the edge of Greco Island. These signs, and the wording contained on each, were provided to Respondents by USFWS.[301]

b) BCDC staff approved of Respondents' placement of signs around Greco Island in lieu of buoys.

The installation of these signs was not a surprise to BCDC staff. Rather, BCDC staff was aware of the plan to place signs around Greco Island as early as December 28, 2002. In a December 28, 2002 letter to Andrea Gaut, Mr. Sanders stated:

> After the informal consultation with FWS as well as the Corps of Engineers, I have continued to discuss progress with the agency, both in Sacramento and the local Refuge Manager. They advise that they are overloaded with emergency work and litigation, but promise to attend to our project soon. Meantime I am proceeding to implement those measures requested by FWS, including the erection of signs around Greco Island to warn boaters of the sensitivity of the area.[302]

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[299] VR/C Exhibit D at 2.

[300] Exhibit 1 (Sanders Declaration).

[301] Exhibit 1 (Sanders Declaration); Exhibit 81 at 1 (Ltr from Clyde Morris, Refuge Manager, Don Edwards San Francisco Bay NWR to Mark Sanders (Jan. 29, 2002)).

[302] Exhibit 82 (Ltr from Mark Sanders to Andrea Gaut, Coastal Program Analyst, BCDC, *Application for Permit number 2-02 to BCDC dated May 21, 2002, BCDC letter response dated June 20, 2002, My letter response dated August 15, 2002 to BCDC, Second BCDC response dated September 15, 2002* (Dec. 28, 2002)).

BCDC staff was informed of this again in January 13, 2003, as evidenced in an email exchange between Mr. Sanders and Clyde Morris of the USFWS, which discusses a call Mr. Morris placed to Steve McAdams of BCDC.[303] An email sent the same day, on January 13, 2003, shows that Andrea Gaut and Steve McAdam were aware of, and discussed, Respondents' plan to place signs around Greco Island.[304] In an email from Mr. Sanders to Tim Hurley at BMS Design Group, provided to Andrea Gaut on July 19, 2006, Mr. Sanders notes, "I recently installed 'restricted access--wildlife refuge' signs all around Greco Island and put them on the wetlands next to the marina too."[305] Ms. Gaut replied to Mr. Sanders' email the following day, stating "I agree with all of Mark's comments below" and "[t]hanks and glad to see we are making progress!"[306] A review of BCDC staff's records also makes clear that Respondents explained all of this to BCDC staff on May 12, 2011, just days after receiving the May 4, 2011 violation letter. In his May 12, 2011, correspondence, Mr. Sanders re-explained his work with Clyde Morris and stated that:

> We spent a great deal of time on signs for Greco Island because of issues with endangered species, channel depth, extreme tidal range and high current in the Westpoint Channel, which make floating signs impractical. In the end USFWS provided the actual signs and Westpoint Harbor designed, fabricated and installed vertical wire barriers (so predator birds couldn't roost on the signs and threaten endangered species) attached to non-metallic posts. The placement at the island's waters edge was directed by the USFWS, and more than 35 signs were placed on Greco Island facing Westpoint Slough and First Slough, and nearby wetland areas not part of the island. Clyde was very pleased with the results, and Mendall Stewart (who succeeded him) is aware of the work to complete this project.[307]

In addition, BCDC staff previously acknowledged that this activity satisfied the intent of the Permit. In fact, BCDC staff's VR/C states, "Sanders reportedly installed 35 signs on Greco Island, in lieu of the required buoy system; at that time, Commission staff determined that the signage on Greco Island met the fundamental intent of required buoy system[.]"[308] This determination was stated in a September 1, 2011 letter from BCDC staff, Tom Sinclair, to Mr. Sanders, which stated:

> I was pleased to receive notification from Eric Mruz of USFWS that the signs on Greco Island are acceptable to the Refuge staff. **As such, BCDC staff has determined that the signage on Greco Island meets the fundamental intent of Special Condition II-H.** However, the permit condition **may** need to be amended to reflect

[303] Exhibit 83 at 1 (Email from Clyde Morris, Manager, Don Edwards San Francisco Bay NWR, to Mark Sanders, *Greco Island* (Jan. 13, 2003)).
[304] Exhibit 84 (Email from Steve McAdam, BCDC to Andrea Gaut, BCDC (Jan. 13, 2003)).
[305] Exhibit 85 at 2 (Email from Andrea Gaut, BCDC to Mark Sanders (July 20, 2006)).
[306] *Id.*
[307] Exhibit 86 (Email from Mark Sanders to Tom Sinclair, BCDC, *Westpoint Marina* (May 12, 2011)).
[308] VR/C Section II.¶A (page 5).

> the proposed changes regarding the buoy and signage specifications.[309]

In handwritten notes, that appear to be from Chief of Enforcement Adrienne Klein, contained in BCDC's hardcopy files, it was noted on February 10, 2012, that "signs vs. buoys. good[,]"[310] which further evidences the fact that BCDC staff approved of the use of signs on Greco Island in satisfaction of Special Condition II.H.

Under basic principles of administrative law, permit terms must be interpreted in light of intent.[311] Thus, there was, and currently is, no Permit violation.

Finally, BCDC staff's allegations that "(a) there is a single sign adjacent to Greco Island stating 'Sensitive Wildlife Habitat / Do Not Enter,' but the sign is so faded that it is almost illegible; (b) there are two other faded signs on Greco Island with no writing visible; and (c) there is no evidence of signs along the majority of the perimeter of Greco Island"[312] is baseless, misleading and simply a cut and paste of allegations made by a third-party. Thus, BCDC staff's Allegation 7B is based on nothing more than hearsay statements and photos submitted by a third-party that purport to demonstrate an absence of signage. As BCDC regulations make clear, inadmissible hearsay evidence alone is not sufficient in itself to support a finding of fact.[313] These photos cannot, and do not, capture the entirety of Greco Island (as the photos, by their nature, only show a portion of a large area and do not show the entire perimeter, or even a majority of, the perimeter of Greco Island). BCDC staff has not provided its own evidence to demonstrate that these signs are not in place. In contrast, Mr. Sanders' July 19, 2006 email to Andrea Gaut, discussed above, is contemporary evidence of the facts that many signs were installed (not merely three signs) as alleged in the VR/C.

For these reasons, Respondents deny that they did not comply with Special Condition II.H. Accordingly, Respondents deny all assertions in the VR/C, including Section II.¶E (page 2), Section II.¶A (page 5), Section VI.¶M.5, Section VI.¶T.1, Section VI.¶EE.4, Section VI.¶HH.11, Section VI.¶YY.2, Section VI.¶ZZ, Section VI.¶LLL, Section IX (page 41), and the

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[309] AR Doc. 25 at 6 (Ltr from Tom Sinclair, Coastal Program Analyst, BCDC, to Mark Sanders (Sept. 1, 2011)) (emphasis added).

[310] Exhibit 87 at 6 (Handwritten notes made to September 1, 2011 letter, red notes written on February 9, 2012, blue notes written on February 10, 2012).

[311] *See Rail-Cycle v. City Council for City of Commerce*, No. B122856, 1999 WL 33221111, at *15 (Cal. Ct. App. Sept. 30, 1999) ("[O]ur primary goal is to ascertain [the agency's] intent so as to effectuate the purpose of the permit. Toward this end, we look first to the language of the permit; if clear and unambiguous, we will give effect to its plain meaning. If ambiguous, we look first to the words used in the permit to ascertain its meaning. The words used should be given their usual, ordinary meanings and, if possible, each word and phrase should be given significance. The words used must be construed in context, and the provisions of the permit must be harmonized, both internally and with each other, to the extent possible. However, literal construction of the permit will not prevail if contrary to the apparent intent of the permit, which must prevail.").

[312] VR/C Section VI.¶A. (page 5) and VI¶LLL.

[313] Cal. Code Regs. tit. 14, § 13329 ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action or unless it is in the form of a declaration under penalty of perjury or in the form of another document referred to in a violation report or complaint for the imposition of civil penalties and the declarant or author of the other document is subject to cross-examination as provided in Sections 11321, 11322, and 11327.")

Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents did not comply with Special Condition II.H.

18. Allegation No. 7C

BCDC staff alleges: "Failure to install signs at public boat launch and other public access areas informing public of access restrictions on Greco Island and other protected marshlands[,] Special Condition II.I[,]" for the period May 2011 to July 2017.[314]

This allegation, like Allegation No. 6B, is based on BCDC staff's misunderstanding of what constitutes a boat launch. For the reasons discussed in the response to Allegation No. 6B and below, Respondents did not violate Special Condition II.I.

Special Condition II.I. requires that "[t]he permittee shall install and permanently maintain information signs at the boat launch and other public access areas informing the public of the access restrictions on Greco Island and other wetlands in the San Francisco Bay National Wildlife Refuge."

a) The Permit does not state when signs must be installed.

Importantly, Special Condition II.I does not state when the sign must be installed. Unlike some other conditions of the Permit, there is no temporal component of the requirement. Thus, there is no basis for BCDC staff's arbitrary assertion that Respondents began violating this Special Condition II.I. in May 2011. Instead, a reasonable reading of the Permit would mandate that this requirement be met when the boat launch is operational. In fact, this is the only logical way to read the Permit. After all, there is no basis to require a sign at the boat launch before the boat launch is operational. As discussed in more detail in the response to Allegation No. 6B, the process to construct the boat launch and ensure its safe use for the public stretched from August 2011 to June 2017. Only in June 2017 was the boat launch finally ready for public access. Once the boat launch was completed, Respondents promptly installed the sign that is currently in place.[315] BCDC staff has seen and documented the current sign in place,[316] and the Permit does not suggest that any more than one sign is required.

BCDC staff has also alleged that Respondents failed to "coordinate the specific wording of such signs with the U.S. Fish and Wildlife Service, the California Department of Fish and Game, and BCDC staff, informing the public of the access restrictions on Greco Island and other wetlands in the Refuge"[317] and that "there is no evidence that USFWS, California Department of Fish and Wildlife or BCDC was consulted or concurred with this change."[318] Both of these assertions are patently false. The California Department of Fish and Wildlife directed Respondents to coordinate with the USFWS, and Respondents coordinated accordingly.[319] An

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[314] VR/C Exhibit D at 2.
[315] Exhibit 1 (Sanders Declaration).
[316] AR Doc. 88 at 3 (photograph of boat launch sign).
[317] VR/C Section VI.¶M.5.b.
[318] VR/C Section VI.¶UUU.1.
[319] Exhibit 1 (Sanders Declaration).

email chain from November 2014 demonstrates that Respondents coordinated closely with USFWS representatives on the contents of the signage.[320]

BCDC staff also levies an assortment of allegations against Respondents related to the operations of 101 Surf Sports. BCDC staff asserts that "there are no signs visible advising customers of the access restrictions on Greco Island and other wetlands in the Refuge"[321] based on Matthew Leddy's March 10, 2017 letter recounting his personal review of photos posted on 101surfsports.com. Not only is this "evidence" inadmissible hearsay, but photos at 101surfsports.com cannot reasonably be expected to provide a complete and accurate view of signage at Westpoint Harbor. Continuing with allegations concerning 101 Surf Sports, BCDC staff alleges that Respondents were required "to prepare a flier that the operators of 101 Surf Sports would provide to their customers[.]"[322] Respondents have no such obligation under the Permit. However, Respondents sent responsive materials used by 101 Surf Sports to BCDC staff, which BCDC staff has acknowledged in the VR/C.[323]

Respondents have gone above-and-beyond the Permit requirements to help protect Greco Island. For these reasons, Respondents deny that they failed to install signs at the public boat launch and other public access areas informing the public of access restrictions on Greco Island and other protected marshlands as required by Special Condition II.I. Accordingly, Respondents deny all assertions in the VR/C, including Section II.¶E (page 2), Section II.¶A (page 5), Section VI.¶M.5, Section VI.¶T.1, Section VI.¶EE.4, Section VI.¶HH.12, Section VI.¶YY.3, Section VI.¶ZZ, Section VI.¶LLL, Section VI.¶OOO.1 and 3, Section VI.¶PPP, Section VI.¶QQQ, Section IX (page 41), and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents did not comply with Special Condition II.I.

19. Allegation No. 8

BCDC staff alleges: "Failure to provide visual barriers to adjacent salt pond[,] Special Condition II.K[,]" for the period of May 2011 to July 2017.[324]

As with other allegations asserted in the VR/C, BCDC staff's allegations is at odds with the facts. The plain, simple truth is that Respondents have fully complied with the Permit requirement, as explained here.

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[320] Exhibit 88 (Emails between Mark Sanders and Eric Mruz, former Don Edwards Refuge Manager, Melissa Amato, Wildlife Refuge Specialist, U.S. Fish and Wildlife Service, and Carmen Leong-Minch, Outdoor Recreation Planner, San Francisco Bay National Wildlife Refuge Complex (beginning Nov. 10, 2014)).
[321] VR/C Section VI.¶ZZ and ¶LLL.
[322] VR/C Section VI.¶OOO.3 and ¶PPP.
[323] VR/C Section VI.¶QQQ.3 ("Sanders' counsel forwarded copies of materials used by 101 Surf Sports with its customers, as well as 101 Surf Sports' explanation of its standard approach with its customers, that include pointing out to those customers that no landing is allowed on Greco and Bair Islands and other nearby areas of the Refuge.").
[324] VR/C Exhibit D at 2.

a) The Permit does not require "aesthetically pleasing" visual barriers.

Special Condition II.K. requires that "the permittee shall provide visual barriers between the active marina areas and the adjacent salt pond to reduce disturbance to water birds using the salt pond."[325] Special Condition II.K further states that "the visual screening can be achieved through setbacks (85 to 90 feet in width) . . . ." The setback requirement is intended to protect wildlife by ensuring that there is a set minimum distance between the marina active areas and the Cargill salt feature to the south. The Permit does not require an "aesthetically pleasing barrier of landscaping"[326] or a "landscaped buffer"[327] as alleged by BCDC staff in the VR/C.

b) The current visual setback at Westpoint Harbor exceeds 85 feet.

It is an objective fact that a person walking from the parking lot of the marina (*i.e.*, the edge of the active areas) to the Cargill salt feature would travel at least 85 feet before he or she reached the salt feature. Neither the VR/C, nor any document provided in the AR, contains evidence that contradicts this fact. When properly taking into account the slope of the Cargill levee, it is clear that Respondents have more than an 85-foot setback.

Exhibit 89,[328] an engineering drawing by Bohley Consulting, clearly shows that an 89-foot setback has been achieved, when properly accounting for the slope of the levee on the Cargill property.

Before 2006, the distance between the marina parking lot and the Cargill salt feature to the south was planned to be shorter in length, and the slope of the levee that separates the Cargill salt feature from the marina property was planned to be relatively steep (at a 3:1 ratio). However, it was determined that, for geotechnical-stabilization reasons, a less-steep slope (at a 7:1 ratio) was needed. Changing the slope of the levee greatly lengthened the distance of the setback between the marina parking lot and the Cargill salt feature. This is clear in the "Addendum to Embankment License Agreement" entered into between Respondents and Cargill in July 2006.[329] This agreement shows that the embankment slope was changed from 18 feet wide to 63 feet wide. A review of records provided by BCDC staff in response to Respondents' CPRA request confirms that on July 21, 2006, BCDC staff received a copy of the "Addendum to Embankment License Agreement."[330]

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[325] Note that the "salt pond" referred to is the remainder of Cargill Pond 10, which, as explained elsewhere, is not technically a salt pond; it is a bittern pond.
[326] VR/C Section VI.¶T.6.
[327] VR/C Section II.¶C.
[328] Exhibit 89 (Bohley Consulting engineering drawing, *Westpoint Marina - Phase 2 Cargill Slope Section* (May 9, 2017)).
[329] Exhibit 90 (Addendum to Embankment License Agreement (July 20, 2006)).
[330] *Id.*

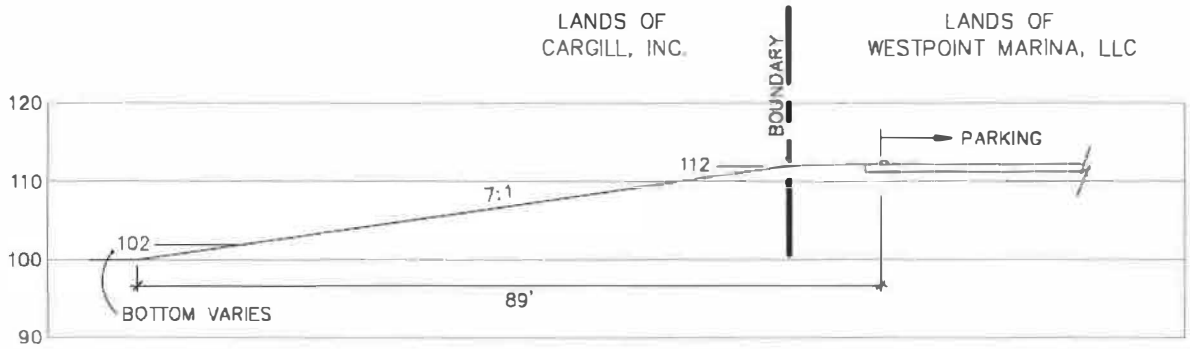

Figure 16 - Excerpt from Engineering Drawing, Showing Setback Exceeds 85 feet[331]

BCDC staff approved the 7:1 slope (which required adding more soil to create the 7:1 slope) in Permit Amendment No. Two. As the Permit clearly states, Amendment No. Two authorized "construction of a wider levee."[332] BCDC staff was aware in 2003 that prior to this change to the slope, the visual setback requirement was unworkable.[333] However, the wider levee, with a minimum width of 63 feet (all of which is on Cargill property), combined with the land owned by Westpoint Harbor at the top of the levee, provides a setback of more than 85 feet. Thus, Special Condition II.K. was satisfied before the parking lot construction was even finished.

For the reasons stated here, Respondents deny that they have failed to provide the required visual barriers under permit Special Condition II.K. Accordingly, Respondents deny all assertions in the VR/C, including Section II.¶E.3 (page 3), Section II.¶C (page 5), Section VI.¶M.2, Section VI.¶M.6, Section VI.¶T.6, Section VI.¶EE.5, Section VI.¶HH.13, Section VI.¶KKK and the Summary of Violations and Proposed Administrative Civil Penalties to the extent these assertions suggest that Respondents did not comply with Special Condition II.K.

20. Allegation No. 9

BCDC staff alleges: "Failure to provide shorebird roost habitat mitigation[,] Special Condition II.F[,]" for the period of October 2016 to July 2017[334]

Special Condition II.F states that "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." Special Condition II.F also requires that "[t]he 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."

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[331] Exhibit 89.
[332] Permit Section III.H.
[333] Exhibit 91 (Ltr from Andrea Gaut, BCDC Coastal Program Analyst to Mark Sanders, *Future Amendments to BCDC Permit No. 2-02; Westpoint Marina* (Aug. 21, 2003)).
[334] VR/C Exhibit D at 2.

a) Agencies agreed, as part of the CEQA review, that Cargill would be responsible for maintaining roost habitat.

As BCDC staff knows, BCDC, the USACE, the USFWS, and the California Department of Fish and Wildlife were all involved in the CEQA process for Westpoint Harbor finalized in 2002. Special Condition II.F was added into the Permit to mirror the mitigation requirements that were specified as a result of the CEQA process.[335] Importantly, those mitigation requirements apply to other Westpoint Harbor permits, including the USACE Clean Water Act ("CWA") Section 404 permit for Westpoint Harbor.[336] The Mitigation and Monitoring Plan for the project provided to USACE in August 2003 for its Section 404 permit acknowledges that approximately three acres of replacement roost habitat will be created by Cargill on Cargill property. It states, "Cargill Salt Company will provide the new roost habitat pursuant to plans approved by the U.S. Fish and Wildlife Service."[337] Furthermore, the terms of the BCDC Permit demonstrate that the mitigation was discussed and agreed prior to the Permit's issuance, that Cargill would achieve the mitigation through management of its remaining salt pond.[338]

Despite BCDC staff's allegations that Respondents must maintain this habitat, the Permit explicitly states "[t]he permit does not contain a condition requiring the permittee to permanently guarantee the shorebird roosting habitat; Cargill will have to provide additional or replacement mitigation for this habitat if it develops the adjacent salt pond."[339] This is in line with the Redwood City Conditional Use Permit, which provides, "[a]lternatively, since Cargill pond 10 is continuing to function as a roost site, it shall be the responsibility of any future developer involved in the conversion of pond 10 to another use to locate a roost site."[340] Both the Permit language and the Redwood City Conditional Use Permit demonstrate approval of the understanding that Cargill would provide and maintain this shorebird roost habitat.

b) Mitigation was completed in 2003 through guarantees from Cargill.

The required mitigation was achieved shortly after the original Permit was signed on August 21, 2003, through guarantees received from Cargill. In a November 26, 2003 letter, Cargill guaranteed to Respondents that Cargill would "create a similar habitat to the south" and that "[b]y minor modifications in [Cargill's] operations an equivalent area of habitat will remain

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[335] Exhibit 1 (Sanders Declaration).

[336] The USACE permit for Westpoint Harbor explicitly requires Respondents to "implement the Wetland Mitigation and Monitoring Plan for Westpoint Marina Project, dated August 2003." Exhibit 92 (Department of the Army Permit, No. 22454S.

[337] Exhibit 93 at 4 (Ltr from Skid Hall, Land Planning and Permitting Consultant, to Phelicia Gomes, Project Manager, U.S. Army Corps of Engineers (transmitting Mitigation Plan) (Aug. 1, 2003)).

[338] *See* Permit Section III.F, which states that "[t]he mitigation for shorebird roosting habitat will include the creation of 3.0 acres of habitat with similar functions on Cargill property to the south of the project site." Section III.F further establishes Cargill's ongoing responsibility, stating that "[t]he permit does not contain a condition requiring the permittee to permanently guarantee the shorebird roosting habitat; Cargill will have to provide additional or replacement mitigation for this habitat if it develops the adjacent salt pond."

[339] *See* VR/C Section VI.¶UUU. As discussed above, Permit Section III.F states that "[t]he permit does not contain a condition requiring the permittee to permanently guarantee the shorebird roosting habitat; Cargill will have to provide additional or replacement mitigation for this habitat if it develops the adjacent salt pond."

[340] AR Doc. 9 at 11 (Redwood City Conditional Use Permit (Nov. 21, 2005)).

to provide the same functions and benefits."[341] As this letter also makes clear, the roost habitat was "ephemeral[,]" and "[w]hen the pond was dry there was no island, and as brines were introduced it reached a maximum size of about three acres, and upon occasion, when the entire pond was filled with brines, the island again disappeared."[342] By the clear terms of the Permit, Respondents must provide habitat "with similar functions and benefits for shorebirds." Here, the existing shorebird roost was ephemeral, disappearing entirely at times. Because the replacement habitat is intended to provide the "same functions and benefits" as the ephemeral roost habitat, the replacement habitat may also be ephemeral.

Once this letter was received, Respondents had met the requirement to provide mitigation under Special Condition II.F. Contrary to any assertions by BCDC staff, the permit does not require Respondents to maintain this habitat once it has been provided. Instead, the Permit places the ongoing responsibility with Cargill.[343] Cargill's modification of its operations was, and remains, the most effective means to assure shorebird roost habitat. While at times the remainder of Pond 10 is filled with water, consistent with the original ephemeral habitat, Exhibit 94,[344] a sequence of satellite photographs over the course of a number of years demonstrates that shorebird roost habitat has been provided by Cargill's operations. BCDC staff's complaint appears to be less concerned about whether the mitigation was actually completed (it was), and more concerned with whose responsibility it is to have completed it. This only reasonable inference here is that BCDC staff is not really concerned about the well-being of shorebirds. Rather, BCDC staff views this allegation as one more feather in its cap, one more violation to bolster its case against Respondents, which is based on made-up paper violations that cause no harm.

c) BCDC staff has provided no evidence demonstrating that Respondents have failed to comply.

BCDC staff has failed to provide a single piece of evidence demonstrating that Respondents have not complied with Special Condition. II.F. A review of BCDC staff's records produced in response to Respondents' CPRA request reveals that BCDC staff searched for any means to make this allegation stick. Yet despite this search, BCDC staff came up empty. When Mr. Zeppetello asked the Don Edwards San Francisco Bay National Wildlife Refuge Manager "whether the shorebird roost habitat should still be required or if the marina owner/operator may be excused from providing such mitigation because the remainder of Pond 10 is not yet developed and continues to provide roosting habitat," he was informed that "[n]one of [the Refuge] staff have monitored whether or not Cargill maintains the habitat in pond 10 for roosting birds or not. This would probably be a better question for Cargill themselves."[345] The Refuge Manager's deference to Cargill confirms everyone's understanding that Cargill was responsible for this mitigation measure. BCDC staff appears to have neglected to follow up and confirm this

[341] *See* Cargill November 26, 2003, letter attached to AR Document 91 in the AR (Email from David Smith to Marc Zeppetello, Chief Counsel, BCDC (June 29, 2017)).
[342] *Id.*
[343] Permit Section III.F.
[344] Exhibit 94.
[345] Exhibit 95 (Email from Jared Underwood, Refuge Manager, Don Edwards San Francisco Bay National Wildlife Refuge to Marc Zeppetello, Chief Counsel, BCDC (July 13, 2017)).

with Cargill. Instead of chasing down the true facts, BCDC staff has chosen to bring this charge against Respondents without any support.

The only "evidence" offered by BCDC staff that the mitigation was not completed is a letter from Brian Gaffney, the lawyer for the Citizens Committee to Complete the Refuge. This letter is inadmissible hearsay that cannot be used alone to support a finding of fact.[346] Indeed, the letter from Mr. Gaffney contains hearsay within hearsay, as Mr. Gaffney purports to explain findings by other members of this citizen group. And, notably, Mr. Gaffney's letter does not even provide any proof that the mitigation was not complete.[347]

For the reasons stated here, Respondents deny that they have failed to provide shorebird roost habitat mitigation as required by Special Condition II.F. Accordingly, Respondents deny all assertions in the VR/C, including Section VI.AAA.¶1, Section VI.¶KKK, Section VI.¶RRR, Section VI.¶UUU, and the Summary of Violations and Proposed Administrative Civil Penalties to the extent these assertions suggest that Respondents did not comply with Special Condition II.F.

21. Allegation No. 10

BCDC staff alleges: "Failure to provide non-tidal wetland mitigation[,] Special Condition II.G[,]" for the period of 2004 to 2017.[348]

a) Agencies agreed, as part of the CEQA review, that wetland mitigation would be accomplished by re-sloping a drainage ditch to a 3:1 slope, which has been accomplished.

As with the roost habitat discussed above in response to BCDC staff's Allegation No. 9, the mitigation requirement that is the subject of Allegation No. 10 did not begin with BCDC. Rather, the requirement to mitigate the loss of non-tidal wetlands began with Westpoint Harbor's application to the USACE for a permit to discharge fill into "Waters of the United States," which are regulated by USACE under Section 404 of the CWA.

The wetlands mitigation is mentioned in the May 2002 Public Notice published by USACE, more than a year before the original BCDC Permit was issued. That Public Notice states:

> To compensate for the loss of 0.27 acre of wetlands in the drainage ditch, the applicant proposes to enhance and enlarge the wetlands in the remainder of the ditch and to create additional wetland areas on isolated fringes of the project site for a replacement ratio of 1:1 or greater.[349]

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[346] Cal. Code Regs. tit. 14, § 11329.
[347] *See* AR Doc. 84 (Ltr from Brian Gaffney to Larry Goldzband, Executive Director, BCDC (May 23, 2017)).
[348] VR/C Exhibit D at 2.
[349] Exhibit 96 at 2 (Public Notice, U.S. Army Corps of Engineers, *Project: WestPoint Marina* (May 17, 2002)).

And that is exactly what Respondents did. Westpoint Harbor's Mitigation and Monitoring Plan, discussed during the CEQA process and submitted to the USACE in August 2003, requires that the mitigation be achieved by re-sloping the ditch to a 3:1 slope. Specifically, the Mitigation and Monitoring Plan states that "[g]rading to create a wider soil saturation gradient in the mitigation site would modify the upper portion (above MHW) of the southwest bank of the existing ditch. The upper bank will be graded back to a slope of approximately 3:1."[350] The proof that the sloping was done is in plain sight for any fair-minded viewer to see. Exhibit 97 is a photo taken by Mark Sanders in 2008 that shows the ditch in question.[351] On the left hand side of the photograph, the slope of the land is 1:1. On the other side, you can observe that the land has a 3:1 slope, as required in the approved mitigation plan.

BCDC Permit Special Condition II.G simply echoes the mitigation that Respondents planned long before the BCDC Permit was issued. Special Condition II.G requires that Respondents:

> [P]rovide mitigation for the loss of 0.27 acres of non-tidal wetlands located in a drainage ditch on the site by enhancing and enlarging the wetlands in the remainder of the drainage ditch and by creating additional wetland on isolated fringes of the project site for a replacement ratio of at least 1:1. The habitat enhancement plans shall be reviewed and approved by the U.S. Fish and Wildlife Service, California Department of Fish and Wildlife, and by or on behalf of the Commission.

The attached Site Preparation Plan, included as Exhibit 98,[352] shows the location of the mitigation. An enlarged version of that portion of the Site Preparation Plan is included as Exhibit 99[353] and excerpted below as Figure 17. On the enlarged version, one can see the cross-section of the ditch, referred to on the plan as "Ex. Cargill Channel" because it was a ditch that Cargill used to move water around their salt-making operations. The cross-section very clearly indicates the area of the wetland mitigation and states "excavate for wetland mitigation." Additionally, other drawings in the Site Preparation Plans show topographical contours that clearly show this mitigation measure along the length of the Cargill ditch.[354]

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[350] Exhibit 93 at 12. (Ltr from Skid Hall, Land Planning and Permitting Consultant, to Phelicia Gomes, Project Manager, U.S. Army Corps of Engineers (Aug. 1, 2003)).
[351] Exhibit 97 (Photograph of wetlands mitigation (2008)).
[352] Exhibit 98 (Bohley Consulting, *Site Preparation Plan for Westpoint Marina and Boatyard* (Nov. 1, 2003)).
[353] Exhibit 99 (enlarged section of Bohley Consulting, *Site Preparation Plan for Westpoint Marina and Boatyard* (Nov. 1, 2003)).
[354] Exhibit 98 (Bohley Consulting, *Site Preparation Plan for Westpoint Marina and Boatyard* (Nov. 1, 2003)).

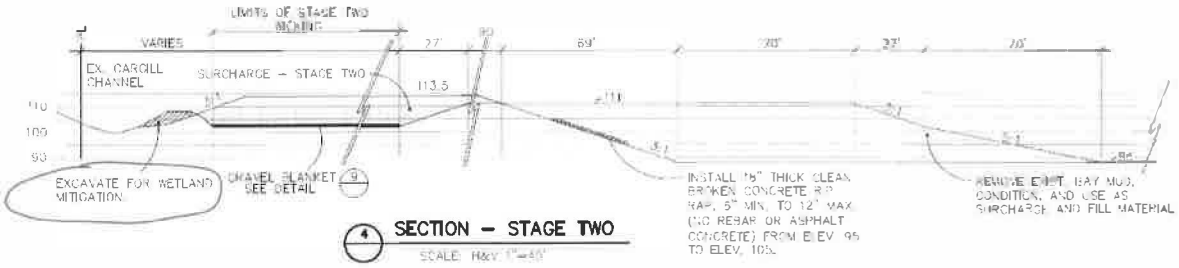

Figure 17 - Excerpt of Cross Section from Site Preparation Plan[355]

Further, BCDC staff approved this plan for wetland mitigation depicted in the Site Preparation Plan. As BCDC staff has pointed out in the AR, the Site Preparation Plan was approved on November 3, 2005.[356]

In addition, the Permit contains a fundamental error that makes compliance technically impossible. As discussed above, Special Condition II.G requires plan approval by the USFWS. However, requiring USFWS approval of wetland mitigation plans is nonsensical. Special Condition II.G should have cited to the USACE, as approval regarding wetlands mitigation is within the jurisdiction of the USACE and not USFWS or BCDC. This is evident on the face of the Permit, and the reference to USFWS is a clear error.[357] Simply put, USFWS does not have the jurisdiction or authority to review the wetland mitigation plans. As such, it is impossible for Respondents to obtain plan approval from USFWS. Instead of obtaining USFWS approval, Respondents received approval from USACE, the correct agency for consultation. The USACE permit for Westpoint Harbor explicitly requires Respondents to "implement the Wetland Mitigation and Monitoring Plan for Westpoint Marina Project, dated August 2003."[358]

As noted above, the proof of completion of the wetlands mitigation is in plain view today at Westpoint Harbor. In addition, in December 2006, Respondents submitted confirmation to the

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[355] *Id.*

[356] AR Doc. 25 at 6 (Ltr from Tom Sinclair, Coastal Program Analyst, BCDC to Mark Sanders (Sept. 1, 2011)).

[357] Also, almost all of the ditch that runs between the Marina from the Pacific Shores Center is outside of BCDC's 100-foot-shoreline jurisdiction. First, most of the ditch is located 100 feet or more from the shoreline. Second, even if BCDC had salt-pond jurisdiction over areas of the Marina that were previously part of Cargill's Pond 10 (which, BCDC does not), that salt-pond jurisdiction would not extend to the ditch in question. BCDC staff noted this fact as early as February 2003 in a letter to Mr. Sanders. The letter addressed whether water in the ditch should be calculated as part of the area of open water on the site. The letter states:

> In addition, you [Mr. Sanders] note that in the calculations for open water, you included the storm water channel located between the project site and Pacific Shores as "open water". First, we are not sure that this channel is part of the salt pond and second, it may not be included in the Commission's jurisdiction. Is there a tide gate located at the mouth of the storm channel or is the channel tidally influenced?

Furthermore, a handwritten note from BCDC staff next to this paragraph of the letter states, "not in our jurisdiction." Exhibit 100 at 2 (Ltr from Andrea Gaut, Coastal Program Analyst, BCDC to Mark Sanders, *BCDC Permit Application No. 2-02 Westpoint Marina* (Feb. 7, 2003)). And, as evidenced by many documents in the record, including the Permit itself, the answer to BCDC staff's February 2003 question regarding tidal influence is "no."

[358] Exhibit 92 (Department of the Army Permit).

USACE that the wetlands mitigation was complete as part of a status update.[359] To further verify the condition of the mitigation, Respondents commissioned a botanist to evaluate the drainage ditch for consistency with the Mitigation and Monitoring Plan. In an October 2, 2017 memorandum, which was also provided to Regional Water Quality Control Board and USACE representatives, the botanist reported that:

> [T]he project site includes 0.32 acre of high value wetlands, of which 0.21 acre contains 100+% coverage of wetland vegetation; 0.01 acre contains 77% coverage of wetland vegetation; and 0.10 acre contains un-vegetated mudflats. This exceeds the 5-year success criteria, which requires 0.27 acre of high value wetlands, including a minimum of 75% coverage of wetland vegetation (equal to 0.20 acre of 100% vegetated wetland). Therefore, success criteria for target jurisdictional acreage of wetlands have been achieved.[360]

This report confirms that mitigation has been achieved, and includes multiple photos demonstrating this fact. Simply put, Respondents have provided multiple forms of evidence demonstrating that this alleged violation has no merit. In contrast, BCDC staff has provided no evidence to suggest that Respondents have failed to complete this mitigation.

Finally, BCDC staff's assertion that this mitigation requirement was "based on the Regional Water Quality Control Board's water quality certification, which further required Sanders to implement a monitoring and reporting program for the non-tidal wetlands mitigation"[361] has no bearing on Respondents' compliance with Special Condition II.G. Similarly, BCDC staff's request that Respondents provide BCDC staff with copies of monitoring reports[362] is not a requirement in the Permit and has no bearing on Permit compliance. BCDC staff's assertion that the "[p]ermit does not establish a compliance deadline, but Regional Board's water quality certification requires this prior to construction of the marina basin"[363] is also irrelevant. BCDC has no authority to assert violations on behalf of the Regional Water Quality Control Board, and BCDC staff's assertion that this violation began in 2004 has no support.

b) <u>This Special Condition has not yet been triggered.</u>

Although Respondents have thoroughly complied with Special Condition II.G, Respondents note that in the alternative, this Special Condition has not yet been triggered. As acknowledged in the VR/C, there is no temporal requirement for this Special Condition. Unlike other Special Conditions that mandate a specific timeframe for compliance, Special Condition II.G merely requires that Respondents "provide mitigation." It is entirely reasonable to read this

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[359] Exhibit 101 (Ltr from Mark Sanders to Mark D'Avignon, U.S. Army Corps of Engineers, *Westpoint Marina Project Status and Extension* (Dec. 5, 2006)).
[360] Exhibit 102 (Memorandum from Nicolas Duffort and Julia King, Anchor QEA to Elizabeth Christian, Regional Water Quality Control Board, *Westpoint Harbor Wetland Vegetation Mitigation Monitoring* (Oct. 2, 2017)).
[361] VR/C Section VI, ¶UUU.2.
[362] VR/C Section VI, ¶UUU.2.
[363] VR/C Exhibit D at 2.

to require Respondents to provide mitigation prior to the expiration of the Permit in 2019. Thus, this requirement has not yet been triggered and Respondents cannot be in noncompliance.

For these reasons, Respondents deny that they failed to provide non-tidal mitigation required under Special Condition II.G. Accordingly, Respondents deny all assertions in the VR/C, including Section VI.AAA.¶2, Section VI.¶KKK, Section VI.¶RRR, Section VI.¶UUU, and the Summary of Violations and Proposed Administrative Civil Penalties to the extent these assertions suggest Respondents did not comply with Special Condition II.G.

22. Allegation No. 11A

BCDC staff alleges: "Unauthorized construction of rower's dock on west side of marina basin. Unauthorized fill and substantial change in use[,] Government Code § 66632(a)[,]" for the period December 2014 to July 2017.[364]

a) The rower's dock is, and always has been, authorized.

BCDC staff's allegation that Respondents constructed an unauthorized rower's dock ignores more than a decade of correspondence and demonstrates BCDC staff's continued unfamiliarity with common marina terminology. The rower's dock is, and always has been, authorized as part of Westpoint Harbor's Permit.

It is unclear how BCDC staff has come to the conclusion that the rower's dock is not authorized. The rower's dock is part of the "remaining docks" referenced in Phase 1B.1 of the Permit, which authorizes Respondents to "[c]onstruct, use, and maintain pile-supported and floating structures for the remaining docks at the marina, approximately 271 slips, for a total of 416 slips." All docks, including the rower's dock, are within the authorized fill amount of 167,964 square feet provided in the Permit.

Further, as acknowledged in Special Condition II.B.1, "Permittee has already obtained staff approval of, and recorded on title, the legal instrument that fulfills the requirement to permanently guarantee the public access required by this permit (County of San Mateo Document number 2007-124894)." This legal instrument, included as AR Document 11, clearly shows the rower's dock in its current location and confirms that the rower's dock was authorized.[365] An excerpt of AR Doc 11 is included here as Figure 18.

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[364] VR/C Exhibit D at 2.

[365] The rower's dock can be viewed in the May 5, 2007, BCDC Public Access maps at page 45 of AR Document 11.

