San Francisco Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

Agenda Item #8

February 23, 2018

TO: Commissioners and Alternates

FROM: Larry Goldzband, Executive Director (415/352-3653; larry.goldzband@bcdc.ca.gov)
Brad McCrea, Regulatory Program Director (415/352-3615; brad.mccrea @bcdc.ca.gov)

SUBJECT: **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)

Summary

To assist the Commission in considering the proposed Cease and Desist and Civil Penalty Order that would be issued to Mark Sanders and Westpoint Harbor, LLC ("Respondents"), staff has prepared the following responses to the public comments made at the Enforcement Committee hearing in this matter on January 18, 2018. These responses address the public comments that raised factual issues regarding the BCDC permit requirements for Westpoint Harbor, the alleged violations, and the enforcement process.

In addition, oral public comments were made at the initial Enforcement Committee hearing on November 16, 2017, and written public comments have been submitted by email and letter to Commission staff (all written comments have been posted on the Commission's website). Although staff has not responded separately to each and every public comment made prior to the January 18th hearing, the comments made at that hearing and responded to in this memorandum are representative and encompass the range of issues raised by other commenters prior to that date.

I. Public Access and Public Access Improvements

A. Failure to Provide Required Public Access for Approximately Eight Years

Public Comment: The violations for lack of required public access do not reflect the reality at Westpoint Harbor. Westpoint Harbor has docks and facilities open for public access, and there are many people currently using the public access pathways at Westpoint Harbor. (Speaker: Paula Bozinovich, Reporter's Transcript ("RT") at 106-107.)

Response: *Westpoint Harbor as it appears today is not what existed when Commission staff commenced its enforcement investigation, or even as recently as a year ago.* Consistent with the phased construction and occupancy of the marina, the permit required Mr. Sanders, by September 2009, to provide over 250,000 square feet of public access areas and a number of specified public access improvements, including 170,500 square feet of landscaping. In October 2016, there was not a single public access or public shore sign posted at Westpoint Harbor, even though the permit requires no fewer than 15 public access signs. In December 2016, portions of the public paths were overgrown with weeds due to lack of maintenance. As recently as June 2017, the main vehicular/pedestrian entrance to Westpoint Harbor was posted with multiple signs that read "Members and Guests Only," a second pedestrian access point from the adjacent Pacific Shores Center was blocked by a fence and locked gate, and Mr. Sanders maintained numerous "Restricted Access" signs at various locations around the site that effectively prohibited or discouraged public access. It was only after Commission staff informed Mr. Sanders in December 2016 that it intended to commence formal enforcement proceedings that Mr. Sanders opened most, but not all, of the required public access areas.

Mr. Sanders continues to prohibit public access by pedestrians to the guest docks, which are a required public access improvement located in a dedicated public access area. (Permit Special Condition II.B.4, Phase 1B, (e).) The gates to the guest docks continue to be posted with "Members and Guests Only" signs, and two of the three gates to the guest docks remain locked, preventing public access by pedestrians.

In addition, Mr. Sanders has failed to obtain approval of required signage, landscaping, and site furnishing plans.

Public Comment: From the beginning, this project had three phases of development: public access would be phased in during Phases 2 and 3. Staff also inserted a different plan by switching the drawings. It was not a secret that public access would be phased in. (Speaker: Peggy Ruan-Linde, RT at 104.)

Response: The original Commission permit, as issued on August 7, 2003, authorized the project to be constructed and implemented in three phases consisting generally of the marina (Phase 1), a boatyard (Phase 2), and commercial development (Phase 3). Mr. Sanders proposed this phasing as part of his permit application for the project. There have always been, and continue to be, separate and discrete requirements for public access areas and public access improvements for each of the three project phases.

At Mr. Sanders' request, Permit No. 2002.002.03 (referred to as Amendment Three), issued on November 1, 2006, divided Phase 1 of the project into two sub-phases, Phase 1A and Phase 1B, and deferred the requirement to provide the Phase 1 public access areas and improvements to Phase 1B. *Under Amendment Three, Mr. Sanders was required to provide all required Phase 1B public access areas and improvements prior to the use of any structure authorized under Phase 1B, including the marina berths. (Permit Special Condition II.B.4, Phase 1B.) A Google Earth image from September 2009 revealed that Mr. Sanders had installed two Phase 1B docks with marina berths in operation at Westpoint Harbor. The permit requires the majority of the public access and public access improvements to have been completed by that time, with relatively minor additions provided with the build-out of Phases 2 and 3.*

The permit's requirements to provide Phase 1B public access areas and improvements have not changed in any material respect since Amendment Three was issued in 2006. Staff did not unilaterally amend the permit, switch drawings or plans, or insert a different public access plan.

B. **Access to Private Boat Docks**

Public Comment: The gates, docks and boats are prevented from being locked at night. If the goal is to be balanced and reasonable, the gates should be allowed to be locked. (Speaker: Jonathan Morris, RT at 99.)

Response: Commission staff's understanding is that there are gates with locks on the gangways leading to each of the private boat docks. At one time, staff discussed with Mr. Sanders whether the permit's public access requirements include public access to the private boat docks (as is the case in some other marinas). Many years ago, staff informed Mr. Sanders that although gates on the gangways to the private docks are not authorized by the permit, any gates may remain in place and may be locked to prevent public access, and that the permit and plans should be updated to reflect site conditions.

