

SAN FRANCISCO BAY CONSERVATION
AND DEVELOPMENT COMMISSION

ENFORCEMENT COMMITTEE MEETING

PORT OF SAN FRANCISCO BOARD ROOM
FERRY BUILDING
SECOND FLOOR
SAN FRANCISCO, CALIFORNIA

THURSDAY, OCTOBER 20, 2016

9:30 A.M.

Reported by:
Ramona Cota

A P P E A R A N C E SEnforcement Committee

Greg Scharff, Chair

Mark Addiego

Sanjay Ranchod

Jill Techel

Also Present

Chris Tiedemann, Deputy Attorney General
Office of the Attorney General

BCDC Staff

Larry Goldzband, Executive Director

Adrienne Klein, Chief of Enforcement

Brad McCrea, Regulatory Director

Greg Ogata, Legal Secretary

Matthew Trujillo, Enforcement Analyst

Maggie Weber, Enforcement Analyst

Marc Zeppetello, Chief Counsel

Permittees - Scott's Jack London Seafood, Inc. and the Port
of Oakland

Raymond Gallagher, Scott's Jack London Seafood, Inc.

Richard Sinkoff, Port of Oakland

Permittee - Marina Village Associates, LLC

Jim Burroughs

A P P E A R A N C E SPublic Speakers

Chris McKay, Scott's Jack London Seafood, Inc.

Barbara Vernon, Scott's Jack London Seafood, Inc.

Michelle Lewis, Northern Light School

Sandré Swanson

Bill Barulich, BiRite Foodservice Distributors

Alex Marqusee, Office of Lynette Gibson McElhaney

Ramiro Carabez, Scott's Jack London Seafood, Inc.

Ignacio De La Fuente, Scott's Jack London Seafood, Inc.

Steve Hanson, Scott's Jack London Seafood, Inc.

Scott Edin, Scott's Jack London Seafood, Inc.

John Tudal, Tudal Winery/Cerruti Cellars

Keith Miller California Canoe & Kayak, Inc.

Sandra Threlfall, Waterfront Action

Savlan Hauser, Jack London Improvement District

Alan Schaevitz, Point San Pedro Road Coalition

Sara Jensen, Point San Pedro Road Coalition

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P R O C E E D I N G S

9:34 a.m.

1
2
3 COMMITTEE CHAIR SCHARFF: I am going to call the
4 meeting of the Enforcement Committee to order.

5 If you want to call the roll.

6 MS. KLEIN: Chair Scharff?

7 COMMITTEE CHAIR SCHARFF: Here.

8 MS. KLEIN: Member Addiego?

9 COMMITTEE MEMBER ADDIEGO: Present.

10 MS. KLEIN: Member Ranchod?

11 COMMITTEE MEMBER RANCHOD: Here.

12 MS. KLEIN: Member Techel?

13 COMMITTEE MEMBER TECHEL: Present.

14 COMMITTEE CHAIR SCHARFF: All right. So the first
15 thing we'll do is - I don't have any cards for it - is
16 public comment for items not on the agenda. So if there are
17 any cards?

18 (No response.)

19 COMMITTEE CHAIR SCHARFF: Seeing none we will move on
20 to the first item, which is a Public Hearing and Possible
21 Vote on a Recommended Enforcement Decision Involving
22 Proposed Stipulated Cease and Desist and Civil Penalty Order
23 No. CCD 2016.03; Scott's Jack London Seafood, Inc. and the
24 Port of Oakland.

25 COMMITTEE MEMBER TECHEL: I think we have the minutes?

1 MS. TIEDEMANN: The minutes.

2 COMMITTEE CHAIR SCHARFF: Oh, the minutes, I missed the
3 minutes.

4 COMMITTEE MEMBER TECHEL: I will make the motion to
5 approve the minutes.

6 COMMITTEE CHAIR SCHARFF: I'll second that.

7 All in favor?

8 (Ayes.)

9 COMMITTEE CHAIR SCHARFF: All right, that passes
10 unanimously.

11 COMMITTEE MEMBER RANCHOD: I'll abstain because I was
12 not here for that meeting.

13 MR. ZEPPETELLO: Do you want to ask ex partes?

14 COMMITTEE CHAIR SCHARFF: Yes. Do any Commissioners
15 have an ex parte communications to report?

16 COMMITTEE MEMBER TECHEL: No.

17 COMMITTEE MEMBER ADDIEGO: No.

18 COMMITTEE MEMBER RANCHOD: No.

19 COMMITTEE CHAIR SCHARFF: And I don't either. Okay, no
20 ex partes.

21 MS. KLEIN: So good morning, I am Adrienne Klein, your
22 Chief of Enforcement. I will be making, along with Marc
23 Zeppetello, a joint presentation regarding Item number 5,
24 the Executive Director's Recommended Enforcement Decision on
25 the Proposed Stipulated Cease and Desist and Civil Penalty

1 Order No. 2016.03 that would be issued to Scott's Jack
2 London Seafood, Inc. and the Port of Oakland.

3 I would like to draw your attention to a copy of the
4 Scott's permit, which you should have, and I would like you
5 to make the two exhibits available for review during this
6 presentation.

7 And I would also like to draw your attention to letters
8 of public comment that were submitted last year during
9 negotiations to make sure that you have received and read
10 those letters, which were posted on the website this week.
11 Thank you.

12 I will be reviewing the operation of Scott's
13 Restaurant, orienting you to the location, describing the
14 permit that was issued, the unauthorized work and permit
15 violations and then Mr. Zeppetello will cover the terms of
16 the Proposed Order.

17 This image shows you Scott's Jack London Seafood
18 Restaurant at Jack London Square in Oakland where many
19 members of the audience have just come from by ferry this
20 morning.

21 This closer-in image is an overview of the Scott's
22 Restaurant operation.

23 The pavilion is noted with an arrow. It is an L-shaped
24 structure to the right of the main building.

25 Scott's operates an approximately 20,000 square foot

1 building located in the shoreline band between Broadway
2 Street, which is to the upper left and corner of the
3 photograph, and Franklin Street, which is to the right,
4 where the North arrow is, within Jack London Square.

5 Scott's main entrance is at the foot of Broadway
6 Street.

7 In addition to a large dining room, the restaurant has
8 seven private event spaces, six of which are located within
9 the building, and the seventh and mixed private/public space
10 is the pavilion, which is located outside the building
11 within the Franklin Street plaza in a BCDC-required public
12 access area.

13 The pavilion is an L-shaped structure; it is 40 feet
14 high. It is supported by three groupings of four steel
15 posts, which I will show you with photographs in a moment,
16 located in the center of the pavilion, giving it a
17 freestanding and open feeling. It is near but not abutting
18 the adjacent restaurant building. Guests attending events
19 in the pavilion enter from Franklin Street through an east-
20 facing doorway.

21 There are two permits that are relevant here.

22 In 1986 the Commission issued BCDC Permit 1985.019 to
23 the Port of Oakland for the commercial and recreational
24 development along the six block section of waterfront
25 property between Jefferson and Harrison Streets that we

1 refer to as Jack London Square. This permit required the
2 entire Franklin Street Plaza between Water Street and San
3 Francisco Bay to become an approximately 20,000 square foot
4 public access plaza.

5 Ten years later in February 1996, Scott's was added as
6 a permittee as part of Amendment Number 8 to that permit;
7 and that permit authorized the construction of the pavilion,
8 which is 4,400 square feet in size.

9 A year later the Commission split this permit into two
10 permits. The A Permit covers all of the Port's operations
11 at Jack London Square and the B Permit exclusively covers
12 the area leased by Scott's underneath the pavilion -- that
13 is the pavilion.

14 So I would now like you to take a look at Permit
15 Exhibit B. It hopefully is more legible than this image
16 that we are projecting.

17 The B Permit, also known as "the Scott's Permit"
18 authorizes the construction, use and maintenance of the
19 pavilion for shared public and private use at a ratio of 80
20 percent public and 20 percent private use. In days that is
21 292 public use days and 73 private use days.

22 The current permit allows Scott's to enclose the public
23 pavilion with fabric tent panels during private events.
24 these panels were hung from the roof line of the pavilion
25 and extended toward the ground. Scott's is required to

1 provide public access signage, tables and chairs within the
2 pavilion when it is in public use.

3 The permit's findings state that:

4 "[t]he proposed pavilion will be situated to
5 provide an unobstructed 34-foot-wide view corridor
6 from Water Street to the estuary approximately 80
7 percent of the time when the facility is open for
8 public use. The existing view corridor width
9 through this plaza is approximately 57 feet wide."

10 And those are the diagonal lines that you can see
11 projected from the main landscaped area of the plaza toward
12 the water. There are three lines. The two that are
13 farthest apart represent the view corridor when the pavilion
14 is open, in public use, and the middle line and the lowest
15 line represent the view corridor when it is in private use.
16 So the view corridor when the pavilion is closed is 18 feet
17 wide.

18 A special condition of the permit "requires
19 installation of ... café seating to furnish the pavilion,
20 enhancing its utility to the public for daily use."

21 When it issued Amendment Number 8 the Commission also
22 found that public access improvements sufficiently offset
23 the potential for the pavilion to privatize the existing
24 plaza and that these enhancements will improve overall the
25 public's use and enjoyment of the existing plaza so that the

1 net effect of the project, given the periodic unavailability
2 of the plaza, will result in an overall enhancement of the
3 public access.

4 The Commission also found, finally, that the private
5 use is incidental to the public access use, is in keeping
6 with the character of the area and will not unduly obstruct
7 access to the and enjoyment of the Bay.

8 Now to further explain the limitations put on the 73
9 private use days:

10 The permit restricts the total number of events that
11 can occur on weekends to four per month during the winter
12 season and three per month during the summer season.

13 There must always be three public use weekend days each
14 month.

15 And there can be no more than two consecutive events at
16 any time.

17 These use restrictions are to be tracked the
18 requirement of Scott's to submit a quarterly calendar of
19 events to the Port and of the Port to submit an annual
20 calendar of events occurred, to BCDC.

21 Now a few photographs so that you can see the
22 structure. We are looking along the line of the view
23 corridor, toward the Bay, so generally northwest. You can
24 see in the foreground -- so I wanted you to see the Franklin
25 Street plaza. I will pan to the left momentarily. This

1 photograph is post-unauthorized construction; so you can see
2 a metal entry doorway connected to the roof line of the
3 pavilion to the ground and that is an unauthorized
4 structure.

5 The next photo we pan left. This is the Franklin
6 Street plaza. I'll go back one so that you can see that the
7 flagpole and tree in the left hand side of the photograph
8 align with the flagpole and tree. So we have panned left
9 and stepped back.

10 And now a closer view of the metal entry doorway.

11 And a view inside the pavilion so that you can see the
12 three sets of posts that hold it up and the shading that
13 happens as you move back toward the building.

14 One more photograph of the Franklin Street plaza
15 looking southeast.

16 Now I will describe the time line of events and then
17 the violations in a little more detail.

18 So between 2004 and the present, Scott's has provided
19 fewer than 73 public use days per year.

20 In December 2011, Scott's approached BCDC and indicated
21 that the canvas tent panel walls were old and challenging to
22 place, to install and remove, and they had been thinking
23 about a new way to enclose the pavilion.

24 They worked very closely with our Bay Design Analyst
25 for a year. Their initial proposal included permanent

1 structures at the four corners of the pavilion. Over the
2 course of the year they generated a design that was much
3 more in keeping with the findings of the permit and the
4 provisions to provide maximum, feasible public access. The
5 metal entry doorway always remained a part of the proposal
6 but staff was quite happy with the design, barring that one
7 feature. Staff had not provided plan approval for the new
8 pavilion enclosure system. During that year of negotiation
9 we had been considering an approval through plan review as
10 the private enclosure was already authorized, albeit via a
11 canvas tent.

12 At the end of that year long period, Scott's commenced
13 construction of the new pavilion enclosure system and they
14 completed that enclosure system.

15 In December, upon learning of this construction, the
16 Bay Design Analyst who had been working with Scott's
17 representatives telephoned Scott's to indicate that they did
18 not have plan approval and that they were undertaking
19 construction without BCDC approval.

20 A few months later staff, including senior staff,
21 conducted a site visit and observed the violations and met
22 with Scott's.

23 A few months later we issued an enforcement letter and
24 it followed the protocols for all of our letters by
25 detailing the permit requirements, the violations of the

1 permit and the law, the need to remove certain elements of
2 the unauthorized structure, of the unauthorized development,
3 and to apply for a permit amendment to retroactively
4 authorize those project elements that were subject to
5 retroactive authorization. The letter also outlined the
6 various enforcement provisions provided by the law that
7 Scott's may be subject to. And the Port, Scott's and the
8 Port.

9 Following issuance of that letter, over a two year
10 period staff attempted to assist Scott's in resolving the
11 violations. The Permittees did submit two permit
12 applications but they did not file those applications. They
13 also have had two public hearings in front of the Design
14 Review Board. Their initial submittal did not include a
15 public access proposal to offset impacts to the public
16 access that we believe would be a result of having permanent
17 structures in place rather than a fully removable enclosure
18 system.

19 So after two years of an inability to resolve the
20 violations staff made a determination to commence a formal
21 enforcement proceeding and prepared a violation report.

22 At the moment in time when that violation report was to
23 be issued, Scott's asked to enter into settlement
24 negotiations and that brings us to the present moment.

25 So now a few photos so that you fully understand the

1 extent and nature of the project -- of the violations.

2 So this is the pavilion retractable wall panel system
3 in closed mode with the permanent metal entry doorway that
4 the stipulated agreement will cause to be removed. Other
5 panels will be replaced to complete the closure.

6 This is looking from the Bay back through the pavilion;
7 it is in partially open and closed position. The purpose of
8 this photograph is to -- at the left hand side of the
9 photograph I would like you to see the three planters in
10 place which are not authorized. You can see the retractable
11 -- the panel on the left you can see a small retractable
12 panel outside of a second panel; that is a permanent wall.
13 And to the left of that the dark area is the storage area.
14 So that storage area was constructed without a permit in a
15 dedicated public access area.

16 This photograph is looking, let me go back. We are
17 looking up the left side of the pavilion so you will be on
18 the inside of the wall I have just described. This is the
19 inside of the permanent wall. This is the panel that enters
20 into the storage area. You can see the stage structures in
21 front of it. And continuing along you're looking at the
22 other permanent wall that is part of the pavilion; it is not
23 retractable. All of that will be staying. But previously
24 these areas were fully open to the public and now they will
25 be permanently walled. This photograph also shows the

1 practice of storing materials in the public access area when
2 the pavilion is in public use, equipment related to the
3 restaurant.

4 Another violation that occurs from time to time is the
5 use of the Franklin Street plaza beyond the area leased by
6 Scott's, so outside of the roof line of the pavilion, to
7 enhance the entry to the pavilion. So this is a recent
8 photograph that was submitted by the neighbor who owns
9 California Canoe and Kayak, a business just next door. This
10 event occurred on September 19th and you can see that these
11 structures are located beyond the roof line of the pavilion.

12 This is showing planters and the public furniture
13 stored in the public access area.

14 And this is, again, the storage area and more equipment
15 and planters stored.

16 So the other violations that are not susceptible to
17 imagery are the privatization or use of the pavilion for
18 more than 73 events per year.

19 Most recently in 2013 and 2014 when we were engaged in
20 the enforcement negotiations, Scott's exceeded the use limit
21 by 120 and 85 private events respectively in each of these
22 two years. They also over the course of the past 10 years
23 had more than 2 consecutive events, provided fewer than 3
24 weekend public use days and also did not adhere to the
25 seasonal use limitations.