Figure 18 - Excerpt from Legal Instrument - Red Circle Showing Rower's Dock[366]

In addition, Redwood City had identical requirements and inspected the docks as built. Exhibit 103 is a Redwood City permit inspection card, showing docks A through Q and nine gangways.[367] The rower's dock is dock Q, which was inspected by Redwood City.

b) Respondents submitted detailed plans for the rower's dock over a decade ago and BCDC staff failed to provide any feedback.

To the extent that this allegation concerns plan approval, Respondents submitted extremely detailed dock plans to BCDC staff in October 2005.[368] These plans clearly showed the rower's dock, marked as dock Q on the west side of the drawings. Perhaps unsurprisingly, BCDC staff never responded to this submittal. However, in a February 2007 meeting, Adrienne Klein questioned whether BCDC staff had received these plans.[369] Although Respondents had already submitted the plans, on March 3, 2007, Mr. Sanders re-submitted a reduced-sized set of the dock plans. In his letter to BCDC staff, Mr. Sanders reiterated his understanding, based on Mr. McCrea's November 3, 2005 letter, that BCDC staff could not review engineering plans and that compliance with the Permit was his responsibility.[370] A review of the records obtained from BCDC staff in response to Respondents' CPRA request confirmed that BCDC staff stamped this letter and plans received on March 5, 2007.[371] These plans apparently went untouched by BCDC staff for at least four years, as BCDC staff still had not reviewed them at the time of the May 4, 2011 letter. An excerpt from these plans, showing the rower's dock is including here as Figure 19.

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[366] *Id.*
[367] Exhibit 103 (Permit Inspection Card, Redwood City (Dec. 18, 2014)).
[368] Exhibit 1 (Sanders Declaration).
[369] Exhibit 1 (Sanders Declaration).
[370] Exhibit 104 (Ltr from Mark Sanders to Brad McCrea, BCDC, *Engineering Drawings* (Mar. 3, 2007)).
[371] Exhibit 105 (photograph of stamped-received dock plans).

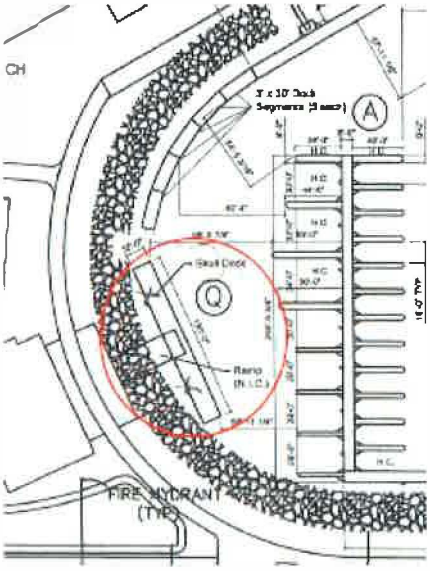

Figure 19 - Excerpt from Dock Plans - Red Circle Showing Rower's Dock[372]

Because they had submitted the appropriate plans multiple times over the course of several years, Respondents were understandably confused by BCDC's allegation in the May 4, 2011, letter that they had failed to obtain approval. In order to promptly resolve this issue, Respondents submitted a copy of the March 3, 2007, letter previously submitted to BCDC staff. A review of BCDC staff's records obtained in response to Respondents' CPRA request confirms that BCDC staff received this copy on June 6, 2011.[373] Respondents submitted these plans again on June 14, 2011 via email to Tom Sinclair, which a review of BCDC staff's records confirms Mr. Sinclair received.[374]

In addition, BCDC staff violated its obligations under Special Condition II.A.1. As discussed in the response to Allegation No. 1A, BCDC staff is required to provide guidance on the specific drawings and information required, as well as review preliminary drawings. BCDC is also required to complete plan review within 45 days of receipt. Here, even the second set of plans, submitted by Respondents in 2007, were ignored by BCDC staff for more than a decade. There is no reasonable explanation for BCDC staff's inaction other than that already explained in Mr. McCrea's November 3, 2005, letter. That is, BCDC staff did not have the means or interest in reviewing plans, and the work was authorized. Because the rower's dock was very clearly included in these plans, it cannot be unauthorized. The rower's dock was included in the Phase 1 Construction Drawings, "conditionally approved" by Ms. Miramontes in her September 8, 2011, letter, and is authorized on that basis as well.

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[372] Exhibit 48 at 3 (dock Plans submitted to BCDC staff and obtained in response to CPRA request).
[373] Exhibit 106 (Ltr from Mark Sanders to Brad McCrea, BCDC, Engineering Drawings (Stamped Received June 6, 2011).
[374] Exhibit 107 (Email from Mark Sanders to Tom Sinclair, BCDC, Dock System files, Westpoint Harbor (June 14, 2011)).

c) The VR/C provides an illogical and unsupported duration for the alleged violation.

Even if one were to assume the rower's dock were not authorized, the alleged duration of Allegation No. 11A is based on an illogical premise. If BCDC staff had properly investigated the facts, it would have been obvious that the rower's dock was not placed in the water at Westpoint Harbor until May 2016, and was not fully installed until June 2016.[375] As can be seen from Google Earth Pro,[376] the rower's dock is not present in the April 5, 2016, satellite image (see the Figure below), and, thus, there is no basis for holding Respondents liable for "[u]nauthorized construction of rower's dock on west side of marina basin" for the period from "December 2014 to July 2017" as asserted in the VR/C.[377] BCDC staff's mistaken belief that the violation began in December 2014 appears to be based on plans submitted by Respondents on December 12, 2014 for presentation to the DRB.[378] One of the plans included in this submittal showed the rower's dock on the west side of Westpoint Harbor, in the exact same spot it was located in the legal instrument on file with San Mateo County and the previously submitted dock plans. If BCDC staff had reviewed Respondents' dock plans or the legal instrument, staff would have realized that the rower's dock was authorized, as discussed above.

[375] *See* Exhibit 1 (Sanders Declaration).
[376] https://www.google.com/earth/download/gep/agree.html.
[377] *See* VR/C Exhibit D at 2.
[378] AR Doc. 61 (Ltr from Mark Sanders to Erik Buehmann, Permit Analyst, BCDC (Dec. 12, 2014)).

Figure 20 - Google Earth Image, Apr. 5, 2016 - Red Circle on Left-Hand Side Showing No Rower's Dock

For the reasons stated here, Respondents deny that they engaged in the unauthorized construction of a rower's dock or that the rower's dock constituted unauthorized fill or a substantial change in use. Accordingly, Respondents deny all assertions in the VR/C, including Section II (page 4), Section VI.¶II, Section VI.¶QQ.3, Section VI.¶UU, Section VI.¶ZZ, Section VI.¶BBB, Section VI.¶OOO.3, Section VI.¶CCC, Section VI.¶LLL, Exhibit C (page 2), and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents violated Government Code § 66632(a).

23. Allegation No. 11B

BCDC staff alleges: "101 Surf Sports use of unauthorized rower's dock, storage of kayaks in required Phase 1B public access area, and use of parking lot for storage container, a wood-enclosed changing or storage area placed over designated public parking spaces, picnic tables, and portable toilet[,] Substantial change in use[,] Government Code § 66632(a)[,]" for the period of September 2016 to July 2017.[379]

[379] VR/C Exhibit D at 2.

a) 101 Surf Sports' use of the rower's dock is not a substantial change in use.

As explained in the response to Allegation No. 11A, the dock used by 101 Surf Sports is an authorized structure, so BCDC staff's assertion that this is use of an unauthorized dock is unsupportable. Further, each piece of equipment and activity is entirely consistent with the currently authorized use and does not constitute a substantial change in use. BCDC regulations define a substantial change in use as "any construction, reconstruction, alteration, or other activity" that has an estimated cost of $250,000 or more, involves a change in the general category of use of the structure or land, involves a substantial change in the intensity of use, or adversely affects existing public access or future public access.[380] Here, 101 Surf Sports utilizes the low-freeboard rower's dock for personal watercraft, including rowing, paddling, and kayaking activities, which is what the dock was designed for. The public may launch their own personal watercraft from this dock as well as rent watercraft, or take lessons from 101 Surf Sports. The changing or storage area, picnic tables, and portable toilet are all the type of equipment often brought in to provide support for public events (*e.g.*, the Stanford "Treeathlon") and are intended for use by the public. Everything BCDC staff has cited to is intended to enhance public access and improve the experience of those visiting Westpoint Harbor, and falls completely outside the definition of a substantial change in use.

BCDC staff has previously acknowledged that the "permit does not require any of the actual float areas to be restricted for public access."[381] The public access agreement included in the legal instrument filed by Respondents in the County of San Mateo also does not designate the rower's dock for public access.[382] Thus, even if the operations of 101 Surf Sports on the rower's dock itself were not improving public access, there is no requirement that they must do so.

For these reasons, Respondents deny that the rower's dock utilized by 101 Surf Sports is unauthorized. In addition, Respondents deny that 101 Surf Sports' use of the rower's dock, storage of kayaks in required Phase 1B public access area, and use of parking lot for storage container, a wood-enclosed changing or storage area placed over designated public parking spaces, picnic tables, and a portable toilet were substantial changes in use under Government Code § 66632(a). Accordingly, Respondents deny all assertions in the VR/C, including Section II (pages 4 and 5), Section VI.QQ.3, Exhibit C (pages 2 and 3), and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents violated Government Code §66632(a).

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[380] Cal. Code Regs. tit. 14, § 10125(b).

[381] Exhibit 108 at 1 (Ltr from Jonathan Smith, Chief Counsel, BCDC to Kent Mitchell, Mitchell and Herzog (Dec. 23, 2003)).

[382] AR Doc. 11 at 45 (Notice of Conditions, Covenants, and Restrictions Affecting San Mateo County Assessor Parcel No. 054-300-620, and a portion of 054-300-600 (Aug. 20, 2007)).

24. Allegation No. 12

BCDC staff alleges: "Three unauthorized floating docks supporting large srorage [sic] tents on the east side of the marina basin[,] [u]nauthorized fill[,] Government Code § 66632(a)[,]" for the period of December 2016 to July 2017.[383]

a) There is no reasonable basis to consider these structures unauthorized fill.

In this allegation, BCDC staff again asserts a violation based on staff's misunderstanding of how modern marinas operate. The structures cited in this violation cannot reasonably be considered fill under any circumstance.

The three structures are floats, in this case "Unifloats" manufactured by Bellingham Marine Industries. These structures are being used as vessels to hold personal watercraft, which is a common occurrence in any marina.[384] They are owned by individuals renting space at Westpoint Harbor and are moved at their pleasure. The reason is practical: small watercraft cannot stay in the water long because of bottom growth and exposure. Thus, small watercraft are often stacked on floats.[385]

It is common for floats to move around.[386] Thus, these floats function and serve as vessels akin to boats. The definition of "fill" in the McAteer-Petris Act is "earth or any other substance or material, including pilings or structures placed on pilings, and structures floating at some or all times and **moored for extended periods**, such as houseboats and floating docks."[387] These three structures are easily and readily moved, and are not moored for extended periods. As such, they do not constitute fill under Government Code § 66632(a). Indeed, as shown by the photo included with the VR/C, these vessels were tied to a dock at the time of the photo, just like any other vessel renting space in the marina.

This allegation is yet another example of BCDC staff's efforts to exceed the reasonable bounds of what qualifies as unauthorized fill and the staff's failure to properly investigate before asserting a Permit violation. BCDC staff consistently cites to objects, such as these three vessels and the equipment used by 101 Surf Sports, that no reasonable person would consider fill. In fact, BCDC staff stretches the concept beyond belief in the VR/C, where staff states "[t]he unauthorized structures or items in the parking lot or in public access areas included, but were not limited to: . . . (b) **a parked fire truck** . . . ."[388] To suggest that a parked fire truck in a parking lot constitutes unauthorized fill is frankly absurd.

For the reasons stated here, Respondents deny that the floating docks are unauthorized fill. Accordingly, Respondents deny all assertions in the VR/C, including Section II page 4, Section VI.¶QQ.8, Exhibit C, and Summary of Violations and Proposed Administrative Civil

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[383] VR/C Exhibit D at 2.
[384] Exhibit 1 (Sanders Declaration).
[385] *Id.*
[386] *Id.*
[387] Cal. Gov't Code § 66632(a) (emphasis added).
[388] VR/C Section VI.¶QQ (emphasis added).

Penalties to the extent these assertions suggest that Respondents have violated Government Code § 66632(a).

25. Allegation No. 13A

BCDC staff alleges: "Failure to obtain plan review approval to construct fuel dock[,] Special Condition II.A.1[,]" for the period of December 2014 to April 2016.[389]

a) There is no fuel dock currently in place.

BCDC staff's allegation that Respondents failed to obtain plan approval to construct a fuel dock is wrong several levels. There can be no failure to obtain plan approval because there is no fuel dock currently in place. An inspection of the dock would reveal that there are no fuel fixtures in place. Currently, the space that BCDC staff alleges is a fuel dock is identical to the rest of the dock surrounding it. These are standard float sections with internal chaises to accommodate hoses, valves, and fittings, in this case to be purposed for a future fuel dock.[390] This section of dock will only become a fuel dock once the requisite fueling structures are added. Exhibit 109 is a set of recent photographs of this dock section, and shows that it is indistinguishable from the rest of the docks at Westpoint Harbor.[391]

b) Respondents obtained plan approval

To the extent that any plan approval is required at this point, Respondents obtained such approval over a decade ago. As explained in the response to Allegation No. 11A, Respondents submitted the original dock plans in 2005, re-submitted the plans in March 2007, and submitted them yet again in June 2011. Each time, Respondents received no feedback from BCDC staff, in clear violation of staff's obligations under Special Condition II.A.1.[392] Considering BCDC staff's inaction and previous admission that staff was unable to review engineering plans, these dock plans should be deemed approved.

The dock plans submitted by Respondents showed docks L, M, and K in place on the east side of Westpoint Harbor, with the fuel dock section clearly noted.[393] Originally, the fuel dock was planned to be on M dock.[394] Mr. Sanders sent a letter to BCDC's Andrea Gaut in July 2006 notifying her that the fuel dock had been moved, but explicitly stated that this design change was

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[389] VR/C Exhibit D at 3.
[390] Exhibit 1 (Sanders Declaration).
[391] Exhibit 109 (photographs of section of dock).
[392] *See* Exhibit 1 (Sanders Declaration).
[393] Exhibit 48 at 4 (dock plans submitted to BCDC staff).
[394] All Westpoint Harbor docks are lettered, A through V, as shown on the attached Exhibit 48. Dock V is the service dock, and has been present in each iteration of the harbor plans, though it moved three times. The 2003 BCDC plans show services on the transient dock (N and P) which is 1,000 feet long and 8 feet wide (8,000 square feet). This dock is labeled "guest berthing area—fuel and pumpout area—guest berthing area." At that time, this plan logically located the services near the harbormaster's office. In 2006, under Amendment No. Three, the harbormaster office moved to the south side of the harbor, and the service dock moved to the east side of the harbor dock. It was 325 feet long (2,900 square feet) and labeled "fuel dock." In Amendment No. Six the service dock was moved to the southeast corner of the marina to be closer to the boat launch.

reflected in the drawings previously sent to BCDC.[395] Respondents received no response from BCDC staff.

The docks were built and arranged in accordance with these plans, including the placement of all pilings. It was only at a later point, in 2014, that Westpoint Harbor shifted the opening in the float sections for the future straddle lift bay, providing the current layout. The docks approved by BCDC staff are all Bellingham Marine docks, which are known for their ability to open to accommodate different vessels. Most modern docks have some flexibility to adapt and accommodate different vessels and configurations.[396] BCDC staff has always been aware of this feature, and the dock plans show the detailed structure of the docks, including whalers and rods, that allow the docks to move in one-foot increments.[397] Moreover, Respondents' opening of the float sections did not require changes to any permanent structures (*i.e.*, pilings) and remained wholly within the footprint of the dock as set out in the submitted plans. Respondents also note that the total dock area at Westpoint Harbor remains below the 167,964 square feet of authorized dock.

For these reasons, Respondents deny that they failed to obtain plan review approval to construct the "fuel dock" as required by Special Condition II.A.1. Accordingly, Respondents deny all assertions in the VR/C, including the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents did not comply with Special Conditions II.A.1.

26. Allegation No. 13B

BCDC staff alleges: "Unauthorized construction of substantially larger fuel dock than authorized[,] Government Code § 66632(a)[,]" for the period of December 2014 to April 2016.[398]

a) <u>The fuel dock cannot be unauthorized because there is no fuel dock currently in place.</u>

Respondents recognize that the text of the Permit, prior to Amendment No. Six, provided authorization to "[c]onstruct, use, and maintain a 500-square-foot fuel dock, including a pump-out facility." However, as already explained in the response to Allegation No. 13A, there is no fuel dock currently in place. Respondents cannot be accused of unauthorized fill based on a fuel dock that does not exist.

b) <u>BCDC staff appears to mistake the service dock for a fuel dock.</u>

If BCDC staff is assuming that the current structure in place is a fuel dock, staff is wrong on the facts. The structure cited by BCDC staff is actually a service dock. While boaters may refer to a service dock as a "fuel dock" as a form of shorthand, the fuel service section is in fact a small and discrete part of the service dock.

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[395] Exhibit 110 at 1 (Ltr from Mark Sanders to Andrea Gaut, BCDC, *Amendment to BCDC Permit No. 2-02* (July 10, 2006)).
[396] Exhibit 1 (Sanders Declaration).
[397] Exhibit 48 at 30 and 36 (dock plans).
[398] VR/C Exhibit D at 3.

Service docks are long linear floats allowing any combination of boats to be accommodated as "side ties."[399] The service dock at Westpoint Harbor provides sewer pumpout service, temporary ties for boat launch vessels, and room for boats to queue up. Because boats must tie-in before they refuel, and understandably need sufficient space to tie-in, the "fuel dock" necessarily needs to be included on the service dock. As explained in the response to Allegation No. 13A, the service dock was modified in 2014 by shifting several floats that were already authorized under Phases 1A and 1B. These docks were simply moved into position to reconfigure the existing docks on the east side of the harbor.

The service dock is 2,900 square feet, as authorized by Amendment No. Six to the Permit. Of this service dock, the space reserved for the "fuel dock" is only a 50 foot section, totaling 500 square feet, which will be specially configured for fuel services. This is entirely consistent with both the text and the intent of the Permit prior to Amendment No. Six, when a 500 square-foot fuel dock was authorized. As discussed in the response to Allegation No. 13A, Westpoint Harbor has remained well below the total dock space authorized by the Permit, negating any inference that this could be unauthorized fill.

For these reasons, Respondents deny that they engaged in unauthorized construction of a substantially larger fuel dock than authorized in violation of Government Code § 66632(a). Accordingly, Respondents deny all assertions in the VR/C, including Section II (page 4), Section VI.¶II, Section VI.¶KK, and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents did not comply with Government Code § 66632(a).

27. Allegation No. 14

BCDC staff alleges: "Numerous instances of unauthorized placement of fill and/or substantial change in use

- Fence and gate blocking public access from Pacific Shores Property
- Fire suppression equipment and utility structure on public access pathway
- Two P&E transformers in public access area near boatyard
- Solar and wind powered container in east end of parking lot
- Storage container, wood-enclosed changing or storage area, and portable toilet, all in parking lot
- Fenced area south of parking lot that contains a garden and may be used for storage
- A wooden storage shed, numerous planters, and stored construction material south of the parking lot
- An asphalt pad of unknown purpose in a dedicated public access area

[399] Exhibit 1 (Sanders Declaration).

Government Code § 66632(a)[,]" with varying durations, stating that certain alleged violations were discovered earlier than September 2014 and others were discovered during a December 2016 site visit.[400]

BCDC staff's list of supposed unauthorized fill or substantial change in use is no more than a list of repetitive meritless and fractured claims intended to artificially inflate the number of violations asserted against Respondents. For the reasons below, none of the listed structures were unauthorized fill.

a) Fencing has been present at that location since before the BCDC Permit was issued.

Allegations concerning the fence between Pacific Shores Center and Westpoint Harbor are repetitive of Allegation No. 1B. Even if they were not repetitive, fencing was placed and maintained in this location by the prior owner of the property, Leslie, decades before the Permit was issued.[401] Although this fence began as a wire-mesh fence, the fence was improved at the request of Pacific Shores Center management in order to stop individuals from crossing the unsafe area by stepping on and over riprap placed in the ditch.[402]

As previously discussed in the response to Allegation No. 1B, Redwood City required Respondents to wait to open areas to public access until it was safe to do so. Here, the area between Westpoint Harbor and Pacific Shores remained unsafe for pedestrian travel. BCDC staff's assertion that "BCDC staff reported that it had confirmed with the onsite manager for Pacific Shores Center that there are no impediments to completing the trail connection between the two properties"[403] is inadmissible hearsay and is simply false. A number of Pacific Shores Center property managers have disputed this statement in discussions with Respondents.[404]

b) Utilities do not impinge on public access and are specifically contemplated in the Bay Trail Design Guidelines and Toolkit.

As it concerns the fire suppression equipment and utility structures, these do not constitute unauthorized fill or a substantial change in use. The intrusion of utility structures such as fire hydrants into walkways is a common occurrence. In general, the utility or governmental agency that controls the facility determines the location of the utility. BCDC staff cannot reasonably expect Respondents to challenge the water department or the fire department when those agencies dictate where fire hydrants and other structures must be located. For obvious reasons, the placement of such structures is often non-negotiable with the utility or local government agency. These utilities were installed years before the pathways and bioswales were completed. The utilities were keyed to the distance from the water in the marina, and could not be moved when it was time to install the pathways.[405] Because the marina basin is not perfectly

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[400] VR/C Exhibit D at 3.
[401] Exhibit 1 (Sanders Declaration).
[402] *See* Exhibit 1 (Sanders Declaration); Exhibit 45 (Email from Bill Moyer, General Manager, Pacific Shores Center to Mark Sanders, *Public Access* (Mar. 14, 2012)).
[403] VR/C Section VI.¶EE.3.h.
[404] *See* Exhibit 1 (Sanders Declaration).
[405] Exhibit 1 (Sanders Declaration).

linear (as are the roads, parking, bioswales, and paths) occasional small intrusions occurred.[406] In addition, the intrusion into the public pathway by this equipment is mere inches, far from constituting a substantial change in use or unauthorized fill. In fact, the Bay Trail Design Guidelines and Toolkit specifically contemplate that obstructions, such as utility lines, can intrude into the trail.[407]

Obstructions

There are many types of obstructions that can intrude into the trail's horizontal clearance zone such as:

- Bollards
- Lights poles and fixtures
- Sign poles and signs of all types
- Bicycle racks
- Benches and drinking fountains
- Fences and walls
- Railings
- Utility boxes
- Curbs
- Boulders
- Landscaping
- Drains
- Trees

Obstructions within the Trail

When obstructions within the trail are unavoidable, solid yellow diamond pavement markings should be used. The obstruction should also be identified with yellow reflective tape.

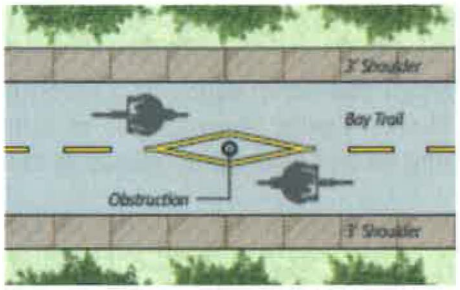

Figure 21 - Bay Trail Design Guidelines on Obstructions[408]

The two PG&E transformers BCDC staff alleges are unauthorized fill or a substantial change in use are actually switchboard cabinets. Each of the two switchboard cabinets impinge on the perimeter of the marina pathway less than 12 inches within a nominal 10 foot pathway width. Because electrical guidelines require large sweeps on conduits carrying high voltage, there is a limit on how close transformers and switchboards can be located to the marina basin.[409] This does not constitute unauthorized fill and certainly does not constitute a substantial change in use of the marina pathway. As Figure 22 and the photographs included in Exhibit 111 clearly show, these structures do not limit public access in any way.[410] Further, BCDC staff was aware of the placement of this equipment and took the position that "the path should follow an intuitive location and that screening of utility box should not push path elsewhere."[411] As above, the presence of utility boxes is also explicitly considered by the Bay Trail Design Guidelines and Toolkit.[412]

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[406] *Id.*
[407] Exhibit 39 at 40 (San Francisco Bay Trail Design Guidelines and Toolkit (June 2016)).
[408] *Id.* at 32 (San Francisco Bay Trail Design Guidelines and Toolkit (June 2016)).
[409] Exhibit 1 (Sanders Declaration).
[410] Exhibit 111 (photographs of utilities near pathways).
[411] AR Doc. 36 (Memorandum from Adrienne Klein (Apr. 25, 2012)).
[412] Exhibit 39 at 32 (San Francisco Bay Trail Design Guidelines and Toolkit (June 2016)).

Figure 22 - PG&E Box Near Path[413]

c) The solar and wind powered container is consistent with boatyard activities.

The solar and wind powered container is a prototype mobile water treatment system that Respondents placed temporarily for evaluation. This container is no larger than a 20-foot box trailer or recreational vehicle that would otherwise normally park in the parking lot. The treatment system can process polluted water (flotsam and jetsam) in the boatyard before returning it to the Bay. This activity is consistent with the activities authorized by the permit to operate Westpoint Harbor and normal for all boatyards treating processed water. Respondents tested this mobile water treatment system for some months, and the unit will be removed shortly.[414] Because this container is easily moveable, temporary, and consistent with the Permit, it is neither unauthorized fill nor a substantial change in use.

d) Structures related to 101 Surf Sports are repetitive and do not constitute a substantial change in use.

The storage container, wood-enclosed changing or storage area, and portable toilet are discussed in Allegation No. 11B. Including these structures in Allegation No. 14 is improperly duplicative. As Respondents noted in the response to Allegation No. 11B, these structures do not

[413] Exhibit 112 (photographs of utilities and pathways at Westpoint Harbor taken by BCDC staff during site visits).
[414] Exhibit 1 (Sanders Declaration).

constitute a substantial change in use and, due to their readily moveable and temporary nature, do not constitute unauthorized fill.

e) The garden is outside BCDC's jurisdictional limits.

The garden cited by BCDC staff is a very small "community garden" at Westpoint Harbor.[415] It is on the setback levee on the south side of the property. Because the extremely salty soils in that area will not support landscaping, the garden is made of raised beds. It is a simple, small amenity for marina tenants and visitors to enjoy. It can be easily deconstructed, and it harms no one.[416] Furthermore, it is outside the 100-foot BCDC jurisdictional line. As a result, BCDC has no jurisdiction over this structure and it does not constitute unauthorized fill or a substantial change in use.

f) Respondents cannot identify the "asphalt pad of unknown purpose" based on scant information provided by BCDC.

BCDC staff's assertion that there is an unauthorized "asphalt pad of unknown purpose in a dedicated public access area" is so vague that Respondents have no choice but to deny that such a condition exists. BCDC staff has provided no details to distinguish this asphalt pad or to identify its location, aside from saying it is in a "dedicated public access area." Similarly, BCDC staff's Exhibit C to the VR/C, which contains site photographs, does not appear to include this alleged structure.

g) The wooden shed, construction materials, and plants are not a substantial change in use.

The wooden shed is a 10 foot by 12 foot "tuffshed" located on a concrete pad designated for trash storage. These concrete pads for trash storage were included in the revised September 13, 2011, version of the Phase I Construction Drawings provided to Ms. Miramontes.[417] The planters are simply plants in pots, which are easily moveable and temporary. The construction material cited by BCDC staff is material used for ongoing construction around the harbor. BCDC cannot seriously allege that a potted plant or construction materials needed to construct elements of the harbor authorized by the Permit constitutes fill or a substantial change in use. This is almost as absurd as BCDC staff's assertion in the VR/C that a parked fire truck constitutes unauthorized fill.[418] If BCDC staff's line of reasoning were accepted here, every car that parks near Westpoint Harbor would be unauthorized fill and every cooler pulled from the trunk would constitute unauthorized fill the moment it touches the ground.

For these reasons, Respondents deny that they engaged in numerous instances of unauthorized placement of fill and/or substantial change in use as stated by BCDC staff in Allegation No. 14. Accordingly, Respondents deny all assertions in the VR/C, including Section II.D (page 2), Section II (page 4), Section VI.¶M.3, Section VI.¶EE.3, Section VI.¶QQ.2, 3, and 5, Section VI.¶GGG.3, Section VI.¶SSS, Exhibit C (pages 1-3), and the Summary of Violations

[415] *Id.*
[416] *Id.*
[417] Exhibit 37 at 6 (Construction Drawings for Westpoint Marina and Boatyard Phase 1).
[418] VR/C Section VI.¶QQ.

and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents violated Government Code § 66632(a).

28. Allegation No. 15

BCDC staff alleges: "Failure to submit Certification of Contractor Review[,] Special Condition II.U[,]" for the period of May 2011 to September 2014.[419]

a) Mr. Sanders was the general contractor for the construction of Westpoint Harbor.

Special Condition II.K. requires that "[p]rior to commencing any grading, demolition, or construction . . . the general contractor or contractors in charge of that portion of the work shall submit written certification . . . ." Mr. Sanders was the general contractor for all portions of the project.[420] Mr. Sanders is a trained engineer experienced with construction and has years of project management experience. Therefore, Mr. Sanders satisfied this requirement of Special Condition II.U. when he signed and returned the original executed Permit to BCDC staff.

b) Respondents provided the Certification of Contractor Review forms to subcontractors.

To the extent that any subcontractors were in charge of a portion of the work, Special Condition II.K places the responsibility for submittal on the contractor, not Respondents. Out of an abundance of caution, Respondents supplied a copy of the BCDC permit to OC Jones, Top Grade Construction, and Bellingham Marine Industries, the three main subcontractors for Westpoint Harbor. Respondents noted the certification requirement in the drawing packages and bid sets provided to the subcontractors.[421] Further, Respondents provided written reminders to the subcontractors to submit this certification.[422] Respondents did all that they could to ensure that this Permit requirement was met.

For these reasons, Respondents deny that they have failed to provide the required Certification of Contractor Review under permit Special Condition II.U. Accordingly, Respondents deny all assertions in the VR/C, including Section II.¶F, pages 5-6, Section VI.¶M.9, Section VI.¶T.3, Section VI.¶EE.6, Section VI.¶T.6, Section VI.¶EE.5, Section VI.¶OO, Section VI.¶EEE and the Summary of Violations and Proposed Administrative Civil Penalties to the extent these assertions suggest that Respondents did not comply with Special Condition II.U.

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[419] VR/C Exhibit D at 3.
[420] Exhibit 1 (Sanders Declaration).
[421] Exhibit 1 (Sanders Declaration).
[422] Exhibit 1 (Sanders Declaration); *see* Exhibit 113 (Ltr from Mark Sanders to Paul Cianciarulo, O.C. Jones and Sons, Inc., *Levee Road Preparation* (Oct. 14, 2003)).

29. Allegation No. 16

BCDC staff alleges: "Failure to submit Certification of Contractor Review[,] Special Condition II.U[,]" for the period of October 22, 2016 to April 24, 2017.[423]

For the same reasons discussed in the response to Allegation No. 15 above, Respondents deny that they have failed to provide the required Certification of Contractor Review under permit Special Condition II.U. During the period from October 22, 2016, to April 24, 2017, W.L. Butler worked on the Phase 2 boatyard building. W.L. Butler was the subcontractor for the steel building, and other aspects of the development continued to be overseen by Mr. Sanders.[424] The site manager for W.L. Butler was Jim Sanford and later Christina Wagenseller. Dawn Jedkins is the architect. Respondents spent many hours with Mr. Sanford, Ms. Wagenseller, and Ms. Jedkins going over the Permit and the need for them to submit a Certification of Contractor Review.[425]

Because Respondents were in compliance with Special Condition II.U and deny the assertions in Allegation No. 15, Respondents also deny that this is a repeat violation. Accordingly, Respondents deny all assertions in the VR/C, including Section II.¶F, pages 5-6, Section VI.¶M.9, Section VI.¶T.3, Section VI.¶EE.6, Section VI.¶T.6, Section VI.¶EE.5, Section VI.¶OO, Section VI.¶EEE and the Summary of Violations and Proposed Administrative Civil Penalties to the extent these assertions suggest that Respondents did not comply with Special Condition II.U.

30. Allegation No. 17

BCDC staff alleges: "Conduct work and operations without authorization (expired permit)[,] Authorization Section I.C.[,] Standard Condition IV.E[,]" for the period of August 16, 2010, to June 15, 2011.[426]

Respondents admit this allegation, and note that the violation was resolved promptly, as BCDC staff has indicated in the VR/C.[427]

31. Allegation No. 18

BCDC staff alleges: "Conduct work and operations without authorization (expired permit)[,] Authorization Section I.C.[,] Standard Condition IV.E[,]" for the period of August 16, 2014, to April 18, 2016.[428]

Respondents deny BCDC staff's assertion that "in August 2014, [Mr. Sanders] again allowed the permit to expire, and thereby conducted work and operations without authorization for 19 months . . . ."[429]

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[423] VR/C Exhibit D at 3.
[424] Exhibit 1 (Sanders Declaration).
[425] Exhibit 1 (Sanders Declaration).
[426] VR/C Exhibit D at 3.
[427] VR/C Exhibit D at 3.
[428] VR/C Exhibit D at 3.

a) Expiration of the Permit does not mean continued normal operation is unauthorized.

The Permit is designed to authorize construction, but does not require authorization for continued operation of existing structures. The authorization section of the Permit is explicitly tied to the time required to complete construction, requiring that all work must be completed by a date certain and "diligently prosecuted to completion." BCDC staff cannot reasonably suggest that after this date certain, the Respondents are no longer authorized to operate the improvements that have been built.

b) Respondents did not construct any improvements during the time before the Permit was renewed.

Here, Respondents did not construct any improvements from August 16, 2014, to April 10, 2016, during the time that the Permit had expired and prior to renewal.[430] As already explained in the response to Allegation No. 2B, Respondents were ordered to halt landscaping in 2011 by Ms. Miramontes. Respondents complied with this order from 2011 until the time Amendment No. Six was signed and the time to complete work was extended.[431] The only ongoing construction activity undertaken by Respondents leading up to August 2014 was completion of the marina docks, which was done before the Permit expired (with the exception of the rower's dock, which was done after the permit's April 2016 renewal). The marina docks were completed by May 2014, as demonstrated by the final cost agreement sent by Bellingham Marine to Respondents on May 15, 2014.[432] Bellingham Marine representatives then conducted a checklist inspection of the docks on July 22, 2014, confirming that the work was complete.[433] No other construction (roads, parking, paving, underground utilities, etc.) took place until Amendment No. Six was in place. Rather than conducting construction during this time period, Respondents were almost solely focused on negotiations with BCDC staff to correct issues with the permit and obtain plan review approval of the Phase 2 boatyard. BCDC staff has provided zero evidence that contradicts the fact that Respondents did not construct any improvements from August 16, 2014, to April 10, 2016.

c) BCDC staff previously provided a grace period for renewal of the Permit during negotiations.

Although Respondents did not construct improvements during the period of August 16, 2014, to April 10, 2016, even if they had, they should not be subject to a penalty for doing so. As noted in the VR/C in regards to Allegation No. 17, BCDC staff previously allowed Respondents ample time to remedy the expiration of the Permit during discussions that extended well beyond the date certain listed in the Permit.[434] It is arbitrary and capricious for BCDC staff

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[429] VR/C Section II (page 6).
[430] Exhibit 1 (Sanders Declaration).
[431] Exhibit 1 (Sanders Declaration).
[432] Exhibit 114 at 1 (Email from Jim Pruder, Bellingham Marine to Mark Sanders, *Mark 5-14-14 last $ review* (May 15, 2014)).
[433] *Id.* at 3-4.
[434] Permit Amendment No. Three set an expiration date of August 16, 2010. BCDC notified Respondents of their alleged failure to complete all authorized work by this deadline on May 2011. Respondents requested an extension and received Amendment No. Four on June 22, 2011. As BCDC Staff correctly states in VR/C Section VI.¶S and

to recognize efforts to correct the expiration of Amendment No. Three, but not to recognize efforts to correct the expiration of Amendment No. Four. Respondents were in constant communication with BCDC as the two parties attempted to settle Amendment No. Five to the Permit, which would have extended the period of authorization and resolved a number of other issues. In fact, in a September 4, 2014, letter to Mr. Sanders, rather than inform Respondents that they were in violation of the Permit, Adrienne Klein stated "[a]s previously stated, Permit No. 2002.002.003 expired on August 15, 2014. In order to preserve his existing authorization, Mr. Sanders must either execute Permit No. 2002.002.05 or seek an extension of completion time of Permit No. 2002.002.03."[435] Ms. Klein further stated that:

> As of the date of this letter, Mr. Sanders has neither executed Permit No. 2002.002.05 nor submitted a request for an extension of completion time for Permit No. 2002.002.03. Unless Mr. Sanders does not plan to execute Permit No. 2002.002.05, he should supplement his pending request for Amendment No. Six to extend Permit No. 2002.002.03's completion time to an appropriate date in the future.[436]

Negotiations surrounding Amendment No. Five continued throughout 2014 and 2015, with BCDC staff sometimes taking months to respond to Respondents.[437] At no point did BCDC staff suggest that Respondents were currently in violation and accruing administrative penalties during these negotiations. Rather, BCDC staff's written statements suggested that even if Respondents chose not to sign Amendment No. Five, an extension of time would be available. BCDC staff's allegation thus appears to be based primarily, if not solely, on BCDC staff's frustration with Respondents' decision not to sign the flawed final version of Amendment No. Five, rather than any actual harm that occurred from the expiration of Amendment No. Four.

For these reasons, Respondents deny that they have conducted work and operations without authorization in violation of Authorization Section 1.C and Standard Condition IV.E. Accordingly, Respondents deny all assertions in the Violation Report/Complaint, including Section II.¶G, page 6, Section VI.¶DD, Section VI¶EE.1, Section VI¶HH, and the Summary of Violations and Proposed Administrative Civil Penalties to the extent this assertion suggests that Respondents did not comply with Authorization Section 1.C and Standard Condition IV.E.

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the Summary of Violations and Proposed Administrative Civil Penalties, this resolved the expiration of permit Amendment No. Three without accruing a standardized fine, despite 303 days of alleged noncompliance.

[435] AR Doc. 60 at 5 (Ltr from Adrienne Klein, Chief of Enforcement, BCDC to Doug Aikins, Hopkins & Carley (Sept. 4, 2014)).

[436] AR Doc. 64 at 8 (Ltr from Adrienne Klein, Chief of Enforcement, BCDC to Doug Aikins, Hopkins & Carley (Sept. 14, 2015)).

[437] *See* Exhibit 115 (Ltr from Doug Aikins to Brad McCrea, Adrienne Klein, Erik Buehmann, and John Bowers, BCDC, *Amendment #5 to BCDC Permit 2-02 ("Permit")* (Dec. 22, 2014)); AR Doc. 62 (Ltr from Ellen Miramontes, Bay Design Analyst, BCDC to Mark Sanders (Jan. 29, 2015)); AR Doc. 64 (Ltr from Adrienne Klein, Chief of Enforcement, BCDC to Doug Aikins, Hopkins & Carley (Sept. 14, 2015)). For example, BCDC staff took nine months to respond to Respondents' comments on the fourth version of Amendment No. Five, as is plainly evident in AR Document 64.