This enforcement action does not allege a violation, or propose a penalty, for any gates on the gangways to the private docks. But because those gates are not authorized by the permit, the proposed cease and desist order would require Mr. Sanders to submit an application to amend the permit to request after-the-fact authorization for any gates installed on each of the gangways leading to the private boat docks.

C. **Access to Public Restroom**

Public Comment: There is a legitimate safety concern for families who use the showers in the public restrooms at night. (Speaker: Jonathan Morris, RT at 99.)

Response: The public restrooms at the Harbormaster's Building (and at the Phase 2 boatyard) are required public access improvements and, as such, the permit requires that these restrooms be available to the public at all times. (Permit Special Conditions II.B.1 and II.B.4, Phase 1B, (f).) However, the permit allows, and has always allowed, Mr. Sanders to impose reasonable rules and restrictions for use of the public access areas at Westpoint Harbor, including the restrooms, to correct particular problems that may arise, upon approval of such rules and restrictions by or on behalf of the Commission. (Permit Special Condition II.B.7.) Mr. Sanders has never submitted a written request, with supporting documentation of a problem, for approval of proposed reasonable rules and restrictions to restrict access to the public restrooms at night. Nevertheless, Doug Furman, the Harbormaster at Westpoint Harbor informed Commission staff during a site visit on January 31, 2018, that the public restrooms are locked from 6:00 p.m. to 9:00 a.m.

D. **Public Boat Launch Ramp**

Public Comment: Mr. Sanders opened the boat ramp in the fall of 2017 and is being fined for six years of violations even though the ramp had yet to be completed. How is it possible to fine Westpoint Harbor for a boat ramp that had yet to be completed? (Speaker: Kenneth Parker, RT at 85.)

Response: *The public boat launch ramp is a required Phase 1B public access improvement, and, therefore, the permit required Mr. Sanders to provide the public boat launch ramp by no later than September 2009. (Permit Special Condition II.B.4, Phase 1B, (a).) But he failed to do so until June 2017. Thus, the violation, and proposed penalty, is for not completing the boat launch ramp and making it available to the public for almost eight years after the date that the permit required Mr. Sanders provide this and all other Phase 1B public access improvements.*

On August 1, 2017, Commission staff notified Mr. Sanders that his unauthorized "Westpoint Harbor Boat Launch" sign at the public boat launch ramp violates the public access requirements of the Commission's permit by requiring boaters to obtain a permit from the Harbormaster's Office and pay a fee to use this required public access improvement. Two days later, on August 3rd, staff directed Mr. Sanders to remove the unauthorized sign or to effectively cover the portion of the sign that improperly requires a permit and the payment of a fee to use the public boat launch. During a site visit on January 31, 2018, staff observed that Mr. Sanders continues to maintain the unauthorized sign and has not covered the portion improperly requiring a permit and payment of a fee to use this required public access improvement.

On January 27, 2018, Commission staff received a complaint by email from a member of the public of a new public access violation at the public boat launch ramp. As the individual was launching his kayak at the public boat launch ramp, he was informed by someone who drove up in a golf cart, apparently a representative of Westpoint Harbor, that the ramp "was not for use by kayaks," and that he should either use the 101 Surf Sports facility or slide his kayak down the steep slope from the parking lot next to the public boat launch ramp. Preventing members of the public from launching kayaks at the public boat launch ramp is a clear violation of the permit, which requires the public boat launch ramp to be accessible to the public, including kayakers, at all times.

E. **Public Parking Spaces**

Public Comment: BCDC staff claims Westpoint Harbor has not provided proper parking spaces with the right signage for public parking since August 2008. This allegation is incorrect because there was only a dirt road at the time and the design phase had not been completed. Once completed, 12 parking spaces were provided with signage. The signage on the ground at Westpoint Harbor is not approved, but neighboring Pacific Shores Center has not been fined for similar signage. Also, putting a sign on a post "goes against the fish and wildlife agency" because the top of these posts provide a roosting place for predatory birds. (Speaker: Dean Hyatt, RT at 96.)

Response: *The required Phase 1B public access improvements include twelve signed public parking spaces at various locations around the marina basin, as well as 15 signed public parking spaces for vehicle and boat trailer parking. (Permit Special Condition II.B.4, Phase 1B. (b) and (c).) The permit required Mr. Sanders to provide these signed public parking spaces by no later than September 2009, but he failed to do so.* In their Statement of Defense, Respondents acknowledge that only eight of the twelve required public parking spaces are currently available and argue that the remaining four public parking spaces are to be included in a parking lot that has not yet been constructed. In response, staff modified this violation to allege a failure to make available eight signed public parking spaces.

The permit requirement for "signed" public parking spaces is not met by stenciling markings with paint on the pavement. BCDC's Public Access Signage Guidelines, Shoreline Signs, published in August 2005, calls for signs to be mounted on posts and do not allow stenciling. Administrative Record Document ("AR Doc.") 96 at 8, 16.[1] Stenciling is not acceptable as signage because it is not as visible as a posted sign and because it weathers easily and requires more maintenance. In addition, because the marina itself is a private facility and most of the parking spaces will be used by members and guests, it is necessary to clearly identify the public parking spaces by posted signs. 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.