1 This completes the description of the violations. Marc
2 will take over to outline the terms of the proposed order.

3 MR. ZEPPETELLO: Thank you, Adrienne. Good morning,
4 Chair, Committee Members.

5 Last September when it was clear that the staff was
6 going to proceed with a formal enforcement proceeding,
7 Scott's asked for an opportunity to try to negotiate a
8 resolution and we engaged in settlement discussions which
9 took place over the past year.

10 The purpose of the stipulated order from both staff's
11 point of view and Scott's was to resolve the violations, to
12 have an appropriate civil penalty paid and also to clarify
13 the matters that would need to be addressed in applications
14 to amend the permit and a time frame for doing so. As
15 Adrienne mentioned, there have been two draft applications
16 but they were never completed, so one of the objectives was
17 to get this matter moving forward and resolved.

18 One of the provisions of the stipulated order is that
19 it's an agreed-upon settlement. If there are any changes
20 made to the stipulated order, if this Committee recommends
21 any or the Commission adopts them, Scott's and the Port have
22 the option to agree to those provisions or not. If they
23 decline to then the agreement would be off the table and we
24 would return to the context of a formal enforcement
25 proceeding.

1 As an overview, the Proposed Order accomplishes four
2 major goals:

3 It requires removal of the metal frame doorway and a
4 process for permit amendments to move forward with
5 acceptable design for the pavilion.

6 A civil penalty amount of \$250,000 that would be paid
7 into the Bay Fill Cleanup and Abatement Fund as required by
8 the McAteer-Petris Act.

9 It would avoid a contested proceeding with an uncertain
10 result.

11 The Order simplifies the future authorization of the
12 pavilion for shared public and private use, which I'll get
13 to in more detail in a few minutes.

14 The Proposed Order has two principle components, cease
15 and desist provisions and also a civil penalty order. There
16 are two additional components sort of subsidiary, which are,
17 there are stipulated penalties for failure to comply with
18 the requirements of the Order in a timely manner, and there
19 is also a framework for the Permittees to request amendments
20 to the permit, to the Scott's permit, regarding future use
21 of the pavilion or an increased use of the pavilion.

22 The cease and desist provisions include a general
23 narrative statement that Scott's shall cease and desist from
24 further permit violations. Second, that they will comply
25 with the -- until the permit is amended they will comply

1 with the private/public use provisions and limitations in
2 the existing permit. That they will also cease from storing
3 restaurant equipment or furnishings in the pavilion when it
4 is open for public use.

5 Within 75 days -- there are a number of days which I
6 will be referring to as I go through this. These are time
7 frames that run from adoption of the Order by the
8 Commission, which is scheduled for November 3rd. So within
9 75 days they will remove the permanent door, the metal entry
10 frame door, and they will install a new door system that is
11 integrated with the door panels that are in place so that
12 when the pavilion opens there won't be an entry door and
13 then it will close. It's consistent with the design that
14 was under discussion with staff several years ago, which we
15 were very close, I believe, to approving, prior to the
16 unauthorized construct.

17 Further cease and desist provisions:

18 Within 15 days they will remove all the plants from
19 around the pavilion, which are in the area under the Port's
20 permit, which are to be maintained unobstructed for public
21 access. They requested, and we agreed, to allow one planter
22 to remain on the north side of the pavilion.

23 Next, within 56 days from approval of the Order,
24 Scott's and the Port would submit complete applications to
25 amend the permits. Actually both permits, both the Scott's

1 permit and the Port permit, require amendment.

2 The permit amendments would address a number of issues:

3 First, request after-the-fact authorization for some of
4 the unauthorized work, being the storage area and the stage
5 in particular and also to get authorization for the new door
6 system that I just mentioned, the retractable door system
7 with the new doors built in.

8 A second item of the permit amendments, and this is
9 what relates to both permits, is a public access plan for
10 the pavilion and the adjacent public access areas. And
11 again, there was discussion and work on this during the
12 negotiations several years ago and there is a conceptual
13 plan that Scott's and the Port had proposed and BCDC staff
14 had generally agreed to but it has never been finalized or
15 implemented.

16 And finally, the permit amendments would allow Scott's
17 and the Port to request authorization for increased use of
18 the pavilion for private events and I will explain that in a
19 little bit more detail in a second.

20 Further cease and desist provisions of the order are
21 that:

22 Within 30 days they will provide all public access area
23 improvements that are required by the permit.

24 They also need to record a legal instrument that
25 permanently guarantees the public access area under the

1 pavilion is dedicated open space.

2 And that within 30 days Scott's will submit all past
3 due quarterly event schedules for prior years.

4 The second component of the cease and desist order is
5 the civil penalty order that within 14 days the Permittees
6 will pay a civil penalty of \$250,000 payable to the Bay Fill
7 Cleanup and Abatement Fund, as required by statute. While
8 the penalty amount is perhaps smaller than the aggregate of
9 all of the potential penalties, in negotiating the penalty
10 it was a compromise of disputed claims by both sides. And
11 staff believes its relatively large size is appropriate in
12 light of the settlement package as a whole in that it will
13 be sufficient to deter future violations.

14 The other penalty component, as I mentioned earlier,
15 that there are stipulated penalty provisions if the
16 permittees are late in performing work under the stipulated
17 order. for example, removing the metal frame door or
18 getting the permit amendment applications filed or filing
19 the public access guarantee. There are daily penalties that
20 escalate over time to provide a strong incentive to keep on
21 schedule and get full compliance with the order.

22 Now I would like to address the settlement framework
23 agreed to by staff and Scott's for requesting, in the permit
24 amendments, increased use of the pavilion. And I would like
25 to declare that this is not an issue that's before the

1 Committee today. You are not being asked to authorize this.
2 This would be in the permit amendment applications and it
3 would eventually come to the Commission, the full
4 Commission, for consideration in amending the permit.

5 The agreement and the order allow the Permittees to
6 request increased pavilion used. As Adrienne mentioned, the
7 current permit allows 73 days of private use.

8 Under the framework it would be a maximum of 124 events
9 per year, broken down as 104 for-profit events, in other
10 words, 2 per week and an additional 20 community-based
11 charitable events held at cost. One of the points that
12 Scott's made to us in the discussions is that this pavilion
13 is used for community events, for memorial services, for
14 nonprofits. They argue that that was a community service
15 that they provided and should be recognized.

16 The proposed framework also specifies specific time
17 frames. One of the ambiguities in the existing permit is it
18 used, I believe, the word "days." We, in the discussions,
19 defined "events" and limit the events in general to no more
20 than 10 hours, except that we agree that they would have the
21 option to ask for 14 events that exceed 10 hours. But in
22 general the events would be limited to 10 hours.

23 In addition there is a provision in the framework that
24 there would be an additional 2 hours allowed for setup and
25 two hours for breakdown at the beginning and the end in

1 addition to the 10 hours, so there is time allowed for setup
2 and breakdown.

3 The next provision -- this goes to trying to clarify
4 the Exhibit A that Adrienne put up under the current permit.
5 It has some ambiguity and uncertainty in terms of how things
6 are counted and makes it difficult to enforce and so we have
7 attempted to make things clearer for both sides, for
8 Scott's, for the public and for BCDC. The proposed
9 framework would be that there would be no private use of the
10 pavilion during both a Saturday and Sunday of the same
11 weekend or for more than 3 events during a seven day week
12 going from Sunday to Saturday.

13 Additional provisions related to this permit amendment
14 request would be that Scott's would install and monitor a
15 camera to record the pavilion's use 24 hours a day, 7 days a
16 week.

17 And that they would create an online web-based calendar
18 of events for the pavilion that would be accessible to the
19 public, to BCDC and the Port so that there would be notice
20 to all concerned when the pavilion is being used and
21 scheduled for use for private events.

22 The framework about requesting permit amendments also
23 makes clear that the amended permit include stipulated
24 penalties for violations of the use limits. This is
25 somewhat unusual for BCDC permits but there is a precedent

1 for it in the America's Cup permit where there were
2 provisions for penalties in the permit. We think this is
3 helpful and important to, again, provide a very strong
4 dis-incentive for overuse of the pavilion in the future,
5 especially with the possibility of increased use.

6 So if they have an extra day, an extra event over the
7 course of the year, it would be \$10,000 for every day over
8 the 104 private use days or additional 20 use days. For a
9 weekend violation, if they were to have private events on a
10 Saturday and Sunday, that would be \$5,000 per event. Or if
11 they have more events that exceed 10 hours in duration or an
12 event exceeding 14 hours, that would be \$2,000. Again,
13 these would be recommended in the permit amendments. The
14 application wouldn't necessarily include this but the staff
15 would put this in the proposed permit for the Commission's
16 consideration.

17 I would like to just repeat and this is expressly
18 stated in the Order that the Permittees understand that this
19 is an agreement agreed to among staff and the Permittees but
20 that the Commission will have sole discretion whether to
21 amend the permit to authorize the increased use and whether
22 or not to include stipulated penalties for violations of the
23 pavilion's use limits, the amended permits' use limits.

24 So in conclusion, the staff's recommendation is that
25 the Enforcement Committee adopt and recommend to the

1 Commission adoption of the proposed Stipulated Cease and
2 Desist and Civil Penalty Order CCD 2016.03, which is in your
3 packets.

4 I would be happy to answer any questions now or would
5 turn it over to the Permittees if they want to make any
6 statements. Thank you.

7 COMMITTEE CHAIR SCHARFF: Do the Permittees want to
8 make any statements?

9 MR. GALLAGHER: Yes, we do.

10 COMMITTEE CHAIR SCHARFF: Why don't you approach and
11 announce who you are.

12 MR. GALLAGHER: My name is Raymond Gallagher; I am the
13 founder of Scott's. I have been in Jack London Square for
14 the last 56 years, starting as a busboy.

15 I thank the staff for their working with us over the
16 last four years; it has been a very trying project for all
17 of us.

18 One must remember that this area that we talk to as a
19 plaza, for 12 hours of day serves as a receptacle for all
20 garbage, all grease, all supplies, produce, milk, fish,
21 dairy, groceries and repair and maintenance vehicles that
22 keep two large restaurants, Kincaid's and Scott's, going.
23 And if you have anything to know about the restaurant
24 business, there is quite a bit that goes on when you are not
25 open. We have grease traps to empty, we have grills, things

1 that have to be replaced on a normal basis. We have
2 approximately 31 deliveries a day to our restaurant, we have
3 approximately 30 deliveries a day to the adjacent
4 restaurant. On top of that this plaza also serves a 20,000
5 square foot building that is a commercial building that
6 houses the kayak, California Canoe, and about seven other
7 tenants.

8 All we respectfully request is that the monies we have
9 spent to alleviate these conditions be applied to the
10 \$250,000. We think that would be very fair. I would like
11 to save the rest of my three minutes at the conclusion. We
12 have several speakers and I would like to take this
13 opportunity now to call upon them. If you have any
14 questions of me I would be glad to answer them now or upon
15 the completion of this hearing.

16 COMMITTEE CHAIR SCHARFF: So let me just talk a little
17 bit about where we are in terms of the rules. So what I was
18 anticipating is that I would let you as the Permittee speak,
19 not for three minutes but you could speak now and say
20 whatever you wanted to say. Then we would return to the
21 Commission for questions. And then after the Commission has
22 a chance to do questions either of you or staff, we will
23 then turn to the public and we will have the public comment.

24 We actually have approaching 20 speakers so I am going
25 to actually limit it to two minutes because of the time

1 frame. I wanted people to have that sense so that they can
2 plan their comments accordingly. And obviously, given the
3 large number of speakers, if you don't have to repeat what
4 other people said that would be great.

5 So that is what I am planning on doing. So if you have
6 other comments you want to make now.

7 MR. GALLAGHER: That's fine with me, sir.

8 COMMITTEE CHAIR SCHARFF: Okay.

9 MR. GALLAGHER: I find that would be very efficient.

10 COMMITTEE CHAIR SCHARFF: All right, thank you. So now
11 we will return to the Commission for any questions that
12 Committee members may have.

13 MR. SINKOFF: Do you want to hear from the Port of
14 Oakland?

15 COMMITTEE CHAIR SCHARFF: Absolutely. I didn't realize
16 the Port of Oakland wanted to speak; I apologize.

17 MR. SINKOFF: Just for the record, Richard Sinkoff,
18 Director of Environmental Programs and Planning for the Port
19 of Oakland. We are also a Permittee and we support the
20 recommended enforcement decision.

21 COMMITTEE CHAIR SCHARFF: Thank you very much.

22 Okay, now we will turn it back to the Committee.

23 COMMITTEE MEMBER TECHEL: I just had a question whether
24 in the developing of this building where they put in the
25 more permanent structures they had to go through any

1 planning or design review from Oakland?

2 MS. KLEIN: Yes, local discretionary approval from the
3 City of Oakland is required and that is, besides finalizing
4 the project description, the element of the permit
5 application that we have not received. I have spoken to the
6 staff at the City of Oakland and they have received the same
7 plans that were submitted to the DRB and they, I believe,
8 are prepared to approve what would come before the
9 Commission as described in this Order. Does that answer
10 your question?

11 COMMITTEE MEMBER TECHEL: I think my question was more,
12 when the original work was done was there any permits from
13 Oakland?

14 MS. KLEIN: I was, I don't know. I believe so.

15 COMMITTEE MEMBER TECHEL: It looks like --

16 COMMITTEE CHAIR SCHARFF: Go ahead.

17 MR. GALLAGHER: Ma'am, if I could answer that. Yes,
18 Mr. Steve Hanson, a representative, applied for all building
19 permits with the City of Oakland. They were granted, paid
20 for and completed.

21 MR. HANSON (OFF MIC): The Port was the planning
22 organization at the time.

23 THE REPORTER: You need to come to the microphone,
24 please.

25 COMMITTEE CHAIR SCHARFF: Can you just state; you are

1 with the Port?

2 MR. HANSON: Well I spent 25 years with the Port, I am
3 no longer with the Port, my name is Steve Hanson, so I am
4 pretty familiar with these permits.

5 The Port had the planning authority at the time so that
6 is simply the answer.

7 COMMITTEE CHAIR SCHARFF: Okay, thank you.

8 Committee Member Techel, do you have further questions?

9 COMMITTEE MEMBER TECHEL: Not at this time.

10 COMMITTEE CHAIR SCHARFF: Okay. Anyone else?

11 COMMITTEE MEMBER ADDIEGO: Recently I have been aware
12 of a stipulated order in regards to a governmental entity
13 that had a permit and they didn't follow some of the
14 improvements that they had agreed to so it was a neglectful
15 situation that indeed ended up costing the governmental
16 entity a similar sum of money.

17 But this seems to be in the willful category where
18 there was a discussion between the staff and yet
19 Mr. Gallagher and Scott's, with the blessing of the Port of
20 Oakland, determined that they would just go ahead with the
21 construction. And if Mr. Gallagher -- I would like to
22 understand, was it a willful violation? Was there some
23 confusion?

24 MR. GALLAGHER: Thank you, that is a very good
25 question. We operate under -- excuse me, sir. We have

1 several different agencies that we must go through. We have
2 the Americans with Disabilities Act, the ADA, which required
3 us to have a permanent, in-place entrance and exit closest
4 to the nearest public street, which is Franklin Street. So
5 we had to abide by the Americans with Disabilities Act.

6 We had the Uniform Building Code, which requires us to
7 have a flight of passage, a flight of regress and egress,
8 which must be fixed in place.

9 So we were being pulled by the ADA and pulled by the
10 California Uniform Building Code to create these and then we
11 are being told by BCDC we don't like the use of the door.