32. *Allegation No. 19*

BCDC staff alleges: "Failure to provide information regarding the number and location of live-aboard boats[,] Special Condition II.P.1[,]" for the period of May 2011 to January 2017.[438]

BCDC staff's assertion that Respondents have failed to provide information regarding the location of live-aboard boats is unfounded. BCDC staff's unfamiliarity with modern marina operations and apparent loss of records has led staff to incorrectly assert violation of Special Conditions II.P.1 and II.P.5.

a) The VR/C makes demands not required by the Permit and shows a lack of understanding of how modern marinas work.

Special Condition II.P.1 does not require that the Permittee "provide information regarding the number and location of live-aboard boats[,]" as the VR/C suggests.[439] Rather, Special Condition II.P.1 requires that "[t]he location of live-aboard boats shall be approved by or on behalf of the Commission pursuant to Special Condition II-A." Older marinas often have one or no pump-out stations for vessels, and some are updated with permanent sewer hookups for so-called "dedicated live-aboard berths." In contrast, as Respondents have previously explained to BCDC staff at length, all Westpoint Harbor slips are "designated live-aboard berths"[440] and are fully equipped to handle sewage. Because Westpoint Harbor has sewer, potable and fire protection water, power, telephone and storage for every slip, all berths are live-aboard capable. BCDC staff and Respondents both acknowledged that the intent of the condition no longer matched the text as early as 2003, as evident in a September 2003 letter from Mark Sanders to Andrea Gaut, wherein Mr. Sanders recounts the agreement that Special Condition II.P would be removed in future Permit amendments.[441]

Contrary to the claim in the VR/C, no part of the Permit requires Respondents to provide a "current list of the total number of live-aboard tenants and the location for each of them within the marina."[442] Mr. Sanders' description of all Westpoint Harbor slips as "dedicated live-aboard berths" and his previous explanations of the Westpoint Harbor pump-out system provided the location of the live-aboard berths. There is simply no need for Respondents to provide the specific locations of each live-aboard boat for approval when all the berths are equipped to handle live-aboards. In fact, BCDC staff appear to have agreed with Respondents in 2012. In a December 2012 email, Mr. Sanders explained to Erik Buehmann that "during yesterday's discussion we agreed language requiring identification of liveaboard berths in Westpoint Harbor (page 17 item 1) should be removed since all slips have liveaboard facilities including pump-out (i.e. there are no 'dedicated liveaboard slips')."[443] In response, Mr. Buehmann stated "[t]hanks Mark, that clears things up a little."[444] This description of the Westpoint Harbor slips has been

[438] VR/C Exhibit D at 3.
[439] VR/C Section VI.¶H.1.
[440] AR Doc. 21 at 8 (Ltr from Mark Sanders to Tom Sinclair, Coastal Program Analyst, BCDC (May 26, 2011)).
[441] Exhibit 116 (Ltr from Mark Sanders to Andrea Gaut, BCDC, *BCDC Permit number 2-02* (Sept. 3, 2003)).
[442] VR/C Section VI.¶EE.7.
[443] Exhibit 117 at 1 (Ltr from Mark Sanders to Erik Buehmann, BCDC (Dec. 14, 2012)).
[444] *Id.* at 2.

apparent throughout the various amendments to the permit, has been understood by BCDC Staff, and constitutes Commission approval.

b) There are no local codes applicable to live-aboards, as already confirmed by Redwood City officials.

The VR/C is vague on this point, but BCDC staff appears to allege that Respondents violated Special Condition II.P.5.[445] This allegation is simply without any basis in fact. With respect to the requirement for a letter from the City of Redwood City regarding live-aboard boats and consistency with local codes, officials from Redwood City informed BCDC staff that "Redwood City does not maintain codes applying to this situation[,]" and a review of BCDC records confirms that staff file-stamped this letter received on October 12, 2011.[446] Thus, BCDC staff had evidence clearly resolving this issue as early as 2011.

c) Respondents obtained plan approval of amenities established to serve live-aboard occupants.

It is also unclear whether the VR/C alleges that Respondents failed to obtain plan approval from Commission staff for "the restrooms, showers, parking, and garbage disposal facilities to serve the authorized resident live-aboard occupants," or whether the VR/C is simply recounting the contents of the May 4, 2011 letter.[447] If this is an assertion that Respondents failed to obtain such plan approval, Respondents deny that assertion as well. The restrooms and showers that serve live-aboard occupants are those located in the Harbormaster's building. The Harbormaster building plans were delivered to BCDC staff in 2005,[448] and BCDC staff failed to provide review within 45 days, constituting deemed approval. In the alternative, the restrooms and showers were clearly a part of the "Architectural Plans prepared by b design studio/ solution that include fifteen sheets and are dated August 18, 2008" that Ms. Miramontes unconditionally approved in September 2011.[449]

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[445] *See* VR/C Section VI.M.¶8 and Section VI.¶T.2.
[446] Exhibit 118 (Ltr from Farris Hix, Building Inspector, Redwood City (Sept. 21, 2011)).
[447] VR/C Section VI.¶M.8.
[448] Exhibit 1 (Sanders Declaration).
[449] AR Doc. 26 at 2 (Ltr from Ellen Miramontes, Bay Design Analyst, BCDC to Mark Sanders (Sept. 8, 2011)).

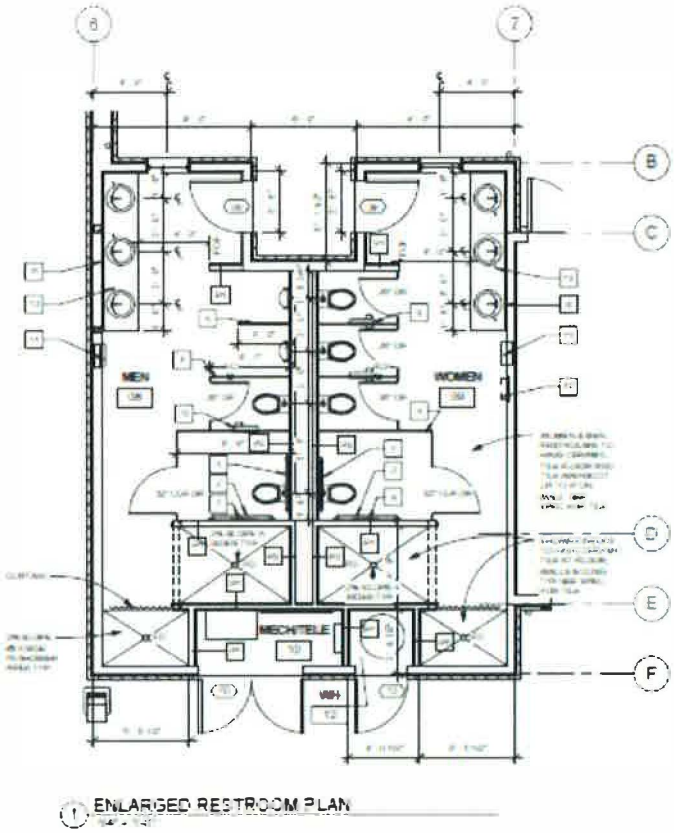

Figure 23 - Restroom Plan from Harbormaster Submittal, Approved by BCDC Staff[450]

The additional facilities, namely the parking and garbage disposal for live-aboard residents, were included in the revised Phase 1 Construction Drawings submitted to BCDC after receiving Ms. Miramontes's "conditional approval" in September 2011.[451] There is simply no merit to any allegation that Respondents did not obtain approval of these facilities.[452]

For these reasons, Respondents deny that they failed to provide information regarding the number and location of live-aboard boats. Accordingly, Respondents deny all assertions in the VR/C, including page 6, Section VI.M.¶8, Section VI.¶T.2 Section VI.¶EE.7, Section VI.¶HH.14, Section VI.¶VV., and the Summary of Violations and Proposed Administrative Civil Penalties to the extent these assertions suggest Respondents did not comply with Special Condition II.P.1 or II.P.5.

[450] Exhibit 119 at 8 (Harbormaster Office Architectural Plans).
[451] Exhibit 37 at 6 (Construction Drawings for Westpoint Marina and Boatyard Phase 1).
[452] Respondents submitted a letter captioned "Live Aboard Report 2016/2017," dated December 2, 2016, containing information regarding the location and number of live-aboards at the marina. VR/C Section VI.¶VV. Respondents submitted this letter in an attempt to accommodate BCDC staff, even though the letter report is not required by the Permit.

33. *Allegation No. 20*

BCDC staff alleges: "Failure to provide copy of berthing agreement re: compliance with requirements for marine toilets[,] Special Condition II.O.4[,]" for the period of May 4, 2011, to July 29, 2011.[453]

This alleged violation, like many others alleged by BCDC staff, is apparently based on staff's inability to keep, or accurately review, records. Respondents provided the berthing agreement timely and complied with Special Condition II.O.4, as explained here.

a) The berthing agreement was submitted in 2007, but BCDC staff decided not to read it.

The berthing agreement was published online a year before the first boats were allowed in the harbor in 2008.[454] Mr. Sanders also hand delivered the Westpoint Harbor Management and Operations Manual to Brad McCrea of BCDC in July 2007, which is confirmed by the transmittal letter in BCDC staff records stamped "received" on July 12, 2007.[455] This manual contained various forms used in the harbor, including the berthing agreement. As explained in Mr. Sanders' declaration, BCDC staff even remarked on specific portions of the submittal when it was delivered in 2007.[456] However, when Mr. Sanders discussed this matter with a different member of BCDC staff in 2012, this staff member admitted that he had never looked at the document.[457] Mr. Sanders provided the same package to Redwood City staff in 2007, as Redwood City staff made clear to BCDC staff in a 2012 email.[458]

In order to conclusively resolve this matter, in September 2011, Mr. Sanders provided a letter, and supporting documentation, to BCDC staff reminding staff that he had previously submitted the required berthing agreement.[459] This letter included a copy of the berthing agreement signed by one of Westpoint Harbor's first boaters in 2008.[460] Despite Mr. Sanders' explanation and the clear fact that this berthing agreement has been in use since at least 2008, BCDC staff decided to include this allegation in the present enforcement matter. Respondents have kept detailed records of interactions with BCDC staff and provided these records time and again after BCDC staff inevitably misplaced correspondence. Simply put, BCDC staff's inability to keep adequate records should not be a basis for the imposition of penalties.

For the reasons stated here, Respondents deny that they failed to provide a copy of the berthing agreement ensuring compliance with requirements for marine toilets in violation of Special Condition II.O.4. Accordingly, Respondents deny all assertions in the VR/C, including Section II.¶H, page 6, Section VI.¶M.7, Section VI.¶S.3, and the Summary of Violations and

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[453] VR/C Exhibit D at 4.
[454] *See* Exhibit 1 (Sanders Declaration).
[455] Exhibit 120 (Ltr from Mark Sanders to Brad McCrea, BCDC, *Best Management Practices* (July 9, 2007)).
[456] *See* Exhibit 1 (Sanders Declaration).
[457] *See* Exhibit 1 (Sanders Declaration).
[458] Exhibit 121 (Email from Charles Jany, Principal Planner, Redwood City to Tom Sinclair, BCDC (Feb. 9, 2012)).
[459] Exhibit 122 (Ltr from Mark Sanders to Tom Sinclair, BCDC, *Berthing Agreements and Liveaboards* (Sept. 22, 2011)).
[460] *Id.* at 7.

Proposed Administrative Civil Penalties to the extent these assertions suggest that Respondents did not comply with Special Condition II.O.4.

34. Allegation No. 21

BCDC staff alleges: "Failure to notify NOAA re: nautical charts[,] Special Condition II.AA[,]" for the period of May 4, 2011, to July 29, 2011.[461]

a) Special Condition II.AA has not yet been triggered.

Based on the plain language of the Permit, Special Condition II.AA has not yet been triggered. Special Condition II.AA requires verification that the permittee has submitted certain information to the National Oceanic and Atmospheric Administration ("NOAA") "[w]ithin 30 days **of the completion of the project authorized by this permit**."[462] Without question, "the project authorized by this permit" is not yet complete. Respondents continue to work on portions of the project and enter into new amendments to the Permit with BCDC staff. BCDC staff's allegation that Respondents are noncompliant with a Special Condition that has not yet been triggered demonstrates BCDC staff's misunderstanding of both the Westpoint Harbor project and the Permit that governs it.

b) Respondents complied with Special Condition II.AA in 2009.

Even if the action required by Special Condition II.AA were required at this point, there is no violation because Respondents fully satisfied Special Condition II.AA in 2009. Respondents worked with the U.S. Coast Guard and NOAA from 2007 to 2009 and submitted all required information to NOAA by February 7, 2009.[463] NOAA staff informed Mr. Sanders that NOAA would submit the required notification to BCDC, consistent with NOAA's common practice.[464] As a former naval officer, Sanders was very familiar with this process and the requirements for authorization, installation and reporting of navigational aids.[465] In emails between Mr. Sanders and Kate Fensterstock of NOAA in January and February of 2009, Ms. Fensterstock stated, "I wanted to let you know that I have received confirmation that chart 18651 will be charted this year, most likely this summer."[466] And, in fact, NOAA published its Local Notice to Mariners in May of 2009.[467] Mr. Sanders continued to work cooperatively with NOAA and the U.S. Coast Guard to update navigation charts, and was informed by Ms. Fensterstock that these updates would be posted as a chart correction.[468]

Tom Sinclair of BCDC admitted in AR Document 25 that "[o]n July 29, 2011, [Respondents] submitted copies of email correspondences between NOAA staff, Coast Guard staff, and [Respondents] regarding updated chart corrections for Westpoint Slough and the harbor. Following our meeting on July 29, 2011, I confirmed the corrections to the NOAA

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[461] VR/C Exhibit D at 4.
[462] (Emphasis added).
[463] AR Doc. 13 (Ltr from Mark Sanders to Kate Fensterstock, NOAA (Feb. 7, 2009)).
[464] Exhibit 1 (Sanders Declaration).
[465] *Id.*
[466] Exhibit 123 at 1 (Email from Kate Fensterstock, NOAA to Mark Sanders (Feb. 5, 2009)).
[467] Exhibit 124 (Local Notice to Mariners (May 13, 2009)).
[468] Exhibit 125 at 1 (Email from Kate Fensterstock, NOAA to Mark Sanders (Sept. 10, 2009)).

nautical charts." BCDC staff receives these NOAA nautical chart updates just like many other interested parties do. In fact, the AR shows that BCDC staff has ready access to these updates on an ongoing basis, as Mr. Sinclair was able to quickly confirm that Respondents had coordinated with NOAA when he actually took the time to look. BCDC staff could have easily confirmed those corrections years earlier, through review of the publicly posted Local Notice to Mariners.

Thus, even if Special Condition II.AA. had already been triggered, there would be no violation because Respondents fully satisfied Special Condition II.AA. in 2009. In other words, (1) no action under Special Condition II.AA. is even required as of now, and (2) the actions that will be required sometime in the future were completed in 2009.

For the reasons stated here, Respondents deny that they "fail[ed] to notify NOAA re: nautical charts" and that they failed to provide verification to BCDC staff that specific information had been submitted to NOAA as required by Special Condition II.AA. Accordingly, Respondents deny all assertions in the VR/C, including Section II.¶H, page 6, Section VI.M.¶10, Section VI.¶S.4, Section and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest Respondents did not comply with Special Condition II.AA.

35. Allegation No. 22

BCDC staff alleges: "Failure to maintain public access improvements[,] Special Condition II.B.5[,]" for the period of May 2011 to July 2017.[469]

a) BCDC staff has provided insufficient evidence to demonstrate that Respondents did not maintain improvements.

BCDC staff's allegation centers solely on supposed issues with the landscaping around Westpoint Harbor. Specifically, BCDC staff returns to its May 4, 2011 letter to suggest that "some of the existing landscaping along public pathway was in poor condition or dead, and portions of the sprinkler system were dysfunctional, missing the landscaped areas and instead saturating the public access perimeter path along southern section of marina."[470] However, at the time BCDC staff visited the site in 2011, landscaping had begun the year before, and as one would expect, the plants were initially stressed as they acclimatized to the new environment.[471] Eggli Landscaping, hired by Respondents, surveyed the site after this allegation and confirmed that the sprinklers were operating as expected and the plants and trees were thriving.[472] BCDC staff appeared to understand this point, as Mr. Sinclair's September 1, 2011 letter stated "[y]ou have indicated that the distressed appearance of the plants was likely due to shock caused by high salinity in the soil, and that the plants have since recovered well. We are pleased to hear that the vegetation has recovered . . . ."[473] Moreover, the plant types that appeared to be in poor condition were a native variety which normally turns brown in summer, even when perfectly

[469] VR/C Exhibit D at 4.
[470] VR/C Section VI.¶M.4.
[471] AR Doc. 21 at 6 (Ltr from Mark Sanders to Tom Sinclair, Coastal Program Analyst, BCDC (May 26, 2011)).
[472] *Id.*
[473] AR Doc. 25 (Ltr from Tom Sinclair, Coastal Program Analyst, BCDC to Mark Sanders (Sept. 1, 2011)).

healthy. Additionally, sprinklers can wet the path when there are strong winds that blow the water toward the path.[474]

This single allegation from 2011 is BCDC staff's only evidence that Respondents failed to maintain public access improvements. Staff has not documented any other issues in follow-up investigations and has provided no other evidence to suggest that Respondents were noncompliant through July 2017.

b) BCDC staff previously voluntarily withdrew this allegation.

BCDC staff's decision to include this allegation in the VR/C makes little sense in the face of past statements made by staff. BCDC staff has listed this violation as occurring from May 2011 to July 2017, but letters from BCDC staff to Respondents, included in the AR, explicitly state that BCDC staff withdrew this allegation years ago. Specifically, Document 60 of the AR states:

> While ten violations of Permit No. 2002.002.03 were cited in our letter dated May 4, 2011, in the subsequent letter dated September 1, 2011, staff voluntarily withdrew from the initial letter the following two violations: 1. The maintenance issues (Special Condition II-B-5) . . . .

BCDC has no reasonable basis to make this allegation again, let alone to allege that the violation occurred for years after BCDC staff withdrew the allegation.

For this reason, Respondents deny that they failed to maintain public access improvements. Accordingly, Respondents deny all assertions in the VR/C, including Section VI.¶M.4, Section VI.¶S.2, and the Summary of Violations and Proposed Administrative Civil Penalties, to the extent these assertions suggest that Respondents did not comply with Special Condition II.B.5.

D. BCDC is barred from imposing penalties or issuing an enforcement order concerning certain alleged violations.

1. The doctrine of laches prevents BCDC from finding liability.

As explained above, Respondents generally complied with the Permit. However, even assuming for the purposes of argument that the alleged violations are supported by substantial evidence, BCDC is barred from finding liability for Allegation Nos. 17, 20, and 21. Additionally, BCDC is barred from assessing penalties for all non-compliance allegedly occurring more than three years prior to the date on which the VR/C was mailed. Thus, penalties for any alleged non-compliance occurring before July 24, 2014, are prohibited.

On the face of the VR/C, Allegation Nos. 17, 20, and 21, and penalties sought for alleged non-compliance occurring before July 24, 2014, are barred by laches, under the rule that a delay "for more than three years is unreasonable as a matter of law" unless BCDC staff "'prove that

[474] Exhibit 1 (Sanders Declaration).

[their] delay was excusable and that [Respondents are] not prejudiced thereby.'"[475] "'In order to excuse delay, [BCDC staff] must show exceptional circumstances prevented earlier action.'"[476] BCDC staff have not met their burden to prove an excuse for their substantial delay in filing a violation report or complaint.

The rule that requires BCDC staff to prove an excuse for their delay shares its policy basis with statutes of limitations that apply in ordinary civil actions. The law recognizes that unreasonable delay creates practical problems for respondents seeking to defend themselves because, among other things, evidence may go stale, witnesses may move or pass away, records may be destroyed or lost, and memories may fade.[477] At its core, it is simply unfair to allow BCDC staff to sit on allegations of violation for so many years (the most striking example is Allegation No. 10, which BCDC staff alleges goes back "more than 13 years" to "2004").[478]

Under California law, "[i]n cases in which no statute of limitations directly applies but there is a statute of limitations governing an analogous action at law, the period [of the statute of limitations] may be borrowed as a measure of the outer limit of reasonable delay in determining laches."[479] In this administrative enforcement proceeding, the three-year statute of limitations period of Section 338(a) of the California Code of Civil Procedure governs an action at law that is analogous to the claims BCDC staff have asserted against Respondents.[480] BCDC staff seeks penalties for Allegation Nos. 17, 20, and 21, asserting that Respondents were in non-compliance: from August 16, 2010, to June 15, 2011 (Allegation No. 17); from May 4, 2011, to July 29, 2011 (Allegation No. 20), and again May 4, 2011, to July 29, 2011 (Allegation No. 21). Alleged violations that were completed prior to July 24, 2014 (three years before the VR/C was mailed) are barred by laches. In addition, BCDC staff seeks penalties for other alleged violations for periods of time preceding July 24, 2014.[481] Penalties for such time are barred by laches.

Even if the burden were not on BCDC staff to show that "exceptional circumstances prevented earlier action[,]"[482] Respondents may not be held liable for alleged acts or omissions occurring three years or more before mailing of the VR/C because there has been both unreasonable delay on the part of BCDC staff and prejudice and manifest injustice to Respondents resulting from the delay. The six-year delay in bringing Allegation Nos. 17, 20, and 21 is unreasonable and results in substantial prejudice to Respondents. Likewise, BCDC

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[475] *See Brown v. State Pers. Bd.*, 166 Cal. App. 3d 1151, 1160-61, 213 Cal. Rptr. 53, 59 (Ct. App. 1985) (quoting *Curbelo v. Matson Nav. Co.*, 194 Cal. App. 2d 305, 14 Cal. Rptr. 913 (Ct. App. 1961)).

[476] *Id.* (quoting *Ponce v. Graceous Navigation, Inc.*, 126 Cal. App. 3d 823, 179 Cal. Rptr. 164 (Ct. App. 1981)).

[477] "Traditionally, the passage of time dims memories; Defendant's inability to examine witnesses closer in time to the [relevant events] may be deemed prejudicial in the absence of a contrary showing." *Ponce* at 830; *see also Rouse v. Underwood*, 242 Cal. App. 2d 316, 330 (1966) (finding laches an appropriate defense where there was a loss or destruction of evidence due to the delay).

[478] VR/C Exhibit D at 2.

[479] *Brown* at 1159-60. *See also Ponce* at 830 (finding that "it is well settled that prejudice to the defendant is presumed from delay beyond the analogous limitations period").

[480] *See California Coastal Comm'n v. Alves*, 176 Cal. App. 3d 952, 222 Cal. Rptr. 572, 582-83 (Ct. App. 1986) (not published).

[481] According to the VR/C: Allegation No. 10 began more than 13 years before the VR/C was filed; Allegation Nos. 1B, 1C, 1D, 2B, 3B, 4B, 5A, 5B, and 6B began more than 8.75 years before the VR/C was filed; Allegation Nos. 1A, 2A, 3A, 4A, 6A, 7A, 7B, 7C, 8, 15, 17, 19, 20, 21, and 22 began more than 6 years before the VR/C was filed; and Allegation No. 2C began more than 4.5 years ago. VR/C Exhibit D.

[482] *Brown v. State Pers. Bd.*, 166 Cal. App. 3d 1151, 1160-61, 213 Cal. Rptr. 53, 59 (Ct. App. 1985)

staff have no excuse for delaying enforcement proceedings for all the other alleged violations that seek penalties going back more than three years. For all of but two of those allegations, BCDC staff assert that they had knowledge of the alleged facts underlying the claimed violations more than six years before the VR/C was mailed.[483] BCDC staff asserts they had knowledge of the conduct underlying Allegation No. 2C more than four and one-half years before the VR/C was mailed. And, while BCDC staff claim that the alleged omission underlying Allegation No. 10 was only recently brought to their attention,[484] BCDC staff assert that the violation goes back *more than 13 years*. These time periods show unreasonable delay, and Respondents are aware of no appropriate excuse for BCDC staff's long delay in failing to file a violation report or complaint.

2. The doctrine of estoppel prevents BCDC from finding liability for all of the alleged violations for the period of time from June 2012 to September 2015.

While Respondents were working with BCDC staff to try to reach agreement regarding improvements to the Permit (the Amendment No. Five discussions), BCDC staff expressly informed Respondents that BCDC staff would not seek to enforce alleged Permit or statutory violations for the period of time that Respondents and BCDC staff were working on the Amendment No. Five discussions. This is evidenced by BCDC staff's own notes from a meeting that took place June 7, 2012. Those notes state, "We said we are holding enforcement in abeyance to achieve an approvable amendment request."[485] Respondents relied upon BCDC staff's representation that enforcement was being held in abeyance, and continued working to try to "achieve an approvable amendment request."[486]

Ultimately, BCDC staff refused to draft a Permit amendment that actually made sense and would allow Respondents to comply with all legal requirements applied to them by all relevant regulatory authorities, such as Redwood City. The end of the Amendment No. Five discussions occurred shortly after September 14, 2015, when BCDC staff sent the fifth version of Amendment No. Five and it became clear to Respondents that BCDC staff would not prepare an acceptable amendment to the Permit.[487] During the more than three years of Amendment No. Five discussions, Respondents worked diligently to achieve an acceptable Permit amendment, as can be seen, for example, from BCDC staff's handwritten notes on Respondent's submittals that explained the reasons Permit changes would be appropriate.[488] BCDC staff, on the other hand, took an unreasonably long time to turn drafts and to respond to Respondent's legitimate comments and concerns. This can be seen, for example, by the fact that version five of

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[483] Allegation Nos. 1B, 1C, 1D, 2B, 3B, 4B, 5A, 5B, 6B, 1A, 2A, 3A, 4A, 6A, 7A, 7B, 7C, 8, 15, 17, 19, and 22.
[484] *See* VR/C ¶ AAA.
[485] AR Doc. 37 at 1 (Memorandum from Adrienne Klein, Chief of Enforcement, BCDC (June 7, 2012)).
[486] Exhibit 1 (Sanders Declaration).
[487] *See* AR Doc. 64 (Ltr from Adrienne Klein, Chief of Enforcement, BCDC, to Doug Aikins, Hopkins & Carley, (September 14, 2015)).
[488] Exhibit 126 (Email from Erik Buehmann, BCDC to Brad McCrea, John Bowers, Adrienne Klein, and Ellen Miramontes, BCDC (May 20, 2013)).

Amendment No. Five was sent in September 2015, approximately *nine months* after Respondents had submitted a December 2014 letter pointing out errors in version four.[489]

Under these circumstances, BCDC is estopped from finding liability for alleged violations for the period of time from June 2012 to September 2015. This is true even though enforcement of the McAteer-Petris Act is important for public policy purposes. The injustice to Respondents, who relied on BCDC staff's representation that enforcement was being held in abeyance, outweighs any effect upon the public interest or policy that would result from estopping BCDC here.

E. The VR/C and this enforcement proceeding violate Respondents' due process rights.

The California Supreme Court has confirmed that the requirements of due process extend to administrative adjudications.[490] As stated by the Court, "when an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal."[491] It is also established law that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[492] Yet BCDC staff's actions here have made it impossible for Respondents to have a meaningful opportunity to be heard.

1. BCDC staff has failed to comply with its own regulations and CPRA demands requiring that public records be disclosed.

BCDC regulations are very clear concerning the documentation that must be provided in association with a VR/C. Section 11321(b) states: "The violation report shall refer to ***all documents*** on which the staff relies to provide a prima facie case and give notice that the documents may be inspected at the Commission's office and that copies will be provided with five days prior notice and upon payment of the cost of copying."[493] BCDC staff has not even come close to complying with this mandate. The VR/C contains references to documents that have not been provided with the VR/C, such as the March 24, 2017 letter from Brian Gaffney referenced in Section VI.¶AAA. The AR prepared by BCDC staff included with the VR/C also contains clear errors, with some documents mislabeled and others missing pages.[494]

In addition, despite alleging violations spanning more than a decade, BCDC staff's AR contains a mere 94 documents, approximately 30 of which were created during the last two

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[489] *See* AR Doc. 64 at 1 (Ltr from Adrienne Klein, Chief of Enforcement, BCDC to Doug Aikins, Hopkins & Carley (Sept. 14, 2015)).

[490] *Today's Fresh Start, Inc. v. Los Angeles Cty. Office of Educ.*, 57 Cal. 4th 197, 214 (2013).

[491] *Morongo Band of Mission Indians v. State Water Res. Control Bd.*, 45 Cal. 4th 731, 737 (2009).

[492] *People v. Litmon* 162 Cal.App.4th 383, 395 (2008).

[493] Cal. Code Regs. tit. 14, § 11321(b) (emphasis added).

[494] For example, the AR states the "Document Description" for AR Doc. 19 as "Email and attachment from Charles Jany to Tom Sinclair, SUBJECT: Re: Westpoint Marina Letter to Mark Sanders." However, AR Doc. 19 is actually a May 12, 2011 email from Mark Sanders to Tom Sinclair. As another example, AR Doc. 60 was missing its second page, which contained crucial information regarding which violations BCDC staff had withdrawn. The email from Charles Jany to Tom Sinclair and the missing page of Doc. 60 were only provided after Respondents sent a CPRA demand letter requesting that the AR be corrected.

years. These 94 documents conveniently leave out a number of critical documents, which Respondents only managed to pry from BCDC staff through the use of a CPRA request. As evident throughout this Statement, the documents obtained via the CPRA request include key documents that undoubtedly bear on the legitimacy of BCDC staff's allegations. BCDC staff's first response to Respondents' August 7, 2017 CPRA request in part resulted in disclosure of more than 500 pages of emails relevant to Westpoint Harbor. From these pages, Respondents identified multiple documents that clearly form the basis of BCDC staff's prima facie case, yet were not provided in the AR. For example, the disclosure contains an email chain between the Citizens Committee to Complete the Refuge and BCDC's chief counsel, Marc Zeppetello, in which Mr. Zeppetello asks Citizens Committee to Complete the Refuge to explain a sentence in the Negative Declaration addendum that "appears to relieve Mr. Sanders of the obligation to provide roost site mitigation."[495] Citizens Committee to Complete the Refuge responded with a detailed email outlining their (erroneous) analysis and attaching additional background documents. Without a doubt, this email and its attachments are documents on which staff rely to provide a prima facie case. And yet, this email was only provided to Respondents as a result of their CPRA request.

Similarly, a review of Adrienne Klein and Andrea Gaut's "staff folders," offered to Respondents only after considerable discussion with BCDC staff,[496] revealed an internal Excel tracking spreadsheet for plan submittals created by Adrienne Klein,[497] as well as the Phase 1 Construction Drawings updated September 13, 2011 that BCDC staff neglected to review.[498] These are critical documents that underlie a number of BCDC's plan approval allegations, but they were not included in the AR. While courts have found that the use of a CPRA request as a discovery tool is appropriate,[499] Respondents should not have to resort to a CPRA action to force BCDC staff to comply with its own regulations.

2. BCDC staff has not provided sufficient time to review and respond to the voluminous VR/C.

In order to prepare this Statement and adequately defend themselves, Respondents must review and respond to a tremendous volume of factual allegations in the VR/C without sufficient time to respond. The text of the VR/C is 41 single-spaced pages in length and contains hundreds of alleged statements of fact. While the AR is clearly missing key documents, as discussed above, even the AR as presented covers more than 865 pages between 94 documents. In order to

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[495] Exhibit 127 (Email from Gail Raabe, Citizens Committee to Complete the Refuge to Marc Zeppetello, Chief Counsel, BCDC (June 23, 2017)).

[496] Respondents were not initially made aware that there were electronic "staff folders" containing files responsive to the CPRA request. The existence of such staff folders was only discovered because Respondents noticed during review of other documents that staff folders were referenced. When questioned about a staff folder, Mr. Zeppetello responded that he had "not been aware" that a referenced file was in the "staff folder," and only then conducted review of that "staff folder." As discussed above, these "staff folders" contained critically relevant documents. Even when relevant information was provided, it was done so in a piecemeal fashion, without sufficient time to review.

[497] Exhibit 128 (spreadsheet of Westpoint Harbor plans from Adrienne Klein's staff folder).

[498] *See* Exhibit 37.

[499] *Cty. of Los Angeles v. Superior Court (Axelrad)*, 82 Cal. App. 4th 819, 826 (2000) ("We conclude that a plaintiff who has filed suit against a public agency may, either directly or indirectly through a representative, file a CPRA request for the purpose of obtaining documents for use in the plaintiff's civil action.").

provide enough time to prepare this Statement and adequately respond to all of the numerous allegations, on August 17, 2017, Respondents requested an extension of 179 days for the time to respond.[500] In response, the BCDC staff acknowledged the "detailed factual allegations in the Violation Report/Complaint," as well as the allegations of a "large number of violations, of many different conditions and requirements of the BCDC permit for Westpoint Harbor[,]" but provided just a 28-day extension.[501] On September 15, 2017, Respondents again requested an extension of time, for all the reasons previously described in their August 17 request and two August 18 emails on this topic, as well as BCDC's incomplete response to Respondents' request for public records under the CPRA, and other good cause.[502] Respondents requested that the deadline to file the Statement be extended to 60 days from the date that BCDC fully complies with Respondents' CPRA request. The Executive Director responded, providing only an additional 25 day extension "because BCDC staff has not yet fully responded to [Respondents'] Public Records Act request."[503] Respondents have been provided with less than three months to respond to a VR/C that spans more than a decade, and which BCDC staff worked to prepare for more than 7 months.[504]

3. BCDC staff is gathering additional documentation not included in the VR/C, without providing an opportunity for Respondents to respond.

The documents disclosed by BCDC staff in response to Respondents' CPRA request reveal that BCDC staff is seeking out and gathering additional information related to the Permit and this enforcement proceeding, as recently as September 2017.[505] BCDC staff disclosed emails, which show that, since the VR/C was issued, staff has reached out to USFWS and USACE representatives in an attempt to gather additional information to use against Respondents. It appears that BCDC staff intends to use this information to bolster the allegations in the VR/C. However, BCDC staff did not provide this information to Respondents along with the VR/C. Respondents also assume that BCDC staff will continue to seek information like this, not previously provided to Respondents with the VR/C. Because BCDC regulations effectively limit Respondents' right to present evidence to this Statement, staff cannot now introduce new evidence that Respondents do not have an opportunity to respond to. The proper procedure is for staff to withdraw the VR/C and begin the process again. Otherwise, BCDC staff's introduction of new evidence constitutes a violation of Respondents' due process rights.

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[500] Exhibit 129 at 3-4 (Email from Chris Carr, Baker Botts LLP to Marc Zeppetello, Chief Counsel, BCDC, *Request for Extension of Time to File Statement of Defense in BCDC Enforcement File No. 2010.013 re Mark Sanders and Westpoint Harbor* (Aug. 17, 2017)).

[501] Exhibit 130 (Email from Marc Zeppetello, Chief Counsel, BCDC to Chris Carr, Baker Botts LLP, *Re: Request for Extension* (Aug. 18, 2017)).

[502] Exhibit 131 at 2-5 (Email from Marc Zeppetello, Chief Counsel, BCDC to Chris Carr, Baker Botts LLP, *Request for Extension of Time to File Statement of Defense in BCDC Enforcement File No. 2010.013 re Mark Sanders and Westpoint Harbor* (Sept. 18, 2017)).

[503] *Id.* at 1

[504] As BCDC staff noted in footnote 1 of AR Doc. 73: "As BCDC's Chief Counsel, Marc Zeppetello, mentioned during the December 8, 2016 site visit, staff is in the process of preparing a Violation Report/Complaint for the Imposition of Administrative Civil Penalties related to the violations, including failure to timely provide required public access, first identified by staff in an enforcement letter dated May 4, 2011."

[505] Exhibit 132 (Email from Kim Squires, Section 7 Division Chief, US Fish and Wildlife Service to Marc Zeppetello (Sept. 7, 2017)).

4. *The VR/C is so confusing and inconsistent that it is impossible for Respondents to respond to all allegations.*

The Statement of Defense form provided by BCDC requests that Respondents "respond to the alleged facts contained in the violation report, to raise any affirmative defenses that you believe apply, to request any cross-examination that you believe necessary, and to inform the staff of all facts that you believe may exonerate you of any legal responsibility for the possible violation or may mitigate your responsibility."[506] It also requests "specific reference to the paragraph number in the violation report."[507] However, the VR/C is organized in such a way that BCDC staff have made it impossible for Respondents to determine what is being alleged as a violation, or even to directly cite to specific allegations that they deny. The VR/C fills page upon page recounting prior letters sent to Respondents and the content of meetings held between Respondents and BCDC. For example, Section VI. ¶¶ M, N, S, and T, among others, simply summarize letters sent to Respondents in 2011. It is unclear whether staff is alleging each of these recaps as a violation, or is merely providing context for the enforcement proceeding. In addition, Section II of the VR/C includes multiple allegations, but includes numerous unlabeled paragraphs. This section also labels paragraphs A through H on pages 2 and 3, then suddenly begins with A again on page 5. These inconsistencies are not limited to Section II. The last paragraph of Section VI is ¶SSS, which BCDC staff has confusingly placed after ¶UUU, and is repetitive of a previous ¶SSS. Respondents cannot be expected to respond to every allegation in the VR/C when BCDC staff cannot correctly label allegations. The lack of clarity concerning what constitutes an allegation and how those allegations are labeled makes it impossible for Respondents to make themselves heard in a meaningful manner, and therefore violates their due process rights.

F. Multiple allegations in the VR/C are not supported by admissible evidence.

The claims in the VR/C are replete with unsupported hearsay statements from third parties, many of whom are not even identified. The law governing this proceeding prohibits use of hearsay evidence "in itself to support a finding[,]" unless (1) the hearsay would be admissible over objection in a civil action or (2) the hearsay is in the form of a declaration under penalty of perjury and the declarant is subject to cross-examination.[508] This rule protect Respondents from being held liable solely based on the written or oral statements of persons who are have not submitted a declaration under oath and who are not available at the hearing to be subject to cross examination.

BCDC staff have relied on inadmissible hearsay to support a number of their allegations and proposed findings of fact.[509] BCDC staff cite to statements or documents from persons who have provided no declarations under penalty of perjury to back up their claims, and BCDC cites to a number of statements from persons whose identity is completely unknown.

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[506] Statement of Defense Form at 1.
[507] Statement of Defense Form at 2.
[508] Cal. Code Regs. tit. 14, § 11329(b).
[509] Hearsay that is "admissible over objection in a civil action" may be used "in itself to support a finding" of fact. 14 Cal. Code Regs. § 11329(b). However, *inadmissible* hearsay (hearsay that does not fit with any of the hearsay exceptions that a California court would apply in a civil trial) cannot be used "in itself to support a finding" unless such inadmissible hearsay meets one of the two categories described above.