No fish and wildlife agency has commented that posted parking signs should not be used at Westpoint Harbor because the top of these posts could potentially serve as perching sites for predatory birds. Moreover, the posted public parking signs required by the permit are to be placed in an active area of the marina – the parking lot – a place unlikely to be used by perching predators, and on the opposite side of the marina basin from Westpoint Slough and the nearby national wildlife refuge. (In contrast to the lack of concern expressed regarding posted parking signs, and as discussed further below, the U.S. Fish and Wildlife Service has objected to the planting of trees along Westpoint Slough, in a location immediately across from the slough and adjacent to the wildlife refuge, because such trees can serve as perching sites for birds that prey on endangered species in the refuge.)

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[1] Administrative Record Documents refer to those documents included by Commission staff on the Index of Administrative Record attached to the Violation Report/Complaint for the Imposition of Administrative Penalties ("Violation Report/Complaint") and attached, as updated, to the Executive Director's Recommended Enforcement Decision, dated November 6, 2017. All Administrative Record Documents are posted on the Commission's website (at Public Meetings/Enforcement Committee/November 16, 2017 and January 18, 2016).

II. Unauthorized Structures or Uses

A. Mooring Redwood City Police and Fireboats

Public Comment: Why does Commission staff's proposed cease and desist order mandate that Mr. Sanders amend his permit to authorize Redwood City's police and fire boats to use the guest docks at Westpoint Harbor docks? These boats are lawfully there because they pay marina slip fees. Staff is endangering public safety. (Speaker: Bob Wilson, RT at 86-87.)

Response: *This enforcement action does not allege a violation, or propose a penalty, for the mooring of the Redwood City police or fire boats at Westpoint Harbor.* Moreover, Commission staff has not suggested that Redwood City police and fire boats may not be moored at Westpoint Harbor or must be relocated elsewhere. However, the existing permit does not authorize the Redwood City police or fire boats to be moored at Westpoint Harbor. Therefore, the proposed cease and desist order would simply require Mr. Sanders to submit an application to amend the permit 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.

B. Rower's Dock

Public Comment: The proposed cease and desist order refers to unauthorized construction of a rower's dock. The rower's dock was included in the original BCDC permit. BCDC wanted the rower's dock to be moved from the boat yard to the retail side of the marina. I have seen BCDC documents approving the change, the Design Review Board (DRB) review and authorization of construction. (Speaker: David Hattery, RT at 89.)

Response: The original permit issued in August 2003 authorized, as part of the Phase 2 boatyard, construction of "an approximately 6,000-square-foot rower's boathouse," among other improvements. When the DRB considered the project a few months earlier, at its meeting on May 5, 2003, one of its general recommendations was that the proposed uses be mixed up by placing some commercial uses by the boatyard and putting some marina functions in the retail area, so that the public users may benefit from and enjoy the marina activity. Statement of Defense Exhibit ("SOD" Ex.") 7 at 5. [2] In response to the DRB's suggestion, in July 2006, Mr. Sanders applied for a permit amendment to relocate the rower's boathouse from the boatyard to the west side of the marina basin.

The plans Mr. Sanders submitted to the DRB for its August 7, 2006, meeting include a site plan showing a "Boathouse and launch ramp/dock" on the western side of the marina basin. SOD Ex. 61 at 6 (Phase 2 Site Plan). The minutes of that meeting indicate that the DRB supported the new location for the rower's boat house. In addition, Permit No. 2002.002.03 (Amendment Three), issued shortly thereafter, on November 1, 2006, includes a statement in Special Condition II.B.1 (Public Access Area) that the relocation of several buildings "authorized herein," as shown on the August 7, 2006, DRB packet, "should not change the quantity or quality of the public access provided at the site in any way."

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[2] Statement of Defense Exhibits refer to those documents submitted by Respondents with their Statement of Defense. All Statement of Defense Exhibits are posted on the Commission's website (at Public Meetings/Enforcement Committee/November 16, 2017 and January 18, 2016).

Based on the above, Amendment Three authorized construction of an approximately 6,000-square-foot rower's boathouse on the west side of the marina basin. However, that authorization did not include construction of a rower's dock, even though the site plan reviewed by DRB, and referenced in Amendment Three, shows a "launch ramp/dock" adjacent to the relocated rower's boathouse. First, as staff has repeatedly explained to Mr. Sanders, the DRB provides advice to the Commission and permittees, but does not approve plans or amend permits. *See* 14 C.C.R. §10270(b). Second, on the referenced site plan, the rower's boathouse and the launch ramp/dock are separate structures; the rower's boathouse is shown on the west side of the path along the perimeter of the marina basin, and the launch ramp/dock is shown east of the path and in the marina basin. Third, both the original permit and Amendment Three authorized a rower's boathouse but neither refers to an associated rower's dock. As proposed new fill in the Bay, the launch ramp/dock requires express authorization in Section I (Authorization) of the permit.

In any event, Mr. Sanders did not seek plan approval to construct, nor did he construct, a rower's boathouse with an associated rower's dock. Nor did he seek plan approval to construct a "stand-alone" rower's dock, without an associated rower's boathouse, to be used for commercial purposes. Thus, in addition to being unauthorized, the rower's dock is another instance of Mr. Sanders violating the permit's requirements for plan review and approval prior to constructing site improvements.

Commission staff has not suggested that the rower's dock must be removed. Both the original and the modified proposed orders prepared by staff, for consideration by the Enforcement Committee, would require Mr. Sanders to request authorization from the Commission (by a permit amendment) for: (1) construction, use, and maintenance of the rower's dock; (2) use of the rower's dock by a business for the purpose of renting kayaks, stand-up paddle boats, and other similar boats to the public; and (3) any accessory facilities or structures associated with use of the rower's dock by such a business.