12 Well we didn't like the look of the door either. We
13 have now put our heads together, and it is very expensive to
14 do, and we have come up with a collapsible door. So it was
15 not willful. We were meeting the Americans with
16 Disabilities Act, which we are 100 percent accessible in our
17 restaurants, all of our restaurants, and we also were
18 meeting the Uniform Building Code for egress and public
19 safety. Thank you.

20 COMMITTEE MEMBER ADDIEGO: I guess I'll accept the
21 answer but there seems to be some willfulness on the front
22 end of entering into the construction phase.

23 I wanted to ask the Port of Oakland.

24 MR. SINKOFF: Richard Sinkoff, Port of Oakland. Just
25 wanted to clarify. The original pavilion that Steve Hanson

1 referred to, that was authorized under the BCDC permit and
2 at that time the Port of Oakland had land use planning
3 jurisdiction at Jack London Square. From that period of
4 time to the present, the port area line, the port
5 jurisdictional line, has been changed. That area is now
6 within the City of Oakland's planning jurisdiction. So the
7 question is, once we move forward the City of Oakland will
8 have to be issuing a building permit for the improvements.

9 I just wanted to clarify the comment that this was done
10 with the Port's blessing. I think that's probably not the
11 correct word. It was fully authorized in the original
12 permit that was the pavilion that had the retractable
13 panels. That went through our land use planning
14 jurisdiction and our building permit process. Today that
15 area is within the City of Oakland so CEQA and the building
16 permit will have to be given by the City of Oakland planning
17 department.

18 COMMITTEE MEMBER ADDIEGO: So the Port of Oakland
19 doesn't work with BCDC? You will grant a permit with no
20 knowledge of whether or not BCDC has agreed? I just find it
21 interesting that --

22 MR. SINKOFF: No, no, no. This was done fully under
23 the BCDC process. So the original permit -- of course. The
24 original permit, as Chief Enforcement Officer Klein
25 described, went through the full BCDC process absolutely

1 every step of the way.

2 COMMITTEE MEMBER ADDIEGO: So the Port didn't see any
3 difference to the original construction, which was more
4 temporary of a nature that could be all pulled back, as
5 opposed to the more permanent construction?

6 MR. SINKOFF: Well we didn't authorize the second.

7 COMMITTEE MEMBER ADDIEGO: Oh, you did not.

8 MR. SINKOFF: Not at all.

9 COMMITTEE MEMBER ADDIEGO: You weren't involved in
10 that?

11 MR. SINKOFF: No.

12 COMMITTEE MEMBER ADDIEGO: I didn't understand that,
13 thank you.

14 MR. SINKOFF: Yes, that's the crux of the issue. Thank
15 you. Please go ahead.

16 COMMITTEE MEMBER RANCHOD: Go ahead.

17 COMMITTEE CHAIR SCHARFF: Are you done?

18 COMMITTEE MEMBER ADDIEGO: I have questions for
19 Mr. Zeppetello.

20 COMMITTEE CHAIR SCHARFF: Why don't you finish your
21 questions.

22 COMMITTEE MEMBER ADDIEGO: When we were looking at some
23 of the restrictions on the use as far as successive days,
24 Saturday, Sunday, what does that come from? Where is the
25 need to restrict it to not a consecutive Saturday/Sunday? I

1 think I know but I'd like to hear it.

2 MR. ZEPPETELLO: I think the basic rationale is that
3 it's a public corridor and the exception is allowing private
4 use. So from staff's point of view, we, for example, felt
5 it was inappropriate to have them privatize the plaza, the
6 pavilion for an entire weekend.

7 COMMITTEE MEMBER ADDIEGO: When there might be more
8 public interested in exploring that part of the bayfront?

9 MR. ZEPPETELLO: Right.

10 COMMITTEE MEMBER ADDIEGO: Do Monday holidays, should
11 they play a factor in this? A Sunday-Monday situation when
12 people have the ability to get out there. Is that something
13 we should look at?

14 MR. ZEPPETELLO: Well that's certainly something that
15 staff could talk about and look at as we come forward with
16 the actual permit amendments and further talk with Scott's
17 but we didn't take that into account in negotiating the
18 order.

19 COMMITTEE MEMBER ADDIEGO: And this will all happen
20 before the full Commission?

21 MR. ZEPPETELLO: Right, the permit amendments.

22 COMMITTEE MEMBER ADDIEGO: Okay. I think some of my
23 other questions are more for that time so at this point I'll
24 defer.

25 COMMITTEE CHAIR SCHARFF: You want to go forth?

1 COMMITTEE MEMBER RANCHOD: Sure. I want to follow up
2 on Commissioner Addiego's point and I have a couple of
3 questions as well. In reading the documents for this it
4 seems to me that there is -- what's troubling about this is
5 there has been a private benefit that has been realized by
6 the business over a number of years as a result of the
7 behavior that was engaged in, so there is a sort of private
8 benefit that's resulted that is certainly a monetary
9 benefit. There are public access requirements that have
10 been flouted; and at the same time there is a proposal,
11 effectively the private use has been expanded and then there
12 is a clear proposal to seek additional private use from this
13 facility.

14 There were some statements in the Stipulated Cease and
15 Desist Order that really jumped out at me. One, and this
16 goes to the point you were making, and I'm curious if the
17 Permittees disagree with any of these statements, that
18 violating the BCDC permit, quote, "was an intentional
19 business decision by Scott's." That these do appear to be
20 knowing and intentional business decisions. There was a
21 failure by the business to cooperate, refusal to abide by
22 the direction from the Commission staff, and then build the
23 project that the staff had denied. That was striking to me.

24 The cost to the state from engaging in this enforcement
25 matter is more than 1,000 hours of staff time, \$80,000 of

1 staff costs. If we just assumed \$100 an hour for the staff
2 time, the penalty amount is barely recouping the state's
3 costs thus far.

4 MR. GALLAGHER: Do you want me to answer that, sir?

5 COMMITTEE MEMBER RANCHOD: It's not a question. I am
6 just noting a few things and I do have some questions at the
7 end.

8 There isn't anything before us on the business's
9 ability to pay or not pay, that doesn't seem to be in
10 dispute.

11 It is not clear what the sort of ill-gotten profits
12 were to the business from this activity. There is a
13 statement that staff could subpoena the business records to
14 determine how much revenue was realized.

15 And then what really struck me towards the end of the
16 stipulated order is a statement that no other business has
17 so flagrantly, extensively and knowingly violated the terms
18 of its permit and the McAteer-Petris Act. That's quite a
19 remarkable statement for a Commission that has had this role
20 as long as this body has.

21 Those are some things that jumped out to me that I felt
22 were remarkable about this.

23 I do have a few questions. I'll just give you these
24 and you can answer them in whatever order makes sense.

25 For Enforcement staff: If this went through in a non-

1 settlement context, what is the maximum penalty that would
2 be sought against the Permittees?

3 Two, what is, if there is, a contractual relationship
4 between the Permittees with respect to obligations to pay a
5 penalty, such as indemnification?

6 Three, is it correct that effectively the public/
7 private use ratio has been almost reversed over the past ten
8 years?

9 And a question for Scott's: I think I heard you say in
10 the statement that you are seeking to apply funds already
11 spent towards the \$250,000 proposed settlement amount. Can
12 you clarify that?

13 Thank you.

14 MR. GALLAGHER: Yes. To clarify that, we are asking
15 that the monies that will be taken to remove the doors. We
16 have also already agreed to putting planters, 10 hanging
17 planters and maintain them for the remaining 40 years of our
18 lease, and we have agreed to do that. The building
19 management, the Jack London Square management, removed the
20 furniture, we bought new furniture. And when you ask about
21 the question about us enriching ourself through the use.
22 Many of these, if not all of these over-uses have been done
23 for public events. I am going to give you an example if you
24 may bear with me.

25 COMMITTEE MEMBER RANCHOD: Please do.

1 MR. GALLAGHER: You get a call on a Thursday afternoon.
2 A long-time Chief Engineer, Charlie Roberts, has passed away
3 and his family calls and says, he wants his funeral services
4 to be held with Port Authority and BCDC involvement in the
5 pavilion. Do we say 'No' or is that a public, conscious
6 contribution? When we have the editor of the Oakland Post
7 is murdered in the middle of the day and you have the NAACP
8 call you up and say, 'Can we have an event for him on a
9 Thursday?' As a public identity in Oakland people call upon
10 us and we say, 'Yes.' And they are not to enrich us. We
11 would be much more enriched by saying, 'No.'

12 There's not a lot of people that are involved in Jack
13 London Square. We are the only remaining family-run
14 business left in Jack London Square, the rest are all chains
15 so we are asked many times. When the Necklace of Light
16 calls and wants to have an event we have to say, 'Yes,'
17 we're obligated. And those are the days that override our
18 public use/private use.

19 The staff and I, we also must realize this permit was
20 issued 30 years ago. A lot of things have changed in 30
21 years and that's what has caused the complexity. We made 26
22 revisions of our plan to try to get through this; 26
23 revisions. I am not looking to recoup that money. All we
24 are doing is looking to have the money that will be spent
25 for the future, remove the doors, counted against the

1 \$250,000. I think it's more than fair. Thank you.

2 COMMITTEE MEMBER RANCHOD: I have a follow-up question
3 if I may? And appreciate the service that Scott's is
4 providing to the community and has provided, thank you for
5 that.

6 MR. GALLAGHER: You're welcome.

7 COMMITTEE MEMBER RANCHOD: Is there evidence in the
8 record or before us as to the breakdown of those events?

9 MR. GALLAGHER: Yes, there was a complete audit done.
10 We hired a consultant, Christopher McKay. He worked for one
11 year on the project and he will speak. And he is here today
12 to speak to that exact point if you'd like me to call him
13 up. Christopher?

14 COMMITTEE MEMBER RANCHOD: I'd like to hear from
15 Enforcement staff in response to all my questions and then
16 we can hear from --

17 MR. GALLAGHER: Mr. McKay did an audit of all the use
18 for 10 years and we have that available for you.

19 COMMITTEE MEMBER RANCHOD: Great. I'd like to hear
20 from Enforcement staff in response to my questions.

21 MR. ZEPPETELLO: First, before I respond to your
22 question, this proposal that has just been offered by
23 Mr. Gallagher to have some of the money that they are going
24 to spend to remove the doors be credited, that is not part
25 of the stipulated order, that is not part of the deal.

1 Arguments like that were made to us in negotiations and we
2 rejected them. This is eleventh hour, it's not part of the
3 staff's recommendation and we don't agree with it.

4 To answer your questions, in terms of the maximum
5 penalty. As you know, under the McAteer-Petris Act
6 administrative penalties max out at \$30,000 per violation.
7 Certainly I would say the maximum penalty would be in the
8 order of \$1 million and maybe significantly over that. One
9 of the issues from staff's point of view is that the vast
10 majority of those penalties would have accrued as a result
11 of overuse violations going back a decade. And while our
12 position is that there is no statute of limitations on
13 recovering those penalties, there are perhaps some equitable
14 laches, estoppel, delay-type arguments that we think the
15 Permittees could make, which is why, as I said earlier, we
16 ultimately are compromising on disputed claims. But
17 certainly the maximum penalty would be much more than the
18 penalty that has been agreed to and proposed.

19 In terms of the contractual relationship between the
20 parties. I think I would defer to the Port or Scott's
21 whether they want to discuss that, because from staff's
22 point of view that is really not our concern; our view is
23 that they are jointly responsible.

24 Adrienne perhaps may want to say more than this on the
25 issue of effective public and private being reversed. I

1 don't know if I would go so far as to say reversed, it
2 certainly has been skewed. But I also think that in the
3 last couple of years that Scott's has been better, certainly
4 in the last year or two. There certainly were times in the
5 past. I'll see if -- I'll leave it at that.

6 COMMITTEE CHAIR SCHARFF: Any further questions?

7 The Port wants to speak.

8 MR. SINKOFF: Yes. Very simply, Scott's is a
9 longstanding tenant of the Port of Oakland, is a tenant of
10 the Port of Oakland. So the relationship between the Port
11 and Scott's is one of a landlord, which is the Port, and
12 Scott's, which is a lessee. In terms of the question of
13 indemnification, we have entered into an indemnification
14 agreement with Scott's so both parties have signed that. So
15 any, I would say provisions of the Cease and Desist Order
16 that arise out of your decision, the Port will be
17 indemnified, is indemnified by Scott's, so they will carry
18 the cost of that.

19 COMMITTEE CHAIR SCHARFF: Thank you.

20 COMMITTEE MEMBER RANCHOD: I have one more question
21 following up on this. So if I am understanding correctly,
22 it is not a necessary part of the Stipulated Cease and
23 Desist Order but the expectation is that Scott's will ask
24 the Commission, if this is resolved, to expand the use of
25 the facility to 124 events per year, 20 of which would be

1 not-for-profit community service events. That seems like
2 the planned use of the facility going forward, about 80
3 percent is for for-profit events, 20 percent for nonprofit
4 events. Is that consistent with the use of the facility to
5 this point?

6 MR. GALLAGHER: Yes, you're exactly right. That is
7 approximately the percentage that come -- we never know when
8 the community events are going to come at us but we do not
9 say 'No.' I would say that we are hitting -- staff and
10 Scott's and our negotiator have worked very hard to try to
11 get that because it is -- the waterfront is the heart of
12 Jack London Square, it is one of the most attractive places
13 in Oakland to hold public events. Thank you.

14 COMMITTEE CHAIR SCHARFF: Any other questions?

15 COMMITTEE MEMBER RANCHOD: Not at this time.

16 COMMITTEE CHAIR SCHARFF: Any other further questions
17 from another members?

18 I have a couple, I have a couple of questions for
19 Mr. Gallagher. Mr. Gallagher, on the one hand I really do
20 appreciate the work that Scott's does in terms of the
21 community events and all of that.

22 MR. GALLAGHER: Thank you.

23 COMMITTEE CHAIR SCHARFF: On the other hand, I am
24 deeply troubled by the fact that this work went through
25 without a permit from BCDC after talking to staff. I heard

1 your explanation, but I've got to say, it did feel willful.
2 It felt like a willful disregard --

3 MR. GALLAGHER: It was not willful, sir. We had been
4 going through the permit process. They permitted the
5 sliding doors. The sliding doors had to have a home for a
6 door. The City of Oakland told us we must have a traceable
7 egress and ingress. We either had to go against the Uniform
8 Building Code or the Americans with Disabilities Act or the
9 BCDC.

10 COMMITTEE CHAIR SCHARFF: So is this permit from the
11 City of Oakland then?

12 MR. GALLAGHER: Yes, we have a permit from the City of
13 Oakland, yes.

14 COMMITTEE CHAIR SCHARFF: All right. Then the other
15 thing I was a little troubled by, frankly, is that you spent
16 a bunch of time negotiating with staff in good faith and I
17 commend all of you for coming up with something that seems
18 to work, but you've come to us and then asked to change the
19 deal.

20 MR. GALLAGHER: Well.

21 COMMITTEE CHAIR SCHARFF: I find that, I find that a
22 little troubling, frankly.

23 MR. GALLAGHER: Let me tell you how the negotiations
24 went. We were delivered an email on a Friday afternoon that
25 said, pay \$250,000 and sign it by Monday at 5:00 o'clock and

1 that is putting a gun to your head. And we agreed to do
2 that with the caveat that we would be able to come before a
3 legitimate body and tell our story to the complete
4 Commission. So we received -- our negotiator, Ignacio De la
5 Fuente, received -- I stayed out of it because there was a
6 motion involved so I engaged a professional. We received on
7 a Friday afternoon an email that said, \$250,000, signed by
8 Monday at 5:00 p.m. or we go to court.