The following specified proposed findings of fact ("FFs") in the VR/C may not be adopted by the Commission because (1) doing so would violate the hearsay prohibition described above or (2) there is no evidence for the finding offered by BCDC staff.

Objections to Evidence Cited in Support of Specific Proposed Findings:

FF L: BCDC staff seeks to prove that Sanders approached a member of the public in December 2009 and informed him that Westpoint Harbor is private and there is no access to the water from the marina. This characterization is misleading. It is true that, in December 2009, the public boat launch was not then completed (thus, it could not then be used to launch motor boats, etc. into the water) and the rowers dock was not then installed (thus, it could not then be used to launch kayaks, etc. into the water). However, BCDC staff's evidence for the assertion that "Sanders had approached [a member of the public] in the marina parking lot and informed him that Westpoint Harbor is private and there is no access to the water from the marina" appears to rely solely on the hearsay statement contained in an email from "Ron" at "ron_powers@comcast.net."[510] BCDC staff has not provided a declaration from "Ron," and this person will not be available for cross-examination at the hearing. Furthermore, "Ron's" purported email is actually hearsay within hearsay because it is just the first email in a chain of emails, and multiple of the later emails do not fit within any exception to the hearsay prohibition. An exception to the hearsay prohibition is required for each email in an email chain. BCDC staff relies on this hearsay to support Allegation No. 6B.

FF U: Portions of this proposed finding of fact are wholly unsupported by evidence or rely solely on hearsay. Such portions include alleged facts concerning the BCDC BDA's purported phone conversation with Mr. Sanders and alleged facts concerning emails that have not been provided in the AR. BCDC staff appears to rely on this hearsay for Allegation No. 2C, but BCDC staff's broad, and unsupported, assertion that "Sanders indicated he understood the need for plan review and approval" could also relate to each of the plan approval allegations (Allegation Nos. 1A, 2A, 3A, 4A, 6A, 13A).

FF V: This proposed finding of fact relies solely on hearsay from an unidentified "member of the public." It appears that BCDC staff relies on this hearsay to support Allegation No. 1B.

FF X: BCDC staff cite to nothing to support this proposed finding of fact, and Respondents have identified nothing in BCDC staff's AR to support it. It appears that BCDC staff relies on this finding of fact to support Allegation No. 1B.

FF Y: This proposed finding is supported solely by hearsay (and hearsay within hearsay) from "Laurence Frank" and "Matt Leddy," neither of whom have

[510] AR Doc. 14 (Email from Adrienne Klein, BCDC to Tom Sinclair, BCDC (July 12, 2010)).

submitted declarations or will be available for cross-examination at the hearing. BCDC staff relies on this hearsay to support Allegation No. 6B.

FF WW: This proposed finding of fact relies on hearsay in the form of purported statements by "Aaron Aknin" and "Veronica Ramirez." There is no declaration from either of those two people and neither will be available for cross-examination at the hearing. BCDC staff relies on this hearsay to support Allegation No. 1B.

FF YY: This proposed finding of fact is solely a recitation of hearsay. Here, the VR/C describes the contents of a letter from "Mr. Gaffney." There is no declaration from Mr. Gaffney and Mr. Gaffney will not be available for cross-examination at the hearing. Mr. Gaffney's hearsay letter also contains hearsay within it,[511] referencing purported statements and attaching a letter "from CCCR member Matt Leddy." BCDC staff relies on this hearsay to support Allegation Nos. 7A, 7B, and 7C.

FF ZZ: This proposed finding of fact is solely a recitation of hearsay. Here, the VR/C describes the contents of a letter from "Mr. Leddy." There is no declaration from Mr. Leddy, and Mr. Leddy will not be available for cross-examination at the hearing. BCDC staff relies on this hearsay to support Allegation Nos. 7A, 7B, and 7C.

FF AAA: This proposed finding of fact is solely a recitation of hearsay. Here, the VR/C describes the contents of a letter from "Mr. Gaffney." There is no declaration from Mr. Gaffney, and Mr. Gaffney will not be available for cross examination at the hearing. The referenced letter, purportedly dated March 24, 2017, is not even contained with the AR provided by BCDC staff. BCDC staff relies on this hearsay to support Allegation Nos. 9 and 10.

FF KKK: This proposed finding of fact is solely a recitation of hearsay within hearsay. Here, the VR/C describes the contents of a letter from "Mr. Gaffney." It is possible, but the VR/C does not actually say, that the letter referred to is the letter produced as AR Document 84. That letter references purported observations at the site by "Citizens." That letter also repeats other hearsay. Out-of-hearing statements by unidentified individuals are the epitome of hearsay. Neither Mr. Gaffney or these "Citizens" will be available for cross-examination at the hearing. BCDC staff relies on this hearsay to support Allegation Nos. 1B, 2B, 8, 9, and 10.

FF LLL: This proposed finding of fact is solely a recitation of hearsay within hearsay. Here, the VR/C describes the contents of a letter from "Mr. Gaffney." It is possible, but the VR/C does not actually say, that the letter referred to is the letter produced as AR Document 85. That letter references "further site visits by Citizens' members" as the source of its alleged facts.[512] As a more specific

[511] *See* AR Doc. 76 (Ltr from Brian Gaffney to Larry Goldzband, Executive Director, BCDC (Mar. 10, 2017)).
[512] AR Doc. 85 at 1 (Ltr from Brian Gaffney to Larry Goldzband, Executive Director, BCDC (May 24, 2017)).

example, the VR/C proposed finding of fact states "Mr. Gaffney's letter noted that . . . 101 Surf Sports allows people to bring dogs on rented paddleboards."[513] AR Document 85 states that "a Citizens' telephone inquiry to the 101 Sports Surf at Westpoint Marina" confirmed that dogs may be brought on rented paddleboards. This is the epitome of hearsay evidence—Respondents are confronted with out-of-hearing statements by unidentified "Citizens' members[.]" Neither Mr. Gaffney or these "Citizens" will be available for cross-examination at the hearing. BCDC staff relies on this hearsay to support Allegation Nos. 7A, 7B, and 7C. Note that the whole AR Document 85 is of dubious value. It purports to provide photographic evidence of the lack of signs posted on Greco Island for the protection of wildlife. Not only are the few photos that are attached to the letter inadmissible hearsay, but also several supposed photos referenced by the letter are not in fact attached.[514]

FF NNN: The VR/C refers to no evidence to support this proposed finding of fact. BCDC relies on this finding of fact to support Allegation No. 1B.

FF OOO: BCDC staff seeks to prove that BCDC attorney, Marc Zeppetello, "informed" Respondents' attorney, David Smith, of certain information "in a phone conversation." However, there is no declaration from Mr. Zeppetello and his statement is hearsay. The VR/C refers to no documentary evidence supporting the alleged statements in this proposed finding. The alleged content of Mr. Zeppetello's phone conversation with Mr. Smith, and the truth of the statements that Mr. Zeppetello purportedly made, have not been proved by any permissible evidence. BCDC staff relies on this hearsay to support Allegation Nos. 4A, 7A, and 7C.

FF UUU: BCDC staff seeks to prove that BCDC attorney, Marc Zeppetello, "responded in a phone conversation" with Respondents' attorney, David Smith, that certain information Mr. Smith provided to BCDC staff regarding Respondents' compliance with certain mitigation requirements of the Permit did not demonstrate compliance with the Permit requirements. However, there is no declaration from Mr. Zeppetello. The VR/C refers to no documentary evidence supporting the alleged statements in this proposed finding. The alleged content of Mr. Zeppetello's phone conversation with Mr. Smith, and the truth of the statements that Mr. Zeppetello purportedly made, have not been proved by any permissible evidence. BCDC staff relies on this hearsay to support Allegation Nos. 9 and 10.

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[513] Note that this is a red herring on the part of VR/C. The Permit has no prohibition against pets on watercraft.

[514] AR Doc. 85 at Enclosure (Ltr from Brian Gaffney to Larry Goldzband, Executive Director, BCDC (May 24, 2017)).

FF SSS:[515]This proposed finding states that "[o]n July 11, BCDC staff conducted a Site visit and confirmed" certain alleged factual conditions at Westpoint Harbor. However, the only documentary evidence of this alleged site visit are certain photos provided as AR Document 94. BCDC staff has not identified who took the photos, the locations at which the photos were taken, or whether the photos actually represent what they purport to show. But, even more important, the photos do not provide evidence of the statements in proposed finding of fact SSS. For example, the proposed finding states that "each of the three gangways to these [guest] docks is blocked by a locked gate containing a sign stating 'Members and Guests Only; Westpoint Harbor Club.'" However, there is only one photo of such a gate in AR Document 94, and it is impossible to tell from that one photo whether that one gate is locked, let alone whether "each of three" gates are locked. In fact, as discussed above, the gates to the guest docks are not locked.[516] Another example of a wholly unsupported statement in proposed finding SSS is, "Sanders has in fact only opened the unauthorized gate [between the Pacific Shores Center public trail and the Westpoint Harbor public trail]; the gate remains attached to the associated unauthorized fence and, therefore, may be closed again at any time." BCDC staff has provided no admissible evidence for this statement in proposed finding SSS. BCDC staff relies on this hearsay to support Allegation Nos. 1B, 7A, and 14.

G. Even if the allegations were true, the proposed penalties are not commensurate with the alleged harm.

None of the thirty-five distinct alleged violations asserted by BCDC staff resulted in any harm to the public or the environment. A number of the allegations are purely paperwork issues, including six alleged failures to obtain plan approval, and supposed failures to submit berthing agreements, live aboard locations, and proof of consultation with NOAA. Other allegations are based on noncompliance with the literal text of the Permit, despite BCDC staff's acknowledgement that the intent of the Permit has clearly been met (*e.g.*, all allegations related to the placement of buoys in Westpoint Slough). A number of violations are also based on conditions that BCDC staff agreed could be changed via amendment, such as the use of 10-foot-wide pathways. None of these allegations caused actual harm to any member of the public or the environment. Even BCDC staff has admitted the trivial impact of the alleged violations they now seek to punish. In meetings between Respondents and BCDC staff, Adrienne Klein previously noted that "And, you know, you had--you fixed some of those violations. We dealt with--and some of them were silly, you know."[517] Similarly, Ms. Klein's notes received as part of the Respondents' CPRA request reveal that "there are a number of other paper violations,"

[515] Along with the many other errors in the VR/C (both substantive errors and technical/procedural errors), the VR/C contains two proposed findings of fact identified as "SSS" (one begins on page 38; the other on page 39). This paragraph refers to the proposed finding of fact "SSS" that begins on page 39 of the VR/C.
[516] *See* Exhibit 1 (Sanders Declaration).
[517] Exhibit 24 at 172 (Transcript of meeting between Mark Sanders and BCDC staff (May 23, 2013)).

confirming that many of the allegations are not of the type that cause any public harm.[518] And yet, BCDC staff asserts that these violations are worth a total penalty of $504,000.

BCDC staff's assessment of over half a million dollars in penalties is grossly out of proportion with not only the character of the harm at issue in this enforcement case, but with similar past BCDC cases. The past BCDC enforcement actions included in Exhibit 134[519] show just how far outside its standard practice BCDC staff has gone here. These enforcement actions show that BCDC has issued penalties of $90,000, with all but $40,000 stayed, for violations including the failure to submit a number of plans (final site plans, grading plans, demolition plans, and landscaping plans), while BCDC issued a penalty of just $37,400, with $23,900 stayed, for violations that included a failure to install and maintain public access improvements and the placement of unauthorized fill (floating docks).[520] If finalized, this $504,000 penalty would become one of the largest BCDC penalties ever imposed. There is no basis for such an extreme penalty in this case.

II. Conclusion

For all the reasons stated herein, Respondents submit that BCDC staff's allegations are not based on the facts or a correct interpretation of the law and conditions in the Permit. Even if the litany of allegations were true, which they are not, absolutely no harm has been caused, or even threatened, to the environment or public access as a result of alleged violations which BCDC staff has called "silly."[521] Respondents believe that the Enforcement Committee should not endorse what staff has done in the VR/C and that instead the Respondents and BCDC staff should endeavor to work cooperatively to resolve any issues with regard to the Permit.

III. List of Exhibits

The documents, exhibits, declarations under penalty of perjury, and other materials attached to this statement are listed here in two tables. One table lists the materials in the order cited in this statement. The other table lists the materials in chronological order.

Exhibit No.	Document Description	Apprx. Date
1	Declaration of Mark Sanders	10/19/2017
2	Ltr from Robert C. Douglass, Cargill Real Property Manager to Andrea Gaut, Coastal Program Analyst, *Portion of Pond 10, Redwood City; Proposed Westpoint Marina Project*	2/24/2003
3	BCDC Staff Report on Salt Ponds, available online at http://www.bcdc.ca.gov/planning/reports/salt_ponds.pdf	10/00/2005
4	Marina Dock Age Magazine *Marina Profile: Mark Sanders' Westpoint Harbor*	12/00/2015

[518] Exhibit 133 at 1 (BCDC enforcement summary notes).
[519] Exhibit 134 (past BCDC enforcement cases).
[520] *Id.*
[521] Exhibit 24 at 172 (transcript of meeting between Mark Sanders and BCDC staff (May 23, 2013)).

Exhibit No.	Document Description	Apprx. Date
5	Memo from Will Travis, Executive Director, BCDC to Commissioners and Alternates, *Comments on Permit Application No. 2-02; Mark Sanders; Westpoint Marina, in the City of Redwood, San Mateo County*	8/1/2003
6	BCDC Commission Meeting Minutes, available online at https://web.archive.org/web/20031223133420/http://www.bcdc.ca.gov:80/nam/comm/2003/20030717cm.htm	7/7/2003
7	DRB Meeting Minutes	5/5/2003
8	Andrea Gaut's handwritten notes from DRB meeting (Aug. 7, 2006); and Email from Andrea Gaut to Mark Sanders (Aug. 10, 2006)	8/7/2006
9	Email from Adrienne Klein to Mark Sanders	8/12/2005
10	Email from Mark Sanders to Brad McCrea, Director of Regulatory Affairs, BCDC	10/16/2012
11	Ltr from Charles Jany, Principal Planner, Redwood City to Mark Sanders, *Permit Update*	2/21/2012
12	Ltr from Steven H. Parker, Redwood City Landscape Architect to Mark Sanders, *Redwood City Safety requirements for Phase 2 and 3 areas, Westpoint Harbor 1529 Seaport Blvd.*	7/15/2017
13	Transcript of BCDC Enforcement Committee Meeting	10/20/2016
14	Email from Marc Zeppetello, Chief Counsel, BCDC to Chris Carr, *Re: Public Records Request - Enforcement Investigation No. ER2010.013* and Additional Correspondence regarding CPRA Request	8/14/2017
15	Complaint filed by Respondents against BCDC under the California Public Records Act, Case No. CPF-17-515880	10/2/2017
16	Meeting Notes of Maureen O'Connor from meeting with BCDC staff	12/17/2011
17	Original version of AR Doc. 14 provided by BCDC staff to Respondents	7/12/2010
18	Ltr from Marc Zeppetello, Chief Counsel, BCDC to Christopher J. Carr, *Public Records Act Request Re: Westpoint Harbor*	9/12/2017
19	Email from Adrienne Klein, BCDC to Tom Sinclair, BCDC	7/12/2010
20	Email from Andrea Gaut, BCDC to BCDC staff	8/30/2004
21	Transcript of meeting between Mark Sanders and BCDC staff	8/21/2013
22	Email from Brad McCrea, BCDC to Adrienne Klein, Ellen Miramontes, and Steve Goldbeck, BCDC	10/12/2012
23	Handwritten notes from Adrienne Klein discussing responding to letters from Mark Sanders	10/24/2012
24	Transcript of meeting between Mark Sanders and BCDC staff	5/23/2013
25	Ltr from Mark Sanders to Andrea Gaut, BCDC, *BCDC Permit Number 2-02*	10/15/2003
26	Email from Mark Sanders to Kent Mitchell and Pete Bohley	10/16/2003
27	Email from Andrea Gaut, BCDC to Mark Sanders, *Westpoint Marina--Site Preparation and entrances into project site*	10/21/2003
28	Ltr from Mark Sanders to Andrea Gaut, BCDC, *BCDC Permit number 2-02*	10/28/2003

Exhibit No.	Document Description	Apprx. Date
29	Email from Mark Sanders to Andrea Gaut, BCDC	8/28/2005
30	Ltr from Jeffrey D. Churchill, Coastal Program Intern, BCDC to Mark Sanders	8/19/2005
31	Ltr from Jon K. Lynch, City Engineer, Redwood City to Pete Bohley, Bohley Consulting, *Westpoint Marina & Boatyard, Phase 1*	7/11/2006
32	Email from Fred Shehabi, Redwood City to Mark Sanders, *Launching ramp @ Westpoint Marina/Bo6-2063*	11/8/2006
33	Ltr from Mark Sanders to Jon Lynch, Redwood City Engineering, *Revised Phase 1 Drawing Package*	7/23/2007
34	Ltr from Mark Sanders to Andrea Gaut and Brad McCrea, BCDC, *Architectural Review Board Items*	5/29/2006
35	Email from Mark Sanders to Tom Sinclair, BCDC, *Electronic Files*	6/14/2011
36	Construction Drawings for Westpoint Marina and Boatyard Phase 1	11/29/2010
37	Construction Drawings for Westpoint Marina and Boatyard Phase 1	9/13/2011
38	Transcript of meeting between Mark Sanders and BCDC staff	12/13/2012
39	San Francisco Bay Trail Design Guidelines and Toolkit	6/00/2016
40	Pacific Shores Center BCDC Permit	1/24/2006
41	Email from Charles Jany, Redwood City to Tom Sinclair, BCDC, *Westpoint Marina Letter to Mark Sanders*	5/6/2011
42	Email from Mark Sanders to Terence Kyaw, Redwood City	11/26/2012
43	Ltr from Mark Sanders to Steven Parker, Redwood City, *Request to allow opening the Phase 3 paths in Westpoint Harbor*	6/28/2017
44	BCDC Permit No. 2002.002.07 (Amendment No. Seven)	5/9/2017
45	Email from Bill Moyer, General Manager, Pacific Shores Center, to Mark Sanders, *Public Access*	3/14/2012
46	Agreement Regarding Easement between Mark Sanders and Pacific Shores Investors, LLC	6/00/2005
47	BCDC Permit No. 2002.002.06 (Amendment No. Six)	4/15/2016
48	Dock Plans	7/13/2006
49	Email from Kevin Atkinson, California Division of Boating and Waterways to Adrienne Klein, BCDC, *West Point Marina, Redwood City, San Mateo County*	5/9/2012
50	California Division of Boating and Waterways Grant	10/30/2007
51	Marina Websites Concerning Guest Docking	10/9/2017
52	Email from Mark Sanders to Silvia Robertson and Kevin Stephens	8/23/2012
53	Ltr from Alex Francis, ALX Technology, to Mark Sanders	6/11/2012
54	Ltr from Cathy Hammer, Division Vice President, Great American Insurance Co. to Mark Sanders	6/13/2012
55	Photos of Signs at Guest Berths	10/11/2017
56	Photographs of Restroom Doors	10/6/2017
57	Photo of Men's Restroom Door	10/22/2016
58	Email from Sonya Boggs, Westpoint Harbor to Harbormaster, Westpoint Harbor	7/25/2017

Exhibit No.	Document Description	Apprx. Date
59	Ltr from Mark Sanders to Tom Sinclair and Ellen Miramontes, BCDC, *Your letter of September 1, 2011, regarding Westpoint Harbor*	10/18/2011
60	Photograph of Restroom Sign Stating Key Available in Harbormaster's Office	10/6/2017
61	Westpoint Harbor Plans	8/7/2006
62	BCDC Permit Checklist	11/1/2006
63	Email from Kevin Stephens, KSDG to Brad McCrea, BCDC	11/15/2012
64	Email from Ellen Miramontes, BCDC to Kevin Stephens, KSDG, *Westpoiont - two questions and drawing comments*	9/10/2012
65	Emails between Kevin Stephens, KSDG and Ellen Miramontes, BCDC	11/16/2012
66	KSDG, *Westpoint Harbor Marina Existing and Proposed Public Access Plans*	10/11/2012
67	*Westpoint Harbor Marina Planting and Irrigation As-Built May 1, 2014*	5/1/2014
68	Email from Maureen O'Connor, Westpoint Harbor to Tom Sinclair, BCDC, *Short Westpoint Harbor Update*	11/21/2011
69	Excerpt from Pacific Shores Center Plans	6/23/2000
70	Shoreline Signs Public Access Signage Guidelines	8/00/2005
71	Revised Signage Plan Submittal	6/5/2017
72	Email from Mark Sanders to Laura Thompson, Bay Trail Project Manager, Association of Bay Area Governments	1/12/2015
73	Handwritten Notes of Adrienne Klein	4/25/2012
74	Errata Sheet from Will Travis and Andrea Gaut to Commissioners and Alternates, *Revisions to the Staff Recommendation on BCDC Permit Application No. 2-02; Mark Sanders; Westpoint Marina, City of Redwood City, San Mateo*	8/7/2003
75	Ltr from Kent Mitchell to Jonathan Smith, Chief Counsel, BCDC, *Permit No. 2-02, Mark Sanders (Westpoint Marina)* (June 21, 2007); and Fax from Mark Sanders to Jonathan Smith, Chief Counsel, BCDC *Your letter dated February 8, 2007* (Feb. 28, 2007)	6/21/2007
76	Photographs of Public Parking Signage (This Exhibit includes one photograph taken on 10/22/2016 and another taken on 4/12/2017)	4/12/2017
77	Photograph of Pacific Shores Center Parking	2/00/2017
78	Construction Drawings for Westpoint Marina & Boatyard Launching Ramp	10/23/2006
79	Email from Don Snaman, Manager of Operations, Port of Redwood City to Mark Sanders (Printed Sept. 9, 2011))	9/9/2011
80	Photograph of "No Wake" Sign at Westpoint Harbor (This Exhibit includes one photograph taken on 5/15/2011 and another taken on 7/11/2017)	7/11/2017
81	Ltr from Clyde Morris, Refuge Manager, Don Edwards San Francisco Bay NWR to Mark Sanders	1/29/2002

Exhibit No.	Document Description	Apprx. Date
82	Ltr from Mark Sanders to Andrea Gaut, Coastal Program Analyst, BCDC, *Application for Permit number 2-02 to BCDC dated May 21, 2002, BCDC letter response dated June 20, 2002, My letter response dated August 15, 2002 to BCDC, Second BCDC response dated September 15, 2002*	12/28/2002
83	Email from Clyde Morris, Manager, Don Edwards San Francisco Bay NWR, to Mark Sanders, *Greco Island*	1/13/2003
84	Email from Steve McAdam, BCDC to Andrea Gaut, BCDC	1/13/2003
85	Email from Andrea Gaut, BCDC to Mark Sanders	7/20/2006
86	Email from Mark Sanders to Tom Sinclair, BCDC, *Westpoint Marina*	5/12/2011
87	Handwritten Notes on September 1, 2011 letter	2/9/2012
88	Emails between Mark Sanders and Eric Mruz, former Don Edwards Refuge Manager, Melissa Amato, Wildlife Refuge Specialist, U.S. Fish and Wildlife Service, and Carmen Leong-Minch, Outdoor Recreation Planner, San Francisco Bay National Wildlife Refuge Complex	11/10/2014
89	Bohley Consulting Engineering Drawing, *Westpoint Marina - Phase 2 Cargill Slope Section*	5/9/2017
90	Addendum to Embankment License Agreement	7/20/2006
91	Ltr from Andrea Gaut, BCDC Coastal Program Analyst to Mark Sanders, *Future Amendments to BCDC Permit No. 2-02; Westpoint Marina*	8/21/2003
92	Department of the Army Permit, No. 22454S (c. Mar. 23, 2004)	3/23/2004
93	Ltr from Skid Hall, Land Planning and Permitting Consultant, to Phelicia Gomes, Project Manager, U.S. Army Corps of Engineers, (transmitting Mitigation Plan)	8/1/2003
94	Satellite Photos from Google Earth Pro (multiple dates)	7/9/1993
95	Email from Jared Underwood, Refuge Manager, Don Edwards San Francisco Bay National Wildlife Refuge to Marc Zeppetello, Chief Counsel, BCDC	7/13/2017
96	Public Notice, U.S. Army Corps of Engineers, *Project: WestPoint Marina*	5/17/2002
97	Photograph of Wetlands Mitigation	00/00/2008
98	Bohley Consulting, *Site Preparation Plan for Westpoint Marina and Boatyard*	11/1/2003
99	Enlarged Section of Bohley Consulting, *Site Preparation Plan for Westpoint Marina and Boatyard*	11/1/2003
100	Ltr from Andrea Gaut, Coastal Program Analyst, BCDC to Mark Sanders, *BCDC Permit Application No. 2-02 Westpoint Marina*	2/7/2003
101	Ltr from Mark Sanders to Mark D'Avignon, U.S. Army Corps of Engineers, *Westpoint Marina Project Status and Extension*	12/5/2006
102	Memorandum from Nicolas Duffort and Julia King, Anchor QEA to Elizabeth Christian, Regional Water Quality Control Board, *Westpoint Harbor Wetland Vegetation Mitigation Monitoring*	10/2/2017
103	Permit Inspection Card, Redwood City	12/18/2014

Exhibit No.	Document Description	Apprx. Date
104	Ltr from Mark Sanders to Brad McCrea, BCDC, *Engineering Drawings*	3/3/2007
105	Photograph of Stamped-Received Dock Plans	3/5/2007
106	Ltr from Mark Sanders to Brad McCrea, BCDC, Engineering Drawings (Stamped Received June 6, 2011)	6/6/2011
107	Email from Mark Sanders to Tom Sinclair, BCDC, Dock System files, Westpoint Harbor	6/14/2011
108	Ltr from Jonathan Smith, Chief Counsel, BCDC to Kent Mitchell, Mitchell and Herzog	12/23/2003
109	Photographs of Section of Dock	10/2/2017
110	(Ltr from Mark Sanders to Andrea Gaut, BCDC, *Amendment to BCDC Permit No. 2-02*	7/10/2006
111	Photographs of Utilities Near Pathways	Undated
112	Photographs of Utilities and Pathways at Westpoint Harbor (taken by BCDC staff during site visits) (This Exhibit includes two photographs taken 12/08/16 and one taken 6/18/2017)	6/18/2017
113	Ltr from Mark Sanders to Paul Cianciarulo, O.C. Jones and Sons, Inc., *Levee Road Preparation*	10/14/2003
114	Email from Jim Pruder, Bellingham Marine to Mark Sanders, *Mark 5-14-14 last $ review*	5/15/2014
115	Ltr from Doug Aikins to Brad McCrea, Adrienne Klein, Erik Buehmann, and John Bowers, BCDC, *Amendment #5 to BCDC Permit 2-02 ("Permit")*	12/22/2014
116	Ltr from Mark Sanders to Andrea Gaut, BCDC, *BCDC Permit number 2-02*	9/3/2003
117	Ltr from Mark Sanders to Erik Buehmann, BCDC	12/14/2012
118	Ltr from Farris Hix, Building Inspector, Redwood City	9/21/2011
119	Harbormaster Office Architectural Plans	08/18/2008
120	Ltr from Mark Sanders to Brad McCrea, BCDC, *Best Management Practices*	7/9/2007
121	Email from Charles Jany, Principal Planner, Redwood City to Tom Sinclair, BCDC	2/9/2012
122	Ltr from Mark Sanders to Tom Sinclair, BCDC, *Berthing Agreements and Liveaboards*	9/22/2011
123	Email from Kate Fensterstock, NOAA to Mark Sanders	2/5/2009
124	Local Notice to Mariners	5/13/2009
125	Email from Kate Fensterstock, NOAA to Mark Sanders	9/10/2009
126	Email from Erik Buehmann, BCDC to Brad McCrea, John Bowers, Adrienne Klein, and Ellen Miramontes, BCDC	5/20/2013
127	Email from Gail Raabe, Citizens Committee to Complete the Refuge to Marc Zeppetello, Chief Counsel, BCDC	6/23/2017

Exhibit No.	Document Description	Apprx. Date
128	Spreadsheet of Westpoint Harbor Plans from Adrienne Klein's Staff Folder (This Exhibit appears to have been created on 10/31/13 and last edited on 6/23/2014)	6/23/2014
129	Email from Chris Carr, Baker Botts LLP to Marc Zeppetello, Chief Counsel, BCDC, *Request for Extension of Time to File Statement of Defense in BCDC Enforcement File No. 2010.013 re Mark Sanders and Westpoint Harbor*	8/17/2017
130	Email from Marc Zeppetello, Chief Counsel, BCDC to Chris Carr, Baker Botts LLP, *Re: Request for Extension*	8/18/2017
131	Email from Marc Zeppetello, Chief Counsel, BCDC to Chris Carr, Baker Botts LLP, *Request for Extension of Time to File Statement of Defense in BCDC Enforcement File No. 2010.013 re Mark Sanders and Westpoint Harbor*	9/18/2017
132	Email from Kim Squires, Section 7 Division Chief, US Fish and Wildlife Service to Marc Zeppetello	9/7/2017
133	BCDC Enforcement Summary Notes	Undated
134	Past BCDC Enforcement Cases (This Exhibit includes one document dated 2/24/2003 and another dated 8/25/2006)	8/25/2006
135	Declaration of Kevin Vickers	10/19/2017

Exhibit No.	Document Description	Apprx. Date
94	Satellite Photos from Google Earth Pro (multiple dates)	7/9/1993
69	Excerpt from Pacific Shores Center Plans	6/23/2000
81	Ltr from Clyde Morris, Refuge Manager, Don Edwards San Francisco Bay NWR to Mark Sanders	1/29/2002
96	Public Notice, U.S. Army Corps of Engineers, *Project: WestPoint Marina*	5/17/2002
82	Ltr from Mark Sanders to Andrea Gaut, Coastal Program Analyst, BCDC, *Application for Permit number 2-02 to BCDC dated May 21, 2002, BCDC letter response dated June 20, 2002, My letter response dated August 15, 2002 to BCDC, Second BCDC response dated September 15, 2002*	12/28/2002
83	Email from Clyde Morris, Manager, Don Edwards San Francisco Bay NWR, to Mark Sanders, *Greco Island*	1/13/2003
84	Email from Steve McAdam, BCDC to Andrea Gaut, BCDC	1/13/2003
100	Ltr from Andrea Gaut, Coastal Program Analyst, BCDC to Mark Sanders, *BCDC Permit Application No. 2-02 Westpoint Marina*	2/7/2003
2	Ltr from Robert C. Douglass, Cargill Real Property Manager to Andrea Gaut, Coastal Program Analyst, *Portion of Pond 10, Redwood City; Proposed Westpoint Marina Project*	2/24/2003

Exhibit No.	Document Description	Apprx. Date
7	DRB Meeting Minutes	5/5/2003
6	BCDC Commission Meeting Minutes, available online at https://web.archive.org/web/20031223133420/http://www.bcdc.ca.gov:80/nam/comm/2003/20030717cm.htm	7/7/2003
5	Memo from Will Travis, Executive Director, BCDC to Commissioners and Alternates, *Comments on Permit Application No. 2-02; Mark Sanders; Westpoint Marina, in the City of Redwood, San Mateo County*	8/1/2003
93	Ltr from Skid Hall, Land Planning and Permitting Consultant, to Phelicia Gomes, Project Manager, U.S. Army Corps of Engineers, (transmitting Mitigation Plan)	8/1/2003
74	Errata Sheet from Will Travis and Andrea Gaut to Commissioners and Alternates, *Revisions to the Staff Recommendation on BCDC Permit Application No. 2-02; Mark Sanders; Westpoint Marina, City of Redwood City, San Mateo*	8/7/2003
91	Ltr from Andrea Gaut, BCDC Coastal Program Analyst to Mark Sanders, *Future Amendments to BCDC Permit No. 2-02; Westpoint Marina*	8/21/2003
116	Ltr from Mark Sanders to Andrea Gaut, BCDC, *BCDC Permit number 2-02*	9/3/2003
113	Ltr from Mark Sanders to Paul Cianciarulo, O.C. Jones and Sons, Inc., *Levee Road Preparation*	10/14/2003
25	Ltr from Mark Sanders to Andrea Gaut, BCDC, *BCDC Permit Number 2-02*	10/15/2003
26	Email from Mark Sanders to Kent Mitchell and Pete Bohley	10/16/2003
27	Email from Andrea Gaut, BCDC to Mark Sanders, *Westpoint Marina--Site Preparation and entrances into project site*	10/21/2003
28	Ltr from Mark Sanders to Andrea Gaut, BCDC, *BCDC Permit number 2-02*	10/28/2003
98	Bohley Consulting, *Site Preparation Plan for Westpoint Marina and Boatyard*	11/1/2003
99	Enlarged Section of Bohley Consulting, *Site Preparation Plan for Westpoint Marina and Boatyard*	11/1/2003
108	Ltr from Jonathan Smith, Chief Counsel, BCDC to Kent Mitchell, Mitchell and Herzog	12/23/2003
92	Department of the Army Permit, No. 22454S (c. Mar. 23, 2004)	3/23/2004
20	Email from Andrea Gaut, BCDC to BCDC staff	8/30/2004
46	Agreement Regarding Easement between Mark Sanders and Pacific Shores Investors, LLC	6/2005
70	Shoreline Signs Public Access Signage Guidelines	8/2005
9	Email from Adrienne Klein to Mark Sanders	8/12/2005
30	Ltr from Jeffrey D. Churchill, Coastal Program Intern, BCDC to Mark Sanders	8/19/2005
29	Email from Mark Sanders to Andrea Gaut, BCDC	8/28/2005

Exhibit No.	Document Description	Apprx. Date
3	BCDC Staff Report on Salt Ponds, available online at http://www.bcdc.ca.gov/planning/reports/salt_ponds.pdf	10/2005
40	Pacific Shores Center BCDC Permit	1/24/2006
34	Ltr from Mark Sanders to Andrea Gaut and Brad McCrea, BCDC, *Architectural Review Board Items*	5/29/2006
110	(Ltr from Mark Sanders to Andrea Gaut, BCDC, *Amendment to BCDC Permit No. 2-02*	7/10/2006
31	Ltr from Jon K. Lynch, City Engineer, Redwood City to Pete Bohley, Bohley Consulting, *Westpoint Marina & Boatyard, Phase 1*	7/11/2006
48	Dock Plans	7/13/2006
85	Email from Andrea Gaut, BCDC to Mark Sanders	7/20/2006
90	Addendum to Embankment License Agreement	7/20/2006
8	Andrea Gaut's handwritten notes from DRB meeting (Aug. 7, 2006); and Email from Andrea Gaut to Mark Sanders (Aug. 10, 2006)	8/7/2006
61	Westpoint Harbor Plans	8/7/2006
134	Past BCDC Enforcement Cases (This Exhibit includes one document dated 2/24/2003 and another dated 8/25/2006)	8/25/2006
78	Construction Drawings for Westpoint Marina & Boatyard Launching Ramp	10/23/2006
62	BCDC Permit Checklist	11/1/2006
32	Email from Fred Shehabi, Redwood City to Mark Sanders, *Launching ramp @ Westpoint Marina/Bo6-2063*	11/8/2006
101	Ltr from Mark Sanders to Mark D'Avignon, U.S. Army Corps of Engineers, *Westpoint Marina Project Status and Extension*	12/5/2006
104	Ltr from Mark Sanders to Brad McCrea, BCDC, *Engineering Drawings*	3/3/2007
105	Photograph of Stamped-Received Dock Plans	3/5/2007
75	Ltr from Kent Mitchell to Jonathan Smith, Chief Counsel, BCDC, *Permit No. 2-02, Mark Sanders (Westpoint Marina)* (June 21, 2007); and Fax from Mark Sanders to Jonathan Smith, Chief Counsel, BCDC *Your letter dated February 8, 2007* (Feb. 28, 2007)	6/21/2007
120	Ltr from Mark Sanders to Brad McCrea, BCDC, *Best Management Practices*	7/9/2007
33	Ltr from Mark Sanders to Jon Lynch, Redwood City Engineering, *Revised Phase 1 Drawing Package*	7/23/2007
50	California Division of Boating and Waterways Grant	10/30/2007
97	Photograph of Wetlands Mitigation	2008
119	Harbormaster Office Architectural Plans	08/18/2008
123	Email from Kate Fensterstock, NOAA to Mark Sanders	2/5/2009
124	Local Notice to Mariners	5/13/2009
125	Email from Kate Fensterstock, NOAA to Mark Sanders	9/10/2009

Exhibit No.	Document Description	Apprx. Date
17	Original version of AR Doc. 14 provided by BCDC staff to Respondents	7/12/2010
19	Email from Adrienne Klein, BCDC to Tom Sinclair, BCDC	7/12/2010
36	Construction Drawings for Westpoint Marina and Boatyard Phase 1	11/29/2010
41	Email from Charles Jany, Redwood City to Tom Sinclair, BCDC, *Westpoint Marina Letter to Mark Sanders*	5/6/2011
86	Email from Mark Sanders to Tom Sinclair, BCDC, *Westpoint Marina*	5/12/2011
106	Ltr from Mark Sanders to Brad McCrea, BCDC, Engineering Drawings (Stamped Received June 6, 2011)	6/6/2011
35	Email from Mark Sanders to Tom Sinclair, BCDC, *Electronic Files*	6/14/2011
107	Email from Mark Sanders to Tom Sinclair, BCDC, Dock System files, Westpoint Harbor	6/14/2011
79	Email from Don Snaman, Manager of Operations, Port of Redwood City to Mark Sanders (Printed Sept. 9, 2011))	9/9/2011
37	Construction Drawings for Westpoint Marina and Boatyard Phase 1	9/13/2011
118	Ltr from Farris Hix, Building Inspector, Redwood City	9/21/2011
122	Ltr from Mark Sanders to Tom Sinclair, BCDC, *Berthing Agreements and Liveaboards*	9/22/2011
59	Ltr from Mark Sanders to Tom Sinclair and Ellen Miramontes, BCDC, *Your letter of September 1, 2011, regarding Westpoint Harbor*	10/18/2011
68	Email from Maureen O'Connor, Westpoint Harbor to Tom Sinclair, BCDC, *Short Westpoint Harbor Update*	11/21/2011
16	Meeting Notes of Maureen O'Connor from meeting with BCDC staff	12/17/2011
87	Handwritten Notes on September 1, 2011 letter	2/9/2012
121	Email from Charles Jany, Principal Planner, Redwood City to Tom Sinclair, BCDC	2/9/2012
11	Ltr from Charles Jany, Principal Planner, Redwood City to Mark Sanders, *Permit Update*	2/21/2012
45	Email from Bill Moyer, General Manager, Pacific Shores Center, to Mark Sanders, *Public Access*	3/14/2012
73	Handwritten Notes of Adrienne Klein	4/25/2012
49	Email from Kevin Atkinson, California Division of Boating and Waterways to Adrienne Klein, BCDC, *West Point Marina, Redwood City, San Mateo County*	5/9/2012
53	Ltr from Alex Francis, ALX Technology, to Mark Sanders	6/11/2012
54	Ltr from Cathy Hammer, Division Vice President, Great American Insurance Co. to Mark Sanders	6/13/2012
52	Email from Mark Sanders to Silvia Robertson and Kevin Stephens	8/23/2012
64	Email from Ellen Miramontes, BCDC to Kevin Stephens, KSDG, *Westpoiont - two questions and drawing comments*	9/10/2012
66	KSDG, *Westpoint Harbor Marina Existing and Proposed Public Access Plans*	10/11/2012