C. **Fenced Enclosure (Garden)**

Public Comment: Westpoint Harbor has had its own community garden for years. It is run by the boaters and is for the benefit of members of the boating community. The garden does not infringe on any of the walking paths and does not block public views. BCDC determined that the garden is a violation of Westpoint Harbor's permit and proposed a fine for the garden. What BCDC rules say it is against organic vegetable gardens? (Speaker: Carol Sheetz, RT at 92.)

Response: *The Commission does not have regulations or policies against gardens. However, Mr. Sanders installed the "community garden" at Westpoint Harbor without authorization in a dedicated public access area, as shown by the public access guarantee recorded by Mr. Sanders.* AR Doc. 11. Under both the permit and the public access guarantee legal instrument, the area in which the garden is located is required to be available to the public for unrestricted public access, and may not be fenced off as a private amenity for marina tenants and guests. Commission staff has not proposed a penalty solely for the unauthorized garden, but rather, has proposed a single penalty for multiple separate instances of unauthorized placement of fill and/or substantial change in use, including the garden, all of which are located in required public access areas.

The modified proposed order that Commission staff prepared for consideration by the Enforcement Committee at its meeting on January 18, 2018, would have allowed Mr. Sanders to request authorization from the Commission (by a permit amendment) to retain the community garden in its present location. Counsel for Mr. Sanders objected to the Enforcement Committee's consideration of that modified proposed order. But even under the proposed order adopted by the Enforcement Committee, Mr. Sanders may apply for a permit amendment to request authorization from the Commission for a community garden at an appropriate location.

D. **Storage Shed**

Public Comment: There is a "Tuff Shed" with fuel absorbent booms and diapers to clean up any fuel spills and it is located south of the parking lot behind the garbage dumpsters. The Executive Director and the Enforcement Committee have decided that this storage shed is illegal and must be removed. This is another example of $30,000 fines that are a total injustice. (Speaker: David Laird, RT at 108.)

Response: *As with the garden, Mr. Sanders installed the storage shed without authorization in a dedicated public access area, as shown by the public access guarantee recorded by Mr. Sanders.* AR Doc. 11. Under both the permit and the public access guarantee legal instrument, the area in which the storage shed is located must be available to the public for unrestricted public access. BCDC staff has not proposed a penalty solely for the unauthorized storage shed, but rather, has proposed a single penalty for multiple separate instances of unauthorized placement of fill and/or substantial change in use, including the storage shed, all of which are located in required public access areas.

The modified proposed order that Commission staff prepared for consideration by the Enforcement Committee at its meeting on January 18, 2018, would have allowed Mr. Sanders to request authorization from the Commission (by a permit amendment) to retain the storage shed in its present location. Counsel for Mr. Sanders objected to the Enforcement Committee's consideration of that modified proposed order. But even under the proposed order adopted by the Enforcement Committee, Mr. Sanders may apply for a permit amendment to request authorization from the Commission for a shed at an appropriate location to store fuel absorbent booms and other materials to clean up any fuel spills.

III. Permit Conditions to Protect Sensitive Wildlife and Wildlife Habitat

A. **Installation of Buoys and Signs in Westpoint Slough**

Public Comment: The process of applying for navigational and no-wake buoys and nautical charts as part of the Army Corps of Engineers permit was completed in 2009. BCDC along with NOAA, the U.S. Coast Guard, and many other agencies were part of this permit. It was a long process that started in 1993 with NOAA being responsible for issuing a permit circulated to all agencies, including BCDC, that was filed in 2002.

Permit requirements changed over time, specifically as it relates to no-wake buoys. It was determined that no-wake buoys are the responsibility of Redwood City and have been maintained at the entrance of the channel. It was also concluded during a meeting with BCDC participation that no-wake buoys cannot be installed beyond the channel entrance because they are a navigational hazard. Westpoint Harbor installed no-wake buoys, 3

miles-per-hour signs on the port and starboard pilings inside the entrance to the Westpoint Harbor. (Speaker: Marianne Barolich-Tracy, RT at 98-99.)

Response: In June 2002, the U.S. Fish & Wildlife Service ("USFWS") submitted a comment letter to BCDC on the proposed project recommending, among other things: (1) the installation and maintenance of a buoy system 100 feet from Greco Island to discourage unauthorized entry; and (2) the adoption of a "no wake" policy. AR Doc. 4, at 4. Consistent with these recommendations, Special Condition II.H of the Commission's permit, as originally issued and signed by Mr. Sanders in 2003 (and as most recently amended in 2017), requires Mr. Sanders to install and maintain: (1) buoys adjacent to (but not in) the navigation channel of Westpoint Slough to identify the "no-wake" speed zone; and (2) a buoy system 100 feet from the salt marsh on Greco Island along the slough with signs informing the public that public access to the marshlands of the national wildlife refuge is prohibited.

The permit also contains an express finding that Mr. Sanders "has agreed to place and maintain buoys 100 feet from the Greco Island salt marshes with signs that inform the public not to enter the sensitive areas of Greco Island, as well as to install and maintain buoys down the centerline of Westpoint Slough to identify a 'no wake' speed zone." Permit Section III, Findings and Declarations, Section F, Fish and Wildlife and Tidal Marshes and Tidal Flats. However, Mr. Sanders has failed to comply with his agreement.