9 COMMITTEE CHAIR SCHARFF: So if we approve the
10 stipulated judgement are you going to abide by it?

11 MR. GALLAGHER: Yes, sir, we are.

12 COMMITTEE CHAIR SCHARFF: Okay. And that is your full
13 intention?

14 MR. GALLAGHER: That is our full intention.

15 COMMITTEE CHAIR SCHARFF: All right, thank you.

16 MR. GALLAGHER: You're welcome.

17 COMMITTEE CHAIR SCHARFF: Staff?

18 MR. ZEPPETELLO: I would just respond to maybe two
19 things. One is just in terms of the timing. You know, as
20 we have talked about, this negotiation went on for over a
21 year. I don't have the specific dates in front of me but I
22 believe that we sent the Proposed Stipulated Order out and
23 provided a week or two weeks for a response and we sent a
24 follow-up email after hearing nothing and basically saying,
25 'Do we have a deal or not?' So it was maybe the second

1 communication that Mr. Gallagher was talking about.

2 Secondly, I would just note with respect to this door
3 and the City of Oakland and the ADA issues. I don't have
4 any specific knowledge of those requirements or Oakland's
5 permitting process but in general a Permittee or someone in
6 this situation would be advised to defer going forward until
7 they have all their ducks in a row.

8 COMMITTEE CHAIR SCHARFF: Thank you.

9 All right, now we will turn to the public if there are
10 no further questions?

11 To the public. We have a number of speakers; you will
12 be limited to two minutes. Our first speaker is Raymond -
13 Raymond Gallagher spoke - is Chris McKay. Chris McKay wants
14 to speak.

15 MR. MCKAY: Good morning, Commissioners, thank you. My
16 name is Chris McKay and I was the Harbor Master at Oakland
17 Marinas from 2011 through 2015. I was the Harbor Master of
18 Jack London Square and I saw what the pavilion did as far as
19 bringing people to the waterfront from 2011 when I started.
20 Jack London Square was hurting very much and Oakland was
21 having rough times and the pavilion brought people in.

22 So as this went on I was asked to come in and see if I
23 could resolve the issues between Scott's and BCDC and take a
24 look at it. So I looked at time lines and looked at the
25 purpose of the McAteer-Petris and Tidelands Trust as far as

1 bringing people to the waterfront; and I did an economic
2 analysis, which I would like to share with you, to kind of
3 put this a little bit in perspective.

4 (Distributed documents to Enforcement Committee.)

5 MR. McKAY: So this was prepared and given to the staff
6 as well as with the supporting documents of it, but it was
7 an analysis of the number of events and the amount of use
8 and overuse of it during the 10 years that I took a look at
9 this.

10 And you can see if you just want to get to the summary
11 of it, the amount of profit generated, the economic benefit
12 that Scott's achieved by the overuse from this is about
13 \$48,000 over the 10 year period. So we are not talking
14 about a substantial amount of profit made from these events.

15 Also, every year there was around an average of \$72,000
16 that was contributed back to the community in the use of
17 these events so that sort of offsets this substantially.

18 You know, there seems to be an impression that Scott's
19 benefited greatly from the overuse of this pavilion, but the
20 economic reality is a lot of these were not big moneymakers
21 for Scott's but they were community events and they did
22 serve the purpose of bringing people to the waterfront.

23 So I would just ask that the Commission take a look at
24 this and also consider the improvements that Scott's is
25 going to make. But the idea of bringing people to the

1 waterfront is really what the Tidelands Trust, what the
2 McAteer-Petris --

3 COMMITTEE CHAIR SCHARFF: So we are at about two
4 minutes.

5 MR. McKAY: Yes, okay, thank you. Do you have any
6 questions about this?

7 COMMITTEE CHAIR SCHARFF: No. Thank you.

8 MR. McKAY: Okay, thank you.

9 COMMITTEE CHAIR SCHARFF: Our next speaker is Barbara
10 Vernon and to be followed by Michelle Lewis.

11 MS. VERNON: Good morning and thank you. My name is
12 Barbara Vernon and I have been employed by Scott's since the
13 doors opened in Jack London Square. And I have the honor of
14 having seen many changes at Jack London Square, of which
15 Scott's has been a proud and supportive anchor.

16 We use our banquet rooms. And I think that's important
17 to note, that these are not rooms. The pavilion is not
18 something that is meant to be permanent. It's a temporary
19 structure that allows people to come in, explore not only
20 Jack London Square but the waterfront. We have people in
21 our community that would not come to Jack London Square if
22 it were not, say, for the high school expos, the health
23 expos that we have there, the fund raisers that we have for
24 community organizers. These are people --

25 Mr. Gallagher put his heart and soul into that

1 restaurant and continues to do so. I find that it's a bit
2 troubling that, yes, I understand that perhaps these
3 structures were not done as the way you would have liked to
4 have them done.

5 But yet the bottom line is that we are building and
6 supporting the community here in the Bay Area, in Oakland,
7 in Alameda County. I think that is so important to the
8 growth of that area, to stimulate it not only economically
9 but also socially.

10 I know I am starting to ramble so I wish to stop, but I
11 just feel so passionately about what we are doing and I
12 would like you to understand that it is so much more than a
13 business. It is really in many ways the heart and soul of
14 Oakland. You have people, generation after generation, that
15 come to our facility for events that are memorable and mean
16 something to them for a lifetime. And that's all I wanted
17 to say.

18 COMMITTEE CHAIR SCHARFF: Thank you very much.

19 MS. VERNON: Thank you.

20 COMMITTEE CHAIR SCHARFF: Michelle Lewis to be followed
21 by Sandra -- all right, Sandra Swanson?

22 MR. SWANSON: Sandré Swanson.

23 MS. LEWIS: Gosh, I feel like I've been in a
24 trigonometry class or something, all these codes and all
25 this stuff. I am here to talk about not Ray Gallagher the

1 business owner, I am here to talk about Ray Gallagher, the
2 man, the human being. I am the founder and Executive
3 Director of Northern Light School in Oakland and Ray's path
4 and mine passed 27 years ago. In fact, it was on the
5 anniversary, it was on the day of the Loma Prieta
6 Earthquake.

7 I opened Northern Light School and -- preschool
8 through, at the time, third grade. Preschool was very
9 important that we get. These kids, the mission of the
10 school was to provide an excellent, whole child education
11 for at-risk kids, kids other people were going to cross off.
12 Because you never do that with a child, they end up being a
13 detriment to society, so we wanted to start with preschool.

14 So a couple of days before the Loma Prieta Earthquake
15 licensing came and they said to us, we were on 4500 Redwood
16 Road, 'Everything looks great. The only thing you have to
17 do is put a fence around the facility.' We had \$50 in our
18 pocket. We weren't having to pay rent for three months. I
19 didn't know what direction to turn in. Ray came up to the
20 school, he heard about our need, and before he was going to
21 head off to the Giants game, the World Series, he looked
22 around and he said, 'No problem, it's a done deal.' In a
23 week our fence was put in and we have had kids in that
24 preschool who have now graduated and are doctors at Duke.
25 One of those preschoolers just got pinned second lieutenant

1 in the White House by Obama.

2 So the work that Ray has done for Northern Light School
3 over the 27 years. He has put galas on in the pavilion for
4 my school and raised countless dollars. If not for Ray
5 Gallagher Northern Light School would not -- the dream of
6 Northern Light School would not have continued for 27 years.
7 So I just wanted to take the time to let you know about Ray
8 Gallagher, the human being, the wonderful man, and how many
9 lives he has saved and put on the right path at Northern
10 Light School.

11 COMMITTEE CHAIR SCHARFF: Thank you.

12 MS. LEWIS: Thanks. And if you can open up that
13 pavilion for extra days it's going to be for the good.
14 Thank you.

15 COMMITTEE CHAIR SCHARFF: Thank you.

16 MR. SWANSON: Thank you, Members, very much. My name
17 is Sandré Swanson. I am a former Deputy Mayor of Oakland
18 and served in the State Assembly for three terms
19 representing Oakland and I have known Mr. Gallagher for
20 many, many years. In fact, my grandfather mentored him for
21 a minute in the city of Alameda.

22 I think that it is fair to say that there has been a
23 lot of emotion involved in negotiations between Scott's and
24 BCDC staff over a number of years but I think we are at a
25 point where all of this can end positively. I support

1 Mr. Gallagher's request for some mitigation with the cost of
2 the doors. I think it's a small matter that I think will
3 get this, would move this in the right direction and I think
4 you should consider that.

5 I will tell you that Mr. Gallagher and Scott's, these
6 are the good guys. These are not people that have
7 intentionally violated a permit, a landfill permit. They
8 are not people who have been trying to spoil the Bay in any
9 kind of way. They have been trying to enhance the
10 facilities at Jack London Square. They have been the anchor
11 tenant through recessions, when restaurants have come and
12 gone, and they have offered their facility to the community
13 in a way to where they have become an institution.

14 But beyond that, they have the longest-serving staff of
15 any of the restaurants in the area. It is a family
16 business. It is a business that supports these families
17 that work there. And I can't tell you how many times that
18 they have not only used their facility for community
19 purposes but have gone out and worked in other facilities in
20 support of community activities.

21 I think that that's important mitigating information
22 for the Board and I would hope that this doesn't proceed in
23 sort of an adversarial way. And I would ask you to look at
24 your purpose, BCDC's purpose. Some would argue that the
25 public access has been enhanced by this, by the groups that

1 have come down, and also by Mr. Gallagher's attempt to be
2 able to put up the pavilion quickly and take it down quickly
3 to increase the public access. And so I would hope that we
4 can consider the substantive suggestions. The environment
5 that we have now where Mr. Gallagher and his new management
6 team are fully available to cooperate. Mr. Gallagher has
7 already stated to you that he will honor the decision and go
8 forward.

9 COMMITTEE CHAIR SCHARFF: Two minutes, sir.

10 MR. SWANSON: Thank you. So thank you so much for your
11 consideration of this but please consider who you're dealing
12 with. Thank you.

13 COMMITTEE CHAIR SCHARFF: Thanks very much.

14 MR. SWANSON: Thank you.

15 COMMITTEE CHAIR SCHARFF: So Bill Barulich to be
16 followed by Lynette Gibson McElhaney.

17 MR. BARULICH: Good morning and thank you. I have
18 known Ray Gallagher for 50 years, both on a professional
19 level and a personal level. Our family owns a food service
20 distribution company located in Brisbane, California, and we
21 service about 4500 restaurants and institutions throughout
22 the greater San Francisco Bay Area and Northern California.
23 So I have had certainly the opportunity to interact with Ray
24 and Scott's for many years.

25 I might add that we do business and have done business

1 for those 50 years with restaurants in the Jack London
2 Square area and unfortunately none of those restaurants have
3 outlived us. There have been many restaurant closures, and
4 one in particular where the Port of Oakland and the City of
5 Oakland subsidized a restaurant and lost a significant
6 amount of money when the restaurant closed.

7 That is quite a contrast to Scott's that has really
8 been iconic in terms of their location in the Port of
9 Oakland and their reputation in terms of a business that has
10 really created -- and this is a time that we're talking
11 about job creation on a national level and a local level.
12 But Scott's, I should remind you, has created thousands and
13 thousands and thousands of good-paying jobs for their staffs
14 and their employees that have been there for many, many
15 years.

16 And on a personal level, I have been involved on a
17 number of boards over the last 20 years and I am happy to
18 say that every time that I have requested Scott's, either to
19 use the pavilion for a special event or have reached out to
20 Ray for a contribution to help the marginalized in our
21 society in the San Francisco Bay Area, Ray has always been
22 very receptive and I very much appreciate that.

23 So I think this is a wonderful opportunity. I know
24 that there has been a lot of discussion with various
25 agencies and with Scott's in terms of negotiating a

1 settlement. I would like to see, obviously, as all parties
2 would, closure. I would ask you, appeal to you, to take in
3 consideration Scott's request in terms of ending this
4 dispute and for both parties to move forward, so thank you
5 very much.

6 COMMITTEE CHAIR SCHARFF: Thank you.

7 MR. MARQUSEE: Good morning. My name is Alex Marqusee,
8 I am not Lynette Gibson McElhaney, but I am her Legislative
9 Analyst.

10 (Laughter.)

11 MR. MARQUSEE: She sent me here today to say to you in
12 no uncertain terms her support for Scott's. They have been
13 a longstanding, community institution in the Jack London
14 area, a strong community partner for organizations
15 throughout Oakland, especially in D3. And we really believe
16 that during this time of demographic transition and kind of
17 the struggle to identify how we pursue equity in the City of
18 Oakland that they have always been there in that fight and
19 that we truly do hope that you honor their request to try to
20 work out a negotiated settlement that is fair for both
21 parties. Thank you.

22 COMMITTEE CHAIR SCHARFF: Thank you. Ramiro Carabez,
23 to be followed by Ignacio De La Fuente.

24 MR. CARABEZ: Good morning, Ramiro Carabez. I have
25 been working for Mr. Gallagher for 25 years. I came from

1 Mexico to escape the violence in my native area. I am from
2 Michoacán state, which happens to be the epicenter of the
3 drug wars. When I left my country that was one of the
4 hardest decisions I ever did. Thankfully, I was able to
5 find a job with Mr. Gallagher; I started working as a
6 dishwasher.

7 Throughout these many years I have witnessed firsthand
8 his generosity. He has always been there not only for me
9 and my family but for many of our employees. There have
10 been many occasions when we have needed assistance, whether
11 for personal stuff or for things back in the old town, and
12 he has never shied away from helping us. In fact, I can
13 mention the most recent. My father came down with cancer
14 this year and he volunteered from the community fund that we
15 have in the restaurant, you know, to help me pay, so my
16 father will have a chance of getting chemotherapy. A couple
17 of years ago I told him about getting some wheelchairs for
18 my community and he wrote a check for \$25,000 that was
19 donated to the Wheelchair Foundation and we were able to
20 bring a container of 250 chairs to my community and the
21 community surrounding my little town. It made a big
22 difference for everyone around there.

23 What I want to say is that, you know, I am in a
24 position where I get to manage every single thing that
25 happens in the restaurant. And perhaps there have been

1 violations that have been made out of ignorance, ignorance
2 on my part and my staff not being aware of what we are
3 supposed to be or not be doing.

4 I can guarantee you that going forward, none of those
5 violations that you saw like the stuff outside the perimeter
6 of the pavilion and any other violations will be committed
7 because I want to make sure that we stay in business for the
8 next 40 years, 80 years, for many generations to come.
9 Because just the way I have benefited, my family has
10 benefited, my community has benefited, many other families
11 that are currently and that were in the past employed by
12 Scott's have benefited. Thank you.

13 COMMITTEE CHAIR SCHARFF: Thank you very much.

14 Steven Hanson.

15 MR. DE LA FUENTE: Good morning. My name is Ignacio De
16 La Fuente, former President of the City Council, the Oakland
17 City Council. I have been in front of you before. I would
18 like to thank you for your time and for your commitment to
19 the Bay, obviously.

20 And actually I want to thank your staff. I think that
21 we have had very lively discussions for the last eight
22 months. I know that this has been going on for a longer
23 period of time, but to be candid, I think that there's
24 always, especially when there are so many agencies involved,
25 you're talking about the Port, you're talking about the

1 City, you're talking about BCDC, you're talking about
2 private business. So when all of those things come together
3 it is not easy to resolve issues.

4 And I know that your staff has been working and talking
5 and come out with some plans before and have spent a lot of
6 time; and I think both sides have spent a lot of time. And
7 finally, obviously, you have something in front of you that
8 will help you deal with, hopefully, put this issue to rest
9 at the same time that we recognize.