Exhibit No.	Document Description	Apprx. Date
22	Email from Brad McCrea, BCDC to Adrienne Klein, Ellen Miramontes, and Steve Goldbeck, BCDC	10/12/2012
10	Email from Mark Sanders to Brad McCrea, Director of Regulatory Affairs, BCDC	10/16/2012
23	Handwritten notes from Adrienne Klein discussing responding to letters from Mark Sanders	10/24/2012
63	Email from Kevin Stephens, KSDG to Brad McCrea, BCDC	11/15/2012
65	Emails between Kevin Stephens, KSDG and Ellen Miramontes, BCDC	11/16/2012
42	Email from Mark Sanders to Terence Kyaw, Redwood City	11/26/2012
38	Transcript of meeting between Mark Sanders and BCDC staff	12/13/2012
117	Ltr from Mark Sanders to Erik Buehmann, BCDC	12/14/2012
126	Email from Erik Buehmann, BCDC to Brad McCrea, John Bowers, Adrienne Klein, and Ellen Miramontes, BCDC	5/20/2013
24	Transcript of meeting between Mark Sanders and BCDC staff	5/23/2013
21	Transcript of meeting between Mark Sanders and BCDC staff	8/21/2013
67	*Westpoint Harbor Marina Planting and Irrigation As-Built May 1, 2014*	5/1/2014
114	Email from Jim Pruder, Bellingham Marine to Mark Sanders, *Mark 5-14-14 last $ review*	5/15/2014
128	Spreadsheet of Westpoint Harbor Plans from Adrienne Klein's Staff Folder (This Exhibit appears to have been created on 10/31/13 and last edited on 6/23/2014)	6/23/2014
88	Emails between Mark Sanders and Eric Mruz, former Don Edwards Refuge Manager, Melissa Amato, Wildlife Refuge Specialist, U.S. Fish and Wildlife Service, and Carmen Leong-Minch, Outdoor Recreation Planner, San Francisco Bay National Wildlife Refuge Complex	11/10/2014
103	Permit Inspection Card, Redwood City	12/18/2014
115	Ltr from Doug Aikins to Brad McCrea, Adrienne Klein, Erik Buehmann, and John Bowers, BCDC, *Amendment #5 to BCDC Permit 2-02 ("Permit")*	12/22/2014
72	Email from Mark Sanders to Laura Thompson, Bay Trail Project Manager, Association of Bay Area Governments	1/12/2015
4	Marina Dock Age Magazine *Marina Profile: Mark Sanders' Westpoint Harbor*	12/2015
47	BCDC Permit No. 2002.002.06 (Amendment No. Six)	4/15/2016
39	San Francisco Bay Trail Design Guidelines and Toolkit	6/2016
13	Transcript of BCDC Enforcement Committee Meeting	10/20/2016
57	Photo of Men's Restroom Door	10/22/2016
77	Photograph of Pacific Shores Center Parking	2/2017
76	Photographs of Public Parking Signage (This Exhibit includes one photograph taken on 10/22/2016 and another taken on 4/12/2017)	4/12/2017

Exhibit No.	Document Description	Apprx. Date
44	BCDC Permit No. 2002.002.07 (Amendment No. Seven)	5/9/2017
89	Bohley Consulting Engineering Drawing, *Westpoint Marina - Phase 2 Cargill Slope Section*	5/9/2017
71	Revised Signage Plan Submittal	6/5/2017
112	Photographs of Utilities and Pathways at Westpoint Harbor (taken by BCDC staff during site visits) (This Exhibit includes two photographs taken 12/08/16 and one taken 6/18/2017)	6/18/2017
127	Email from Gail Raabe, Citizens Committee to Complete the Refuge to Marc Zeppetello, Chief Counsel, BCDC	6/23/2017
43	Ltr from Mark Sanders to Steven Parker, Redwood City, *Request to allow opening the Phase 3 paths in Westpoint Harbor*	6/28/2017
80	Photograph of "No Wake" Sign at Westpoint Harbor (This Exhibit includes one photograph taken on 5/15/2011 and another taken on 7/11/2017)	7/11/2017
95	Email from Jared Underwood, Refuge Manager, Don Edwards San Francisco Bay National Wildlife Refuge to Marc Zeppetello, Chief Counsel, BCDC	7/13/2017
12	Ltr from Steven H. Parker, Redwood City Landscape Architect to Mark Sanders, *Redwood City Safety requirements for Phase 2 and 3 areas, Westpoint Harbor 1529 Seaport Blvd.*	7/15/2017
58	Email from Sonya Boggs, Westpoint Harbor to Harbormaster, Westpoint Harbor	7/25/2017
14	Email from Marc Zeppetello, Chief Counsel, BCDC to Chris Carr, *Re: Public Records Request - Enforcement Investigation No. ER2010.013* and Additional Correspondence regarding CPRA Request	8/14/2017
129	Email from Chris Carr, Baker Botts LLP to Marc Zeppetello, Chief Counsel, BCDC, *Request for Extension of Time to File Statement of Defense in BCDC Enforcement File No. 2010.013 re Mark Sanders and Westpoint Harbor*	8/17/2017
130	Email from Marc Zeppetello, Chief Counsel, BCDC to Chris Carr, Baker Botts LLP, *Re: Request for Extension*	8/18/2017
132	Email from Kim Squires, Section 7 Division Chief, US Fish and Wildlife Service to Marc Zeppetello	9/7/2017
18	Ltr from Marc Zeppetello, Chief Counsel, BCDC to Christopher J. Carr, *Public Records Act Request Re: Westpoint Harbor*	9/12/2017
131	Email from Marc Zeppetello, Chief Counsel, BCDC to Chris Carr, Baker Botts LLP, *Request for Extension of Time to File Statement of Defense in BCDC Enforcement File No. 2010.013 re Mark Sanders and Westpoint Harbor*	9/18/2017
15	Complaint filed by Respondents against BCDC under the California Public Records Act, Case No. CPF-17-515880	10/2/2017

Exhibit No.	Document Description	Apprx. Date
102	Memorandum from Nicolas Duffort and Julia King, Anchor QEA to Elizabeth Christian, Regional Water Quality Control Board, *Westpoint Harbor Wetland Vegetation Mitigation Monitoring*	10/2/2017
109	Photographs of Section of Dock	10/2/2017
56	Photographs of Restroom Doors	10/6/2017
60	Photograph of Restroom Sign Stating Key Available in Harbormaster's Office	10/6/2017
51	Marina Websites Concerning Guest Docking	10/9/2017
55	Photos of Signs at Guest Berths	10/11/2017
1	Declaration of Mark Sanders	10/19/2017
135	Declaration of Kevin Vickers	10/19/2017
111	Photographs of Utilities Near Pathways	Undated
133	BCDC Enforcement Summary Notes	Undated

IV. Persons Respondents Desire to Cross-Examine

Respondents note that no declarations under penalty of perjury were included with, or cited in, the VR/C. However, the VR/C describes alleged written and oral statements by several individuals, and the documents included in the AR prepared by BCDC staff reference alleged written and oral statements by several individuals. The findings of fact proposed in the VR/C rely on alleged statements from the following individuals, all of whom Respondents want to cross-examine.

John Bowers - Respondents desire to cross-examine this individual regarding multiple documents and topics, including the process for plan receipt and approval, the alleged facts stated in VR/C Section VI.¶X, and this individual's relationship with representatives and members of the Citizens Committee to Complete the Refuge. Respondents dispute alleged facts referenced herein. Respondents believe that the accuracy and context of alleged facts referenced herein may be elicited by cross-examination. The information can best be provided by cross-examination rather than by declarations or other written evidence because: this individual is cited by BCDC staff as adverse to Respondents; this individual is not within Respondents' control and, thus, not obligated to submit a declaration at Respondents' request; and cross-examination is a better form of soliciting the accuracy and context of the alleged facts referenced herein.

Laurence Frank - Respondents desire to cross-examine this individual regarding the alleged facts stated in VR/C Section VI.¶Y and AR Document 39. Respondents dispute alleged facts referenced herein. Though BCDC staff have not in the VR/C directly identified Laurence Frank as one of the two individuals referred to in VR/C ¶ Y, based on AR Document 39, Respondents believe that Laurence Frank may be said individual. Respondents believe that the accuracy and context of alleged facts referenced herein may be elicited by cross-examination. The information can best be provided by cross-examination rather than by declarations or other written evidence because: this individual is cited by BCDC staff as adverse to Respondents; this individual is not within

Respondents' control and, thus, not obligated to submit a declaration at Respondents' request; and cross-examination is a better form of soliciting the accuracy and context of the alleged facts referenced herein.

Andrea Gaffney - Respondents desire to cross-examine this individual regarding multiple documents and topics, including the process for plan receipt and approval, the alleged facts stated in VR/C Section VI.¶QQ, and this individual's relationship with representatives and members of the Citizens Committee to Complete the Refuge. Respondents dispute alleged facts referenced herein. Respondents believe that the accuracy and context of alleged facts referenced herein may be elicited by cross-examination. The information can best be provided by cross-examination rather than by declarations or other written evidence because: this individual is cited by BCDC staff as adverse to Respondents; this individual is not within Respondents' control and, thus, not obligated to submit a declaration at Respondents' request; and cross-examination is a better form of soliciting the accuracy and context of the alleged facts referenced herein.

Brian Gaffney - Respondents desire to cross-examine this individual regarding multiple documents and topics, including the alleged facts stated in VR/C Section VI.¶YY, ¶AAA, ¶KKK, ¶LLL, and AR Documents 76, 84, 85. Respondents dispute alleged facts referenced herein. Respondents believe that the accuracy and context of alleged facts referenced herein may be elicited by cross-examination. The information can best be provided by cross-examination rather than by declarations or other written evidence because: this individual is cited by BCDC staff as adverse to Respondents; this individual is not within Respondents' control and, thus, not obligated to submit a declaration at Respondents' request; and cross-examination is a better form of soliciting the accuracy and context of the alleged facts referenced herein.

Andrea Gaut - Respondents desire to cross-examine this individual regarding multiple documents and topics, including the process for plan receipt and approval, the contents of AR Document 6, this individual's relationship with representatives and members of the Citizens Committee to Complete the Refuge, and discussions with the Design Review Board. Respondents dispute alleged facts referenced herein. Respondents believe that the accuracy and context of alleged facts referenced herein may be elicited by cross-examination. The information can best be provided by cross-examination rather than by declarations or other written evidence because: this individual is not within Respondents' control and, thus, not obligated to submit a declaration at Respondents' request; and cross-examination is a better form of soliciting the accuracy and context of the alleged facts referenced herein.

Adrienne Klein - Respondents desire to cross-examine this individual regarding multiple documents and topics, including the process for plan receipt and approval, the alleged facts stated in VR/C Section VI.¶X, and this individual's relationship with representatives and members of the Citizens Committee to Complete the Refuge. Respondents dispute alleged facts referenced herein. Respondents believe that the accuracy and context of alleged facts referenced herein may be elicited by cross-examination. The information can best be provided by cross-examination rather than by declarations or other written evidence because: this individual is cited by BCDC staff as adverse to Respondents; this

individual is not within Respondents' control and, thus, not obligated to submit a declaration at Respondents' request; and cross-examination is a better form of soliciting the accuracy and context of the alleged facts referenced herein.

Matt Leddy - Respondents desire to cross-examine this individual regarding the alleged facts stated in VR/C ¶ Y and AR Document 45. Respondents dispute alleged facts referenced herein. Though BCDC staff have not in the VR/C directly identified Matt Leddy as one of the two individuals referred to in VR/C Section VI.¶Y, based on AR Document 45, Respondents believe that Matt Leddy may be said individual. Respondents believe that the accuracy and context of alleged facts referenced herein may be elicited by cross-examination. The information can best be provided by cross-examination rather than by declarations or other written evidence because: this individual is cited by BCDC staff as adverse to Respondents; this individual is not within Respondents' control and, thus, not obligated to submit a declaration at Respondents' request; and cross-examination is a better form of soliciting the accuracy and context of the alleged facts referenced herein.

Steve McAdams - Respondents desire to cross-examine this individual regarding the alleged facts stated in AR Document 6 and 60 and this individual's relationship with representatives and members of the Citizens Committee to Complete the Refuge. Respondents dispute alleged facts referenced herein. Respondents believe that the accuracy and context of alleged facts referenced herein may be elicited by cross-examination. The information can best be provided by cross-examination rather than by declarations or other written evidence because: this individual is not within Respondents' control and, thus, not obligated to submit a declaration at Respondents' request; and cross-examination is a better form of soliciting the accuracy and context of the alleged facts referenced herein.

Brad McCrea - Respondents desire to cross-examine this individual regarding multiple documents and topics, including the process for plan receipt and approval, alleged facts stated in VR/C Section VI.¶X and ¶QQ, AR Document 8, and this individual's relationship with representatives and members of the Citizens Committee to Complete the Refuge. Respondents dispute alleged facts referenced herein. Respondents believe that the accuracy and context of alleged facts referenced herein may be elicited by cross-examination. The information can best be provided by cross-examination rather than by declarations or other written evidence because: this individual is cited by BCDC staff as adverse to Respondents; this individual is not within Respondents' control and, thus, not obligated to submit a declaration at Respondents' request; and cross-examination is a better form of soliciting the accuracy and context of the alleged facts referenced herein.

Ellen Miramontes - Respondents desire to cross-examine this individual regarding multiple documents and topics, including the process for plan receipt and approval, the alleged facts stated in VR/C Section VI.¶U, ¶W, ¶X, ¶BB, numerous AR documents concerning landscaping and signage plans, and this individual's relationship with representatives and members of the Citizens Committee to Complete the Refuge. Respondents dispute alleged facts referenced herein. Respondents believe that the accuracy and context of alleged facts referenced herein may be elicited by cross-

examination. The information can best be provided by cross-examination rather than by declarations or other written evidence because: this individual is cited by BCDC staff as adverse to Respondents; this individual is not within Respondents' control and, thus, not obligated to submit a declaration at Respondents' request; and cross-examination is a better form of soliciting the accuracy and context of the alleged facts referenced herein.

Ron Powers - Respondents desire to cross-examine this individual regarding the alleged December 2009 interaction with Mark Sanders referenced in VR/C Section VI.¶L. Though BCDC staff have not in the VR/C directly identified Ron Powers as the individual referred to in VR/C Section VI.¶L, based on AR Document 14, Respondents believe that Ron Powers may be said individual. Respondents dispute the allegation made in the first sentence of VR/C Section VI.¶L. Respondents believe that the accuracy and context of any alleged interaction this individual had with Mr. Sanders may be elicited by cross-examination. The information can best be provided by cross-examination rather than by declarations or other written evidence because: this individual is cited by BCDC staff as adverse to Respondents; this individual is not within Respondents' control and, thus, not obligated to submit a declaration at Respondents' request; and cross-examination is a better form of soliciting the accuracy and context of any alleged interaction this individual had with Mr. Sanders.

Unnamed "Member of the Public" #1 - Respondents desire to cross-examine this individual regarding the alleged December 2009 interaction with Mark Sanders referenced in VR/C Section VI.¶L. Respondents dispute the allegation made in the first sentence of VR/C ¶L. Respondents believe that the accuracy and context of any alleged interaction this individual had with Mr. Sanders may be elicited by cross-examination. The information can best be provided by cross-examination rather than by declarations or other written evidence because: this individual is cited by BCDC staff as adverse to Respondents; this individual is not within Respondents' control and, thus, not obligated to submit a declaration at Respondents' request; this individual has not been directly named by BCDC staff in the VR/C and, thus, Respondents are unsure of this individual's identity; and cross-examination is a better form of soliciting the accuracy and context of any alleged interaction this individual had with Mr. Sanders.

Unnamed "Member of the Public" #2 - Respondents desire to cross-examine this individual regarding the alleged facts stated in VR/C Section VI.¶Y. Respondents dispute alleged facts referenced herein. Respondents believe that the accuracy and context of alleged facts referenced herein may be elicited by cross-examination. The information can best be provided by cross-examination rather than by declarations or other written evidence because: this individual is cited by BCDC staff as adverse to Respondents; this individual is not within Respondents' control and, thus, not obligated to submit a declaration at Respondents' request; this individual has not been directly named by BCDC staff in the VR/C and, thus, Respondents are unsure of this individual's identity; and cross-examination is a better form of soliciting the accuracy and context of the alleged facts referenced herein.

Unnamed "Member of the Public" #3 - Respondents desire to cross-examine this individual regarding the alleged facts stated in VR/C Section VI.¶Y. Respondents

dispute alleged facts referenced herein. Respondents believe that the accuracy and context of alleged facts referenced herein may be elicited by cross-examination. The information can best be provided by cross-examination rather than by declarations or other written evidence because: this individual is cited by BCDC staff as adverse to Respondents; this individual is not within Respondents' control and, thus, not obligated to submit a declaration at Respondents' request; this individual has not been directly named by BCDC staff in the VR/C and, thus, Respondents are unsure of this individual's identity; and cross-examination is a better form of soliciting the accuracy and context of the alleged facts referenced herein.

Tom Sinclair - Respondents desire to cross-examine this individual regarding multiple documents and topics including the process for plan receipt and approval, the alleged facts stated in VR/C Section VI.¶M, ¶S, ¶T and AR Documents 17, 18, 19, and 25, and this individual's relationship with representatives and members of the Citizens Committee to Complete the Refuge. Respondents dispute alleged facts referenced herein. Respondents believe that the accuracy and context of alleged facts referenced herein may be elicited by cross-examination. The information can best be provided by cross-examination rather than by declarations or other written evidence because: this individual is cited by BCDC staff as adverse to Respondents; this individual is not within Respondents' control and, thus, not obligated to submit a declaration at Respondents' request; and cross-examination is a better form of soliciting the accuracy and context of the alleged facts referenced herein.

Marc Zeppetello - Respondents desire to cross-examine this individual regarding multiple documents and topics, including the process for plan receipt and approval, alleged facts stated in VR/C Section VI. ¶ LL, and this individual's relationship with representatives and members of the Citizens Committee to Complete the Refuge. Respondents dispute alleged facts referenced herein. Respondents believe that the accuracy and context of alleged facts referenced herein may be elicited by cross-examination. The information can best be provided by cross-examination rather than by declarations or other written evidence because: this individual is cited by BCDC staff as adverse to Respondents; this individual is not within Respondents' control and, thus, not obligated to submit a declaration at Respondents' request; and cross-examination is a better form of soliciting the accuracy and context of the alleged facts referenced herein.

Dated: October 19, 2017

Respectfully submitted,

BAKER BOTTS L.L.P.

By: */s/ Christopher J. Carr*

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Attorneys for Respondents
Mark Sanders and Westpoint Harbor, LLC

Statement of Defense Form

Enforcement Investigation ER2010.013

Mark Sanders and Westpoint Harbor, LLC

FAILURE (1) TO COMPLETE THIS FORM, (2) TO INCLUDE WITH THE COMPLETED FORM ALL DOCUMENTS, DECLAREATIONS UNDER PENALTY OF PERJURY, AND OTHER EVIDENCE YOU WANT PLACED IN THE RECORD AND TO BE CONSIDERED BY THE COMMISSION, (3) TO LIST ANY WITNESSES WHOSE DECLARATION IS PART OF THE STAFF'S CASE AS IDENTIFIED IN THE VIOLATION REPORT THAT YOU WISH TO CROSS-EXAMINE, THE AREA OF KNOWLEDGE ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE WITNESS, AND THE INFORMATION YOU HOPE TO ELICIT BY CROSS-EXAMINATION, AND (4) TO RETURN THE COMPLETED FROM AND ALL INCLUDED MATERIALS TO THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION STAFF OR TO CONTACT **MARC ZEPPETELLO** OF THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION STAFF BY **AUGUST 28, 2017** MEANS THAT THE COMMISSION CAN REFUSE TO CONSIDER SUCH STATEMENTS AND EVIDENCE WHEN THE COMMISSION HEARS THIS MATTER.

DEPENDING ON THE OUTCOME OF FURTHER DISCUSSIONS THAT OCCUR WITH THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION ENFORCEMENT STAFF AFTER YOU HAVE COMPLETED AND RETURNED THIS FORM, ADMINISTRATIVE OR LEGAL ENFORCEMENT PROCEEDINGS MAY NEVERTHELESS BE INITIATED AGAINST YOU, IF THAT OCCURS, ANY STATEMENTS THAT YOU MAKE ON THIS FORM WILL BECOME PART OF THE ENFORCEMENT RECORD AND MAY BY USED AGAINST YOU.

YOU MAY WISH TO CONSULT WITH OR RETAIN AND ATTORNEY BEFORE YOU COMPLETE THIS FORM OR OTHERWISE CONTACT THE SAN FRANCISCO BAY CONSERVATION AND DEVLOPMENT COMMISSION ENFORCEMENT STAFF.

This form is enclosed with a violation report. The violation report indicates that you may be responsible for or in some way involved in either a violation of the Commission's laws, a Commission permit, or a Commission cease and desist order. The violation report summarizes what the possible violation involves, who may be responsible for it, where and when it occurred, if the Commission staff is proposing any civil penalty and, if so, how much, and other pertinent information concerning the possible violation.

This form requires you to respond to the alleged facts contained in the violation report, to raise any affirmative defenses that you believe apply, to request any cross-examination that you believe necessary, and to inform the staff of all facts that you believe may exonerate you of any legal responsibility for the possible violation or may mitigate your responsibility. This form also requires you to enclose with the completed statement of defense form copies of all written documents, such as letters, photographs, maps drawings, etc. and written declarations under penalty of perjury that you want the Commission to consider as part of this enforcement hearing. This form also requires you to identify by name any person whom you may want to cross-examine prior to the enforcement hearing on this matter, the area of knowledge that you want to cover in the cross-examination, the nature of the testimony that you hope to elicit, and the reasons that you believe other means of producing this evidence are unsatisfactory. Finally, if the staff is only proposing a civil penalty, i.e., no issuance of either a cease or desist order or a permit revocation order, this form allows you alternatively to pay the proposed fine without contesting the matter subject to ratification of the amount by the Commission.

IF YOU WANT TO CROSS-EXAMINE ANY PERSON ON WHOSE TESTIMONY THE STAFF HAS RELIED IN THE VIOLATION REPORT, YOU MUST COMPLETE PARAGRAPH SEVEN TO THIS STATEMENT OF DEFENSE FORM. THIS PARAGRAPH REQUIRES YOU TO SET OUT (1) THE NAME(S) OF THE PERSON(S) YOU WANT TO CROSS-EXAMINE, ()2) REFERENCES TO ANY DOCUMENTS ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE PERSON, (3) THE AREA OF KNOWLEDGE ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE PERSON, (4) THE INFORMATION THAT YOU BELIEVE CAN BE ELICITED BY CROSS-EXAMINATION, AND (5) THE REASON WHY YOU BELIEVE THIS INFORMATION CANNOT BE PRESENTED BY DECLARATION OR OTHER DOCUMENT.

You should complete the form as fully and accurately as you can as quickly as you can and return it no later than 35 days after its having been mailed to you to the Commission's enforcement staff at the address:

San Francisco Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600
San Francisco, California 94102

If you believe that you have good cause for not being able to complete this form within 35 days of its having been mailed, please complete it to the extent that you can and within 35 days of the mailing of the violation report send the statement of defense form completed as much as possible with a written explanation of what additional information you need to complete the form in its entirety, how long it will take to obtain the additional information needed to complete the form, and why it will take longer than 35 days to obtain the additional information, send all of this to the Commission's staff at the above address. Following this procedure does not mean that the Executive Director will automatically allow you to take the additional time to complete the form. Only if the Executive Director determines that you have shown good cause for the delay and have otherwise complete the form as much as is currently possible will be grant an extension to complete the form.

If the staff violation report/complaint that accompanied this statement of defense form included a proposed civil penalty, you may, if you wish, resolve the civil penalty aspect of the alleged violation by simply providing to the staff a certified cashier's check in the amount of the proposed fine within the 35-day time period. If you choose to follow this alternative, the Executive Director will cash your check and place a brief summary of the violation and proposed penalty along with a notation that you are choosing to pay the penalty rather than contesting it on an administrative permit listing. If no Commissioner objects to the amount of the penalty, your payment will resolve the civil penalty portion of the alleged violation. If a Commissioner objects to the proposed payment of the penalty, the Commission shall determine by a majority of those present and voting whether to let the proposed penalty stand. If such a majority votes to let the proposed penalty stand, your payment will resolve the civil penalty portion of the alleged violation. If such a majority does not let the proposed penalty stand, the Commission shall direct the staff to return the money paid to you and shall direct you to file your completed statement of defense form and all supporting documents within 35 days of the Commission's action. Of course, you also have the opportunity of contesting the fine from the outset by completing this form and filing it and all supporting documents within 35 days of its having been mailed to you.

If you have any questions, please contact as soon as possible **MARC ZEPPETELLO** of the Commission Staff at telephone number **415-352-3600**.

1. Facts or allegations contained in the violation report that you admit (with specific reference to the paragraph number in the violation report):

See Sections I and II above.

2. Facts or allegations contained in the violation report that you deny (with specific reference to paragraph number in the violation report):

See Sections I and II above.

3. Facts or allegations contained in the violation report of which you have no personal knowledge (with specific reference to paragraph number in the violation report):

See Sections I and II above. The Violation Report/Complaint assumes as true statements in documents that neither Respondents nor BCDC staff have any personal knowledge of, and draws many conclusions from photographs taken when neither Respondents nor BCDC staff were present.

4. Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any documents, photographs, maps, letters, or other evidence that you believe are relevant, please identity it by name, date, type, and any other identifying information and provide the original or a copy if you can):

See Sections I and II above.

5. Any other information, statement, etc. that you want to make:

See Sections I and II above.

6. Documents, exhibits, declarations under penalty of perjury or other materials that you have attached to this statement to support your answers or that you want to be made part of the administrative record for this enforcement proceeding (Please list in chronological order by date, author, title and enclose a copy with this completed form):

See Section III above. Respondents have attached copies of each Exhibit listed in Section III.

7. Name of any person whose declaration under penalty of perjury was listed in the violation report as being part of the staff's case who the respondent wants to cross-examine, all documents about which you want to cross-examine the person, area or areas of information about which the respondent wants to cross-examine the witness, information that the respondent hopes to elicit in cross-examination, and the reason(s) why some other method of proving this information is unsatisfactory:

BCDC staff did not provide any declarations. Respondents have listed each person they desire to cross-examine in Section IV above.

ATTACHMENT B

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SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

IN THE MATTER OF: VIOLATION REPORT/COMPLAINT FOR THE IMPOSITION OF ADMINISTRATIVE CIVIL PENALTIES NO. ER2010.013 PROPOSED CEASE AND DESIST AND CIVIL PENALTY ORDER NO. CDO 2017.04 MARK SANDERS AND WESTPOINT HARBOR, LLC	RESPONDENTS' OBJECTIONS TO EXECUTIVE DIRECTOR'S RECOMMENDED ENFORCEMENT DECISION AND ATTACHMENTS

Respondents Mark Sanders and Westpoint Harbor, LLC ("Respondents") submit the following objections to the Executive Director's Recommended Enforcement Decision ("Recommended Enforcement Decision") and attachments to the same.

1. Objection to BCDC staff's late addition of Allegation No. 23

Sections III.B, V.J, VI.B, VI.C, and VI.I of the Recommended Enforcement Decision, Paragraphs II.H, II.J, III.B, IV.D, IV.E, and IV.K of the attached Proposed Cease and Desist and Civil Penalty Order No. CDO 2017.04 ("Proposed Order"), and the attached "Revised Penalty Chart 2017.11.06" set forth or reference the completely new Allegation No. 23, which proposes a $30,000 penalty due to an allegedly unauthorized sign at the public boat launch. Allegation No. 23 was never asserted in the initial Violation Report/Complaint for the Imposition of Administrative Civil Penalties (Enforcement Investigation No. ER2010.013) ("VR/C"). The Revised Penalty Chart itself acknowledges that the alleged violation occurred after the VR/C had already been issued. BCDC staff's attempt to tack on this last-minute allegation on the evening of November 6, 2017—a mere ten days before the Enforcement Hearing—violates BCDC's regulations. Among other violations, staff failed to provide necessary notice and deprived Respondents of the opportunity to defend against the new allegation.

A. BCDC must comply with its own regulations

The law is clear that BCDC is required to comply with its own regulations. In particular, "[a] public entity has a ministerial duty to comply with its own rules and regulations where they are valid and unambiguous." *Galzinski v. Somers*, 2 Cal. App. 5th 1164, 1171 (Cal. Ct. App. 2016); *see also Gregory v. State Bd. of Control*, 73 Cal. App. 4th 584, 595 (1999) (including duties codified in the California Code of Regulations). A duty is ministerial when there is a clearly defined rule. *Redwood Coast Watersheds All. v. State Bd. of Forestry & Fire Prot.*, 70

Cal. App. 4th 962, 970 (1999). The rules discussed below are valid, unambiguous, and clearly defined, and therefore BCDC has a ministerial, rather than discretionary, duty to comply.

B. Violation of requirement to provide notice

Allegation No. 23 cannot be the subject of enforcement under Section 11386(e)(2) and (3) of BCDC's own regulations, which require a 35-day notice and opportunity to cure the alleged violations, and no such notice or opportunity to cure has been provided.

Section 11386 of Title 14 of the California Code of Regulations applies to an enforcement action if the Executive Director determines it is the case: "(1) that the alleged violation is one of the types identified in subsection 11386(e); (2) that the alleged violation has not resulted in significant harm to the Bay's resources or to existing or future public access; and (3) that the alleged violation can be corrected in a manner consistent with the Commission's laws and policies." Cal. Code Regs. tit. 14, § 11386(a). If Section 11386 applies to an alleged violation, "the Executive Director **shall** mail a written notice to the person(s) believed to be responsible for the alleged violation[.]" Cal. Code Regs. tit. 14, § 11386(b) (emphasis added).

Here, Allegation No. 23 fits squarely within the category of Section 11386(e)(3), which applies to "the failure to comply with any condition required by a Commission permit not covered by subsections (e)(1) and (e)(2)[.]" Cal. Code Regs. tit. 14, § 11386(e)(3). Additionally, the alleged violation has not resulted in significant harm, or indeed any harm, and, even if proved true, could be corrected in a manner consistent with the Commission's laws and policies. Therefore, the regulations imposed a duty on the Executive Director to mail a written notice to the Respondents for Allegation No. 23, which is a requirement that staff has failed to fulfill. The written notice must comply with the requirements of § 11386(b).

The Recommended Enforcement Decision contends that none of the alleged violations Respondents identified in their Statement of Defense as requiring 35-day notice letters fall in the categories described by Section 11386, apparently for no other reason than because the Executive Director said so: "§ 11386 gives the Executive Director discretion to make these determinations, and he has made no such determination in this case." (Recommended Enforcement Decision, p. 40.)

BCDC's reading of the law is clearly erroneous. Under California law, when an agency makes a determination in accordance with rules and definitions established by regulations, the duty imposed on the agency is not discretionary but ministerial. *Goonewardene v. ADP, LLC*, 5 Cal. App. 5th 154, 169 (Cal. Ct. App. 2016).

The California Code of Regulations imposes a duty on the Executive Director to determine whether an alleged violation falls under Section 11386 **in accordance with established rules**; the Executive Director's "determination" is therefore necessarily constrained as he is only deciding whether the facts of an alleged violation fit any of the definitions that Section 11386 establishes for each category. Section 11386 provides valid, unambiguous, and clearly defined rules for classifying alleged violations under each category, and therefore staff had a ministerial duty to make determinations in accordance with those rules.

BCDC staff cannot instead claim that Section 11386 is intended to give the Executive Director unfettered discretion to disregard the regulations and arbitrarily choose whether alleged violations fall under Section 11386. Such an interpretation would render Section 11386 meaningless. Furthermore, the Executive Director's supposed "determination" in this instance is additionally suspect because the Executive Director provides no reasoning or evidence for why Allegation No. 23 (or, for that matter, any of the allegations Respondents identified in their

Statement of Defense as requiring 35-day notice letters) does not fit within the category of Section 11386(e)(3), which applies to "the failure to comply with any condition required by a Commission permit not covered by subsections (e)(1) and (e)(2)[.]" Neither does the Executive Director provide any explanation for why Allegation No. 23 or any other alleged violation has resulted in significant harm or could not be corrected in a manner consistent with the Commission's laws and policies.

Staff also asserts that it provided notice sending an email on August 3, 2017, regarding the public boat launch sign. (Recommended Enforcement Decision, p. 7.) However, BCDC's own regulations require that a notice letter must include each of the following:

> (1) the nature of the alleged violation and each and every action that must be taken to correct the alleged violation;
>
> (2) the fact that if the alleged violation is fully **corrected within 35 days** of the mailing of the notice, the Commission **shall not impose any civil penalty**; and
>
> (3) the fact that if the alleged violation is not fully corrected within 35 days of mailing of the notice, the person believed to be responsible for the alleged violation may be subject to the payment of a civil penalty and may resolve the penalty portion of the alleged violation by paying the standardized fine specified in subsections (e), and (f) without having to go through a formal enforcement proceeding pursuant to Sections 11300 through 11385 except as provided in subsection (h).

Cal. Code Regs. tit. 14, § 11386(b) (emphasis added). The August 3, 2017 email did not include notice that meets the requirements of paragraphs (2) and (3), and therefore does not constitute a proper notice letter.

In addition, the email indicates that staff was aware of Allegation No. 23 as early as August 2017, and could have followed the correct procedure of providing proper notice and including the allegation in a revised VR/C or a separate violation report/complaint at the time, but chose not to do so. Instead, staff waited more than three months after sending the email before finally attempting to slip in Allegation No. 23 a mere ten days before the Enforcement Hearing.

The Executive Director failed to send a proper 35-day notice letter to Respondents and provide them with the opportunity to correct the alleged violation. Until the Executive Director submits the 35-day notice letter, Allegation No. 23 cannot legally be the subject of an enforcement action. Contrary to arguments in the Recommended Enforcement Decision, nothing in BCDC's regulations allows staff to circumvent this requirement and simply tack on violations at the eleventh hour without following proper procedure.

C. Violation of requirement to issue allegations 45 days before Enforcement Hearing

In addition, under Section 11321(a) of BCDC's regulations, Allegation No. 23 cannot be the subject of enforcement. Section 11321(a) requires that staff issued the VR/C asserting the allegation at least 45 days prior to the Enforcement Hearing:

> [T]he Executive Director **shall** commence Commission enforcement proceedings by **issuing at least 45 days prior to holding** an **enforcement hearing** on the matter the following materials:
>
> (1) a violation report that complies with the format set out in Appendix H,
>
> (2) a complaint for civil penalties that complies with the format set out in Appendix H if the staff seeks civil penalties, and
>
> (3) a statement of defense form that complies with the format set out in Appendix I.

Cal. Code Regs. tit. 14, § 11321(a) (emphasis added). The rule is valid, unambiguous, and clearly defined that staff must issue materials (that comply with the format set out in Appendix H of BCDC's regulations) alleging Allegation No. 23 at least 45 days prior to the Enforcement Hearing, and therefore staff had a ministerial duty to comply. Staff did no such thing. Instead, staff has chosen to add the new violation only 10 days prior to the Enforcement Hearing.

In addition, by failing to comply with BCDC's regulations, staff deprives Respondents of the opportunity to respond to Allegation No. 23. Section 11322(a) and (c) provide for Respondents to submit a defense to the allegations of a violation report/complaint within 35 days. Cal. Code Regs. tit. 14, § 11322(a), (c). Respondents have already submitted their Statement of Defense and will be unable to provide a response to this new Allegation No. 23 before the date of the Enforcement Hearing. Even if they could, Respondents would not be given the requisite 35 days to prepare a defense to Allegation No. 23 as provided for by BCDC's regulations.

As discussed, staff certainly had the opportunity to issue a revised VR/C or a separate violation report/complaint 45 days in advance of the Enforcement Hearing, as staff mentioned the alleged facts in emails as early as August 2017. Respondents should not be punished for staff's choice to delay three months in a failure to follow their own regulations, thereby depriving Respondents of the basic right to defend against an allegation. Due to the violation of Section 11321(a), Allegation No. 23 cannot legally be the subject of an enforcement action.

D. Violation of constitutional due process obligations

Due to staff's violations of the procedures described above, BCDC staff has also violated its constitutional due process obligations. The California Supreme Court has confirmed that the requirements of due process extend to administrative adjudications. *Today's Fresh Start, Inc. v.*

Los Angeles Cty. Office of Educ., 57 Cal. 4th 197, 214 (2013). As stated by the Court, "when an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal." *Morongo Band of Mission Indians v. State Water Res. Control Bd.*, 45 Cal. 4th 731, 737 (2009). It is also established law that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *People v. Litmon* 162 Cal. App. 4th 383, 395 (2008); *see also B. C. Cotton, Inc. v. Voss*, 33 Cal. App. 4th 929, 954 (1995) (finding that "at a rock-bottom minimum due process requires some form of notice and an opportunity to respond"). Yet BCDC staff's actions here have made it impossible for Respondents to have a meaningful opportunity to be heard.

Because BCDC regulations effectively limit Respondents' right to present evidence to the already submitted Statement of Defense, staff cannot now introduce new evidence that Respondents do not have an opportunity to respond to. If staff wish to assert Allegation No. 23, the proper procedure is for staff to withdraw the VR/C and begin the process again or to issue a separate violation report/complaint. Otherwise, BCDC staff's introduction of new evidence constitutes a violation of Respondents' due process rights in addition to violation of BCDC's regulations. For these reasons, Respondents request that the Enforcement Committee exclude Allegation No. 23 as improperly proposed, and strike the inclusion and reference of Allegation No. 23 from Sections III.B, V.J, VI.B, VI.C, and VI.I of the Recommended Enforcement Decision, Paragraphs II.H, II.J, III.B, IV.D, IV.E, and IV.K of the attached Proposed Order, and the attached "Revised Penalty Chart 2017.11.06."

2. Objection to late addition of information concerning "asphalt pad of unknown purpose"

Section VI.Q of the Recommended Enforcement Decision and Paragraph III.F of the Proposed Order reference an allegedly unauthorized asphalt pad. In the VR/C, BCDC staff

provided no information or evidence concerning this condition beyond referring to it as "an asphalt pad of unknown purpose." Because Respondents could not identify this supposed asphalt pad based solely on this ambiguous description, they denied that such a condition exists. BCDC staff now claims that the photograph showing this alleged asphalt pad was "inadvertently not included" and that to "correct this error" BCDC has added Exhibit B to the Recommended Enforcement Decision, which purports to be a photograph showing this asphalt pad. Respondents object to BCDC staff's submittal of additional evidence in an attempt to "correct this error" after Respondents have filed the Statement of Defense.