Contrary to the commenter's belief that the process of applying for navigational and no-wake buoys was completed as part of the Army Corps of Engineers permit for Westpoint Harbor, that permit does not include conditions related to navigational or no-wake buoys in Westpoint Slough. Similarly, Mr. Sanders has not provided any evidence that NOAA issued, or that he even applied to NOAA, for a permit for the marina or for navigational or no-wake buoys. There also is no evidence, other than unsupported hearsay statements from Mr. Sanders, of any meeting among various agencies at which it was allegedly agreed that no-wake buoys or any other buoys required by the Commission's permit would not be allowed in Westpoint Slough.

Finally, Mr. Sanders has provided no evidence that he ever even submitted an application to the U.S. Coast Guard for authorization to comply with the BCDC permit's requirements to install buoys and signs in Westpoint Slough. The 3-miles-per hour signs installed at the marina entrance, and any no-wake buoys in the marina, do not meet the requirements of the permit.

The modified proposed order that Commission staff prepared for consideration by the Enforcement Committee would have allowed Mr. Sanders to request authorization from the Commission (by a permit amendment) to implement alternative measure that meet the intent of the requirements of Permit Special Condition II.H if, after applying to the Coast Guard to install the buoys required by that permit condition, Mr. Sanders is unable to obtain such approval. Counsel for Mr. Sanders objected to the Enforcement Committee's consideration of that modified proposed order.

Public Comment: BCDC staff is proposing fines for things they cannot even enforce, such as buoys that they are not authorized to enforce. They don't even know what they are enforcing. (Speaker: Stephen Estrada, RT at 94.)

Response: *As discussed above, there is no evidence, other than unsupported hearsay statements from Mr. Sanders, that the U.S. Coast Guard would not allow him to install buoys 100 feet from Greco Island or no-wake buoys in Westpoint Slough. Coast Guard and California regulations cited by Respondents in their Statement of Defense would allow Mr. Sanders to install such buoys and signs upon obtaining authorization from all appropriate agencies. However, Mr. Sanders has provided no evidence that he ever even submitted an application to the U.S. Coast Guard for authorization to comply with the requirements of Permit Special Condition II.H to install such buoys.*

B. **Removal of Trees Planted Along Westpoint Slough**

Public Comment: The landscape plan was presented to the Commission back in 2003 and approved in 2006 by BCDC. Now ten years later, BCDC desires to remove those trees that were specified and approved in accordance with the permit. "So why did these mandated and approved trees fall out of favor and fall out of the permit after ten years?" (Speaker: Sheila Finch, RT at 111.)

Response: *The permit requires approximately 170,500 square feet of landscaped areas as a Phase 1B public access improvement (Permit Special Condition II.B.4, Phase 1B, (g).), but neither the original permit as issued in 2003 nor the current permit as amended in 2017 approved any particular landscaping plan. On the contrary, Permit Special Condition II.A.1.a requires Mr. Sanders to submit a landscaping plan to Commission staff for plan review and approval prior to installing the required landscaping. To date, Mr. Sanders has not obtained BCDC staff approval of a landscaping plan.*

The plans Mr. Sanders submitted to the Design Review Board (DRB) for its August 7, 2006, meeting included a conceptual Phase 1 landscaping plan. However, the DRB provides advice to the Commission and permittees, but does not approve plans. *See* 14 C.C.R. § 10270(b). The Commission's Bay Design Analyst, or in some cases a staff engineer, reviews plans submitted for plan review approval to ensure that those plans are consistent with the work authorized by the permit. Such plans must contain a greater level of detail than those reviewed by the DRB which is necessary to assure that the construction comports with the permit's requirements, the Commission's design guidelines for landscaping and signage, and sound construction practices to assure durability and to minimize the need for future maintenance.

The landscaping plan Mr. Sanders submitted to the DRB for its August 7, 2006 meeting did not show any trees to be planted along Westpoint Slough, but did show Monterey Cypress trees proposed to be planted along the inland side of the pathway along the west side of the marina basin. SOD Ex. 61, at 8 (Phase 1 Planting and Furnishing Plan). Thus, Mr. Sanders planted Monterey Cypress trees, as well as Poplar trees, along the slough, without authorization at a different location than the trees that are shown on the landscaping plan he submitted to the DRB in 2006.

In 2011 and 2012, BCDC's former Bay Design Analyst directed Mr. Sanders to remove the Monterey Cypress and Popular trees that he had planted along the slough, without plan approval, because these trees can serve as perching sites for raptors that can then prey on listed species found in the adjacent national wildlife refuge. AR Docs. 26, at 2-3; 27, at 1-2;

and 30 at 2. The USFWS raised this concern as early as June 2002 in its comments on the proposed project. AR Doc. 4 at 4-5 ("Project landscaping should be of a type that will limit opportunities of avian predators to affect listed species."). In a comment letter submitted on this enforcement action, dated November 1, 2017, the USFWS reaffirmed that trees and other potential roosting sites should be kept well back from tidal areas.

C. **Mitigation for Project Impacts**

Public Comment: BCDC staff alleges that Westpoint Harbor has failed to create a roosting habitat as required by the permit. However, the permit states that the creation of the 3 acres of roosting habitat was not the responsibility of Westpoint Harbor, it was the responsibility of Cargill, which created this habitat 15 years ago. During a recent visit to the site, the commenter saw hundreds if not thousands birds on this roosting habitat. (Speaker: Michelle Bonhof, RT at 89.)