10 And I think that Sandré has put it right. I am going
11 to be one of those that will argue that only the mission of
12 BCDC but should include part of it giving back to the
13 community. I had some of these discussions with your staff.
14 And I believe that when we're talking about events and we're
15 talking about somehow Scott's violated some of the number,
16 let's just remember that the agreement is more than 20 years
17 old. Jack London Square was totally different then. Again,
18 I will argue that I think Scott's Restaurant is one of those
19 very few restaurants that are committed not only to Oakland
20 but Jack London Square.

21 All of us know that for the last, at least myself
22 living in Oakland for 45 years, been trying to revitalize
23 Jack London Square and now it's happening. Obviously now,
24 it's better. Obviously now we have spent a lot of time with
25 the Port on the dredging, on many issues that have improved

1 lives in the City of Oakland. But at the same time I think
2 that we have to recognize, right, the restaurants, the
3 people that stuck around during the hard times.

4 And I think that when you look at the agreement that
5 was signed 20 years ago and you look at what is proposed
6 today, about the number of events. Yes, I believe that all
7 of us are responsible for and have, it should be part of our
8 agenda to give back, to provide, in this case Scott's space,
9 for organizations that cannot afford to rent the pavilion.

10 And I hear you, I heard some of your questions about if
11 this was willful. I don't think so. I think looking at the
12 last three or four years that your staff has been working on
13 this. And again, with all due respect, there's been a lot
14 of personalities. Sometimes when personalities get
15 involved, when things for whatever reasons clash, it is very
16 difficult to arrive to a reasonable settlement.

17 I can tell you that spending time with your staff and
18 looking at all the issues that are in front of you today and
19 the agreement that is in front of you this morning.

20 COMMITTEE CHAIR SCHARFF: So we're sort of over two
21 minutes.

22 MR. DE LA FUENTE: In front of you this morning, I
23 think that you will recognize that I think Scott's has been
24 willing and will be willing and is committed, right, to
25 abide by that agreement. At the same time I think that you

1 cannot obviously ignore, you know, the give-back to the
2 community because I think that is something that, in my
3 opinion, is what makes Scott's Restaurant different than
4 anybody else.

5 In closing I think that -- and again, I argue with your
6 staff about this because I think that if anything I will
7 argue that Scott's is bringing hundreds of thousands of
8 people to Jack London Square. People who will not otherwise
9 will be in Jack London Square. And I think that is the
10 mission of BCDC and is the mission of the City and is the
11 mission of the Port. So I will thank you for your time and
12 I will thank your staff but I think we have to recognize
13 that at some point we have to settle something in a
14 reasonable way so the business can continue functioning and
15 providing those jobs. Thank you very much, appreciate your
16 time.

17 COMMITTEE CHAIR SCHARFF: Thank you.

18 Steve Hanson to be followed by Scott Edin.

19 MR. HANSON: Hi. My name is Steve Hanson. I am here
20 to say that I think the pavilion does bring people down to
21 Jack London Square, the waterfront, and certainly enhances
22 access to the water.

23 But I am here, I think, because I have been asked by
24 Scott's to help them meet the terms of the Order and I have
25 a technical question here and I may need Richard from the

1 Port to help me with this. But there is a requirement for
2 the -- and it's a technical problem. There is a requirement
3 for the permanent draft guarantee for the recording of this
4 guaranteed open public space under the pavilion. And that
5 is required in 30 days but the permit application is
6 required in 56 days. I'd like to see if those could be
7 coterminous because my understanding, and as I say Richard
8 can help me, is that the Port attorney is not yet willing to
9 execute that permanent guarantee. He wants the permit
10 amended so that, in fact, that guarantee can be coterminous
11 with the termination of the lease. That's a technical issue
12 and I just need some help with that if I could.

13 COMMITTEE CHAIR SCHARFF: Why don't you go ahead. I'll
14 stop the time so you can answer the question.

15 MR. ZEPPETELLO (OFF MIC): I would just say that that
16 is a technical issue that we can certainly discuss offline
17 here. The Port has already dedicated the entire plaza area
18 under the permit and there is no reason that that can't be
19 done on the time frame. But we can certainly answer any
20 questions or clarifications for Mr. Hanson.

21 COMMITTEE CHAIR SCHARFF: All right, thank you very
22 much.

23 MR. HANSON: That's correct. The whole area is
24 dedicated already, so thank you.

25 COMMITTEE CHAIR SCHARFF: Scott Edin, to be followed by

1 John Tudal.

2 MR. EDIN: Thank you to the Board. I am an advisor to
3 Ray Gallagher on the community fund that he supports with
4 the community events and the charities that are hosted, both
5 in his restaurant and within with the pavilion.

6 The decision that you guys will be making here today
7 will have a material effect on the community events, the
8 support for the charities, because the payment of this fine
9 will be coming out of the funds that Mr. Gallagher has
10 contributed from his own behalf and on behalf of his
11 restaurants to these community events.

12 As a situation for what Mr. Gallagher has done in the
13 past as far as the revenue generated by the pavilion, I can
14 tell you for a fact because I have been invited for decades
15 to a birthday celebration that he has for a community leader
16 who has since passed that has been attended by not only the
17 charities, not only our Governor, the charities that he
18 supports, the charter school, the military institute. All
19 of these events are hosted and Mr. Gallagher out of his own
20 pocket pays for this. There has been no remuneration. You
21 might give a tip to the wait-staff that services it within
22 the pavilion. These are events that aren't really
23 broadcasted. You may not be aware of them, but the
24 community is.

25 So in your decision I'd just appreciate you considering

1 where the money might be coming from for the support in the
2 community that he provides. Thank you.

3 COMMITTEE CHAIR SCHARFF: Thank you.

4 John Tudal to be followed by Keith Miller.

5 MR. TUDAL: Thank you. A pleasure to speak here on
6 behalf of Ray and frankly it is an honor to stand here and
7 speak on behalf of Ray and Scott's Restaurant.

8 I have known Ray Gallagher for over 50 years. My
9 family's roots go back to Jack London Square, 1932. We
10 started farming and selling our vegetables at 327 Franklin
11 Street, two blocks from Scott's. Ray Gallagher worked
12 there, drove the delivery trucks and worked as a lumper down
13 in the produce market.

14 I own the building at 100 Webster, about a block away
15 from Scott's. If it wasn't for Ray Gallagher and his
16 commitment and his passion, I never would have opened
17 Cerruti Cellars, which is named after my grandfather,
18 Giobatta Cerruti, who mentored Ray and loved Ray like a son.

19 I drove down today from beautiful little St. Helena.
20 Yes, we sold our vegetable farm in 1972 and moved to the
21 Napa Valley before it was fashionable. When I told people
22 in the Napa Valley that I was going to open up a secondary
23 tasting room at 100 Webster, 2009, my ground floor was
24 vacant, most of the places had closed up. The lights were
25 -- no, one guy had the lights on. Two guys, Raymond

1 Gallagher and Pescatore. I know Jack London Square. People
2 laughed at me and said I was crazy. The only reason I did
3 it, I thought we were going to have a market across the
4 street by Ellis Partners; never happened. But I knew Ray
5 Gallagher wouldn't turn out the lights and I knew I could
6 trust Ray.

7 Now, community. One day Ray gave me a call during the
8 Occupy Oakland. 'Hey, John, get your sport coat, get your
9 butt down --' excuse me -- 'get down here by 11:00 o'clock,
10 meet me at the pavilion.' 'What's going on, Ray?' 'Just
11 meet me at the pavilion, don't be late.' I show up. As I'm
12 walking from Hunter Webster over to the pavilion what do I
13 see? I start seeing GMCs, I start seeing security people,
14 what's going on? Well let me tell you what was going on.
15 There was a fund raiser, very quietly, for a charter school
16 in Oakland. Who were the speakers? Governor Brown, De La
17 Fuente was there, Sandré Swanson was there and Secretary
18 Schultz. I sat at a table that Ray bought for \$10,000; I
19 was his guest. Not because he wanted anything from me, he
20 wanted to give back to the charter school and the community.

21 So yes, Ray, you're guilty of a few things, but what
22 are you not guilty of?

23 COMMITTEE CHAIR SCHARFF: We are over two minutes so,
24 thanks.

25 MR. TUDAL: I've got a lot to say.

1 (Laughter.)

2 COMMITTEE CHAIR SCHARFF: Our next speaker is Keith
3 Miller, to be followed by Sandra Threlfall.

4 MR. MILLER: My name is Keith Miller, I am the owner of
5 California Canoe and Kayak, the other family-owned business
6 in Jack London Square. I don't know quite how to start.

7 Doing good things doesn't give me a free pass. Doing
8 good things doesn't give anybody a free pass. Two weeks ago
9 we did our annual Support Strokes Paddle down at Jack London
10 Square and raised \$15,000 for the Charlotte Maxwell Clinic;
11 it serves women with breast cancer in Oakland. On my dock,
12 on the public dock that I use at Jack London Square I had an
13 illegal rack. When I was notified by BCDC and the Port of
14 Oakland that I had an illegal rack down there I removed the
15 rack. Didn't take four years to do it, took two days.

16 I don't think business people should get a free pass.
17 If I was being deposed right now by you guys, if you asked
18 me, 'Were the actions of Ray Gallagher willful?' I would
19 say, 'Absolutely they were.' I'm the whistle-blower. I'm
20 the one that called the City of Oakland building department
21 when this construction was happening and had the building
22 red tagged. I didn't do it, they did it, because he had no
23 permit.

24 Ray does a lot of great things. I've heard a lot of
25 new ones today and I've heard many before. But as a

1 business person, as an owner myself, I'm a thousandaire,
2 he's a millionaire. We are obligated every day of our lives
3 to do the right thing, to do it legally. He didn't have a
4 permit to do it, he shouldn't have did it, he should have
5 had it from the get-go.

6 Ray asked me 20 years ago to come before BCDC and speak
7 in favor of the pavilion, which I did. I gain business by
8 the pavilion every day. People come by with the events,
9 they see my business. I want Ray to be successful. I want
10 him to earn as much money as he possibly can. But I also
11 want him to act with integrity, honesty and with the public
12 trust in mind.

13 I feel that this agreement is awarding someone for
14 doing bad things, by giving 51 more days. From day one of
15 this pavilion -- I know my time is up. But from day one
16 he's broached his agreement. So my suggestion would be,
17 step back just for one year and say, 'Hey, Ray, use this
18 thing the way your signature said you would years ago; then
19 we'll revisit it.'

20 COMMITTEE CHAIR SCHARFF: Thank you.

21 MR. MILLER: All right, thanks.

22 COMMITTEE CHAIR SCHARFF: Sandra Threlfall, to be
23 followed by John Tudal.

24 MS. THRELFALL: Good morning, Commissioners.

25 Enforcement is a tough assignment. My name is Sandra

1 Threlfall, I am the Executive Director of Waterfront Action
2 and our mission is to bring people to the water. Public
3 deserves the public trust, which is the edge of the water.

4 When the illegal action started I called BCDC and said,
5 'Does he have a permit?' 'Well, no.' Well it took them,
6 because they were understaffed in Enforcement, three months
7 to come to Oakland to see that he has, in fact, violated the
8 integrity of a business owner, he did not go through the
9 process. He started to but didn't like that they were
10 refusing him.

11 I was stunned but BCDC Enforcement came out in March of
12 2013. They started doing their penalty phase in May of
13 2013. I asked, why aren't you doing a cease and desist? As
14 long as he is doing this and continuing to rent how are we
15 winning anything? How are we giving this to the public to
16 whom it belongs? It belongs to the public.

17 No, you should not give him 51 more days. All you are
18 telling other waterfront owners - well, people who are next
19 to the waterfront - is, 'Don't worry about BCDC, it takes
20 them three or four years to decide on anything. Just think
21 how much we can earn in three or four years.' That is not
22 what I want for the waterfront or for the public access to
23 the waterfront.

24 And when he has events you don't see the waterfront
25 because it is all closed in. Thank you very much.

1 COMMITTEE CHAIR SCHARFF: Thank you.

2 John Tudal, to be followed by Savlan Hauser.

3 MR. TUDAL: I'd love to have another bite of the apple
4 but I already --

5 COMMITTEE CHAIR SCHARFF: Oh, so you had two cards in.

6 MR. TUDAL: Yes, I think so.

7 COMMITTEE CHAIR SCHARFF: All right, no worries.

8 Savlan Hauser to be followed by Alex Marqusee.

9 MS. HAUSER: Good morning; Savlan Hauser, Executive
10 Director of the Jack London Improvement District. We are a
11 relatively newcomer but we are a public/private partnership.
12 We promote and improve Jack London through day-to-day litter
13 and blight abatement for the neighborhood that encompasses
14 Jack London Square.

15 In April I was contacted by BCDC staff to comment on
16 the public benefit of the Square and use of the public
17 pavilion and you have my comment letter from then.

18 And I spoke with numerous district stakeholders and
19 businesses over the course of finding out how the community
20 feels about this. Many assume that the public pavilion is
21 actually privately owned by Scott's, which was surprising.
22 However, all shared their interest in holding private events
23 at the square, at the public waterfront as well. It's
24 actually a pretty unique thing to be able to do.

25 Jack London Square is becoming increasingly popular.

1 The daily flow of people recreating, cadet trainings,
2 historic walking tours, diners and increasing work and
3 residential population along with the huge seasonal
4 celebrations, it's really becoming an active place and the
5 Port and property management at the square deserve kudos for
6 their lead role in activating that space.

7 At one time we've all heard that Scott's events may
8 have been the significant contributor to activity at the
9 square and they are truly appreciated and it has been
10 marvelous to hear the amazing stories. This fact I don't
11 think is contested today.

12 There is no doubt that the new Square tenants, local
13 merchants and community groups today contribute to the
14 activity at the Square. In addition there is an exciting
15 new property owner with a tremendous vision for the public
16 spaces at the waterfront.

17 Now this private event, the ability to hold a private
18 event at the Square. Even at my office we get inquiries
19 about this all the time. So many of these stakeholders that
20 want to hold a private event wonder why the only way is
21 through a private permit holder, particularly a private
22 permit holder that has violated BCDC regulations in the past
23 and why should they be allowed exclusive control of the
24 private use? And they would also be surprised to see that
25 this Commission has considered increasing the number of

1 days.

2 We suggest that the new local businesses such as Cuesa
3 Farmers Market and California Canoe and Kayak and other
4 local companies have the ability to sign up for use of this
5 public amenity much like at a state park or other reservable
6 areas. This would drive a more diverse pool of people to
7 enjoy the waterfront and would spread the economic benefit
8 and utility of the waterfront.

9 Thank you so much for this opportunity.

10 COMMITTEE CHAIR SCHARFF: Thank you.

11 Alex Marqusee.

12 UNIDENTIFIED SPEAKER (OFF MIC): He spoke already.

13 COMMITTEE CHAIR SCHARFF: He spoke already; another
14 card. All right, thank you.

15 So now we will return back to the Commission for
16 deliberations and we will close the public hearing.

17 COMMITTEE MEMBER TECHEL: I'll move we close the public
18 testimony portion of the hearing.

19 COMMITTEE MEMBER RANCHOD: I second.

20 COMMITTEE CHAIR SCHARFF: All in favor?

21 (Ayes.)

22 COMMITTEE CHAIR SCHARFF: So that's closed.

23 Now we'll return to the Commission. Comments?

24 COMMITTEE MEMBER RANCHOD: So thank you to everybody
25 who spoke, it is all helpful context for us to have as we

1 deliberate on this.

2 I have a question for Enforcement staff about the
3 handout we were provided by the first speaker. This is the
4 one that shows the breakdown of events from 2006 to 2015.
5 Do you agree with this summary of information we were
6 provided?