Under Section 11321(b) of BCDC's regulations, the VR/C must "refer to all documents on which the staff relies to provide a prima facie case[.]" Exhibit B was not included with the VR/C. By failing to comply with BCDC's regulations, staff deprives Respondents of the opportunity to adequately respond to the allegation concerning this "asphalt pad of unknown purpose." As discussed above, because BCDC regulations effectively limit Respondents' right to present evidence to the already submitted Statement of Defense, staff cannot now introduce new evidence that Respondents do not have an opportunity to respond to. If staff wish to provide additional evidence concerning this "asphalt pad of unknown purpose[,]" the proper procedure is for staff to withdraw the VR/C and begin the process again. Otherwise, BCDC staff's introduction of new evidence constitutes a violation of Respondents' due process rights in addition to violation of BCDC's regulations.

3. Objection to BCDC staff's use of hearsay evidence

Respondents object to the hearsay evidence included in the Proposed Order. The Recommended Enforcement Decision states: "in light of Respondents' objections, **none of the hearsay statements to which Respondents object is included in the findings in the proposed**

cease and desist and civil penalty order that is part of the Recommended Enforcement Decision." Despite this claim, three Paragraphs of the Proposed Order include the very facts that Respondents objected to as hearsay in the Statement of Defense:

- "Photographs taken on April 9, 2017, document that: (a) there is a single sign adjacent to Greco Island stating, "Sensitive Wildlife Habitat / Do Not Enter," but the sign is so faded that it is almost illegible; (b) there are two other faded signs on Greco Island with no writing visible; and (c) there is no evidence of signs along the majority of the perimeter of Greco Island." (Proposed Order, ¶ II.R.)
- "Photographs taken on June 5, 2016 and April 9, 2017, show a buoy in the Slough marked "Slow 10 MPH," and two photographs taken on June 6, 2016, show a ferry in the Slough generating a substantial wake." (Proposed Order, ¶ II.S.)
- "By letter dated March 24, 2017, an interested organization, the Citizen's Committee to Complete the Refuge ("CCCR"), brought to BCDC staff's attention alleged violations of the following two permit conditions requiring Sanders to provide mitigation for project impacts:

  1. Shorebird Roost Habitat Mitigation. Permit Special Condition II.F requires Sanders to provide, prior to commencement of work authorized under Phase 2 (i.e., the boatyard), approximately 3.0 acres of shorebird roost habitat mitigation, to replace such habitat lost as a result of the project. Special Condition II.F. provides that 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 California Department of Fish and Wildlife.

2. Non-tidal Wetland Mitigation. Permit Special Condition II.G requires Sanders to provide mitigation for the loss of 0.27 acres of non-tidal wetlands located in a drainage ditch on the Site by enlarging the wetlands in the remainder in the ditch and creating additional wetlands for a replacement ratio of at least 1:1. Special Condition II.G. provides that the habitat enhancement plans shall be reviewed and approved by the U.S. Fish and Wildlife Service, California Department of Fish and Wildlife, and by or on behalf of the Commission." (Proposed Order, ¶ II.V.)

In regards to Paragraphs R and S, BCDC staff relies heavily on the hearsay statements and photographs provided by CCCR that purport to demonstrate an absence of signage. As BCDC regulations make clear, inadmissible hearsay evidence alone is not sufficient in itself to support a finding of fact. Cal. Code Regs. tit. 14, § 13329. Additionally, these photos cannot, and do not, capture the entirety of Greco Island (as the photos, by their nature, only show a portion of a large area and do not show the entire perimeter, or even a majority of, the perimeter of Greco Island). BCDC staff has not provided any evidence that can support a finding that these signs are not in place. Paragraph V suffers from the same defects, as the "evidence" contained in the letter is inadmissible hearsay that cannot be used alone to support a finding of fact. *Id.* Indeed, the letter from Mr. Gaffney contains hearsay within hearsay, as Mr. Gaffney purports to explain findings by other members of this citizen group. And, notably, Mr. Gaffney's letter does not even provide any proof that the mitigation was not complete.

BCDC staff continues to base their allegations on improper hearsay evidence despite claiming that that very same hearsay evidence would be removed. Respondents request that the Enforcement Committee strike the hearsay evidence relied on in Paragraphs R, S, and V.

Respondents also object to BCDC staff's reliance on improper hearsay evidence to support the factual claim that "Respondents' long-standing violations of the Permit's public access requirements have resulted in the complete denial and loss of the public access areas and improvements at the Site for an approximately eight-year period, from September 2009 to July 2017" and the Recommended Enforcement Decision's repeated claims of an adverse effect on public access. (Recommended Enforcement Decision, p. 42; Proposed Order, ¶ IV.E.1.) BCDC staff relies only on years-old hearsay (and hearsay within hearsay) from "Laurence Frank," "Matt Leddy," and other unidentified "members of the public" who are not witnesses at this proceeding. Respondents therefore request that the Enforcement Committee strike Paragraph IV.E.1. of the Proposed Order.

4. Objections to BCDC staff's assertions of unverified factual claims

The Recommended Enforcement Decision and the Proposed Order contain many unverified factual claims that are inadmissible statements because they are speculative assertions, improper expert opinion, and not based on any evidence in the enforcement record. Respondents' objections to the factual claims include:

Unverified Fact No. 1: BCDC staff repeatedly makes the factual claim that Monterey Cypress and Poplar trees serve as habitats to raptors that allegedly prey on endangered birds. (Recommended Enforcement Decision, pp. 6, 20-21, 23, 43; Proposed Order, ¶¶ II.U, IV.E.3.) Only documents referred to in the VR/C may be relied on by staff to establish a prima facie case, and the VR/C did not refer to any documents supporting this alleged fact. Cal. Code Regs. tit. 14, § 11321(b). The Administrative Record contains absolutely no evidence that Monterey Cypress and Poplar trees serve as habitats to raptors that allegedly prey on endangered birds.[1] BCDC staff

[1] Any supposed evidence relied upon by BCDC staff to demonstrate environmental harm in the VR/C is inadmissible hearsay, as discussed here and in the Statement of Defense.

has not established any evidentiary support for this factual claim, and therefore the claim is speculative, unverified, and conclusory. The claim is also an improper opinion because BCDC staff has not established any expertise regarding the habitats of raptors or endangered birds.

Unverified Fact No. 2: BCDC staff repeatedly makes the factual claim that the alleged lack of visual barriers between the marina and the salt pond causes disturbance to water birds and affects sensitive habitats. (Recommended Enforcement Decision, pp. 5, 7, 27, 43; Proposed Order, ¶¶ II.B.5, II.T, IV.E.3.) Only documents referred to in the VR/C may be relied on by staff to establish a prima facie case, and the VR/C did not refer to any documents supporting this alleged fact. Cal. Code Regs. tit. 14, § 11321(b). The Administrative Record contains absolutely no evidence that the alleged lack of visual barriers has disturbed water birds or negatively affected sensitive habitats. BCDC staff has not established any evidentiary support for this factual claim, and therefore the claim is speculative, unverified, and conclusory. The claim is also an improper opinion because BCDC staff has not established any expertise regarding the water birds or habitats in question.

Unverified Fact No. 3: BCDC staff makes the factual claim that the current shorebird roost habitat does not provide the same functions and benefits for shorebirds as before. BCDC staff further asserts that "there is no way to remove or compensate for the past impacts to wildlife that have results from...the project's adverse impacts to shorebird roosting habitat." (Recommended Enforcement Decision, pp. 27-28, 43; Proposed Order, ¶¶ IV.E.3, IV.F.) Only documents referred to in the VR/C may be relied on by staff to establish a prima facie case, and the VR/C did not refer to any documents supporting these alleged facts. Cal. Code Regs. tit. 14, § 11321(b). The Administrative Record contains absolutely no evidence that the current shorebird roost habitat does not provide the same functions and benefits for shorebirds, that there have

been any negative impacts to wildlife, or that the project has had an adverse impact on shorebird roosting habitat. BCDC staff has not established any evidentiary support for these factual claims, and therefore the claims are speculative, unverified, and conclusory. The claims are also improper opinion because BCDC staff has not established any expertise regarding shorebird roost habitats.

Unverified Fact No. 4: BCDC staff makes the factual claim that the alleged lack of buoys and signage results in "significant adverse impacts" to wildlife and sensitive habitats. (Recommended Enforcement Decision, pp. 7, 25-27, 42; Proposed Order, ¶¶ II.B.4, IV.E.3.) Only documents referred to in the VR/C may be relied on by staff to establish a prima facie case, and the VR/C did not refer to any documents supporting this alleged fact. Cal. Code Regs. tit. 14, § 11321(b). The Administrative Record contains absolutely no evidence that there have been "significant adverse impacts" to wildlife and sensitive habitats. BCDC staff has not established any evidentiary support for this factual claim, and therefore the claim is speculative, unverified, and conclusory. The claim is also an improper opinion because BCDC staff has not established any expertise regarding the wildlife and sensitive habits in the marina.

Unverified Fact No. 5: BCDC staff makes the factual claim that the alleged lack of buoys identifying a "no wake" zone results in "significant adverse impacts" to wildlife and sensitive habitats. (Recommended Enforcement Decision, pp. 7, 25, 42; Proposed Order, ¶¶ II.B.4, IV.E.3.) Only documents referred to in the VR/C may be relied on by staff to establish a prima facie case, and the VR/C did not refer to any documents supporting this alleged fact. Cal. Code Regs. tit. 14, § 11321(b). The Administrative Record contains absolutely no evidence that there have been "significant adverse impacts" to wildlife and sensitive habitats. BCDC staff has not established any evidentiary support for this factual claim, and therefore the claim is speculative,

unverified, and conclusory. The claim is also an improper opinion because BCDC staff has not established any expertise regarding the wildlife and sensitive habits in the marina.

Unverified Fact No. 6: BCDC staff makes the general factual claim that "there is no way to recover or compensate for the adverse impacts to listed species and sensitive habitat that have occurred as a result of Respondents' violations." (Recommended Enforcement Decision, p. 43; Proposed Order, ¶ IV.F.) Only documents referred to in the VR/C may be relied on by staff to establish a prima facie case, and the VR/C did not refer to any documents supporting this alleged fact. Cal. Code Regs. tit. 14, § 11321(b). The Administrative Record contains absolutely no evidence that there have been adverse impacts to listed species and sensitive habitats. BCDC staff has not established any evidentiary support for the claim that any adverse impacts have occurred, and therefore the claim is speculative, unverified, and conclusory. The claim is also an improper opinion because BCDC staff has not established any expertise regarding the wildlife and sensitive habits in the marina.

Unverified Fact No. 7: BCDC staff makes the factual claim that "Respondents' long-standing violations of the Permit's public access requirements have resulted in the complete denial and loss of the public access areas and improvements at the Site for an approximately eight-year period, from September 2009 to July 2017." The Recommended Enforcement Decision also repeatedly asserts a claim of adverse effect on public access. (Recommended Enforcement Decision, p. 42; Proposed Order, ¶ IV.E.1.) The Administrative Record contains absolutely no evidence that there has been a "complete denial and loss of the public access areas and improvements[.]" BCDC staff has not established any evidentiary support for adverse impact, nor any support of alleged "complete denial" of public access areas for eight years.

BCDC staff has cited to only five alleged incidents[2] of public access issues in the span of fourteen years since the permit was granted, an exceptionally low number that does not support an allegedly significant denial of public access. (VR/C, ¶¶ V, Y, X.) Therefore, this factual claim is speculative, unverified, and conclusory.

Unverified Fact No. 8: BCDC staff repeatedly makes factual claims about the state of mind of Respondents in allegedly failing to provide public access, such as the claim that Respondents "knowingly and intentionally deceived and misled the public for years by maintaining numerous unauthorized signs around the Site prohibiting public access." BCDC staff also makes the claim that Respondents "actively prevented and discouraged public access for approximately eight years." (Recommended Enforcement Decision, pp. 3, 6, 43; Proposed Order, ¶¶ IV.E.2, IV.D, IV.K.). The Administrative Record contains absolutely no evidence that the public access was negatively impacted.[3] BCDC staff has not established any evidentiary support for the assertion that public access was negatively impacted. Furthermore, BCDC staff has not established any evidentiary support that Respondents "intentionally deceived" the public in allegedly denying public access. Therefore, these factual claims are speculative, unverified, and conclusory.

BCDC staff has presented no evidentiary support for their speculative, unverified, and conclusory assertions of factual claims. Respondents request that the Enforcement Committee strike these factual claims improperly contained in the Recommended Enforcement Decision and the Proposed Order. In addition, Respondents reiterate their denial and objections made in

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[3] In support of these assertions, staff relies only on years-old hearsay (and hearsay within hearsay) from "Laurence Frank," "Matt Leddy," and other unidentified "members of the public" who are not witnesses at this proceeding. Even if this hearsay were admissible, which it is not, BCDC staff has cited to only a handful of alleged incidents of public access issues in the span of fourteen years since the permit was granted, an exceptionally low number that does not support an allegedly significant denial of public access. (*See* VR/C, ¶¶ V, Y, X.)

Respondents' Statement of Defense to BCDC's assertions of untrue or objectionable statements of fact.

5. Objection to BCDC staff's inclusion of alleged requirements by other agencies

Respondents object to BCDC staff including findings in the Recommended Enforcement Decision and the Proposed Order that relate to alleged requirements by other agencies such as the U.S. Army Corps of Engineers and the Regional Water Quality Control Board. (*See* Recommended Enforcement Decision, p. 28; Proposed Order, ¶ X). Such findings are irrelevant in this proceeding. BCDC has no authority to assert violations on behalf of the U.S. Army Corps of Engineers or the Regional Water Quality Control Board.

6. Objection to BCDC staff's improper assertions of Respondents' admissions

BCDC staff has attributed a number of admissions to Respondents that Respondents never made, and such alleged admissions even conflict with Respondents' plain language in the Statement of Defense. These improper assertions of Respondents' admissions include:

Improper Assertion No. 1: "Respondents admit that they did not provide access to the Phase 1B public access pathways until July 2017." (Recommended Enforcement Decision, p. 11.) As the basis for this supposed admission, BCDC staff cites to the Statement of Defense 51:5-7, which states: "Respondents promptly installed public access and Bay Trail signs around the Phase 3 area after Redwood City authorized Respondents to open the pathways in the area in July 2017." This statement by Respondents does not make the admission that BCDC staff imagines. Rather, Respondents **specifically denied** BCDC's allegations concerning public access pathways in the Statement of Defense 35:15-16. BCDC staff has chosen to willfully ignore this denial, fabricating an admission from which BCDC staff then asserts "Respondents cannot escape their admission that they did not provide access to the Phase 1B public pathways until

July 2017." (Recommended Enforcement Decision, p. 17.) Respondents object to the assertion of this alleged admission in its entirety.

Improper Assertion No. 2: "Respondents essentially admit that they did not install public access signs while they were prohibiting access to the required Phase 1B public access areas." (Recommended Enforcement Decision, p. 22.) Contrary to this claim, Respondents explicitly stated in the Statement of Defense that they maintained a sign near the Harbormaster's office and installed "future extension of the Bay Trail" signs. (Statement of Defense, 50:11-15.) Respondents object to the assertion of this alleged admission in its entirety.

Improper Assertion No. 3: "[Respondents] concede that a reasonable reading of Permit is that this requirement must be met when public boat launch is operational." (Recommended Enforcement Decision, p. 26.) Respondents object to this alleged admission because BCDC mischaracterizes it as a concession that the public boat launch and all other Phase 1B public access improvements were required by September 2009. *Id.* at 26. Respondents explicitly stated otherwise: that the triggering date was instead July 2017. (Statement of Defense, 59:5-22.)

Improper Assertion No. 4: "Respondents admit that there are three floating structures, as alleged by staff, that are used to hold (i.e., store) personal watercraft." (Recommended Enforcement Decision, p. 31.) Respondents object to this alleged admission because BCDC mischaracterizes it as Respondents' concession that they were not in compliance. Respondents have stated that they are in compliance because the floats do not constitute fill under Government Code § 66632(a). (Statement of Defense, 82:16-23.)

Improper Assertion No. 5: "Regardless of whether the structure is called a fuel dock or a service dock, Respondents admit that they modified the dock in 2014." (Recommended Enforcement Decision, p. 32.) Respondents object to this alleged admission because it

mischaracterizes Respondents' statements. Respondents stated that they "shifted the [dock] opening in the float sections for the future straddle lift bay," and that the "opening of the float sections did not require changes to any permanent structures (i.e., pilings) and remained wholly within the footprint of the dock as set out in the submitted plans." (Statement of Defense, 84:4-13.)

Improper Assertion No. 6: "Special Condition II.AA. requires Respondents to provide the Commission verification that Respondents had sent updated nautical charts to NOAA... Respondents admit they failed to send staff the necessary verification timely." (Recommended Enforcement Decision, p. 36.) Respondents object to this alleged admission because Respondents stated they had worked with NOAA staff to submit the required information and satisfy Special Condition II.AA. (Statement of Defense, 98:17-29.)

Conclusion

For the reasons set forth, Respondents object to the Recommended Enforcement Decision and its attachments. Respondents request that the Enforcement Committee exclude Allegation No. 23 as improperly proposed and strike inclusion of Allegation No. 23 from the Recommended Enforcement Decision, the Proposed Order, and the Revised Penalty Chart; strike the hearsay evidence improperly relied on in Paragraphs R, S, and V of the Proposed Order; strike alleged admissions improperly attributed to Respondents in the Recommended Enforcement Decision; strike unverified factual claims asserted in the Recommended Enforcement Decision and the Proposed Order; and strike findings about alleged requirements by other agencies in the Recommended Enforcement Decision and the Proposed Order.

Dated: November 15, 2017

Respectfully submitted,

BAKER BOTTS L.L.P.

By: *_/s/ Christopher J. Carr_____*

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SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

IN THE MATTER OF: VIOLATION REPORT/COMPLAINT FOR THE IMPOSITION OF ADMINISTRATIVE CIVIL PENALTIES NO. ER2010.013 PROPOSED CEASE AND DESIST AND CIVIL PENALTY ORDER NO. CDO 2017.04 MARK SANDERS AND WESTPOINT HARBOR, LLC	RESPONDENTS' RESPONSE TO STAFF'S OBJECTIONS TO DECLARATION OF MARK SANDERS

Respondents Mark Sanders and Westpoint Harbor, LLC ("Respondents") submit the following response to the staff's objections to the Declaration of Mark Sanders.

Response to Staff's Claim Regarding Sufficiency of Statements in Sanders' Declaration to Support Findings of Fact

For the reasons explained below, San Francisco Bay Conservation and Development Commission ("BCDC") Staff is incorrect in asserting that certain statements in Mark Sanders' declaration (Respondents' Statement of Defense, Exhibit No. 1) are hearsay. Nonetheless, even if Sanders' declaration did contain hearsay, BCDC staff's claim that such "hearsay statements are not sufficient to support a finding" is false. (*See* Executive Director's Recommended Enforcement Decision, p. 48.) Sanders' declaration has been submitted under penalty of perjury, and Sanders would be subject to cross-examination as provided by BCDC regulations, if BCDC staff had chosen to request cross-examination of Sanders. Cal. Code of Regs. tit. 14, §§ 11321, 11322, 11327, 11329. BCDC staff cannot, by choosing not to cross-examine Sanders, legally preclude the use of statements found in Sanders' declaration to support findings of fact.

Response to Staff's Objections

Paragraph 8:

Declaration Text: "These meetings together with more detailed discussions with the U.S. Coast Guard ('USCG') and National Oceanic and Atmospheric Administration ('NOAA'), prior to the issuance of the Permit, resulted in an agreement among all concerned that regular channel markers would be placed over the length of Westpoint Slough, but other buoys and markers in the navigable channel would not be allowed (other than an existing 'no wake' buoy and other marks already located in the channel by the Port of Redwood City)."

Objection: Staff objects to the above excerpt regarding any purported "agreement" about channel markers as hearsay.

Response: This excerpt is not hearsay because it is not being offered to prove the truth of the matter asserted. Evid. Code, § 1200(a). Rather, the excerpt is being offered to show the effect of the statement on Mark Sanders and why he took specific actions in his efforts to comply with the permit, while operating under the belief that an agreement about channel markers existed.

Paragraph 9:

Declaration Text: "This of course was well understood by the USCG and NOAA representatives, who detailed the channel marks and locations as well as additional no-wake signage to be used, and made clear that the buoys 100 feet from Greco Island would not be allowed as they would constitute navigational hazards."

Objection: Staff objects to the above excerpt regarding what was allegedly "well understood by the USCG and NOAA representatives," as well as what these agencies allegedly "made clear" regarding the buoys as hearsay.

Response: This excerpt is not hearsay because it is not being offered to prove the truth of the matter asserted. Evid. Code, § 1200(a). Rather, the excerpt is being offered to show the effect of the statement on Mark Sanders and why he took specific actions in his efforts to comply with the permit, while operating under the belief that the USCG and NOAA representatives understood and made clear certain requirements.

Paragraph 9:

Declaration Text: "This was clear to the source of this condition, Clyde Morris at the U.S. Fish and Wildlife Service ('USFWS'), who quickly understood and the decision to use standard USFWS signs on the island was adopted."

Objection: Staff objects to the above excerpt regarding what was allegedly "clear to ... Clyde Morris," as well as what Clyde Morris allegedly "quickly understood" regarding the USFWS signs as hearsay.

Response: This excerpt is not hearsay because it is not being offered to prove the truth of the matter asserted. Evid. Code, § 1200(a). Rather, the excerpt is being offered to show the effect of the statement on Mark Sanders and why he took specific actions in his efforts to comply with the permit, while operating under the belief that a USFWS representative understood his decision regarding signage.

Paragraph 12:

Declaration Text: "BCDC staff required that the rowing facility be moved to the west side, and the harbor office, service dock (fuel, pumpout) moved to the east side, which required a number of design changes."

Objection: Staff objects to the above excerpt regarding what allegedly "BCDC staff required," concerning the rowing facility, harbor office, and service dock as hearsay.

Response: Under the Evidence Code, this excerpt is not hearsay because "[e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity." Evid. Code, § 1220. BCDC staff's own statements are admissible evidence and not hearsay.

Paragraph 29:

Declaration Text: "In a February 2007 meeting, Adrienne Klein questioned whether BCDC staff had received the dock plans."

Objection: Staff objects to the above excerpt regarding what Adrienne Klein allegedly "questioned," regarding the dock plans as hearsay.

Response: Under the Evidence Code, this excerpt is not hearsay because "[e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity." Evid. Code, § 1220. The declarant, Adrienne Klein, is a BCDC staff member, and therefore her statements are admissible evidence and not hearsay.

Paragraph 35:

Declaration Text: "Redwood City in issuing a conditional occupancy permit for Phase 1A required the future Phase 2 and 3 areas to be restricted from public access for safety reasons."

Objection: Staff objects to the above excerpt stating that that in issuing a permit Redwood City allegedly "required," areas to be restricted from public access as hearsay.

Response: This excerpt is not hearsay because it is not being offered to prove the truth of the matter asserted. Evid. Code, § 1200(a). Rather, the excerpt is being offered to show the effect of the statement on Mark Sanders and why he took specific actions in his efforts to comply with the permit, while operating under the belief that Redwood City required areas to be restricted from public access.

Paragraph 42:

Declaration Text: "In 2009, I coordinated with NOAA to update their Local Notice to Mariners to account for Westpoint Harbor. The NOAA representatives I worked with informed me that they would submit the required notification to BCDC, per their common practice."

Objection: Staff objects to the above excerpt regarding what the NOAA representatives allegedly "informed" Mr. Sanders regarding submission of the required notification to BCDC, as well as what is allegedly considered NOAA's "common practice" as hearsay.

Response: This excerpt is not hearsay because it is not being offered to prove the truth of the matter asserted. Evid. Code, § 1200(a). Rather, the excerpt is being offered to show the effect of the statement on Mark Sanders and why he took specific actions in his efforts to comply with the permit, while operating under the belief that the NOAA representatives would submit the required notification to BCDC and that such was their common practice.

Paragraph 46:

Declaration Text: "On March 14, 2012, I was asked by Bill Moyer, manager of Pacific Shores Center, to improve the fence between Westpoint Harbor and Pacific Shores in order to stop individuals from crossing the unsafe area on and over riprap placed in the ditch."

Objection: Staff objects to the above excerpt regarding what Mr. Sanders allegedly "was asked by Bill Moyer," regarding fence improvement as hearsay.

Response: This excerpt is not hearsay because it is not being offered to prove the truth of the matter asserted. Evid. Code, § 1200(a). Rather, the excerpt is being offered to show the effect of the statement on Mark Sanders and why he took specific actions in his efforts to comply with the permit, while operating under the belief that the Pacific Shores Center required him to improve the fence.

Paragraph 47:

Declaration Text: "Although the Violation Report/Complaint claims that BCDC staff confirmed with the onsite manager for Pacific Shores Center that there were no impediments to completing the trail between Pacific Shores Center and Westpoint Harbor, Yvette Montoya and Carey Liggett, property managers for Pacific Shores Center both disputed this statement when I spoke with them. The previous manager, Kris Vargas informed me that she was pushed by BCDC's Adrienne Klein to assert that there was no impediment to opening the gate. Ms. Vargas

told me she was unwilling to make this statement and said she didn't want to put the public or employees at risk."

Objection: Staff objects to the above excerpt regarding what Yvette Montoya and Carey Liggett allegedly disputed, as well as what Kris Vargas allegedly informed Mr. Sanders about alleged pushback from Adrienne Klein as hearsay.

Response: This excerpt is not hearsay because it is not being offered to prove the truth of the matter asserted. Evid. Code, § 1200(a). Rather, the excerpt is being offered to show the effect of the statements on Mark Sanders and why he took specific actions in his efforts to comply with the permit, while operating under the belief that property managers for Pacific Shores Center considered there to be impediments to completing the trail between Pacific Shores Center and Westpoint Harbor. In addition, Adrienne Klein is a BCDC staff member whose statement to Kris Vargas is being offered against BCDC staff.

Paragraph 53:

Declaration Text: "In past discussions with BCDC staff concerning signage of the restrooms, BCDC staff agreed restroom and shower access could be controlled for the safety of tenants and others, and provided suggested designs on signage for this purpose."

Objection: Staff objects to the above excerpt stating what, BCDC staff allegedly "agreed" to concerning controlling restroom and shower access as hearsay.

Response: Under the Evidence Code, this excerpt is not hearsay because "[e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity." Evid. Code, § 1220. BCDC staff's statement is admissible evidence and not hearsay.

Paragraph 72:

Declaration Text: "I hand-delivered the Westpoint Harbor Management and Operations Manual to Brad McCrea of BCDC in July 2007. BCDC staff even remarked on specific portions of the submittal when it was delivered in 2007. However, when I later discussed this submittal with Tom Sinclair in 2012, he admitted that he had never looked at the document."

Objection: Staff objects to the above excerpt regarding alleged remarks by BCDC staff as well as Tom Sinclair's alleged admission concerning a document as hearsay.

Response: Under the Evidence Code, this excerpt is not hearsay because "[e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity." Evid. Code, § 1220. BCDC staff's statements are admissible evidence and not hearsay. Similarly, Tom Sinclair was a BCDC staff member whose statement is being offered against BCDC in this case.

Conclusion

For the reasons set forth, Respondents request that the Enforcement Committee overrule BCDC staff's objections and admit the statements.

Dated: November 15, 2017

Respectfully submitted,

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SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

IN THE MATTER OF: VIOLATION REPORT/COMPLAINT FOR THE IMPOSITION OF ADMINISTRATIVE CIVIL PENALTIES NO. ER2010.013 PROPOSED CEASE AND DESIST AND CIVIL PENALTY ORDER NO. CDO 2017.04 MARK SANDERS AND WESTPOINT HARBOR, LLC	RESPONDENTS' OBJECTIONS TO LETTER AND ATTACHMENT FROM CITIZENS COMMITTEE TO COMPLETE THE REFUGE

Respondents Mark Sanders and Westpoint Harbor, LLC ("Respondents") object to the letter and attachment submitted by Citizens Committee to Complete the Refuge ("CCCR Letter"). The CCCR Letter is being used to introduce new purported evidence that should have been included with the Violation Report/Complaint for the Imposition of Administrative Civil Penalties (Enforcement Investigation No. ER2010.013) ("VR/C"), and that Respondents should have had an opportunity to address in their Statement of Defense. The CCCR Letter has been submitted less than two weeks before the Enforcement Hearing, and Respondents received the CCCR Letter a mere 10 days before the Enforcement Hearing. Far from merely taking the form of a "public comment letter," the letter is essentially improper testimony in the form of multiple assertions of unverified purported facts, improper purported expert opinions, as well as annotated purported exhibits allegedly supporting the same.[1] Under BCDC's regulations, the CCCR Letter cannot be used as evidence to support any factual findings or any enforcement decision. Furthermore, as detailed in the specific objections below, many of the purported factual claims in the CCCR Letter are additionally inadmissible statements due to hearsay, improper opinion, speculative assertions, and lack of personal knowledge.

Respondents request that the Enforcement Committee strike the entirety of the CCCR Letter, or in the alternative, strike purported factual claims improperly contained in the CCCR Letter and exclude statements that are inadmissible under the Evidence Code.

General Objection to the Entire CCCR Letter

Respondents object to the entirety of the CCCR Letter as improper under BCDC's regulations regarding hearsay evidence and introduction of new evidence. The CCCR Letter contains much alleged evidence being offered to support factual findings in of itself, including but not limited to: the effects of alleged lack of tree removal and buoy installation on the listed

[1] For example, the CCCR letter characterizes its own contents as "ample evidence" of a claim. (CCCR Letter, p. 4.)

clapper rail, western snowy plover, and salt marsh harvest mouse living on nearby Greco Island (CCCR Letter, pp. 3, 7-8); the characteristics of the Monterey cypress tree and Lombardy poplar tree that allegedly do not meet the requirements for high-suitability designation (CCCR Letter, pp. 3-4); the allegedly "ample evidence" that the Monterey cypress tree is used by predatory raptors (CCCR Letter, p. 4); the alleged lack of records regarding Westpoint Harbor found by the Coast Guard Commander (CCCR Letter, p. 6); the alleged level of activity and wakes generated by ferry services (CCCR Letter, pp. 6-7); and the alleged failure to provide a shorebird roost habitat and the alleged effects this had on shorebirds this year (CCCR Letter, pp. 8-9, 12-13). In addition, the letter includes what amounts to be newly created trial exhibits in the form of annotated and manipulated images designed by CCCR, such as images allegedly annotated with the locations of 85-foot setback requirements in the marina. (CCCR Letter, p. 11.)

The introduction of hearsay evidence offered to support factual findings in of itself is explicitly barred by BCDC's procedural rules at this stage. Section 11329(b) of Title 14 of the California Code of Regulations states: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but **shall not be sufficient in itself to support a finding** unless it would be admissible over objection in a civil action or unless it is in the form of a declaration under penalty of perjury or in the form of another document **referred to in a violation report or complaint for the imposition of civil penalties** and the declarant or author of the other document is subject to cross-examination as provided in Sections 11321, 11322, and 11327." Cal. Code Regs. tit. 14, § 11329(b). In addition, Section 11321(b) requires: "The violation report shall refer to all documents on which the staff relies to provide a prima facie case." Cal. Code Regs. tit. 14, § 11321(b).

Here, the CCCR Letter was never "referred to in a violation report or complaint for the imposition of civil penalties"—indeed, at the time the VR/C was issued, the CCCR Letter did not exist. Cal. Code Regs. tit. 14, § 11329(b). Instead, the letter was submitted *more than three months after the VR/C was mailed*, and appears to be used to assert new purported facts to rebut Respondents' Statement of Defense. Because the CCCR Letter was not submitted in compliance with proper procedures, under the California Code of Regulations, the letter is hearsay evidence that "shall not be sufficient in itself to support a finding" and therefore cannot be used as it is here to serve as the sole evidence of several factual claims. *Id.* In addition, BCDC staff cannot rely on the CCCR Letter in providing a prima facie case. Cal. Code Regs. tit. 14, § 11321(b).

"A public entity has a ministerial duty to comply with its own rules and regulations where they are valid and unambiguous." *Galzinski v. Somers*, 2 Cal. App. 5th 1164, 1171 (Cal. Ct. App. 2016); *see also Gregory v. State Bd. of Control*, 73 Cal. App. 4th 584, 595 (1999) (including duties codified in the California Code of Regulations). A duty is ministerial when there is a clearly defined rule. *Redwood Coast Watersheds All. v. State Bd. of Forestry & Fire Prot.*, 70 Cal. App. 4th 962, 970 (1999). As discussed above, Section 11329(b) and Section 11321(b) are valid, unambiguous, and clearly defined rules that do not allow hearsay evidence such as the CCCR Letter to be the sole evidence used to support a finding of fact when the letter was not referred to in the VR/C (and the author is not subject to cross-examination). Respondents therefore request the Enforcement Committee require BCDC staff to comply with its rules and strike the CCCR Letter in its entirety.

Evidentiary Objections to CCCR Letter

In addition, Respondents submit the following evidentiary objections to the CCCR Letter.

Objection Number 1

Letter Text: "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." (CCCR Letter, p. 2.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). The statement is an improper opinion because CCCR members have not been established as experts on what constitutes "unacceptable risks" or "possibly illegal impacts" to species. CCCR members have not established that they have personal knowledge of the same, and therefore the statement lacks foundation and is speculative.

Objection Number 2

Letter Text: "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." (CCCR Letter, p. 3.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). CCCR members have not established that they have personal knowledge of the alleged failure to remove trees, and therefore the statement lacks foundation and is speculative. The statement about raptors is an improper opinion because CCCR members have not been established as experts on the habitats and prey of raptors. CCCR members have not established that they have personal knowledge of the same, and therefore the statement lacks foundation and is speculative.

Objection Number 3

Letter Text: "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), 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)." (CCCR Letter, p. 3.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); hearsay (Evid. Code, § 1200); lack of authentication (Evid. Code, § 1401). The statement is hearsay because it is an out of court statement submitted for the truth of the matter asserted. In addition, the alleged information from the websites has not been verified or authenticated. CCCR members have not established that they have personal knowledge of the Monterey cypress tree, and therefore the statement lacks foundation and is speculative. In addition, the statement is an improper opinion because CCCR members have not been established as experts on the Monterey cypress tree.

Objection Number 4

Letter Text: "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[1]	Landscaping Suitability Index[2]
Populus nigra Lombardy poplar	40 to 100 feet; dense columnar shape with upward reaching branches	Poor to Very Poor

"

(CCCR Letter, p. 4.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); hearsay (Evid. Code, § 1200); lack of authentication (Evid. Code, § 1401). The statement is hearsay because it is an out of court statement submitted for the truth of the matter asserted. In addition, the alleged information from the Pacific Shores Center Landscape Tree Suitability Index has not been verified or authenticated. CCCR members have not established that they have personal knowledge of the Lombardy poplar tree, and therefore the statement lacks foundation and is speculative. In addition, the statement is an improper opinion because CCCR members have not been established as experts on the Lombardy poplar tree.

Objection Number 5

Letter Text: "'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…'

'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...'

'Peregrine Falcons nest in the Monterey cypress trees around the Hearn farm house.'"

(CCCR Letter, p. 4-5) (internal citations omitted).

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); hearsay (Evid. Code, § 1200); lack of authentication (Evid. Code, § 1401). The statement is hearsay because it is an out of court statement submitted for the truth of the matter asserted. In addition, the alleged information from the cited websites has not been verified or authenticated. CCCR members have not established that they have personal knowledge of the Monterey cypress trees or the habitats of raptors, and therefore the statement lacks foundation and is speculative. In addition, the statement is an improper opinion because CCCR members have not been established as experts on the Monterey cypress trees or the habitats of raptors.

Objection Number 6

Letter Text: "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." (CCCR Letter, p. 5.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702). CCCR members have not established that they have personal knowledge of the alleged failure to install and maintain a buoy system, and therefore the statement lacks foundation and is speculative.

Objection Number 7

Letter Text: "In fact, there is undisputed testimony under penalty of perjury by Matthew Leddy that no buoys stating 'no wake' exist anyplace in Westpoint Slough and recent photographs attesting to that fact." (CCCR Letter, p. 5.)

Grounds for Objection: Cal. Code Regs. tit. 14, §§ 11329(b), 11321(b); improper opinion (Evid. Code, §§ 800, 803). Under BCDC's own regulations, any hearsay evidence including testimony from the Matthew Leddy declaration "shall not be sufficient in itself to support a finding" such as the existence of signs or the authenticity of photographs allegedly attesting to the same. Evidence from the Matthew Leddy declaration also cannot be relied on by BCDC staff to establish a prima facie case. In addition, the statement that the Matthew Leddy testimony is "undisputed" is an improper opinion.

Objection Number 8

Letter Text: "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... 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." (CCCR Letter, p. 6.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). CCCR members have not established that they have personal knowledge of whether Respondents met with various agencies or reached an agreement with those agencies, and therefore the statement lacks foundation and is speculative. The statement that "clearly no such non-buoy agreement had been reached" is an improper opinion because it is an assumption

not rationally based on the perception of CCCR members, as the buoy requirements could have been included despite an initial or later agreement otherwise.

Objection Number 9

Letter Text: "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." (CCCR Letter, p. 6.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803); hearsay (Evid. Code, § 1200). The Coast Guard Commander's alleged statement is hearsay because it is an out of court statement submitted for the truth of the matter asserted. The characterization of the Coast Guard's search as "thorough" is not based on personal knowledge, lacks foundation, is speculative, and constitutes improper opinion.

Objection Number 10

Letter Text: "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." (CCCR Letter, p. 6.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,

§§ 800, 803). CCCR members have not established that they have personal knowledge of the alleged existence of "commercial high-speed ferry service" in the harbor or that Respondents allegedly "allowed" such operation, and therefore the statement lacks foundation and is speculative. The statement is an improper opinion because CCCR members have not been established as experts on what constitutes a "substantial wake." The assumption that the current buoys and signage are allegedly not working is also not based on personal knowledge, is speculative, lacks foundation, and constitutes an improper opinion.

Objection Number 11

Letter Text: "Last year, PROP's high-speed catamarans were making four round trips/day during the work week, generating a significant wake from excessive speeds as they traversed a mile of Westpoint Slough along the shoreline of Greco Island between Redwood Creek and the harbor." (CCCR Letter, pp. 6-7.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). CCCR members have not established that they have personal knowledge of the alleged activity of "PROP's high-speed catamarans," and therefore the statement lacks foundation and is speculative. The statement is an improper opinion because CCCR members have not been established as experts on what constitutes a "substantial wake" or "excessive speeds."

Objection Number 12

Letter Text: "Respondents have failed to install and maintain buoys along Greco Island with signage prohibiting public access into the marshlands of the Refuge." (CCCR Letter, p. 7.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702). CCCR members have not established that they have personal knowledge of the alleged failure to install and maintain buoys along Greco Island with signage, and therefore the statement lacks foundation and is speculative.

Objection Number 13

Letter Text: "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 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." (CCCR Letter, p. 7.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702). CCCR members have not established that they have personal knowledge of the activity of the nesting Clapper Rail or other species, and therefore the statement lacks foundation and is speculative. The statement that endangered species "are at risk of being disturbed and harassed" due to the alleged absence of signs is an improper opinion because it is an assumption not based on the perception of CCCR members, and CCCR members have not been established as experts regarding the nesting Clapper Rail or other species.