Response: *Permit Special Condition II.F requires Mr. Sanders to provide mitigation for the 2.3 acres of shorebird roost habitat lost as a result of the project with approximately 3.0 acres of replacement habitat with similar functions and benefits for shorebirds. Shorebird roost habitat was lost when a portion of the salt pond known as Pond 10 was developed as Westpoint Harbor; the remainder of Pond 10 is located immediately adjacent to the project site to the south and is owned by Cargill. The permit contains a finding that if Cargill develops the remainder of Pond 10 in the future, "Cargill will have to provide additional or replacement mitigation for this habitat." Permit Section III, Findings and Declarations, Section F, Fish and Wildlife and Tidal Marshes and Tidal Flats. However, this finding concerns potential future development of the remainder of Pond 10, which has not yet occurred. This finding does not pertain to mitigation requirements for the impacts of developing Westpoint Harbor, formerly a portion of Pond 10, and does not require Cargill to provide shorebird roost habitat for such impacts.*

In their Statement of Defense, Respondents claim that the required mitigation was achieved by a November 26, 2003 letter from Cargill that purportedly guaranteed that "Cargill would 'create a similar habitat to the south' and that '[b]y modifications in [Cargill's] operations an equivalent area of habitat will remain to provide the same functions and benefits.'" Statement of Defense at 70:26-71:1 (quoting from Cargill memorandum attached to AR Doc. 91). Cargill's letter is not a guarantee, or any other type of binding commitment or enforceable document, that Cargill will in fact provide 3.0 acres of replacement habitat with similar functions or benefits for shorebirds. Therefore, this letter does not satisfy the requirements of the permit that Mr. Sanders guarantee 3.0 acres of replacement habitat for shorebird roosting.

Moreover, the permit requires Mr. Sanders' habitat creation plan to be reviewed and approved by or on behalf of the Commission after consultation with USFWS and the California Department of Fish and Wildlife, and there is no evidence that any of these agencies determined that Cargill's memorandum complied with the permit's shorebird roosting habitat mitigation requirement.

Finally, Respondents have provided no evidence that Cargill has managed the claimed mitigation area (the remainder of Pond 10) for the past 14 years, or that it continues to do so, to ensure an equivalent area of habitat providing the same functions and benefits as the habitat impacted by the Westpoint Harbor project. The fact that the commenter reportedly observed many birds in or on the adjacent salt pond during a recent site visit does not establish that Mr. Sanders, or Cargill, has complied with the permit's requirement to provide replacement shorebird roosting habitat.

Public Comment: The Center for Biological Diversity's interest in this matter is to see that the permit conditions that protect habitat like Greco Island and the no-wake zone, and the other issues as far as perching and some of the trees that were planted, are enforced. It is very important to enforce these kinds of permit conditions that were a pre-condition of the marina being placed there. Part of the reason the birds seem to be doing well is because of the national wildlife refuge. This is one of the last best places for a lot of our bird species in this area. People think, "there's tons of birds," but it is these very small refuges that are protected. We must ensure that there are sufficient conditions to protect them. (Speaker: Lisa Belenky, RT at 109.)

Response: Comment acknowledged.

IV. Other Issues

A. Amendment Five

Public Comment: At a meeting held on August 21, 2013, Brad McCrea was the chief spokesperson for BCDC and "agreed to correct 44 major conflicts in the permit" by proposed Amendment Five. Both Westpoint Harbor and BCDC staff spent many hours on that amendment to resolve the issues now before the Enforcement Committee. At that meeting, Adrienne Klein stated that regardless of any modifications to the permit, Mr. Sanders "would have to admit that he purposefully violated his permit and that we was responsible for fines from the time of the original permit until the signing of [proposed] Amendment No Five," which no reasonable person would admit. (Speaker: Doug Furman, RT at 87-88.)

Response: *Mr. Sanders recorded the August 21, 2013, meeting with BCDC staff and included a transcript of the meeting as an exhibit to his Statement of Defense. Based on the transcript, neither Mr. McCrea nor Ms. Klein made the statements attributed to them by the commenter.*

At that meeting, according to the transcript, Mr. Sanders claimed to have "identified 44 significant errors and conflicts, which we've corrected--44 of them." SOD Ex. 21 at 135. Mr. McCrea did not agree that the permit was badly written or that it contained major conflicts. Rather, McCrea stated: "we're here to tell you today that we are going to entertain what you have to say. We have some things that we feel we can change and some things that we can't change." *Id.* at 3-4.

According to the transcript, Ms. Klein did not state that Mr. Sanders would have to admit to purposely violating the permit or that he would be responsible for fines. However, Mr. McCrae did state that if Mr. Sanders declined to sign proposed Amendment Five, he would continue to be bound by the then-existing permit and that, in the absence of an agreement on the proposed amendment, BCDC staff would initiate enforcement proceedings. *Id.* In addition, BCDC's staff counsel, John Bowers advised Mr. Sanders that in an enforcement context he would be vulnerable to civil fines. *Id.* at 140.