7 MR. ZEPPETELLO: We were provided this a year or so
8 ago. We were provided this financial analysis a year or so
9 ago and I believe we -- we don't have a sufficient basis in
10 evidence of what is behind this to really validate it or
11 not. For example, I believe we asked some questions in
12 terms of how was profit determined and various questions
13 that I don't recall the answers to; but I can't say that we
14 agree with this. No, I would say that we have no basis to
15 comment on it one way or the other.

16 MS. KLEIN: And may I remind you that the permit does
17 not distinguish the type of events. It is limited to 73,
18 regardless of whether they are for- or nonprofit at present.

19 COMMITTEE CHAIR SCHARFF: Thank you.

20 MS. KLEIN: Also, I have not compared recently the
21 number of use days that are listed in this against what is
22 provided in Attachment A. But during our negotiations
23 Scott's and the Port were both keeping track of events and
24 the data provided by the Port often exceeded what was
25 provided by Scott's.

1 COMMITTEE MEMBER RANCHOD: The question For the
2 Permittee, is there a statement --

3 COMMITTEE CHAIR SCHARFF: Just wait one second, I have
4 to ask a legal question. So we closed the public hearing.
5 We can't ask the public but the Permittees we can ask,
6 correct?

7 MS. TIEDEMANN: Yes.

8 COMMITTEE MEMBER RANCHOD: A question for the
9 Permittees. On page 20 of the Proposed Stipulated Cease and
10 Desist Order there is a statement that:

11 "As of the date of this Order, the Co-
12 Permittees have neither dedicated the 4,400-
13 square-foot public access area in the manner
14 required by the Permit nor submitted an
15 application to amend the Permit to change the
16 terms, including duration, of the Permit's
17 dedication requirement."

18 Given that the enforcement action here began in 2013
19 and this has been under discussion with the staff for quite
20 some time, as we heard, why have certain steps not been
21 taken that would, at least to me, indicate good faith intent
22 to cooperate with the requirements?

23 MR. ZEPPETELLO: I can respond to that on behalf of
24 staff just to say that there were discussions between the
25 Port and BCDC staff on this legal instrument and there were

1 some issues raised by, I believe, a former Port attorney
2 regarding the duration of the guarantee and whether it was
3 consistent, whether it should be limited to the term of the
4 lease or there were public trust issues. I am not sure that
5 those issues have been resolved but my understanding is,
6 again as I said, that the Port has already dedicated the
7 rest of the plaza under its own permit. So as far as I can
8 tell there is no reason for, there is no reason to hold this
9 up any further and that's why there is a time frame that
10 this be done within 30 days of adoption of the Order.

11 COMMITTEE MEMBER RANCHOD: Do the Permittees wish to
12 address that?

13 MR. DE LA FUENTE: During our discussions --

14 COMMITTEE MEMBER RANCHOD: I don't believe -- I'm
15 sorry, Mr. De La Fuente, I don't believe you're one of the
16 Permittees.

17 MR. DE LA FUENTE: Well, I represent the Permittee.

18 COMMITTEE MEMBER RANCHOD: But we closed the public
19 comment period.

20 COMMITTEE CHAIR SCHARFF: We did, we closed the public
21 comment. That was my clarification.

22 MR. GALLAGHER: Ignacio negotiated on behalf of Scott's
23 and is intimately understanding. However, we have tried
24 continuously to get this to be settled. It is very
25 difficult, as you can see. It's like a three-legged stool,

1 you think you have it settled one way and then the Port
2 brings up an issue or an issue that the Commission has
3 brought up here today regarding the dedication in
4 perpetuity. But we are trying to get this done and we
5 respectfully request that we resolve it today. I don't know
6 if that answers your question but it's a plea for common
7 sense.

8 MR. SINKOFF: On this issue our Port attorney, Danny
9 Wan, is aware of this issue, which I think does turn on a
10 technicality. I can't speak on Danny's behalf but I
11 understand that he has essentially a pathway to resolve the
12 issue and make sure that the -- all the -- so the dedication
13 lines up. We don't see this any longer as sort of impeding
14 our movement forward.

15 COMMITTEE MEMBER RANCHOD: Thank you. One more
16 question. I'm curious how the other members of the
17 Committee feel about this.

18 So according to the handout we received from the first
19 speaker, the number of days over the authorized use is about
20 124 over this period and that about 32 percent of the events
21 were not-for-profit or charitable events. I appreciate that
22 the permit doesn't distinguish between the types of events
23 and I also appreciate there is a community service and
24 benefit that is being provided by hosting not-for-profit
25 events.

1 I am trying to square that with the request to amend
2 the permit, that staff have agreed to recommend approval of
3 such amendments to the Commission to increase the authorized
4 use of the pavilion to 124 events a year, a maximum of 20 of
5 which would be community-based, charitable events. So that
6 would indicate we're actually -- that you are going to
7 request and staff are going to recommend an increased
8 private use with a lower percent of charitable events.

9 Maybe I'm missing something. Can somebody explain that
10 to me or clarify why the proposal is to actually have a
11 lower percent of community-based charitable events going
12 forward per the request that staff will support?

13 MR. GALLAGHER: That was meant to be a minimum, that
14 was meant to be a minimum of community events. I'm sorry.
15 I believe the intention was the community events would be a
16 minimum of 20. That was the crux of the idea there, it was
17 not to limit it to 20. We get so many requests for use that
18 it's very easy that it could be 40. The staff at BCDC
19 recognizes Jack London Square has changed. This is a 30
20 year old permit and I think in their due diligence they saw
21 that it was time to increase because there are commands and
22 there are wishes to use it.

23 Other speakers here have said that we willfully -- you
24 know, I operate many businesses. They think I sit down
25 there and count my pennies, what I am going to make from the

1 pavilion. Believe me, I would be better off to say 'No' but
2 I can't say 'No' to my community. ut the idea of the 20
3 events was a minimum of 20 events.

4 COMMITTEE CHAIR SCHARFF: So this issue is going to get
5 fully discussed at the BCDC Commission.

6 MR. ZEPPETELLO: Correct.

7 COMMITTEE CHAIR SCHARFF: I actually think that is the
8 right forum to have that discussion. We can talk a little
9 bit about it here, but I mean, at the end of the day the
10 whole Commission needs to talk about that and understand the
11 details of it.

12 COMMITTEE MEMBER RANCHOD: I agree. The reason I am
13 asking about it is that this is in the Stipulated Cease and
14 Desist Civil Penalty Order that caps, this language says a
15 maximum of 20, and so I don't understand why we would be
16 approving something that caps the number of community-based
17 events. I agree with Mr. Gallagher, that should be a
18 minimum and that number should probably be higher. Does
19 staff agree with that? Is that a typo in the document?

20 MR. ZEPPETELLO: No, it is to be a maximum but I think
21 that they would have the flexibility to use some of their
22 104 days of private events, if they wanted to use some of
23 those days for nonprofits they could count them that way,
24 but there still would be an annual maximum of 124.

25 COMMITTEE CHAIR SCHARFF: So staff's concern is the

1 total 124, not the breakdown between private and --

2 MR. ZEPPETELLO: Correct. And in the discussions,
3 though, we were talking about the 104 number and they asked
4 for some additional days to accommodate these. As Ray
5 testified, the phone calls and can we have a memorial
6 service with short notice. It was added in the negotiation
7 on top of the original number we had been discussing.

8 COMMITTEE MEMBER RANCHOD: So there would be no
9 disagreement to changing maximum to minimum in that
10 paragraph 1 on page 10; is that correct?

11 MR. ZEPPETELLO: No, I think there would be because we
12 want to keep the overall maximum of 124. Again, I think
13 this is something that when we write up the draft permit
14 language we will have to maybe think through and discuss
15 with the Permittees.

16 COMMITTEE MEMBER RANCHOD: Okay. It seems like that --
17 I agree, we can defer this to the full Commission. But I
18 would just say, from my perspective, we should have language
19 that indicates a maximum of 124 private events per year,
20 including a minimum of 20 community-based charitable events.
21 And I would prefer to see that number higher, given the
22 historical unauthorized use of the pavilion that is over 30
23 percent. If in fact this is providing a public benefit and
24 a community service, which you have been, Mr. Gallagher, and
25 it's appreciated, then that should be reflected going

1 forward if the Commission is going to authorize expanded
2 private use. I appreciate folks expressing their intent on
3 that it's not meant to cap the number of community-based
4 events.

5 COMMITTEE MEMBER TECHEL: I'll go. This indeed is a
6 complex issue and thank you for all the work on it.

7 As Mr. Gallagher testified and folks testified about
8 Mr. Gallagher, I am the Mayor of Napa and I think I know
9 exactly who you are in my community, the person we go to,
10 the person that is willing to give us spaces and accommodate
11 nonprofits. I am not sure in this case how much of that I
12 get to take into consideration.

13 But I do take into consideration that you came here
14 with an agreement that both sides or all three sides came
15 and this is an agreement they came saying, we can support
16 this together. And I haven't heard anything today that
17 would lead me not to support this. In fact, the argument
18 about this avoids a contested proceeding and that we have a
19 more predictable future, that we remove some structures that
20 need to be removed and the penalty is paid I think leads me
21 to move -- I think I will move forward with the staff
22 recommendation.

23 COMMITTEE MEMBER ADDIEGO: Thank you, Chairman. I
24 concur with the Mayor of Napa. As the Mayor of South San
25 Francisco I have long been familiar with Scott's Restaurant

1 and the renaissance of Jack London Square, but I have
2 actually only today learned a great deal about Raymond
3 Gallagher. I think that I didn't anticipate that this
4 enforcement hearing would turn out to be a celebration of
5 the life and involvement of Ray Gallagher. It almost had a
6 tone of a memorial service so you know what you can
7 anticipate in the distant future.

8 (Laughter.)

9 COMMITTEE MEMBER ADDIEGO: But what I wanted to -- and
10 it was quite -- for this small town mayor it was quite nice
11 to be able to hear from Ignacio De La Fuente and former
12 Assemblyman Sandré Swanson. I think you are good men to
13 stand with a member of the community who is so very
14 important and that has proved himself for so many years.
15 Assemblyman Swanson mentioned that he is one of the good
16 guys and certainly he is.

17 But the question before us, there is no doubt that
18 Mr. Gallagher is an outstanding, successful citizen of the
19 city of Oakland and gives back. But my question, not so
20 much for the public, for the colleagues, if an outstanding
21 successful citizen runs afoul of the law should the penalty
22 be less than that of a scoundrel? And I think in our world
23 the answer is, 'No.' In the world that I prefer to live in
24 the answer is we celebrate that type of success and
25 involvement, but when it comes to these type of

1 administrative matters the penalty is the penalty and
2 looking for offsets I don't think is proper.

3 The amount, the amount I think is extremely generous
4 and responsible. And I hope that, as he has with other
5 aspects of the community, when he writes that check for a
6 quarter of a million dollars, he can take some solace in
7 knowing that it is really not so much a fine or a penalty,
8 it's a contribution to the Bay Fill Cleanup and Abatement
9 Fund and all of the public will benefit from that. So,
10 Mr. Gallagher, I hope you feel good when you write that
11 check.

12 MR. GALLAGHER: We will, sir.

13 COMMITTEE MEMBER ADDIEGO: I think that -- I have
14 actually enjoyed this hearing more than I thought I might.
15 The dynamics are beyond what I experience in the little town
16 of South San Francisco.

17 I will say that initially when we looked at the
18 potential amount of penalties, if you really did have 124,
19 as you have submitted, extra events, at that horribly
20 inflated price of \$30,000 an incident, I think
21 Mr. Zeppetello was being kind to say a little over a million
22 because it would actually be \$3 million-plus. So we are
23 nowhere near that and I think we are on the right path and I
24 applaud the staff in getting Mr. Gallagher and Scott's to
25 the table and reaching this type of an agreement, which I

1 can fully support.

2 COMMITTEE CHAIR SCHARFF: I also fully support the
3 agreement with staff and appreciate staff's hard efforts on
4 this and your working with staff, Mr. Gallagher. And I also
5 appreciate all of the public comment and it's nice to have
6 so many people in the community come out and support you.

7 But I would also concur that the rules are the rules
8 and I think we have come to a fair resolution of this with
9 staff and I hope we won't have these problems in the future.
10 I think that is sort of what I would like to stress, that I
11 hope you don't have these problems in the future and that we
12 fully comply with the BCDC permits.

13 I do look forward to the discussion at BCDC on the
14 increase of the use. Actually in thinking of Mr. Ranchod's
15 point regarding the Permittees and requests. I think that
16 language could be written a little more artfully. And I
17 think when we come to the Commission maybe it could -- I
18 understand the complete intent, 124 maximum is what I
19 understand it to be; 124 maximum, really a minimum of 20
20 community-based out of that 124. It's 124 plus 20, right?
21 No, it's 124 total. So out of that 124, a minimum of 20,
22 but I guess it just doesn't quite read that way.

23 MR. ZEPPETELLO: We'll work on it.

24 COMMITTEE CHAIR SCHARFF: Yes, I figured you would.
25 But I did want to commend you all for coming together and

1 working with staff.

2 And with that I will actually move the staff
3 recommendation.

4 COMMITTEE MEMBER TECHEL: I'll second it.

5 COMMITTEE MEMBER RANCHOD: I'd like to say I will
6 support the proposed recommendation and I appreciate the
7 hard work that the staff and all the stakeholders put into
8 this and Mr. De La Fuente for helping get to a resolution
9 here. And I agree with the sentiments expressed by the
10 other Members of the Committee that the rules are the rules.
11 We appreciate the context and the community benefit that's
12 been provided and I hope that that benefit will continue
13 going forward. do think that, Mr. Gallagher, it seemed
14 that you were asking us to change the proposed agreement
15 here on the fly, earlier.

16 MR. GALLAGHER: We accept the agreement.

17 COMMITTEE MEMBER RANCHOD: And thank you for clarifying
18 that. Because if there is a proposed agreement it needs to
19 be honored by all parties.

20 MR. GALLAGHER: We accept the agreement.

21 COMMITTEE MEMBER RANCHOD: Thank you. With that
22 clarification I'm prepared to vote.

23 COMMITTEE CHAIR SCHARFF: Any other comments before we
24 vote?

25 Okay, all in favor?

1 (Ayes.)

2 COMMITTEE CHAIR SCHARFF: Any opposed?

3 That passes unanimously.

4 MR. GALLAGHER: Thank you very much.

5 COMMITTEE CHAIR SCHARFF: Thank you very much.

6 (Off the record at 11:31 a.m.)

7 (On the record at 11:44 a.m.)

8 COMMITTEE CHAIR SCHARFF: We are back in session and we
9 are going to have a Public Hearing and Possible Vote on a
10 Recommended Enforcement Decision Involving Proposed
11 Stipulated Cease and Desist and Civil Penalty Order No. CCD
12 2016.04; Marina Village Associates, LLC. Does staff want to
13 start?

14 MS. WEBER: Good morning, Commissioners, almost
15 afternoon. My name is Maggie Weber and I am an Enforcement
16 Analyst with your Commission's staff.

17 I am presenting Proposed Stipulated Cease and Desist
18 and Civil Penalty Order No. CCD 2016.04 that was negotiated
19 with and agreed to by Marina Village Associates, LLC, the
20 Respondents that would be subject to this agreement. Staff
21 encourages you to recommend the issuance of the stipulated
22 Order to the full Commission on November 3rd.

23 The Stipulated Order codifies the agreement that staff
24 has reached with Marina Village Associates to settle the
25 civil penalties that have accrued for all 24 violations and

1 resolve the remaining outstanding violations.