Objection Number 14

Letter Text: "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." (CCCR Letter, p. 8.)

Grounds for Objection: Cal. Code Regs. tit. 14, §§ 11329(b), 11321(b). Under BCDC's own regulations, any hearsay evidence including testimony from the Matthew Leddy declaration "shall not be sufficient in itself to support a finding" such as the alleged authenticity of photographs. Evidence from the Matthew Leddy declaration also cannot be relied on by BCDC staff to establish a prima facie case.

Objection Number 15

Letter Text: "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." (CCCR Letter, p. 8.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702). CCCR members have not established that they have personal knowledge of the alleged failure to install and maintain visual barriers, and therefore the statement lacks foundation and is speculative.

Objection Number 16

Letter Text: "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." (CCCR Letter, p. 9.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). CCCR members have not established that they have personal knowledge of the alleged "degradation of the adjacent shorebird habitat," and therefore the statement lacks foundation and is speculative. The statement that the alleged degradation is the result of an

alleged failure to implement a permit condition is an improper opinion because CCCR members have not been established as experts on shorebird habitats.

Objection Number 17

Letter Text: "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: [image annotated with alleged location of Bohley's Section A].

"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: [image annotated with alleged locations that do not meet requirements]." (CCCR Letter, p. 11.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). The images included have been manipulated and annotated by CCCR members to allegedly indicate the locations of 85-foot setback requirements in the marina. The statement and accompanying images, including those annotations, constitute improper opinion because CCCR members have not been established as experts on GPS coordinates or geographic calculations. The statement and accompanying images therefore also lack foundation and are speculative. CCCR members have also not established that they have personal knowledge of the locations of 85-foot setback requirements in the marina, and therefore the statement and annotations inserted on the images lack foundation, are speculative, and constitute improper opinion.

Objection Number 18

Letter Text: "To date, Respondents have not provided 3 acres of shorebird roost habitat with similar functions and benefits." (CCCR Letter, p. 12.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). CCCR members have not established that they have personal knowledge of the alleged failure to provide 3 acres of shorebird roost habitat, and therefore the statement lacks foundation and is speculative.

Objection Number 19

Letter Text: "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." (CCCR Letter, p. 12.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803); hearsay (Evid. Code, § 1200); lack of authentication (Evid. Code, § 1401). The statement allegedly from the August 17, 2001 LSA Biotic Resources Report is hearsay because it is an out of court statement submitted for the truth of the matter asserted. In addition, the alleged information from the August 17, 2001 LSA Biotic Resources Report has not been verified or

authenticated. CCCR members have not established that they have personal knowledge of the roost habitat or the plans of that habitat, and therefore the statement lacks foundation and is speculative.

Objection Number 20

Letter Text: "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." (CCCR Letter, p. 12.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). CCCR members have not established that they have personal knowledge of whether Respondents created habitat plans or whether Respondents consulted with resource agencies about the plan, and therefore the statement lacks foundation and is speculative. The statement that the replacement habitat "does not have similar functions and benefits as the original habitat" is an improper opinion because CCCR members have not been established as

experts on shorebird roost habitats. The statement about the replacement habitat therefore also is not based on personal knowledge, lacks foundation, and is speculative.

Objection Number 21

Letter Text: "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." (CCCR Letter, p. 12.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). CCCR members have not established that they have personal knowledge of Respondents' replacement habitat or the activity of shorebirds in it, and therefore the statement lacks foundation and is speculative. The statement attributing the alleged abandonment of the shorebirds to the elevation level of the habitat is an improper opinion because CCCR members have not been established as experts on shorebird roost habitats.

Objection Number 22

Letter Text: "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." (CCCR Letter, p. 13.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702). CCCR members have not established that they have personal knowledge of the alleged failure to create the habitat or consult with required agencies, and therefore the statement lacks foundation and is speculative.

Objection Number 23

Letter Text: "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." (CCCR Letter, p. 14.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702). CCCR members have not established that they have personal knowledge about whether Respondents enhanced and enlarged wetlands, whether Respondents prepared habitat plans, or whether Respondents had such plans approved by state or federal agencies, and therefore the statement lacks foundation and is speculative.

Objection Number 24

Letter Text: "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. [Image allegedly depicting Figure 3.]" (CCCR Letter, p. 10.)

Grounds for Objection: Hearsay (Evid. Code, § 1200); lack of authentication (Evid. Code, § 1401). The image of "Figure 3" allegedly from the Army Corp is hearsay because it is an

out of court statement submitted for the truth of the matter asserted. In addition, the alleged image of "Figure 3" has not been verified or authenticated.

Conclusion

For the reasons set forth, Respondents request that the Enforcement Committee strike the entire CCCR Letter, or in the alternative, strike factual claims improperly contained in the letter and exclude statements that are inadmissible under the Evidence Code.

Dated: November 15, 2017

Respectfully submitted,

BAKER BOTTS L.L.P.

By: */s/ Christopher J. Carr*

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SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

IN THE MATTER OF: VIOLATION REPORT/COMPLAINT FOR THE IMPOSITION OF ADMINISTRATIVE CIVIL PENALTIES NO. ER2010.013 PROPOSED CEASE AND DESIST AND CIVIL PENALTY ORDER NO. CDO 2017.04 MARK SANDERS AND WESTPOINT HARBOR, LLC	RESPONDENTS' OBJECTIONS TO DECLARATION OF MATTHEW LEDDY

Respondents Mark Sanders and Westpoint Harbor, LLC ("Respondents") object to the Declaration of Matthew Leddy ("Leddy Declaration"). The Leddy Declaration is being used to introduce new purported evidence that should have been included with the Violation Report/Complaint for the Imposition of Administrative Civil Penalties (Enforcement Investigation No. ER2010.013) ("VR/C"), and that Respondents should have had an opportunity to address in their Statement of Defense. Instead, the Leddy Declaration has been submitted less than two weeks before the Enforcement Hearing, and improperly offers factual claims standing on their own as well as annotated exhibits allegedly supporting the same. Under BCDC's own regulations, the entirety of the Leddy Declaration cannot be used as evidence to support any factual findings or any enforcement decision. Furthermore, as detailed in the specific objections below, many of the factual claims in the Leddy Declaration are inadmissible statements due to improper opinion, speculative assertions, and lack of personal knowledge.

Declarants request that the Enforcement Committee strike the entire Declaration of Matthew Leddy, or in the alternative, strike factual claims improperly contained in the declaration and exclude statements that are inadmissible under the Evidence Code.

General Objection to the Entire Leddy Declaration

Respondents object to the entirety of the Leddy Declaration as improper under BCDC's own regulations regarding hearsay evidence and the introduction of new evidence. The declaration contains much alleged evidence being offered to support factual findings in of itself, including but not limited to: the alleged absence of buoys and signage in Westpoint Slough (Leddy Decl., ¶¶ 7-29, 46-56); the alleged absence of information signs at Westpoint Marina (Leddy Decl., ¶¶ 30, 31); the alleged commercial ferry operation in Westpoint Slough and its effects (Leddy Decl., ¶¶ 33-35); the alleged absence of fencing along Westpoint Marina and its

effects (Leddy Decl., ¶¶ 37-40); the alleged absence of visual barriers to the Cargill salt pond and its effects (Leddy Decl., ¶¶ 41-42); and the alleged signs prohibiting public access (Leddy Decl., ¶¶ 43-45). In addition, the declaration includes what amounts to be newly created trial exhibits containing annotations from the Declarant, such as annotations about fencing along Westpoint Martina (exhibits M and N), annotations of alleged disturbance to the Cargill salt pond (Exhibits Q and R), and annotations of alleged locations of signs and buoys in Westpoint Slough as well as a chart of Declarant's notes and comments about the same (Exhibit EE).

The introduction of hearsay evidence offered to support factual findings in of itself is explicitly barred by BCDC's procedural rules at this stage. Section 11329(b) of Title 14 of the California Code of Regulations states: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but **shall not be sufficient in itself to support a finding** unless it would be admissible over objection in a civil action or unless it is in the form of a declaration under penalty of perjury or in the form of another document **referred to in a violation report or complaint for the imposition of civil penalties** and the Declarant or author of the other document is subject to cross-examination as provided in Sections 11321, 11322, and 11327." Cal. Code Regs. tit. 14, § 11329(b). In addition, Section 11321(b) requires: "The violation report shall refer to all documents on which the staff relies to provide a prima facie case." Cal. Code Regs. tit. 14, § 11321(b).

Here, the Leddy Declaration was never "referred to in a violation report or complaint for the imposition of civil penalties"—indeed, at the time the VR/C was issued, the Leddy Declaration did not exist. Cal. Code Regs. tit. 14, § 11329(b). Instead, the declaration was submitted not only *more than three months after the VR/C was mailed*, but after Respondents had already filed their Statement of Defense. Because the Leddy Declaration was not submitted in

compliance with proper procedures, the California Code of Regulations mandate that the declaration is hearsay evidence that "shall not be sufficient in itself to support a finding" and therefore cannot be used as it is here to serve as the sole evidence of several factual claims. *Id.* In addition, BCDC staff cannot rely on the Leddy Declaration in providing a prima facie case. Cal. Code Regs. tit. 14, § 11321(b).

"A public entity has a ministerial duty to comply with its own rules and regulations where they are valid and unambiguous." *Galzinski v. Somers*, 2 Cal. App. 5th 1164, 1171 (Cal. Ct. App. 2016); *see also Gregory v. State Bd. of Control*, 73 Cal. App. 4th 584, 595 (1999) (including duties codified in the California Code of Regulations). A duty is ministerial when there is a clearly defined rule. *Redwood Coast Watersheds All. v. State Bd. of Forestry & Fire Prot.*, 70 Cal. App. 4th 962, 970 (1999). As discussed above, Section 11329(b) and Section 11321(b) are valid, unambiguous, and clearly defined rules that do not allow hearsay evidence such as the Leddy Declaration to be the sole evidence used to support a finding of fact when the declaration was never referred to in the VR/C. Respondents therefore request the Enforcement Committee strike the Leddy Declaration in its entirety.

Evidentiary Objections to Leddy Declaration

In the alternative, Respondents submit the following evidentiary objections to the Leddy Declaration.

Objection Number 1

Declaration Text: "From the Pacific Shores Center public access walkway, adjacent to Westpoint Marina, I have observed, and taken photos of, Westpoint Slough, inter alia, on the dates listed below:

August 3, 2012 - See attached Photo A;

July 12, 2013 - See attached Photos Bl and B2;

July 17, 2014 - See attached Photos Cl and C2...." (Leddy Decl., ¶ 9.)

Grounds for Objection: Irrelevant (Evid. Code, § 350); barred by laches. *See Brown v. State Pers. Bd.*, 166 Cal. App. 3d 1151, (Ct. App. 1985). The photograph exhibits and text describing the exhibits are irrelevant because under the doctrine of laches, penalties cannot be assessed for any non-compliance allegedly occurring more than three years prior to the date on which the VR/C was mailed. Thus, evidence of any alleged non-compliance occurring before July 24, 2014 is irrelevant. Photograph exhibits A, B1, B2, C1, and C2 were all taken prior to July 24, 2014 and therefore do not constitute relevant evidence.

Objection Number 2

Declaration Text: "Photographs A through G4 are copies of the same photographs that were submitted to BCDC on my behalf on March 10, 2017, and inform my opinion about the absence of buoys and required signage in Westpoint Slough." (Leddy Decl., ¶ 10.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). The statement is an improper opinion because the referenced photos cannot reasonably be expected to provide a complete and accurate view of buoys and signage. Declarant has not established that he has personal knowledge of all the buoys and signage in Westpoint Slough, and therefore the statement lacks foundation and is speculative.

Objection Number 3

Declaration Text: "I took Photo A on August 3, 2012, at 10: 18 a.m. The photo was taken from the Pacific Shores Center looking towards the Westpoint Slough confluence with Redwood Creek. No buoy system identifying a 'No Wake' speed zone or delineating the center of the

channel were visible in the Slough. A true and correct copy of that photograph is attached hereto as Exhibit A." (Leddy Decl., ¶ 11.)

Grounds for Objection: Irrelevant (Evid. Code, § 350); barred by laches. *See Brown v. State Pers. Bd.*, 166 Cal. App. 3d 1151, (Ct. App. 1985). The statement and accompanying exhibit are irrelevant because under the doctrine of laches, penalties cannot be assessed for any non-compliance allegedly occurring more than three years prior to the date on which the VR/C was mailed. Thus, evidence of any alleged non-compliance occurring before July 24, 2014 is irrelevant.

Objection Number 4

Declaration Text: "I took Photo Bl on July 12, 2013, at 1:24 p.m. The photo was taken from the Pacific Shores Center looking towards the Westpoint Slough confluence with Redwood Creek. No buoy system identifying a 'No Wake' speed zone or delineating the center of the channel were visible in the Slough. A true and correct copy of that photograph is attached hereto as Exhibit Bl." (Leddy Decl., ¶ 12.)

Grounds for Objection: Irrelevant (Evid. Code, § 350); barred by laches. *See Brown v. State Pers. Bd.*, 166 Cal. App. 3d 1151, (Ct. App. 1985). The statement and accompanying exhibit are irrelevant because under the doctrine of laches, penalties cannot be assessed for any non-compliance allegedly occurring more than three years prior to the date on which the VR/C was mailed. Thus, evidence of any alleged non-compliance occurring before July 24, 2014 is irrelevant.

Objection Number 5

Declaration Text: "I took Photo B2 on July 12, 2013, at 1:27 p.m. The photo was taken from the Pacific Shores Center. The photo is of Westpoint Slough looking towards the entrance

to Westpoint Marina. No buoy system identifying a 'No Wake' speed zone or delineating the center of the channel were visible in the Slough. A true and correct copy of that photograph is attached hereto as Exhibit B2." (Leddy Decl., ¶ 13.)

Grounds for Objection: Irrelevant (Evid. Code, § 350); barred by laches. *See Brown v. State Pers. Bd.*, 166 Cal. App. 3d 1151, (Ct. App. 1985). The statement and accompanying exhibit are irrelevant because under the doctrine of laches, penalties cannot be assessed for any non-compliance allegedly occurring more than three years prior to the date on which the VR/C was mailed. Thus, evidence of any alleged non-compliance occurring before July 24, 2014 is irrelevant.

Objection Number 6

Declaration Text: "I took Photo Cl on July 17, 2014, at 12:20 p.m. The photo was taken from the Pacific Shores Center. The photo is of Westpoint Slough looking towards confluence with Redwood Creek. No buoy system identifying a 'No Wake' speed zone or delineating the center of the channel were visible in the Slough. A true and correct copy of that photograph is attached hereto as Exhibit Cl." (Leddy Decl., ¶ 14.)

Grounds for Objection: Irrelevant (Evid. Code, § 350); barred by laches. *See Brown v. State Pers. Bd.*, 166 Cal. App. 3d 1151, (Ct. App. 1985). The statement and accompanying exhibit are irrelevant because under the doctrine of laches, penalties cannot be assessed for any non-compliance allegedly occurring more than three years prior to the date on which the VR/C was mailed. Thus, evidence of any alleged non-compliance occurring before July 24, 2014 is irrelevant.

Objection Number 7

Declaration Text: "I took Photo C2 on July 17, 2014, at 12:20 p.m. The photo was taken from the Pacific Shores Center. The photo is of Westpoint Slough looking towards the entrance to Westpoint Marina. No buoy system identifying a 'No Wake' speed zone or delineating the center of the channel were visible in the Slough. A true and correct copy of that photograph is attached hereto as Exhibit C2." (Leddy Decl., ¶ 15.)

Grounds for Objection: Irrelevant (Evid. Code, § 350); barred by laches. *See Brown v. State Pers. Bd.*, 166 Cal. App. 3d 1151, (Ct. App. 1985). The statement and accompanying exhibit are irrelevant because under the doctrine of laches, penalties cannot be assessed for any non-compliance allegedly occurring more than three years prior to the date on which the VR/C was mailed. Thus, evidence of any alleged non-compliance occurring before July 24, 2014 is irrelevant.

Objection Number 8

Declaration Text: "I looked up 101 SURF SPORTS on the internet. In the website photos of their business operations at Westpoint Marina, I could see no visible signs on the dock advising customers of the sensitive nature of Greco Island area or access restrictions on Greco Island and other wetlands in the Refuge." (Leddy Decl., ¶ 31.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803); hearsay (Evid. Code, § 1200); lack of authentication (Evid. Code, § 1401). Declarant does not establish that he has personal knowledge of signage and access restrictions, and therefore the statement lacks foundation and is speculative. The statement about the alleged website and its photographs is also hearsay because it is an out of court statement submitted for

the truth of the matter asserted regarding signage and access restrictions. Information from the alleged website and its photographs has not been verified or authenticated. In addition, the statement is an improper opinion because any alleged photographs cannot reasonably be expected to provide a complete and accurate view of signage and access restrictions at Westpoint Marina.

Objection Number 9

Declaration Text: "I became aware of commercial ferries operating in Westpoint Slough around February 2016 as the result of several news stories at that time." (Leddy Decl., ¶ 32.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); hearsay (Evid. Code, § 1200); lack of authentication (Evid. Code, § 1401). Declarant does not establish that he has personal knowledge of the alleged commercial ferries operating in Westpoint Slough around February 2016, and therefore the statement lacks foundation and is speculative. The statement about alleged news stories is also hearsay because it is an out of court statement submitted for the truth of the matter asserted. In addition, information from the alleged news stories has not been verified or authenticated.

Objection Number 10

Declaration Text: "On June 6, 2016 at around 9 a.m., I observed a PROP catamaran ferry operating in Westpoint Slough. I was on the public walkway at the Pacific Shores Center property adjacent to Westpoint Marina when I saw the ferry. Based on my kayaking experience and observations of boats on a regular basis, I believe this ferry was traveling at a high speed (which I estimate at greater than 10 mph), and generating a substantial wake en route to Westpoint Marina." (Leddy Decl., ¶ 33.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). The statement is an improper opinion because Declarant is not qualified as an expert on calculating the speed of a ferry or what constitutes a "substantial wake." Declarant has not established that he has personal knowledge of the speed of the ferry or its destination, and therefore the statement lacks foundation and is speculative.

Objection Number 11

Declaration Text: "As a result of internet research, I learned that PROP, a private commercial ferry service, began operating ferries in February 2016 between Tiburon, Emeryville and Westpoint Marina. Based on review of the company's website earlier this year, I believe that more ferries are being contemplated for routes between Redwood City and Alameda, Berkeley and San Francisco." (Leddy Decl., ¶ 34.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803); hearsay (Evid. Code, § 1200); lack of authentication (Evid. Code, § 1401). Declarant does not have personal knowledge of PROP or the nature of its ferry services and routes, and therefore the statement lacks foundation and is speculative. The statement about the alleged website is also hearsay because it is an out of court statement submitted for the truth of the matter asserted regarding PROP's ferry service. In addition, information from the alleged website and its photographs has not been verified or authenticated. The second sentence in the above text is an improper opinion because Declarant's belief that "more ferries are being contemplated" is not based on his own perception and he does not have personal knowledge of the statement. Therefore, that statement also lacks foundation and is speculative.

Objection Number 12

Declaration Text: "Based on reading articles about the effects of high speed ferries, including articles printed by the nearby Redwood City Bair Island Aquatic Center website, I am concerned that small boats and marine-dependent wildlife risk injury both from direct contact with such high speed ferries. I am also concerned that the wakes caused by such ferries can alter habitat, including erosional damage to slough mudflats and Greco Island which is part of the Don Edwards SF Bay National wildlife Refuge." (Leddy Decl., ¶ 35.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803); hearsay (Evid. Code, § 1200); lack of authentication (Evid. Code, § 1401). The statement is an improper opinion because Declarant is not qualified as an expert on the effects of high speed ferries or their wakes. Declarant has not established that he has personal knowledge of the effects of high speed ferries or their wakes, and therefore the statement lacks foundation and is speculative. The statement about the alleged articles is also hearsay because it is an out of court statement submitted for the truth of the matter asserted. In addition, information from the alleged articles has not been verified or authenticated.

Objection Number 13

Declaration Text: "My concerns about risks to the public and wildlife resulting from this Westpoint Marina ferry activity is only exacerbated by the absence of buoys delineating the center of the Westpoint channel and a 'no wake' zone." (Leddy Decl., ¶ 36.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). The statement is an improper opinion because Declarant is not qualified as an

expert on the effects of high speed ferries or their wakes. Declarant has not established that he has personal knowledge of the effects of high speed ferries or their wakes, and therefore the statement lacks foundation and is speculative.

Objection Number 14

Declaration Text: "On January 18, 2014, while looking for roosting shorebirds in the Cargill salt pond adjacent to the south side of Westpoint Marina, I observed and photographed three people walking out on the Cargill pond. I observed the people subsequently return to the Westpoint Marina. I was at a labeled public parking space at the Westpoint Marina, looking for birds, when I observed the people walking out on the Cargill pond. True and correct copies of the photographs I took on January 18, 2014 of people on the Cargill pond are attached hereto as Exhibits J and K." (Leddy Decl., ¶ 37.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702). Declarant has not established that he has personal knowledge of the identity of these three people, including whether they were merely Cargill employees, and therefore the statement lacks foundation and is speculative.

Objection Number 15

Declaration Text: "Based on this visit and my other observations at Westpoint Marina, it is my opinion that fencing along the southern boundary of the Westpoint Marina has never been installed." (Leddy Decl., ¶ 38.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). Declarant has not established that he has personal knowledge of the fencing along the southern boundary of the Westpoint Marina, especially if he is basing this assumption on the

fact that he observed three unknown individuals on the Cargill pond who may or may not have been Cargill employees. The statement therefore lacks foundation and is speculative. The statement is also an improper opinion because it is not rationally based on the perception of the Declarant.

Objection Number 16

Declaration Text: "From my kayak in Westpoint Slough, I took a picture of the east side of the Westpoint Marina with my cellphone. My cellphone notes GPS coordinates and embeds these coordinates into the photo. I know the geographic location was 37°30'38.48"N, 122°1 l'21.04"W 37, and the time was 11:04 a.m. I enlarged, divided and cropped the photo into two photos (Exhibits M and N) in order to show detail of the fencing along the east side of Westpoint Marina. I observed fencing in some areas and have inserted the locations of fencing observed in Exhibit M. I did not observe fending in other areas and have inserted the locations where fencing was absent in Exhibit N. True and correct copies of that photograph are attached hereto as Exhibits M and N." (Leddy Decl., ¶ 39.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). The statement regarding geographic location is an improper opinion because the Declarant is not qualified as an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which has not been authenticated or verified. The statement therefore also lacks foundation and is speculative. In addition, Declarant has not established that he has personal knowledge of the required locations for fencing on the eastside of the Westpoint Marina. Therefore, the annotations inserted on the photograph exhibits are not based on personal knowledge, lack foundation, are speculative, and constitute improper opinion.

Objection Number 17

Declaration Text: "Based on my observations, it is my opinion that Westpoint Marina has never installed visual barriers between active Westpoint Marina areas and the adjacent salt pond. Based on my observations, it is also my opinion that the failure to install such visual barriers results in disturbance to waterbirds using the salt pond." (Leddy Decl., ¶ 41.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). In regards to the statement about visual barriers, Declarant has not established that he has personal knowledge of the alleged lack of visual barriers, especially if he is basing this assumption on the fact that he observed an unknown individual at the location a single time who may or may not have been a Cargill employee. The statement therefore lacks foundation and is speculative. The statement is also an improper opinion because it is not rationally based on the perception of the Declarant. In regards to the statement about waterbirds, Declarant has not established that he has personal knowledge that the alleged lack of visual barriers results in disturbance to waterbirds. The statement therefore lacks foundation and is speculative. The statement is also an improper opinion because it is not based on the perception of the Declarant.

Objection Number 18

Declaration Text: "I observed a person exit from their automobile in the Westpoint Marina parking lot, and in the seconds that followed the birds flushed from their roost. I observed all the godwits and willits, and about half of the stilts completely flush from their roost at waters edge next to the Westpoint Marina parking lot and fly out over the salt pond levee towards First Slough. True and correct copy of the photographs I took of this event on February 11, 2017 are attached hereto as Exhibits P, Q, R and S. In photographs Q and R, I have circled in

red the location of the person exiting their automobile that I mention above." (Leddy Decl., ¶ 42.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). Declarant has not established that he has personal knowledge of the identity of this individual, including whether he or she was merely a Cargill employee, and therefore the statement lacks foundation and is speculative. Declarant has also not established that he has personal knowledge of the reason that the birds allegedly took flight, including whether the flight could have been triggered by any number of other variables aside from the presence of the individual, and therefore the statement lacks foundation and is speculative. For the same reasons, the annotations inserted on the photograph exhibits are not based on personal knowledge, lack foundation, are speculative, and constitute improper opinion.

Objection Number 19

Declaration Text: "On August 14, 2012, I sent an email to Adrienne Klein at BCDC regarding signs and a barrier denying public access to Westpoint Marina. I have reviewed Document No. 45 in the Administrative Record for this matter. Document No. 45 is a true and correct copy of my August 14, 2012 email to Adrienne Klein at BCDC." (Leddy Decl., ¶ 43.)

Grounds for Objection: Cal. Code Regs. tit. 14, §§ 11329(b), 11321(b). Under BCDC's own regulations, any alleged evidence from this declaration "shall not be sufficient in itself to support a finding" such as the authenticity of documents in the Administrative Record, nor can alleged evidence from this declaration be relied on by BCDC staff to establish a prima facie case.

Objection Number 20

Declaration Text: "As I described in paragraph 39 above, on April 9, 2017, I kayaked Westpoint Slough. Starting at the confluence of First Slough and Westpoint Slough, I paddled along Westpoint Slough around the Westpoint Marina until Westpoint Slough meets Redwood Creek. I stopped to take photographs approximately every 500 feet. As I paddled I looked for any and all signs placed on Greco Island or elsewhere on the water. I had my cellphone with me, so each photo has its location documented with GPS coordinates." (Leddy Decl., ¶ 46.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). The statement as well as the annotations of alleged locations of the photographs constitute improper opinion because the Declarant is not qualified as an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which has not been authenticated or verified. The statement and accompanying exhibits therefore also lack foundation and are speculative. Declarant has also not established that he has personal knowledge of the required locations for signs and buoys in Westpoint Slough, and therefore the annotations inserted on the photograph exhibits lack foundation, are speculative, and constitute improper opinion.

Objection Number 21

Declaration Text: "Based on my April 9, 2017 observations and photographs, I have noted the locations where I stopped to take photographs and make observations on a Google Earth aerial photo of Westpoint Slough. I have numbered the locations 1 through 22 inclusive. I have also noted whether I saw any signage or buoys, and if so the character of those signs and buoys. A true and correct copy of this Google Earth aerial photo of Westpoint Slough, noting my

observation locations and summarizing my observations is attached hereto as Exhibit EE." (Leddy Decl., ¶ 47.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). The accompanying exhibit includes annotations of alleged locations of photographs as well as a chart of Declarant's notes and comments about signs and buoys. The Declarant is not qualified as an expert on GPS coordinates and was apparently relying on his phone to calculate geographic locations for his annotations and notes, the accuracy of which has not been authenticated or verified. Therefore, the statement and the accompanying exhibit are not based on personal knowledge, lack foundation, are speculative, and constitute improper opinion. Declarant has also not established that he has personal knowledge of the required locations for signs and buoys in Westpoint Slough, and therefore the statement and accompanying exhibit lack foundation, are speculative, and constitute improper opinion.

Objection Number 22

Declaration Text: "On April 9, 2017, I observed no signs on Greco Island at locations 1 through inclusive, nor at locations 17, 19 or 20. Other than the signs and buoys photographed and described below, I observed found no other signs or buoys from the confluence of Westpoint Slough and First Slough to the confluence of Westpoint Slough and Redwood Creek, nor on Redwood Creek towards San Francisco Bay proper." (Leddy Decl., ¶ 48.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). The statement and accompanying exhibit, including annotations of alleged locations of the photographs, constitute improper opinion because the Declarant is not qualified

as an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which has not been authenticated or verified. The statement and accompanying exhibit therefore also lack foundation and are speculative. Declarant has also not established that he has personal knowledge of all signage and buoys in Westpoint Slough, and therefore the statement and annotations inserted on the photograph exhibits lack foundation, are speculative, and constitute improper opinion.

Objection Number 23

Declaration Text: "On April 9, 2017 at 11:51 a.m., at location #13, I observed a USFWS Refuge sign on Greco Island. The photo was taken from GPS coordinates 37°30'59.15"N, 122°11'44.68"W. A true and correct copy of that photograph is attached hereto as Exhibit V." (Leddy Decl., ¶ 49.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). The statement and accompanying exhibits, including annotation of the alleged location of the photograph, constitute improper opinion because the Declarant is not qualified as an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which has not been authenticated or verified. The statement and accompanying exhibits therefore also lack foundation and are speculative.

Objection Number 24

Declaration Text: "On April 9, 2017 at 11:54 a.m., at location #14, I observed another USFWS Refuge sign on Greco Island. The photo was taken from GPS coordinates 37°30'59.57"N, 122°11'51.04"W. A true and correct copy of that photograph is attached hereto as Exhibit W." (Leddy Decl., ¶ 50.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). The statement and accompanying exhibits, including annotation of the alleged location of the photograph, constitute improper opinion because the Declarant is not qualified as an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which has not been authenticated or verified. The statement and accompanying exhibits therefore also lack foundation and are speculative.

Objection Number 25

Declaration Text: "On April 9, 2017 at 11:57 a.m., at location #15, I observed a faded sign on Greco Island. The photo was taken from GPS coordinates 37°31'1.03"N, 122°11'59.82"W. A true and correct copy of that photograph is attached hereto as Exhibit X." (Leddy Decl., ¶ 51 (mislabeled as 50 in original).)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). The statement and accompanying exhibits, including annotation of the alleged location of the photograph, constitute improper opinion because the Declarant is not qualified as an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which has not been authenticated or verified. The statement and accompanying exhibits therefore also lack foundation and are speculative.

Objection Number 26

Declaration Text: "On April 9, 2017 at 12:02 p.m., at location #16, I observed a faded sign on Greco Island. The photo was taken from GPS coordinates 37°31'3.16"N, 122°12'3.7"W. A true and correct copy of that photograph is attached hereto as Exhibit Y." (Leddy Decl., ¶ 52.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). The statement and accompanying exhibits, including annotation of the alleged location of the photograph, constitute improper opinion because the Declarant is not qualified as an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which has not been authenticated or verified. The statement and accompanying exhibits therefore also lack foundation and are speculative.

Objection Number 27

Declaration Text: "On April 9, 2017 at 12:09 p.m., at location #18, I observed a faded 'Sensitive Wildlife Habitat - No Not Enter' sign in the water off Greco Island. The photo was taken from GPS coordinates 37°31'13.03"N, 122°12'11.85"W. A true and correct copy of that photograph is attached hereto as Exhibit Z." (Leddy Decl., ¶ 53.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). The statement and accompanying exhibits, including annotation of the alleged location of the photograph, constitute improper opinion because the Declarant is not qualified as an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which has not been authenticated or verified. The statement and accompanying exhibits therefore also lack foundation and are speculative.

Objection Number 28

Declaration Text: "On April 9, 2017 at 12:18 p.m., at location# 21, I observed a green buoy at the confluence of Redwood Creek and Westpoint Slough. The photo was taken from

GPS coordinates from 37°31'7.41"N, 122°12'15.89"W. A true and correct copy of that photograph is attached hereto as Exhibit AA." (Leddy Decl., ¶ 54.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). The statement and accompanying exhibits, including annotation of the alleged location of the photograph, constitute improper opinion because the Declarant is not qualified as an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which has not been authenticated or verified. The statement and accompanying exhibits therefore also lack foundation and are speculative.

Objection Number 29

Declaration Text: "On April 9, 2017 at 12:21 p.m., at location #22, I observed a red buoy at the confluence of Redwood Creek and Westpoint Slough. The photo was taken from GPS coordinates from 37°31'2.72"N, 122°12'13.64"W. A true and correct copy of that photograph is attached hereto as Exhibit BB." (Leddy Decl., ¶ 55.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). The statement and accompanying exhibits, including annotation of the alleged location of the photograph, constitute improper opinion because the Declarant is not qualified as an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which has not been authenticated or verified. The statement and accompanying exhibits therefore also lack foundation and are speculative.

Objection Number 30

Declaration Text: "On April 9, 2017 at 12:25 p.m., at location #23, I observed a '10 MPH' buoy. The photo was taken from GPS coordinates from 37°30'59.00"N, 122°12'1.22"W. A true and correct copy of that photograph is attached hereto as Exhibit CC." (Leddy Decl., ¶ 56.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). The statement and accompanying exhibits, including annotation of the alleged location of the photograph, constitute improper opinion because the Declarant is not qualified as an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which has not been authenticated or verified. The statement and accompanying exhibits therefore also lack foundation and are speculative.

Objection Number 31

Declaration Text: "On April 9, 2017 at 11:39 a.m., at location #24, I observed a sign on the end of PGE boardwalk. The photo was taken from GPS coordinates from 37°30'53.S"N, 122°11'24.59"W. A true and correct copy of that photograph is attached hereto as Exhibit DD." (Leddy Decl., ¶ 57 (mislabeled as 56 in original).)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). The statement and accompanying exhibits, including annotation of the alleged location of the photograph, constitute improper opinion because the Declarant is not qualified as an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which has not been authenticated or verified. The statement and accompanying exhibits therefore also lack foundation and are speculative.

Summary of Objection to Exhibits

Exhibits A, B1, B2, C1, and C2: Irrelevant (Evid. Code, § 350); barred by laches. *See Brown v. State Pers. Bd.*, 166 Cal. App. 3d 1151, (Ct. App. 1985). The photograph exhibits and text describing the exhibits are irrelevant because under the doctrine of laches, penalties cannot be assessed for any non-compliance allegedly occurring more than three years prior to the date on which the VR/C was mailed. Thus, evidence of any alleged non-compliance occurring before July 24, 2014 is irrelevant. Photograph exhibits A, B1, B2, C1, and C2 were all taken prior to July 24, 2014 and therefore do not constitute relevant evidence.

Exhibits M and N: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). Declarant has not established that he has personal knowledge of the required locations for fencing on the eastside of the Westpoint Marina. Therefore, the annotations inserted on the photograph exhibits are not based on personal knowledge, lack foundation, are speculative, and constitute improper opinion.

Exhibits Q and R: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803). Declarant has not established that he has personal knowledge of the reason that the birds allegedly took flight in this photographs, including whether the flight could have been triggered by any number of other variables aside from the presence of the individual annotated in the exhibits. Therefore, the annotations inserted on the exhibits are not based on personal knowledge, lack foundation, are speculative, and constitute improper opinion.

Exhibit EE: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800,

803). Exhibit EE contains annotations of alleged locations of photographs as well as a chart of Declarant's notes and comments about signage and buoys. The Declarant is not qualified as an expert on GPS coordinates and was apparently relying on his phone to calculate geographic locations for his annotations and notes, the accuracy of which has not been authenticated or verified. The annotations and the chart therefore are not based on personal knowledge, lack foundation, are speculative, and constitute improper opinion. In addition, Declarant has not established that he has personal knowledge of the required locations for signage and buoys in Westpoint Slough, and therefore the annotations and the chart lack foundation, are speculative, and constitute improper opinion.

Conclusion

For the reasons set forth, Respondents request that the Enforcement Committee strike the entire Declaration of Matthew Leddy, or in the alternative, strike purported factual claims improperly contained in the declaration and exclude statements that are inadmissible under the Evidence Code.

Dated: November 15, 2017

Respectfully submitted,

BAKER BOTTS L.L.P.

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ATTACHMENT F

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SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

IN THE MATTER OF: VIOLATION REPORT/COMPLAINT FOR THE IMPOSITION OF ADMINISTRATIVE CIVIL PENALTIES NO. ER2010.013 PROPOSED CEASE AND DESIST AND CIVIL PENALTY ORDER NO. CDO 2018.01 MARK SANDERS AND WESTPOINT HARBOR, LLC	RESPONDENTS' OBJECTIONS TO EXECUTIVE DIRECTOR'S MODIFIED RECOMMENDED ENFORCEMENT DECISION AND ATTACHMENTS

Respondents Mark Sanders and Westpoint Harbor, LLC ("Respondents") re-urge, resubmit, and incorporate herein by reference the following, all of which were previously submitted prior to the Enforcement Committee hearing held on November 16, 2017: (1) Respondents' Response to Staff's Objections to Declaration of Mark Sanders (included here as Attachment A); (2) Respondents' Objections to Letter and Attachment from Citizens Committee to Complete the Refuge (Attachment B); and (3) Respondents' Objections to Declaration of Matthew Leddy (Attachment C).

Respondents re-urge their request to cross-examine the 16 individuals specified in Respondents' Statement of Defense (pages 123-27),[1] all of whom are relied on by staff in its violation report.

Additionally, Respondents submit the following objections to the Executive Director's Recommended Enforcement Decision, dated November 6, 2017, as modified by the Executive Director's "Modification of Executive Director's Recommended Enforcement Decision" dated January 8, 2018, (the "Recommended Enforcement Decision"), and the attachments to the same.

1. <u>Objection to BCDC staff's violation of ministerial duty</u>

At the Enforcement Committee hearing held on November 16, 2017, the Enforcement Committee approved a motion made by Chair Scharff to "adopt the Cease and Desist Order as recommended by staff, subject to modification by agreement." Transcript 138:16-17. Chair Scharff further clarified the intent of the motion that was approved: "If you [BCDC staff and Respondents] don't come to an agreement then this [Proposed Cease and Desist and Civil Penalty] Order [No. CDO 2017.04] becomes the recommendation of the Committee to BCDC." Transcript 141:7-9.

[1] John Bowers; Laurence Frank; Andrea Gaffney; Brian Gaffney; Andrea Gaut; Adrienne Klein; Matt Leddy; Steve McAdams; Brad McCrea; Ellen Miramontes; Ron Powers; Unnamed "Member of the Public" #1; Unnamed "Member of the Public" #2; Unnamed "Member of the Public" #3; Tom Sinclair; and Marc Zeppetello

BCDC's rules require that "[a]fter the enforcement committee or a hearing officer has closed the enforcement hearing and completed its deliberations, it shall adopt a recommended enforcement decision[.]" Cal. Code Regs. tit. 14, § 11330. At the November 16 hearing, the Enforcement Committee did just that. BCDC's rules further require "Referral of the Recommended Enforcement Decision to the Commission[,]" and state, "At least ten (10) days prior to the Commission's consideration of a recommended enforcement decision referred to it either directly by the Executive Director, by the enforcement committee, or by a hearing officer, the staff shall mail the recommended enforcement decision to all respondents and to all Commissioners." Cal. Code Regs. tit. 14, § 11331.