Staff expended considerable time and effort attempting to address Mr. Sanders' concerns with the permit that he had signed in 2003, and signed as amended in 2006, and to accommodate his requests for changes to the permit, by preparing five different versions of proposed Amendment Five over a three-year period (September 2012 to September 2015). The meeting on August 21, 2013, was to discuss the third version of proposed Amendment Five. BCDC staff subsequently prepared two more versions of proposed Amendment Five, in 2014 and 2015, in further efforts to address Mr. Sanders' concerns. However, Mr. Sanders and his former counsel continued to find fault with different aspects of each revision of the amended permit, even though staff prepared lengthy letters responding to the comments that Mr. Sanders and his former counsel had made on previous versions and explained the basis for staff's determination that certain requested changes could not be made administratively. *See* AR Docs. 60 and 64.

B. **Alleged Staff Changes to the Permit.**

Public Comment: In the records I saw, staff "doubled back and changed decisions, imposed new requirements not in the original permit and confused or disingenuously stretched the facts." (Speaker: Brenda Hattery, RT at 91.)

Response: *Mr. Sanders signed Permit No. 2002.002.03 (Amendment Three) on November 7, 2006. No changes were made to the permit for almost ten years, until Permit No. 2002.002.06 (Amendment Six) was issued on April 18, 2016, and subsequently signed by Mr. Sanders. Staff did not unilaterally change the permit's requirements or impose new requirements not contained in the permit as signed by Mr. Sanders.*

C. **Request to Amend the Permit to Authorize Dredging**

Public Comment: In April 2017, Mr. Sanders applied for a permit amendment to authorize maintenance dredging at Westpoint Harbor. Such dredging "is specified in his BCDC permit every ten years." Commission staff would not authorize the maintenance dredging. Mr. McCrae asserted that a new EIR under CEQA had to be done; that Redwood City had not done a proper one 15 years ago. CEQA contains a clear exception for maintenance dredging. It appears that Commission staff is slowing, delaying, maybe preventing, maintenance dredging to punish Mr. Sanders for exercising his rights in this case. It's harassment; it's vindictive, and directly harms the harbor. (Speaker: Maureen O'Connor Sanders, RT at 83-84.)

Response: The amendment application submitted by Mr. Sanders is for both maintenance and new work dredging of up to 500,000 cubic yards of sediment over a period of ten years, including proposed new dredging of 2,600 cubic yards of material from the marina's entrance channel into Westpoint Slough.

As BCDC staff explained to Mr. Sanders in a letter dated November 29, 2017, the BCDC permit for Westpoint Harbor does not authorize maintenance dredging in the marina or the slough, nor the disposal of dredged material at any authorized disposal site. On the contrary, the permit contains a finding stating that, "[i]f dredging of Westpoint Slough is proposed ... the Commission will consider whether to authorize it at that time." Moreover, the permit also contains a finding that the marina project mitigation measures should include that "no dredging should be allowed in Westpoint Slough in the future ... to avoid any potential erosion of [San Francisco Bay National Wildlife Refuge] salt marshes and mud flats from increased tidal flows down Westpoint Slough." Permit Section III, Findings and Declarations, Section F, Fish and Wildlife and Tidal Marshes and Tidal Flats.

As staff further explained, the original CEQA documents for excavation and construction of the marina that resulted in Redwood City's 2001 mitigated negative declaration noted and acknowledged that no studies on the potential impacts of maintenance dredging in Westpoint Harbor and Westpoint Slough were conducted as part of the mitigated negative declaration. In addition, the Redwood City Planning Commission Staff Report (Oct. 16, 2001; EA 10913-01 and U10142-9) stated that little to no dredging was expected to be needed in the harbor or slough. The report also acknowledged that any future dredging of the harbor or slough would require additional environmental and public review before being authorized.

For all of these reasons, staff determined that the proposed dredging project is not exempt from CEQA as maintenance dredging or under any other statutory or categorical exemption, and, therefore, that CEQA review will be required for any proposed permit amendment to authorize new and maintenance dredging.

In addition, public comments on the proposed dredging project have raised concerns about potential environmental impacts and have argued that further environmental review is necessary. In light of these public comments, and as BCDC's Chief Counsel advised one of Mr. Sanders' attorneys, there is a possibility of a legal challenge against BCDC for alleged noncompliance with CEQA, if the Commission were to issue the requested permit amendment without preparing an environmental assessment in accordance with the Commission's regulations.

In its November 29, 2017 letter, BCDC staff invited Mr. Sanders to meet to discuss the environmental review process under BCDC's regulations and associated timelines with the necessary review. To date, Mr. Sanders has declined the invitation.

D. **Suggestion to Involve a Neutral Third-Party**

Public Comment: The only solution to this issue with Westpoint Harbor is for the Commission to appoint a qualified neutral third-party to review the facts of this case. (Speaker: Sonya Boggs, RT at 95.)

An independent third-party entity is needed to come between Mr. Sanders and BCDC staff because it's gotten personal. (Speaker: David Wells, RT at 97.)

I am in favor of a third-party neutral decider because the facts are that BCDC staff is being disingenuous with you as a Committee. (Speaker: Peggy Ruan-Linde, RT at 104.)

I am sad to hear that litigation may be in the future. I hope that maybe a third-party could step in and help mitigate these polarizing issues. (Speaker: Redwood City Vice Mayor Diane Howard, RT at 113.)