2 For the remainder of the presentation Marina Village
3 Associates will be referred to as MVA.

4 This morning in your packets you should also have a
5 letter of support from the City of San Rafael. Paul Jensen
6 who is the project leader for the City couldn't be here
7 today but wanted to share some thoughts with you.

8 The Proposed Stipulated Order arises out of an
9 enforcement action concerning Loch Lomond Marina located in
10 San Rafael, Marin County.

11 The stipulated order, if adopted, will rectify
12 compliance issues with BCDC Permit No. 2006.010.03 that was
13 issued to MVA in 2007 and authorizes the construction of a
14 new, mixed-use community and extensive public access
15 improvements at the existing Loch Lomond Marina.

16 Here is an aerial image of the site from earlier this
17 year. This aerial image highlights the locations on site
18 where violations have occurred. Although the development is
19 not yet complete, most of the public amenities are available
20 for use and the first residence was occupied as of last
21 March.

22 This presentation will cover the timeline of events
23 within the enforcement proceeding; a description of the
24 unauthorized work and permit violations that are subject to
25 the proceeding; and key terms of the Proposed Cease and

1 Desist and Civil Penalty Order.

2 The Commission issued the permit on September 27th,
3 2007.

4 This enforcement proceeding commenced on March 14th,
5 2015, when staff observed rock riprap bayward of the
6 Boardwalk and a Mud Wave west of the East Spit. It appeared
7 that the riprap had not been engineered and was placed in
8 the Bay at a slope steeper than the authorized 2:1 without
9 plan approval. The permit authorizes riprap to be placed in
10 the shoreline band and Commission staff had not reviewed,
11 much less approved, engineering plans for this location.

12 From March 20th to October 20th, 2015, staff reviewed
13 the permit file, found and investigated additional
14 violations and met with a representative of MVA several
15 times on-site and at BCDC's office in an attempt to
16 informally resolve the violations and bring the permit into
17 compliance.

18 On November 20th, 2015, staff sent MVA a letter that
19 summarized the violations of the permit and the McAteer-
20 Petris Act that that Staff was aware of at that time, along
21 with proposed resolutions and a proposed settlement
22 agreement. MVA did not contact staff about reaching a
23 resolution.

24 On May 20th staff issued a Violation Report and
25 Complaint for the imposition of administrative civil

1 penalties to expedite resolution of the violations.

2 After the Violation Report was issued, MVA and its
3 counsel met with staff multiple times to discuss the
4 violations and negotiate a resolution.

5 On August 15th staff issued a Supplemental Violation
6 Report to eliminate two of the originally alleged
7 violations, modify the scope of one of the originally
8 alleged violations and provide notice of seven additional
9 alleged violations that had occurred or that staff became
10 aware of since mailing the original Violation Report in May.

11 After receiving the Supplemental Violation Report,
12 staff, MVA and its counsel continued negotiations and
13 reached an agreement which is codified in the Proposed
14 Stipulated Order that is before you today.

15 MVA signed the Stipulated Order on October 5th.

16 The following slides show the violations that are
17 subject to the Stipulated Order and how the Order addresses
18 the impacts from each violation.

19 This slide shows the original violations that staff
20 observed in March 2015. The unauthorized placement of
21 riprap adjacent to the Boardwalk that appeared to be in the
22 Bay, not engineered, at a slope steeper than the authorized
23 2:1 grade and lacked plan approval, all in violation of the
24 permit.

25 The photograph at the bottom right shows the presence

1 of marsh vegetation and Bay over and within the riprap.

2 The Stipulated Order requires MVA to submit an
3 engineered survey that maps the toe of the existing riprap
4 slope, which is also the boundary between the Bay and the
5 shoreline band.

6 MVA shall establish horizontal control points at this
7 boundary and shall be required to annually remove all riprap
8 located bayward of the horizontal control points and submit
9 annual monitoring reports that include photographs taken at
10 low tide before and after the riprap removal activities.

11 Here you can see the Mud Wave visible at low tide,
12 adjacent to the Boardwalk, where marsh vegetation used to be
13 present. Last October a representative of MVA disclosed to
14 staff that the mud wave occurred in September of 2014 and
15 was caused by unauthorized stockpiling of soil in the
16 Commission's shoreline band jurisdiction. The stockpile
17 destabilized the site and caused the seawall, boardwalk and
18 riprap located between Docks E and F to collapse and shift
19 14 feet to the south, creating the surcharge of Bay mud,
20 which laterally displaced subsurface Bay mud and Marsh
21 vegetation. This event is being referred to as a Mud Wave
22 and constitutes unauthorized Bay fill.

23 MVA repaired the seawall, boardwalk and riprap without
24 contacting staff or applying for an emergency permit,
25 thereby conducting unauthorized work in the Bay and

1 shoreline band. Unfortunately, even though MVA attempted to
2 correct the impacts of the surcharge, the mud wave remains
3 and no marsh vegetation is present at this location adjacent
4 to the Boardwalk.

5 The Stipulated Order requires MVA to submit an
6 environmental report that evaluates both the potential
7 mitigation measures for the adverse impacts to biological
8 resources in the Bay and shoreline band caused by the mud
9 wave and also the extent to which said biological resources
10 may recover from such impacts.

11 The unauthorized riprap that was placed in the Bay and
12 shoreline band located at Lot D on the west side of the East
13 Spit. The Stipulated Order requires MVA to submit both an
14 engineering report that documents the extent to which the
15 unauthorized riprap placed along a portion of Lot D is
16 necessary for shoreline protection and also a proposed work
17 plan to remove all unauthorized riprap that is not necessary
18 for shoreline stabilization.

19 The unauthorized placement of electrical posts and
20 associated electrical wiring in the Bay and shoreline band
21 located adjacent to the Boardwalk. The Stipulated Order
22 requires MVA to remove the temporary electrical posts and
23 associated electrical wiring in the Bay and shoreline band
24 and apply for after-the-fact authorization for the placement
25 of underground utilities in the shoreline band.

1 The unauthorized placement of several utilities in the
2 required, dedicated public access area. From top left
3 moving clockwise, a transformer and electrical equipment
4 located bayward of the east parking lot, adjacent to the
5 start of the breakwater trail. A transformer, a T-shaped
6 metal pole and a switchgear cabinet, all located at the
7 landward edge of the East Spit.

8 The switchgear cabinet, as seen here from a different
9 angle, was placed on an unauthorized concrete foundation,
10 which extends beyond the authorized built edge of the East
11 Spit. As you can see, the layout plan that was approved by
12 staff authorizes vegetation for this location where the
13 concrete foundation and switchgear cabinet rest. The
14 unauthorized riprap was also placed next to the switchgear
15 cabinet located on the eastward landward edge of the East
16 Spit.

17 The Stipulated Order requires MVA to remove the T-
18 shaped metal pole and the unauthorized riprap shown here.

19 The Stipulated Order also requires MVA to apply for
20 after-the-fact authorization for the permanent placement of
21 the utilities and the concrete foundation shown on the last
22 two slides.

23 The failure to provide and make available for public
24 use the public park on the East Spit and all of its required
25 amenities including a picnic area, benches, children's

1 playground, trail and public restroom.

2 The public park and all of its amenities, with the
3 exception of the public restroom, were open to the public on
4 September 9th. The public restroom remains an unresolved
5 violation, subject to the Stipulated Order, which requires
6 MVA to open it and make it available for public use.

7 The failure to provide and make available for public
8 use a striped pathway on the existing asphalt to connect the
9 park located on the West Spit to the existing access located
10 offsite at San Pedro Cove.

11 The Stipulated Order requires MVA to install a striped
12 pathway, roughly at the location shown in red, make it
13 available for public use and ensure that the path areas stay
14 clear of all obstructions that may deter public access.

15 The failure to maintain the public access area from
16 flooding.

17 This photo was provided to staff by the City of San
18 Rafael and shows the public access area located at the head
19 of the breakwater trail, adjacent to the managed wetland
20 mitigation site inundated with Bay water by the King Tides
21 event last December.

22 This photo shows standing water on the same public
23 access area at the end of July during the dry season.

24 This photo was also taken in July and shows more
25 standing water at an adjacent location.

1 In 2007 when issuing the permit the Commission was
2 aware that this public access area would experience
3 occasional flooding due to the design of the adjacent
4 managed wetland. The frequency and scale of the flooding,
5 however, was not anticipated. It should be noted that the
6 Commission issued the permit in 2007, prior to the adoption
7 of your Sea Level Rise Policies that were implemented
8 starting in 2011.

9 In spite of this, the permit requires all public access
10 areas to be maintained and necessitates repairs to any
11 public access areas damaged by flooding. The standing water
12 adversely impacts public access and public shore parking
13 areas by creating potholes, erosions of pathway surfaces and
14 unseasonably muddy conditions. The permit also requires all
15 public access areas to be built at appropriate elevations to
16 prevent overtopping, flooding and 100 year storm events.

17 In the wake of sea level rise these flooding concerns
18 will only increase with time. During negotiations staff
19 determined that any agreement reached needed to address and
20 rectify the frequent tidal flooding and post-tidal standing
21 water.

22 With these concerns in mind the Stipulated Order
23 requires MVA to submit a report prepared by an engineer that
24 evaluates the frequency, duration, extent of tidal flooding
25 and post-flooding standing water in the public access area

1 located between the east parking lot and head of the
2 breakwater trail. And also potential alternatives to reduce
3 tidal flooding and post-tidal standing water in this area,
4 including but not limited to raising land elevations and
5 redesigning the public access area to protect and ensure the
6 usability of the public access areas and improvements.

7 The Stipulated Order further requires MVA to complete
8 an application to amend the permit to implement those
9 measures proposed by MVA to reduce tidal flooding and post-
10 tidal standing water in the public access areas based on the
11 consideration of the potential alternatives evaluated in the
12 report.

13 Upon issuance of the amended permit, MVA shall
14 implement the authorized and/or required measures
15 thereafter.

16 This past week it came to staff's attention that the
17 flooding issues actually go beyond this section of the site
18 and extend to the public access area located on the East
19 Spit where the part was recently opened last month.

20 MVA has this week agreed to review Paragraph II.N. of
21 the Stipulated Order to expand the scope of the flood report
22 to include the East Spit. However, at this time, MVA has
23 not agreed to implement any of the recommended measures for
24 the East Spit through a permit amendment.

25 The remaining violations subject to the Stipulated

1 Order are listed here. The violations in green font have
2 been resolved.

3 The Stipulated Order requires MVA to record the public
4 access and view corridor instruments on title with Marin
5 County once staff counsel has approved language and exhibits
6 within each instrument. The purpose of the legal
7 instruments, respective, is to protect the public's right to
8 use the public access area and view the Bay from distinct
9 view corridors for the life of the permit.

10 The Stipulated Order also requires MVA to revise the
11 Covenants, Conditions & Restrictions to provide notice of
12 the requirements of the permit for every membership
13 association that may in the future assume responsibility to
14 maintain public access improvements, including landscaping
15 and view corridors.

16 In addition to what we have already discussed, the
17 Stipulated Order requires MVA to cease and desist from all
18 activity in violation of the permit; submit a complete
19 application to amend the permit to receive after-the-fact
20 authorization for unauthorized activities and fill that can
21 be authorized after-the-fact; pay a \$210,000 civil penalty
22 to the Commission's Bay Fill Cleanup and Abatement Fund; and
23 pay stipulated penalties for failure to comply in a timely
24 manner with the requirements of the Stipulated Order.
25 Failure to comply with certain requirements will trigger

1 higher daily fines than others.

2 The Violation Reports proposed a total penalty of
3 \$563,500. Staff ultimately agreed to accept MVA's proposed
4 penalty of \$210,000 if MVA committed to study and address
5 the flooding issues by preparing a report and implementing
6 measures to reduce tidal flooding, based on the report's
7 recommendations for the area close to the breakwater trail
8 entrance, after obtaining an amendment to the permit. Staff
9 took the unknown costs of the report and implementation of
10 its recommendations into account in agreeing to reduce the
11 penalty to \$210,000.

12 Staff has determined that the proposed Stipulated Order
13 is a fair resolution to the alleged violations and will
14 provide BCDC with important data we need regarding the
15 impacts of sea level rise on public access areas that were
16 required prior to the 2011 adoption of BCDC's sea level rise
17 policies.

18 This concludes staff's presentation and I will turn the
19 mic over to counsel for MVA, Jim Burroughs, if he has any
20 comments, which I believe he does. Thank you so much.

21 COMMITTEE CHAIR SCHARFF: Mr. Burroughs.

22 MR. BURROUGHS: Good morning, Commissioners. I'm Jim
23 Burroughs, attorney for MVA. Happy to be here today and
24 thank you very much.

25 Thank you to staff for the good work that they have

1 done with us over the last six months to bring us to where
2 we are today.

3 We, MVA, fully support the recommended Stipulated Order
4 and Penalty and have every intention to, of course, to abide
5 by it, in the event that that's the Commission's decision to
6 ultimately adopt it.

7 Let me just make a couple of comments about the
8 presentation that you just heard. First of all, as I said,
9 we are not disputing anything that has been put into the
10 Stipulated Order at this point or anything that Ms. Weber
11 has just disclosed to you. A couple of points of context, I
12 suppose, though.

13 This is, as you can imagine, as most of these issues
14 are, a very fact-specific, fact-intensive kind of a matter.
15 Just to give you by way of example of the kinds of things
16 that we are dealing with. In the picture that you saw that
17 Ms. Weber put up with regard to the unauthorized Boardwalk
18 riprap. Just to be clear, that was riprap that was put on
19 existing riprap, that wasn't any -- that wasn't new riprap.
20 It was new riprap but it was put on existing riprap that
21 preexisted and is still there today. In fact, it was put
22 there at the direction of the City who was concerned about a
23 safety issue that we had to address. We did not get a
24 permit from BCDC to do that, we should have and that's why
25 we are here today and that's why we are agreeing to the

1 civil penalty, among other things.

2 Another point of context, I suppose, is the restroom
3 that hasn't been opened yet for the public access area.
4 Again, MVA has been ready and willing to open up that
5 restroom for some time now. The issue has been with the
6 City who has not wanted us to open it up until a certain
7 number of punch list issues are resolved. We are working
8 through that and we think we have got a path forward to get
9 to that resolution. But my point though, it's not as if --
10 we built it, we are ready to open it and we will be opening
11 it as soon as we can get some resolution with the City
12 Sanitation District and some other issues.

13 Finally, on the flooding that Ms. Weber was referring
14 to on the east side of the project site. There is some
15 flooding that is going on out there. We have agreed to
16 study it. We have agreed to come up with some ideas and
17 recommendations and permit proposals to address that issue.
18 But again by way of context, everything that was done out
19 there was done pursuant to permit requirements and built
20 pursuant to permit requirements. It turns out after the
21 fact that maybe it wasn't designed and permitted as well as
22 it could have been. We are going to look at that and try to
23 resolve that now.

24 Finally, we did -- we do agree to modify the Stipulated
25 Order as Ms. Weber was talking about with regard to adding

1 into the Stipulated Order an obligation to include in the
2 study of flooding out of the public access areas. I'll call
3 it the alleged, the alleged flooding of the East Spit
4 recreational area. This is the park area that was opened up
5 on September 9th, a little over a month ago.

6 We just learned, I think it was on Monday or just a
7 couple of days ago, that there are members of the public
8 that are concerned that this area might be flooding or is
9 flooding. We don't know that it's flooding. It has been
10 open for a little over a month.