As noted in the "Modification of Executive Director's Recommended Enforcement Decision" dated January 8, 2018, the parties did not agree on appropriate modifications to the proposed order. Therefore, by the motion approved by the Enforcement Committee on November 16, 2017, Proposed Cease and Desist and Civil Penalty Order No. CDO 2017.04 (Recommended Enforcement Decision, Attachment E) is the recommendation of the Enforcement Committee to the full Commission. The Executive Director has no authority to disregard the Enforcement Committee's recommendation. To the contrary, the Executive Director has a ministerial duty to send the Enforcement Committee's recommendation to the full Commission. Instead of following his ministerial duty, the Executive Director has drafted a new proposed order (Proposed Cease and Desist and Civil Penalty Order No. CDO 2018.01) (the "Proposed Order") and issued notice of a second Enforcement Committee hearing on January 18, 2018. Respondents object to the Executive Director's violation of his ministerial duty.

2. Objection to BCDC staff's modification of the proposed order as violative of Respondents' due process rights and California Evidence Code Section 1152 by relying on alleged discussions between BCDC staff and Respondents' counsel outside of the Administrative Record.

The Modification of Executive Director's Recommended Enforcement Decision (January 8, 2018) states that the Executive Director has modified his recommended enforcement decision by providing a revised proposed cease and desist and civil penalty order "that incorporates certain modifications" to the Proposed Order "based on the discussions between BCDC staff and Respondents' counsel." Respondents object to inclusion in the Administrative Record of this statement and the modifications to the Proposed Order on the basis that any statements made in negotiation of an offer to compromise are protected under California Evidence Code Section 1152. More importantly, Respondents object to BCDC staff's decision to modify the Recommended Enforcement Decision (and the Proposed Order) on the basis of information that is wholly outside the Administrative Record, as the Executive Director admits to doing. Changing provisions of the Proposed Order based on information that has never been subject to public scrutiny, and without affording Respondents all of the procedural protections required by statutes, regulations, and constitutions, violates Respondents' due process rights. BCDC cannot properly make a decision based on information that is admittedly outside the record in this case.

3. Objection to BCDC's failure to provide a fair trial

Due process requires agencies to separate advocates from decision makers, and prohibits ex parte communications between them. *See Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal. 4th 1, 5. An agency violates a party's constitutional due process right to an impartial trial when "rules mandating that an agency's internal separation of functions and prohibiting ex party communications" are not observed, or

when the totality of the circumstances creates an unacceptable risk of bias. *See Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 741.

BCDC's regulations, and the procedure used in this penalty proceeding, violate the requirement for separation of functions. The Executive Director issued the Violation Report/Complaint for the Imposition of Administrative Civil Penalties (Enforcement Investigation No. ER2010.013) ("VR/C"). But BCDC regulations call for the Executive Director to prepare a "recommended enforcement decision," Cal. Code Regs. tit. 14, §§ 11324, 11326, which is the province of the advisory team and the decision-makers. Because the Executive Director is given this special role, he is not being treated "like any other party[.]" *Morongo* at 735. The Executive Director is effectively serving as a special advisor to the Enforcement Committee. This procedure violates Respondents' right to a fair trial.

At the Enforcement Committee hearing held on November 16, 2017, the Enforcement Committee simply adopted the Executive Directors' Recommended Enforcement Decision (albeit with a change to the recommended Cease and Desist and Civil Penalty Order No. 2017.04). The Enforcement Committee members followed the Executive Director's recommendation, a member of the prosecution team, and the Enforcement Committee members will be inclined to follow the Executive Director's modification of the Recommended Enforcement Decision and/or other future recommendations. This further shows that the BCDC regulations (and the actual practice) violates the requirement for separation of functions and deprives Respondents of a fair trial.

Additionally, BCDC regulations state that the Executive Director must summarize "the essential allegations made by staff" and "all defenses and mitigating factors raised by the respondent(s)" as well as provide "a summary and analysis of all unresolved issues[.]" The

"analysis of all unresolved issues" is a decision-making function that has been delegated to the Executive Director (i.e., the prosecution team) in violation of Respondents' right to a fair trial. The analysis of all unresolved issues should be performed by neutral decision-makers or their advisors. An actual analysis was never performed in this case; the Executive Director has provided only his own position instead of fairly evaluating the facts and the arguments of both sides.

BCDC has further violated Respondents' right to a fair trial by failing to consider the statutorily mandated factors that must be considered when imposing a penalty. *See* Cal. Gov't Code § 66641.9 (describing required considerations). At the Enforcement Committee hearing on November 16, 2017, the Enforcement Committee members acted arbitrarily and capriciously when determining the penalty amount they recommended to the full Commission. For example, Commissioners on the Enforcement Committee directly discussed arbitrary percentages of the Executive Director's proposed penalty (e.g., Transcript at 124) and discussed the penalty amount in relation to such considerations as whether the amount "might keep us out of court" (Transcript at 137:4-5), whether it "is bad precedent to go below 50 percent on the fines" (Transcript at 137:11). This shows that Respondents' did not receive a fair trial and that BCDC has acted arbitrarily and capriciously, in violation of its statutory duties.

4. <u>Objection to BCDC staff's late addition of Allegation No. 23</u>

Sections III.B, V.J, VI.B, VI.C, and VI.I of the Recommended Enforcement Decision, Paragraphs II.H, II.J, III.B, IV.D, and IV.E of the attached Proposed Cease and Desist and Civil Penalty Order No. CDO 2018.01 ("Proposed Order"), and the attached "Revised Penalty Chart 2017.11.06" set forth or reference the completely new Allegation No. 23, which relates to an allegedly unauthorized sign at the public boat launch. Allegation No. 23 was never asserted in the initial VR/C. The Revised Penalty Chart itself acknowledges that the alleged violation

occurred after the VR/C had already been issued. BCDC staff's attempt to tack on this last-minute allegation on the evening of November 6, 2017—a mere ten days before the first Enforcement Hearing—violates BCDC's regulations. Among other violations, staff failed to provide necessary notice and deprived Respondents of the opportunity to defend against the new allegation.

A. BCDC must comply with its own regulations

The law is clear that BCDC is required to comply with its own regulations. In particular, "[a] public entity has a ministerial duty to comply with its own rules and regulations where they are valid and unambiguous." *Galzinski v. Somers*, 2 Cal. App. 5th 1164, 1171 (Cal. Ct. App. 2016); *see also Gregory v. State Bd. of Control*, 73 Cal. App. 4th 584, 595 (1999) (including duties codified in the California Code of Regulations). A duty is ministerial when there is a clearly defined rule. *Redwood Coast Watersheds All. v. State Bd. of Forestry & Fire Prot.*, 70 Cal. App. 4th 962, 970 (1999). The rules discussed below are valid, unambiguous, and clearly defined, and therefore BCDC has a ministerial, rather than discretionary, duty to comply.

B. Violation of requirement to provide notice

Allegation No. 23 cannot be the subject of enforcement under Section 11386(e)(2) and (3) of BCDC's own regulations, which require a 35-day notice and opportunity to cure the alleged violations, and no such notice or opportunity to cure has been provided.

Section 11386 of Title 14 of the California Code of Regulations applies to an enforcement action if the Executive Director determines it is the case: "(1) that the alleged violation is one of the types identified in subsection 11386(e); (2) that the alleged violation has not resulted in significant harm to the Bay's resources or to existing or future public access; and (3) that the alleged violation can be corrected in a manner consistent with the Commission's laws

and policies." Cal. Code Regs. tit. 14, § 11386(a). If Section 11386 applies to an alleged violation, "the Executive Director **shall** mail a written notice to the person(s) believed to be responsible for the alleged violation[.]" Cal. Code Regs. tit. 14, § 11386(b) (emphasis added).

Here, Allegation No. 23 fits squarely within the category of Section 11386(e)(3), which applies to "the failure to comply with any condition required by a Commission permit not covered by subsections (e)(1) and (e)(2)[.]" Cal. Code Regs. tit. 14, § 11386(e)(3). Additionally, the alleged violation has not resulted in significant harm, or indeed any harm, and, even if proved true, could be corrected in a manner consistent with the Commission's laws and policies. Therefore, the regulations imposed a duty on the Executive Director to mail a written notice to the Respondents for Allegation No. 23, which is a requirement that staff has failed to fulfill. The written notice must comply with the requirements of § 11386(b).

The Recommended Enforcement Decision contends that none of the alleged violations Respondents identified in their Statement of Defense as requiring 35-day notice letters fall in the categories described by Section 11386, apparently for no other reason than because the Executive Director said so: "§ 11386 gives the Executive Director discretion to make these determinations, and he has made no such determination in this case." (Recommended Enforcement Decision, p. 40.)

BCDC's reading of the law is clearly erroneous. Under California law, when an agency makes a determination in accordance with rules and definitions established by regulations, the duty imposed on the agency is not discretionary but ministerial. *Goonewardene v. ADP, LLC*, 5 Cal. App. 5th 154, 169 (Cal. Ct. App. 2016).

The California Code of Regulations imposes a duty on the Executive Director to determine whether an alleged violation falls under Section 11386 **in accordance with**

established rules; the Executive Director's "determination" is therefore necessarily constrained as he is only deciding whether the facts of an alleged violation fit any of the definitions that Section 11386 establishes for each category. Section 11386 provides valid, unambiguous, and clearly defined rules for classifying alleged violations under each category, and therefore staff had a ministerial duty to make determinations in accordance with those rules.

BCDC staff cannot instead claim that Section 11386 is intended to give the Executive Director unfettered discretion to disregard the regulations and arbitrarily choose whether alleged violations fall under Section 11386. Such an interpretation would render Section 11386 meaningless. Furthermore, the Executive Director's supposed "determination" in this instance is additionally suspect because the Executive Director provides no reasoning or evidence for why Allegation No. 23 (or, for that matter, any of the allegations Respondents identified in their Statement of Defense as requiring 35-day notice letters) does not fit within the category of Section 11386(e)(3), which applies to "the failure to comply with any condition required by a Commission permit not covered by subsections (e)(1) and (e)(2)[.]" Neither does the Executive Director provide any explanation for why Allegation No. 23 or any other alleged violation has resulted in significant harm or could not be corrected in a manner consistent with the Commission's laws and policies.

Staff also asserts that it provided notice sending an email on August 3, 2017, regarding the public boat launch sign. (Recommended Enforcement Decision, p. 7.) However, BCDC's own regulations require that a notice letter must include each of the following:

> (1) the nature of the alleged violation and each and every action that must be taken to correct the alleged violation;

(2) the fact that if the alleged violation is fully **corrected within 35 days** of the mailing of the notice, the Commission **shall not impose any civil penalty**; and

(3) the fact that if the alleged violation is not fully corrected within 35 days of mailing of the notice, the person believed to be responsible for the alleged violation may be subject to the payment of a civil penalty and may resolve the penalty portion of the alleged violation by paying the standardized fine specified in subsections (e), and (f) without having to go through a formal enforcement proceeding pursuant to Sections 11300 through 11385 except as provided in subsection (h).

Cal. Code Regs. tit. 14, § 11386(b) (emphasis added). The August 3, 2017 email did not include notice that meets the requirements of paragraphs (2) and (3), and therefore does not constitute a proper notice letter.

In addition, the email indicates that staff was aware of Allegation No. 23 as early as August 2017, and could have followed the correct procedure of providing proper notice and including the allegation in a revised VR/C or a separate violation report/complaint at the time, but chose not to do so. Instead, staff waited more than three months after sending the email before finally attempting to slip in Allegation No. 23 a mere ten days before the Enforcement Hearing.

The Executive Director failed to send a proper 35-day notice letter to Respondents and provide them with the opportunity to correct the alleged violation. Until the Executive Director submits the 35-day notice letter, Allegation No. 23 cannot legally be the subject of an enforcement action. Contrary to arguments in the Recommended Enforcement Decision, nothing in BCDC's regulations allows staff to circumvent this requirement and simply tack on violations at the eleventh hour without following proper procedure.

C. Violation of requirement to issue allegations in the form of a violation report 45 days before Enforcement Hearing

In addition, under Section 11321(a) of BCDC's regulations, Allegation No. 23 cannot be the subject of enforcement. Section 11321(a) requires that staff issued the VR/C asserting the allegation at least 45 days prior to the Enforcement Hearing:

> [T]he Executive Director **shall** commence Commission enforcement proceedings by **issuing at least 45 days prior to holding** an **enforcement hearing** on the matter the following materials:
>
> (1) a violation report that complies with the format set out in Appendix H,
>
> (2) a complaint for civil penalties that complies with the format set out in Appendix H if the staff seeks civil penalties, and
>
> (3) a statement of defense form that complies with the format set out in Appendix I.

Cal. Code Regs. tit. 14, § 11321(a) (emphasis added). The rule is valid, unambiguous, and clearly defined that staff must issue materials (that comply with the format set out in Appendix H of BCDC's regulations) alleging Allegation No. 23 at least 45 days prior to the Enforcement Hearing, and therefore staff had a ministerial duty to comply. Staff did no such thing. Instead, staff has chosen to add the new violation only 10 days prior to the first Enforcement Hearing.

In addition, by failing to comply with BCDC's regulations, staff deprives Respondents of the opportunity to respond to Allegation No. 23. Section 11322(a) and (c) provide for Respondents to submit a defense to the allegations of a violation report/complaint within 35 days. Cal. Code Regs. tit. 14, § 11322(a), (c). Respondents have already submitted their Statement of Defense and were unable to provide a response to this new Allegation No. 23 before the date of the first Enforcement Hearing. Even if they could, Respondents would not be

given the requisite 35 days to prepare a defense to Allegation No. 23 as provided for by BCDC's regulations.

As discussed, staff certainly had the opportunity to issue a revised VR/C or a separate violation report/complaint 45 days in advance of the Enforcement Hearing, as staff mentioned the alleged facts in emails as early as August 2017. Respondents should not be punished for staff's choice to delay three months in a failure to follow their own regulations, thereby depriving Respondents of the basic right to defend against an allegation. Due to the violation of Section 11321(a), Allegation No. 23 cannot legally be the subject of an enforcement action.

D. Violation of constitutional due process obligations

Due to staff's violations of the procedures described above, BCDC staff has also violated its constitutional due process obligations. The California Supreme Court has confirmed that the requirements of due process extend to administrative adjudications. *Today's Fresh Start, Inc. v. Los Angeles Cty. Office of Educ.*, 57 Cal. 4th 197, 214 (2013). As stated by the Court, "when an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal." *Morongo Band of Mission Indians v. State Water Res. Control Bd.*, 45 Cal. 4th 731, 737 (2009). It is also established law that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *People v. Litmon* 162 Cal. App. 4th 383, 395 (2008); *see also B. C. Cotton, Inc. v. Voss*, 33 Cal. App. 4th 929, 954 (1995) (finding that "at a rock-bottom minimum due process requires some form of notice and an opportunity to respond"). Yet BCDC staff's actions here have made it impossible for Respondents to have a meaningful opportunity to be heard.

Because BCDC regulations effectively limit Respondents' right to present evidence to the already submitted Statement of Defense, staff cannot now introduce new evidence that

Respondents do not have an opportunity to respond to. If staff wish to assert Allegation No. 23, the proper procedure is for staff to withdraw the VR/C and begin the process again or to issue a separate violation report/complaint. Otherwise, BCDC staff's introduction of new evidence constitutes a violation of Respondents' due process rights in addition to violation of BCDC's regulations. For these reasons, Respondents request that the Enforcement Committee exclude Allegation No. 23 as improperly proposed, and strike the inclusion and reference of Allegation No. 23 from Sections III.B, V.J, VI.B, VI.C, and VI.I of the Recommended Enforcement Decision, Paragraphs II.H, II.J, III.B, IV.D, and IV.E of the attached Proposed Order, and the attached "Revised Penalty Chart 2017.11.06."

5. Objection to late addition of information concerning "asphalt pad of unknown purpose"

Section VI.Q of the Recommended Enforcement Decision and Paragraph III.F of the Proposed Order reference an allegedly unauthorized asphalt pad. In the VR/C, BCDC staff provided no information or evidence concerning this condition beyond referring to it as "an asphalt pad of unknown purpose." Because Respondents could not identify this supposed asphalt pad based solely on this ambiguous description, they denied that such a condition exists. BCDC staff now claims that the photograph showing this alleged asphalt pad was "inadvertently not included" and that to "correct this error" BCDC has added Exhibit B to the Recommended Enforcement Decision, which purports to be a photograph showing this asphalt pad. Respondents object to BCDC staff's submittal of additional evidence in an attempt to "correct this error" after Respondents have filed the Statement of Defense.

Under Section 11321(b) of BCDC's regulations, the VR/C must "refer to all documents on which the staff relies to provide a prima facie case[.]" Exhibit B was not included with the VR/C. By failing to comply with BCDC's regulations, staff deprives Respondents of the

opportunity to adequately respond to the allegation concerning this "asphalt pad of unknown purpose." As discussed above, because BCDC regulations effectively limit Respondents' right to present evidence to the already submitted Statement of Defense, staff cannot now introduce new evidence that Respondents do not have an opportunity to respond to. If staff wish to provide additional evidence concerning this "asphalt pad of unknown purpose[,]" the proper procedure is for staff to withdraw the VR/C and begin the process again. Otherwise, BCDC staff's introduction of new evidence constitutes a violation of Respondents' due process rights in addition to violation of BCDC's regulations.

6. <u>Objection to BCDC staff's use of hearsay evidence</u>

Respondents object to the hearsay evidence included in the Proposed Order. The Recommended Enforcement Decision states: "in light of Respondents' objections, **none of the hearsay statements to which Respondents object is included in the findings in the proposed cease and desist and civil penalty order** that is part of the Recommended Enforcement Decision." Despite this claim, three Paragraphs of the Proposed Order include the very facts that Respondents objected to as hearsay in the Statement of Defense:

- "Photographs taken on April 9, 2017 by a member of the public and provided to BCDC staff document that: (a) there is a single sign adjacent to Greco Island stating, "Sensitive Wildlife Habitat / Do Not Enter," but the sign is so faded that it is almost illegible; (b) there are two other faded signs on Greco Island with no writing visible; and (c) there is no evidence of signs along the majority of the perimeter of Greco Island." (Proposed Order, ¶ II.R.)
- "Photographs taken on June 5, 2016 and April 9, 2017 by a member of the public and provided to BCDC staff show a buoy in the Slough marked "Slow 10 MPH," and two

photographs taken on June 6, 2016, show a ferry in the Slough generating a substantial wake." (Proposed Order, ¶ II.S.)

- "By letter dated March 24, 2017, an interested organization, the Citizen's Committee to Complete the Refuge ("CCCR"), brought to BCDC staff's attention alleged violations of the following two permit conditions requiring Sanders to provide mitigation for project impacts:

  1. Shorebird Roost Habitat Mitigation. Permit Special Condition II.F requires Sanders to provide, prior to commencement of work authorized under Phase 2 (i.e., the boatyard), approximately 3.0 acres of shorebird roost habitat mitigation, to replace such habitat lost as a result of the project. Special Condition II.F. provides that 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 California Department of Fish and Wildlife.

  2. Non-tidal Wetland Mitigation. Permit Special Condition II.G requires Sanders to provide mitigation for the loss of 0.27 acres of non-tidal wetlands located in a drainage ditch on the Site by enlarging the wetlands in the remainder in the ditch and creating additional wetlands for a replacement ratio of at least 1:1. Special Condition II.G. provides that the habitat enhancement plans shall be reviewed and approved by the U.S. Fish and Wildlife Service and California Department of Fish and Wildlife, and also by or on behalf of the Commission." (Proposed Order, ¶ II.V.)

In regards to Paragraphs R and S, BCDC staff relies heavily on the hearsay statements and photographs provided by CCCR that purport to demonstrate an absence of signage. As BCDC regulations make clear, inadmissible hearsay evidence alone is not sufficient in itself to support a finding of fact. Cal. Code Regs. tit. 14, § 13329. Additionally, these photos cannot, and do not, capture the entirety of Greco Island (as the photos, by their nature, only show a portion of a large area and do not show the entire perimeter, or even a majority of, the perimeter of Greco Island). BCDC staff has not provided any evidence that can support a finding that these signs are not in place. Paragraph V suffers from the same defects, as the "evidence" contained in the letter is inadmissible hearsay that cannot be used alone to support a finding of fact. *Id.* Indeed, the letter from Mr. Gaffney contains hearsay within hearsay, as Mr. Gaffney purports to explain findings by other members of this citizen group. And, notably, Mr. Gaffney's letter does not even provide any proof that the mitigation was not complete.

BCDC staff continues to base their allegations on improper hearsay evidence despite claiming that that very same hearsay evidence would be removed. Respondents request that the Enforcement Committee strike the hearsay evidence relied on in Paragraphs R, S, and V.

Respondents also object to BCDC staff's reliance on improper hearsay evidence to support the factual claim that "Respondents' violations of the Permit's public access requirements have resulted in the denial and loss of public access areas and improvements at the Site for an approximately eight-year period, from September 2009 to July 2017" and the Recommended Enforcement Decision's repeated claims of an adverse effect on public access. (Recommended Enforcement Decision, p. 42; Proposed Order, ¶ IV.E.1.) BCDC staff relies only on years-old hearsay (and hearsay within hearsay) from "Laurence Frank," "Matt Leddy," and other unidentified "members of the public" who are not witnesses at this proceeding.

Respondents therefore request that the Enforcement Committee strike Paragraph IV.E.1. of the Proposed Order.

In addition, for the reasons described in Respondents' Objections to Letter and Attachment from Citizens Committee to Complete the Refuge (Attachment B) and Respondents' Objections to Declaration of Matthew Leddy (Attachment C), Respondents object to BCDC's reliance on the Citizens Committee to Complete the Refuge letter (dated November 3, 2017) and the Declaration of Matthew Leddy (dated November 2, 2017) as evidence. Respondents re-urge their objections to this hearsay evidence, and Respondents continue to object to the ruling made by Enforcement Committee Chair Scharff on November 16, 2017 (Transcript at 14:16 ("I'm going to allow the declarations in")). Respondents further object that such ruling shows that Respondents have not received a fair trial as the ruling is plainly contrary to law.

7. Objections to BCDC staff's assertions of unverified factual claims

The Recommended Enforcement Decision and the Proposed Order contain many unverified factual claims that are inadmissible statements because they are speculative assertions, improper expert opinion, and not based on any evidence in the enforcement record. Respondents' objections to the factual claims include:

Unverified Fact No. 1: BCDC staff repeatedly makes the factual claim that Monterey Cypress and Poplar trees serve as habitats to raptors that allegedly prey on endangered birds. (Recommended Enforcement Decision, pp. 6, 20-21, 23, 43; Proposed Order, ¶¶ II.U, IV.E.3.) Only documents referred to in the VR/C may be relied on by staff to establish a prima facie case, and the VR/C did not refer to any documents supporting this alleged fact. Cal. Code Regs. tit. 14, § 11321(b). The Administrative Record contains absolutely no evidence that Monterey Cypress

and Poplar trees serve as habitats to raptors that allegedly prey on endangered birds.[2] BCDC staff has not established any evidentiary support for this factual claim, and therefore the claim is speculative, unverified, and conclusory. The claim is also an improper opinion because BCDC staff has not established any expertise regarding the habitats of raptors or endangered birds.

Unverified Fact No. 2: BCDC staff repeatedly makes the factual claim that the alleged lack of visual barriers between the marina and the salt pond causes disturbance to water birds and affects sensitive habitats. (Recommended Enforcement Decision, pp. 5, 7, 27, 43; Proposed Order, ¶¶ II.B.5, II.T, IV.E.3.) Only documents referred to in the VR/C may be relied on by staff to establish a prima facie case, and the VR/C did not refer to any documents supporting this alleged fact. Cal. Code Regs. tit. 14, § 11321(b). The Administrative Record contains absolutely no evidence that the alleged lack of visual barriers has disturbed, or likely disturbed, water birds or negatively affected, or likely negatively affected, sensitive habitats. BCDC staff has not established any evidentiary support for this factual claim, and therefore the claim is speculative, unverified, and conclusory. The claim is also an improper opinion because BCDC staff has not established any expertise regarding the water birds or habitats in question.

Unverified Fact No. 3: BCDC staff makes the factual claim that the current shorebird roost habitat does not provide the same functions and benefits for shorebirds as before. BCDC staff further asserts that "there is no way to remove or compensate for the past impacts to wildlife that have results from...the project's adverse impacts to shorebird roosting habitat." (Recommended Enforcement Decision, pp. 27-28, 43; Proposed Order, ¶¶ IV.E.3, IV.F.) Only documents referred to in the VR/C may be relied on by staff to establish a prima facie case, and the VR/C did not refer to any documents supporting these alleged facts. Cal. Code Regs. tit. 14, §

[2] Any supposed evidence relied upon by BCDC staff to demonstrate environmental harm in the VR/C is inadmissible hearsay, as discussed here and in the Statement of Defense.

11321(b). The Administrative Record contains absolutely no evidence that the current shorebird roost habitat does not provide the same functions and benefits for shorebirds, that there have been any negative impacts, or likely negative impacts, to wildlife, or that the project has had an adverse impact, or likely adverse impact, on shorebird roosting habitat. BCDC staff has not established any evidentiary support for these factual claims, and therefore the claims are speculative, unverified, and conclusory. The claims are also improper opinion because BCDC staff has not established any expertise regarding shorebird roost habitats.

Unverified Fact No. 4: BCDC staff makes the factual claim that the alleged lack of buoys and signage results in, or likely results in, "adverse impacts" to wildlife and sensitive habitats. (Recommended Enforcement Decision, pp. 7, 25-27, 42; Proposed Order, ¶¶ II.B.4, IV.E.3.) Only documents referred to in the VR/C may be relied on by staff to establish a prima facie case, and the VR/C did not refer to any documents supporting this alleged fact. Cal. Code Regs. tit. 14, § 11321(b). The Administrative Record contains absolutely no evidence that there have been, or likely have been, "adverse impacts" to wildlife and sensitive habitats. BCDC staff has not established any evidentiary support for this factual claim, and therefore the claim is speculative, unverified, and conclusory. The claim is also an improper opinion because BCDC staff has not established any expertise regarding the wildlife and sensitive habits in the marina.

Unverified Fact No. 5: BCDC staff makes the factual claim that the alleged lack of buoys identifying a "no wake" zone results in "adverse impacts" to wildlife and sensitive habitats. (Recommended Enforcement Decision, pp. 7, 25, 42; Proposed Order, ¶¶ II.B.4, IV.E.3.) Only documents referred to in the VR/C may be relied on by staff to establish a prima facie case, and the VR/C did not refer to any documents supporting this alleged fact. Cal. Code Regs. tit. 14, § 11321(b). The Administrative Record contains absolutely no evidence that there have been, or

likely have been, "adverse impacts" to wildlife and sensitive habitats. BCDC staff has not established any evidentiary support for this factual claim, and therefore the claim is speculative, unverified, and conclusory. The claim is also an improper opinion because BCDC staff has not established any expertise regarding the wildlife and sensitive habits in the marina.

Unverified Fact No. 6: BCDC staff makes the general factual claim that "there is no way to recover or compensate for the adverse impacts to listed species and sensitive habitat that have occurred as a result of Respondents' violations." (Recommended Enforcement Decision, p. 43; Proposed Order, ¶ IV.F.) Only documents referred to in the VR/C may be relied on by staff to establish a prima facie case, and the VR/C did not refer to any documents supporting this alleged fact. Cal. Code Regs. tit. 14, § 11321(b). The Administrative Record contains absolutely no evidence that there have been, or likely have been, adverse impacts to listed or sensitive species and sensitive habitats. BCDC staff has not established any evidentiary support for the claim that any adverse impacts, or likely adverse impacts, have occurred, and therefore the claim is speculative, unverified, and conclusory. The claim is also an improper opinion because BCDC staff has not established any expertise regarding the wildlife and sensitive habits in the marina.

Unverified Fact No. 7: BCDC staff makes the factual claim that "Respondents' violations of the Permit's public access requirements have resulted in the denial and loss of public access areas and improvements at the Site for an approximately eight-year period, from September 2009 to July 2017." The Recommended Enforcement Decision also repeatedly asserts a claim of adverse effect on public access. (Recommended Enforcement Decision, p. 42; Proposed Order, ¶ IV.E.1.) The Administrative Record contains absolutely no evidence that there has been a "denial and loss of public access areas and improvements[.]" BCDC staff has not established any evidentiary support for adverse impact or likely adverse impact, nor any support of alleged

denial of public access areas for eight years. BCDC staff has cited to only five alleged incidents[3] of public access issues in the span of fourteen years since the permit was granted, an exceptionally low number that does not support an alleged denial of public access. (VR/C, ¶¶ V, Y, X.) Therefore, this factual claim is speculative, unverified, and conclusory.

Unverified Fact No. 8: BCDC staff repeatedly makes factual claims about the state of mind of Respondents in allegedly failing to provide public access, such as the claim that Respondents "knowingly and intentionally deceived and misled the public for years by maintaining numerous unauthorized signs around the Site prohibiting public access." BCDC staff also makes the claim that Respondents "actively prevented and discouraged public access for approximately eight years." (Recommended Enforcement Decision, pp. 3, 6, 43; Proposed Order, ¶¶ IV.E.2, IV.K.). The Administrative Record contains absolutely no evidence that the public access was negatively impacted.[4] BCDC staff has not established any evidentiary support for the assertion that public access was negatively impacted. Furthermore, BCDC staff has not established any evidentiary support that Respondents deceived the public in allegedly denying public access. Therefore, these factual claims are speculative, unverified, and conclusory.

BCDC staff has presented no evidentiary support for their speculative, unverified, and conclusory assertions of factual claims. Respondents request that the Enforcement Committee strike these factual claims improperly contained in the Recommended Enforcement Decision and the Proposed Order. In addition, Respondents reiterate their denial and objections made in

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[4] In support of these assertions, staff relies only on years-old hearsay (and hearsay within hearsay) from "Laurence Frank," "Matt Leddy," and other unidentified "members of the public" who are not witnesses at this proceeding. Even if this hearsay were admissible, which it is not, BCDC staff has cited to only a handful of alleged incidents of public access issues in the span of fourteen years since the permit was granted, an exceptionally low number that does not support an alleged denial of public access. (*See* VR/C, ¶¶ V, Y, X.)

Respondents' Statement of Defense to BCDC's assertions of untrue or objectionable statements of fact.

8. Objection to BCDC staff's inclusion of alleged requirements by other agencies

Respondents object to BCDC staff including findings in the Recommended Enforcement Decision and the Proposed Order that relate to alleged requirements by other agencies such as the U.S. Army Corps of Engineers and the Regional Water Quality Control Board. (*See* Recommended Enforcement Decision, p. 28; Proposed Order, ¶ II.X). Such findings are irrelevant in this proceeding. BCDC has no authority to assert violations on behalf of the U.S. Army Corps of Engineers or the Regional Water Quality Control Board.

9. Objection to BCDC staff's improper assertions of Respondents' admissions

BCDC staff has attributed a number of admissions to Respondents that Respondents never made, and such alleged admissions even conflict with Respondents' plain language in the Statement of Defense. All of these improper assertions of Respondents' alleged admissions show that Respondents have not received (and cannot receive) a fair trial under BCDC's regulations, which delegate decision-maker authority to the prosecution team. These improper assertions of Respondents' admissions include:

Improper Assertion No. 1: "Respondents admit that they did not provide access to the Phase 1B public access pathways until July 2017." (Recommended Enforcement Decision, p. 11.) As the basis for this supposed admission, BCDC staff cites to the Statement of Defense 51:5-7, which states: "Respondents promptly installed public access and Bay Trail signs around the Phase 3 area after Redwood City authorized Respondents to open the pathways in the area in July 2017." This statement by Respondents does not make the admission that BCDC staff imagines. Rather, Respondents **specifically denied** BCDC's allegations concerning public access pathways in the Statement of Defense 35:15-16. BCDC staff has chosen to willfully ignore this

denial, fabricating an admission from which BCDC staff then asserts "Respondents cannot escape their admission that they did not provide access to the Phase 1B public pathways until July 2017." (Recommended Enforcement Decision, p. 17.) Respondents object to the assertion of this alleged admission in its entirety.

Improper Assertion No. 2: "Respondents essentially admit that they did not install public access signs while they were prohibiting access to the required Phase 1B public access areas." (Recommended Enforcement Decision, p. 22.) Contrary to this claim, Respondents explicitly stated in the Statement of Defense that they maintained a sign near the Harbormaster's office and installed "future extension of the Bay Trail" signs. (Statement of Defense, 50:11-15.) Respondents object to the assertion of this alleged admission in its entirety.

Improper Assertion No. 3: "[Respondents] concede that a reasonable reading of Permit is that this requirement must be met when public boat launch is operational." (Recommended Enforcement Decision, p. 26.) Respondents object to this alleged admission because BCDC mischaracterizes it as a concession that the public boat launch and all other Phase 1B public access improvements were required by September 2009. *Id.* at 26. Respondents explicitly stated otherwise: that the triggering date was instead July 2017. (Statement of Defense, 59:5-22.)

Improper Assertion No. 4: "Respondents admit that there are three floating structures, as alleged by staff, that are used to hold (i.e., store) personal watercraft." (Recommended Enforcement Decision, p. 31.) Respondents object to this alleged admission because BCDC mischaracterizes it as Respondents' concession that they were not in compliance. Respondents have stated that they are in compliance because the floats do not constitute fill under Government Code § 66632(a). (Statement of Defense, 82:16-23.)

Improper Assertion No. 5: "Regardless of whether the structure is called a fuel dock or a service dock, Respondents admit that they modified the dock in 2014." (Recommended Enforcement Decision, p. 32.) Respondents object to this alleged admission because it mischaracterizes Respondents' statements. Respondents stated that they "shifted the [dock] opening in the float sections for the future straddle lift bay," and that the "opening of the float sections did not require changes to any permanent structures (i.e., pilings) and remained wholly within the footprint of the dock as set out in the submitted plans." (Statement of Defense, 84:4-13.)

Improper Assertion No. 6: "Special Condition II.AA. requires Respondents to provide the Commission verification that Respondents had sent updated nautical charts to NOAA... Respondents admit they failed to send staff the necessary verification timely." (Recommended Enforcement Decision, p. 36.) Respondents object to this alleged admission because Respondents stated they had worked with NOAA staff to submit the required information and satisfy Special Condition II.AA. (Statement of Defense, 98:17-29.)

10. Objection to imposition of excessive fines

Respondents reiterate the objection made in the Statement of Defense that, even if all of BCDC staff's allegations were true, the proposed fines are excessive and not commensurate with the alleged harm. The proposed fines are not based on the evidence in the Administrative Record and are not proper in light of the statutory factors that must be considered. The proposed fines also violate the U.S. Constitution's Eighth Amendment prohibition on excessive fines and the California Constitution's similar protection.

Under Government Code Section 66641.9, the Commission must consider multiple factors when imposing administrative civil liability, including the nature, circumstance, extent, and gravity of a violation. Additionally, related factors bear on whether a fine is

unconstitutionally excessive, including: (1) the defendants' culpability; (2) the relationship between the harm and the penalty; and (3) the penalties imposed in similar statutes. *People ex rel. Bill Lockyer v. R.J. Reynolds Tobacco Co.* (2006) 37 Cal.4th 707, 728.

In this case, even assuming all of BCDC staff's allegations were true, Respondents' culpability was low. Respondents' motivation for many of the activities that BCDC staff complain of has been public safety. For example, with respect to marking areas of the Site as restricted, Respondents sought to protect members of the public from physical injury that could occur as a result of construction activities and unsafe terrain in those areas. Respondents' motivation for other activities that BCDC staff complain of has been expanding public access. For example, installation of a rower's dock expands the public's access to the Bay by providing a spot for members of the public to launch kayaks and other personal watercraft. And for certain other activities complained of, Respondents' motivation has been protection of the environment. For example, Respondents' use of stenciled signage on the pavement to indicate specific public parking spots as "Public Parking" was motivated by a desire to minimize the number of posts at the Site that could be used as perches by birds of prey. Respondents' admirable motivations reflect low culpability.

Regarding the gravity of the alleged violations and the relationship between the harm and the penalty, BCDC staff's Proposed Order would impose a penalty that is grossly disproportional to any alleged harm. Additionally, the alleged harm is wholly unsupported by any evidence in the Administrative Record. The Proposed Order seeks to impose the statutory maximum amount of penalty ($30,000) for almost all of the alleged violations. The statutory maximum penalty is not merited. While, the BCDC staff claims that there have been "substantial adverse impacts on public access" (Proposed Order ¶ IV.E.1), there is no evidence of such substantial adverse

impact in the Administrative Record. For example, there is not a single declarant that asserts that he or she has been denied public access to public facilities at Westpoint Harbor, let alone a *substantial* denial of access.

Regarding impact on the environment and Bay resources, BCDC staff does not even claim that there has actually been adverse impact or that any presumed adverse impact is substantial. If fact, there is no evidence of adverse impacts (substantial or insubstantial) on the environment or Bay resources in the Administrative Record. The lack of evidence is revealed even by reference to BCDC staff's procedurally improper effort to "clean-up" the Proposed Order, where BCDC staff changed the heading of civil penalty order paragraph IV.E.3. in draft Order No. 2017.04, from stating that "violations have had adverse impacts on Bay resources" to stating that "violations have *likely* had adverse impacts on Bay resources" (Proposed Order No. 2018.01 ¶ IV.E.3 (emphasis added)). BCDC staff's evidence does not establish the existence or magnitude of any actual harm.

To the extent that BCDC staff is relying on the presumption of harm to public access, the environment, or Bay resources, Respondents object to such reliance as speculative. It is statutorily and constitutionally improper to presume harm in connection with BCDC's determination of administrative civil liability. Judge Kinnicutt's Statement of Decision on BCDC Order in *Sweeney and Point Buckler Club, LLC v. BCDC, et al.*, Case No. FCS048136 at 9-10, Superior Court of the State of California, County of Solano, is a recent judicial decision that makes clear that assertions of "likely" impact are insufficient to warrant large fines.

A third factor that bears on Respondents' objection that the fines are excessive is the penalties imposed in similar statutes. Under U.S. Supreme Court case law, that factor is equivalent to "the sanctions imposed in other cases for comparable misconduct." *Cooper*

Industries v. Leatherman Tool Group, Inc., 532 U.S. 424, 435 (2001). As described in the Statement of Defense, similar past BCDC cases have imposed much lower penalties than the more than half a million dollars sought against Respondents here. *See* Statement of Defense at 111.

Conclusion

For the reasons set forth, Respondents object to the Recommended Enforcement Decision and its attachments. Respondents request that the Enforcement Committee exclude Allegation No. 23 as improperly proposed and strike inclusion of Allegation No. 23 from the Recommended Enforcement Decision, the Proposed Order, and the Revised Penalty Chart; strike the hearsay evidence improperly relied on in Paragraphs R, S, and V of the Proposed Order; strike alleged admissions improperly attributed to Respondents in the Recommended Enforcement Decision; strike unverified factual claims asserted in the Recommended Enforcement Decision and the Proposed Order; strike findings about alleged requirements by other agencies in the Recommended Enforcement Decision and the Proposed Order; and strike the statutorily and constitutionally excess fines from the Proposed Order. Respondents further request that they be allowed to cross-examine witnesses, that the Executive Director be instructed to follow his ministerial duties, and that Respondents be given a fair trial as is their right.

Dated: January 16, 2018

Respectfully submitted,

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