Response: *BCDC staff has attempted to work cooperatively with Mr. Sanders over the past seven years to resolve the permit violations at Westpoint Harbor, including preparing five different versions of a proposed permit amendment to address concerns Mr. Sanders has with the permit he signed in 2003, and signed as amended in 2006, and to make modifications to the permit that he requested. Mr. Sanders and his former counsel found fault with different aspects of each revision of the amended permit, even though staff prepared lengthy letters responding to the comments that Mr. Sanders and his former counsel made on previous versions of the proposed amendment and explained the basis for staff's determination that certain requested changes could not be made administratively. See* AR Docs. 60 and 64.

Mr. Sanders and some members of the public may believe that the disagreements between Mr. Sanders and BCDC staff have become "personal," but staff disagrees. Staff has always sought to work and communicate with Mr. Sanders in a professional manner, in the same way that it works successfully with hundreds of other permittees, including other marina owners and operators.

Regardless of the relationship between Mr. Sanders and BCDC staff, the Commission has the authority and responsibility to enforce the permits that it issues, and staff will not recommend that the Commission delegate its authority or responsibility to a third-party. The Executive Director brought this enforcement action because the Commission needs to consider the violations at Westpoint Harbor and adopt an order to resolve them. Similarly, to the extent the permit needs to be amended, or Mr. Sanders would like to request material amendments to change existing permit conditions, the amendments need to be considered by the Commission following a public hearing, not processed administratively by staff.

E. **The Modified Proposed Order Presented for the Enforcement Committee's Consideration on January 18, 2018**

Public Comment: The modified proposed order submitted to the Enforcement Committee has changes that are not highlighted and were not called out to Westpoint Harbor. This is standard operating procedure for your organization and part of the culture that the Commission needs to change. (Speaker: Sonya Boggs, RT at 95.)

Response: Commission staff's January 8, 2018, memorandum transmitting the revised proposed order to the Enforcement Committee states that the modifications included certain revisions to the cease and desist provisions of the proposed order, the findings, and the civil penalty provisions. The memorandum further states that "the principal revisions, which staff will discuss at the Enforcement Committee meeting on January 18, 2018, are highlighted in yellow on the attached revised proposed order."

The highlighted revisions concern the substantive requirements of the order (*i.e.,* the cease and desist provisions), the addition of terms by which Respondents would be entitled to a waiver of 50% of the total proposed penalty, and an updated description of the enforcement proceedings. In addition, BCDC's counsel revised certain findings and provisions concerning the civil penalty factors to address evidentiary objections raised by Respondents' counsel at the November 16, 2017, Enforcement Committee hearing and based on further review of the administrative record. BCDC's counsel was prepared to provide Word documents of both the original and modified proposed orders to Respondents' counsel to facilitate their comparison of the two documents, at their request. Although Respondents' counsel did not make such a request, their comments at the January 18, 2018 Enforcement Committee hearing demonstrate that they did compare the original and revised proposed orders and identified those additional revisions.

As required by BCDC regulations, the Executive Director provided the Enforcement Committee, Respondents, and the public with ten days advance notice of the modified proposed order and the opportunity to review and comment on the revised proposed order by submitting it to the Enforcement Committee for consideration at a second public hearing. BCDC staff was not required to provide a "redline" document showing each and every change to the original proposed order.

F. **BCDC's Relationship with Boaters**

Public Comment: BCDC does not conduct talks on boating and the environment in the South Bay and elsewhere. Would it not be better to develop relationships with boaters rather that than trying to eliminate any and all boating in the South Bay? (Speaker: Terey Quinlan, RT at 101-102.)

Response: BCDC is a state planning and regulatory agency with regional authority over the San Francisco Bay, the Bay's shoreline band, and the Suisun Marsh. BCDC staff works cooperatively with hundreds of permittees, including marina owners and operators, and fully supports boating on San Francisco Bay. In July 2017, the Commission identified the importance of working with others to develop a regional educational campaign to increase awareness of rising sea level and how the Bay Area can adapt successfully to its challenges. However, if the Commission does not have the mission, resources, or staff to conduct talks or other educational programs on boating and the environment throughout the region.

In bringing this enforcement action, BCDC staff is not trying to adversely impact or eliminate boating in the South Bay. Rather, this enforcement action has little to do with operation of the Westpoint Harbor marina or with associated boating in the South Bay. This enforcement action concerns Mr. Sanders' ongoing and longstanding refusal to comply with numerous conditions of the BCDC permit that he signed in 2003 and again as amended in 2006 related to the upland development at Westpoint Harbor, including permit requirements to provide public access and public access improvements and to protect wildlife and sensitive wildlife habitat.

G. **The Commission's Jurisdiction**

Public Comment: The jurisdiction of BCDC over this matter has been questioned. If jurisdiction is challenged under the precedent set by *Maine v. Thiboutot*, no further proceeding may commence until there is proof of jurisdiction. (Speaker: Miles Dawood, RT at 113.)

Response: The Commission is expressly authorized by statute to enforce the permits that it issues. Government Code §§ 66638, 66641, 66641.6. *See* also 14 C.C.R. §§ 11310 - 11386.

In Maine v. Thiboutot, 448 U.S. 1 (1980), which involved the deprivation of welfare benefits under the Social Security Act, the United States Supreme Court held that 42 U.S.C. section 1983, a provision of the federal Civil Rights Act, provides a cause of action for the protection of any federal statutory right, as well as Constitutional rights. The case had nothing to do with the Commission's jurisdiction or with the jurisdiction of administrative agencies under California law.