11 We are not aware that it has been flooded, defer to
12 staff; but when we asked staff last they weren't aware that
13 it had been flooded. But it's an issue and it's an issue
14 that the public wants to look at so we are going to include
15 it in our flooding assessment and figure out whether or not,
16 in fact, this public recreational area is subject to
17 flooding and high tides or King Tides or any other kind of a
18 tide. But when Ms. Weber said that we have not agreed to
19 implement recommended measures for addressing the flooding
20 on this particular part of the project site, there aren't
21 any recommended measures yet. We haven't even, we haven't
22 even assessed the -- we don't even know if it's flooding
23 yet, we haven't even assessed the situation yet.

24 With that we, again, appreciate the very good work that
25 staff has done in working with us and working through these

1 issues and fully support the Proposed Stipulated Order.

2 Thank you.

3 COMMITTEE CHAIR SCHARFF: Thank you. With that we'll
4 come back to the Commission for any questions, the
5 Committee.

6 None? Okay. Then we'll go to the public. We have two
7 speaker cards, Sara Jensen to be followed by Alan Schaevitz.

8 MR. SCHAEVITZ: The other way.

9 COMMITTEE CHAIR SCHARFF: You want to do it the other
10 way?

11 MR. SCHAEVITZ: We also request, since there's only two
12 of us, that we might be given four minutes instead of three?

13 COMMITTEE CHAIR SCHARFF: Okay. I'll be generous.

14 MR. SCHAEVITZ: Thank you. We'll try not to abuse
15 that. My name is Alan Schaevitz. Among other things I am a
16 member of the board of the Bayside Acres Homeowners
17 Association, which borders this marina on the east side.

18 I am also a member of the board of the Point San Pedro
19 Road Coalition, which is a coalition of members all along
20 Point San Pedro Road. We have been a vocal public face for
21 the community for quite some number of years on a number of
22 issues.

23 I am also co-chair along with Sara Jensen, who will be
24 the other speaker, of the Coalition's Marina Committee,
25 which was formed in 2002 when this project was first

1 proposed, so we have been at it for some 14 years now.
2 Heavily involved in representing the community in this
3 development effort.

4 I would like to start off by thanking BCDC for coming
5 to the plate with regard to enforcement issues on this
6 property. It has been missed for quite some time and we are
7 glad that BCDC staffing has finally allowed it to take on
8 the role of enforcing the regulations and permits that it
9 has put in place.

10 In terms of the number of items that are on it, we are
11 fully in support of the recommendation that's been made by
12 the staff in the Cease and Desist Order but we feel there's
13 a few things missing from it and we'd like to address those
14 things that are missing.

15 With regard to the flooding on the connector to the
16 breakwater. The Coalition has been pointing out this
17 flooding problem for many years. The City also has been
18 pointing it out. BCDC, now that you're involved, is also
19 taking a look at that and that is welcome.

20 Mention was made of the Central, what we call the
21 Central Spit, what you call the East Spit, with the
22 playground equipment. We have also been pointing out the
23 flooding there for quite some time.

24 The developer does believe that it solved that problem
25 with the installation of duckbill flap gates and some other

1 construction item around there and they may very well have,
2 but it hasn't been proven yet. The City is the one who has
3 put the weight, if you will, and the inclusion of that
4 Central Spit because they would like to go through a winter,
5 determine whether or not flooding, in fact, has been
6 resolved in that Central Spit, and we as a community concur
7 with that. We believe that if flooding still occurs on the
8 Central Spit that it should be included in any remediation
9 process.

10 There are some light poles. One of the items that is
11 in the Cease and Desist is Item II.F, which is a request to
12 remove the power poles, the temporary power poles that are
13 still in place that have been there for quite some time.
14 The lighting that has been established as part of the
15 construction has been completed and has been operable, so
16 those power poles ought to be removed.

17 But there is one other thing that should be added to
18 that list. There are two light poles that were illegally
19 installed on the property in 1998. Now that's before the
20 current owners; but they were illegally installed in 1998
21 without BCDC or City approval. They are on the eastern edge
22 of the Boardwalk and we would like those -- removal of those
23 two light poles to be included as well in Item II.F.

24 In the area of public facilities there's a few things
25 that seem to be missing from the Cease and Desist Order.

1 There is to be a kayak launch ramp at that connector
2 between the Boardwalk and the breakwater. That kayak ramp
3 has not yet been installed. There was a reason for
4 postponing it, because of the flooding issues. Obviously we
5 didn't want to see, neither does the developer, want to see
6 implementation of that kayak ramp if there is going to be
7 some change that has to take place because of the flooding.
8 But the Cease and Desist Order should include some
9 indication that that kayak ramp would be installed at the
10 time those problems are resolved.

11 There is also a fish cleaning station there that has
12 been installed but is not yet operational. That should be
13 included as an item that should be brought up and be made
14 operational in the Cease and Desist Order.

15 And finally, there is a kayak launch dock that was
16 permitted to be built next to the existing boat ramp launch
17 ramps and that doesn't seem to be mentioned as to when it
18 might be installed and be in place.

19 On the West Spit there's some --

20 COMMITTEE CHAIR SCHARFF: We are at four minutes so
21 let's wrap up.

22 MR. SCHAEVITZ: I'll try to wrap up. On the West Spit
23 there is some debris that needs to be cleaned up, some
24 rebar, et cetera that hasn't yet been cleaned up and that
25 should be included.

1 And that can complete it; thank you very much for your
2 time.

3 COMMITTEE CHAIR SCHARFF: Thank you very much.

4 Sara Jensen. You will also have four minutes.

5 MS. JENSEN: I'm Sara Jensen, I am a resident of Loch
6 Lomond, the neighborhood immediately to the north. I have
7 been on their Marina Committee and the Marina Chair for that
8 HOA and as Alan pointed out, the Co-Chair with him of the
9 Coalition Marina Committee.

10 My comments also include input from Jeff Iverson, who
11 is a resident of the Cove neighborhood directly to the west
12 of the site and he is on our Marina Committee as well but
13 couldn't be here today.

14 Again I'll repeat the thanks. We are appreciative of
15 both BCDC and the City making every effort to work with the
16 developers to make this development an asset for the public.

17 Alan focused on detail, small details. I am going to
18 focus on three areas that are much broader but are of strong
19 concern to the public.

20 This site has always been a very popular site for
21 people to come and make visual contact with the Bay. You
22 can watch the water birds, see an occasional shark or seal.
23 It's a wonderful spot, especially with the breakwater where
24 you can get right out and make real close contact.

25 But this visual connection has been broken in one

1 place; that is the West Spit. With the best of intentions a
2 chain link fence was placed around the West Spit with the
3 idea that it would keep dogs out of environmentally
4 sensitive areas. However, this fence can't work that way
5 because it is only on three sides, the landward end of it is
6 totally open. Dogs can easily enter the Bay at those ends.
7 In fact, it's easier to enter there than it would be at the
8 end because the Spit goes up as it goes out.

9 Because it goes up as it goes out, even when you're
10 standing, walking onto the Spit, this fence is right in your
11 line of vision, you're having to look at the Bay through the
12 fence. If you go far into it and try to use the benches at
13 the end, the fence is so close to them that you're forced to
14 sit with your back to the Bay, looking landward. That's not
15 why people come to the Bay, to sit and look at the land.

16 Now we understand from the City that the developers
17 would be willing to remove this fence and reuse it over in
18 the seasonal wetlands where fencing is needed but BCDC must
19 give approval for this. We hope that that approval will be
20 given. It's the only part of the site that has fencing
21 around it, so the same water that is tried to be protected
22 here can be entered from other spots, especially from the
23 end of the breakwater. It's much easier to enter the Cove
24 water.

25 The next big broad item I want to talk about is the

1 hours. Historically this site has had sunrise to sunset
2 hours for the public access area. In the past even with
3 that regulation there have been some behavioral problems
4 after dark that are not desirable. As it is now with the
5 new development, there is lighting along the main land but
6 the spits and the breakwater do not have any lighting for
7 after dark and would be dangerous with the darkness and
8 slippery rocks and sharp rocks.

9 Also, these areas are very close to housing, both on
10 the east and west side plus the new housing that is being
11 built there. So with noise traveling very readily across
12 the water, people there after dark can cause a real problem
13 for people who live nearby. Unlike most park areas there is
14 no --

15 COMMITTEE CHAIR SCHARFF: We are at a little over four
16 minutes.

17 MS. JENSEN: Okay. There is no effective buffer there
18 to protect the neighbors.

19 The last item I was going to talk about is the fuel
20 dock. Paul Jensen in his letter addressed that fact. We
21 hope that the fuel dock will soon be reopened because people
22 are carrying gas to their boats - they have little choice -
23 and it's getting spilled in the Bay so we hope that that can
24 be resolved soon. Thank you.

25 COMMITTEE CHAIR SCHARFF: Thank you very much.

1 MR. ZEPPETELLO: Thank you. Before you close the
2 public hearing I just wanted to do two things. One is just
3 to respond to a couple of the comments we just heard and
4 also read into the record the modified language on this
5 expanded study, just so that we will revise, assuming the
6 Committee adopts it, will revise the Order when we send it
7 out to the full Commission.

8 With respect to some of the points that were just
9 raised, staff is hearing this for the first time today in
10 terms of the fish cleaning station and the kayak launch.

11 I was recently reviewing the file and saw something
12 about the kayak launch ramp in the record, but my suggestion
13 is that we don't modify the proposed Order at this time but
14 let staff take a look at these and talk with MVA and work
15 with MVA and see if we can resolve them. If it turns out
16 that there are some issues here presumably we can work them
17 out with MVA and the City, and if not we could have a
18 further enforcement action if that becomes necessary. I
19 certainly don't think that will be the case, given that MVA
20 is being cooperative in working with us.

21 With respect to this East Spit and the possible
22 flooding or the flooding. The language that we have agreed
23 to is on page 8 of the Proposed Order in Paragraph N. The
24 paragraph has I and II. The new language is actually to add
25 a parenthetical (3) and review the end of (2) just for

1 grammar. So I'll just read it as it would be revised,
2 starting at that (2):

3 "(2) potential alternatives to reduce tidal
4 flooding and post-tidal standing water in this
5 area, including but not limited to raising land
6 elevations and redesigning public access (e.g., a
7 boardwalk, installing culverts and/or a tide gate
8 under the trail), to protect and ensure the
9 usability of the public access areas and
10 improvements, and also including cost estimates
11 for implementing each potential alternative; and
12 (3) the potential for tidal flooding and post-
13 flooding standing water in the public access area
14 on the East Spit."

15 Thank you.

16 COMMITTEE CHAIR SCHARFF: Thank you. All right, we
17 will return to the Commission for -- are there any further
18 questions before we close the public hearing?

19 No? Okay.

20 A motion to close the public hearing?

21 COMMITTEE MEMBER TECHEL: I will make that motion.

22 COMMITTEE MEMBER RANCHOD: Second.

23 COMMITTEE CHAIR SCHARFF: All in favor?

24 (Ayes.)

25 COMMITTEE CHAIR SCHARFF: So we are now at the

1 Commission for questions, motions, deliberations. Anyone
2 want to go first?

3 COMMITTEE MEMBER TECHEL: Again, I like it when the
4 staff and the people involved have gotten together and bring
5 us a stipulated Cease and Desist. The information that was
6 brought up at the hearing, I believe staff has heard and
7 will deal with separately and bring it back to us if there
8 is a need to do so because it has not been able to be
9 incorporated. So if anyone else doesn't have any questions
10 I'll make a motion to move forward with that item.

11 COMMITTEE CHAIR SCHARFF: To approve the staff
12 recommendation?

13 COMMITTEE MEMBER TECHEL: To approve the staff
14 recommendation.

15 COMMITTEE MEMBER RANCHOD: I agree with those comments
16 and I'd second the motion.

17 COMMITTEE CHAIR SCHARFF: Okay.

18 COMMITTEE MEMBER ADDIEGO: On the question. Are hours
19 of access to be determined by BCDC or is that a City of San
20 Rafael item?

21 MR. ZEPPETELLO: A comment on this. Actually we have
22 an issue here that we are going to need to discuss with the
23 City of San Rafael. We have a provision in the permit that
24 the public access areas are basically open and publicly
25 accessible at all times. There is a provision that would

1 allow the Permittee to request reasonable rules and
2 restrictions on the public access if there is a documented
3 problem. With respect to this park, since it's just opened,
4 at least to our knowledge, there is no evidence of a problem
5 yet. On the other hand the City has an ordinance that
6 restricts parks from dusk to dawn or 9:00 p.m. to 9:00 a.m.
7 being closed. So this is an issue that has actually come up
8 in these discussions and we are going to have to talk with
9 the permittee and talk with the City and perhaps with
10 members of the public and see if we can come to a
11 resolution.

12 COMMITTEE CHAIR SCHARFF: All right, thank you.
13 Anything further?

14 COMMITTEE MEMBER ADDIEGO: No.

15 COMMITTEE CHAIR SCHARFF: All right. All in favor of
16 the motion?

17 (Ayes.)

18 COMMITTEE CHAIR SCHARFF: And that passes unanimously.
19 I believe with that we are adjourned.

20 COMMITTEE MEMBER TECHEL: No, we have 7.

21 COMMITTEE CHAIR SCHARFF: Oh, we have 7, I missed 7.

22 COMMITTEE MEMBER ADDIEGO: You tried.

23 COMMITTEE CHAIR SCHARFF: We tried.

24 MS. KLEIN: All right, for something completely
25 different. I will spend, hopefully, less than 30 minutes

1 describing the development of an enforcement strategy that
2 we have been and will continue to work on. Wanted to bring
3 you into the loop and find out what you think.

4 So in May 2013 you adopted a Strategic Plan and among
5 the action items you determined that we should develop
6 and/or revise a systematic and data-driven enforcement
7 strategy and policy to set enforcement priorities, improve
8 compliance, improve our regulatory effectiveness, and use
9 our limited resources more efficiently.

10 So I am going to review what we do. Just let you know
11 how we do business, permit issuance and enforcement, you
12 have some idea there.

13 Then I will outline the gaps in our system; propose
14 possible solutions to resolve some of the limitations; speak
15 to your role in this process; and outline our and your next
16 steps.

17 So I will cover for each of the three categories,
18 Current Practice, Gaps and Solutions, six topics:

19 How are permits prepared?

20 What happens once a permit is issued? Known as
21 compliance assistance, or as you will find out, the lack
22 thereof.

23 And how violations are A) Discovered, B) Catalogued, 3)
24 Selected and 4) Resolved.

25 We aim for standardizing our permits and we do a decent

1 but not a perfect job.

2 All of the permits, as you know, have special
3 conditions to assure that the proposed projects are
4 consistent with the law and policies and findings to support
5 the conditions that you impose.

6 The permits that require public access have an exhibit
7 that shows that public access so that it is clear to the
8 permittees and the staff what areas are designated for
9 public access uses only. And that would extend also to view
10 corridors and open space areas.

11 The issues that affect the consistency of that process
12 could be the level of staffing in relation to the number of
13 permits that we have and, for example, the experience of
14 staff. We have recently gone through a full sail turnover
15 of the permit staff and that puts a big burden on us.

16 Once permits are issued the permit analysts move on to
17 processing the next application sitting on their desks; they
18 do not continue to own the permit once it's issued. There
19 is an exception and that is with our dredging permits. That
20 team works with the permits once issued.

21 So post-issuance. As I've indicated, we don't have
22 regular staff follow-up and compliance is really in the
23 permittee's court.

24 When documents do come in to us what do we do with them
25 in house? Simple compliance documents like the executed

1 permit, the notice of completion, those things are logged
2 but we don't track them.

3 The more complex compliance documents that actually
4 need to be reviewed and either approved, modified or denied,
5 such as the legal instruments that you heard about this
6 morning, those reviews go on in an uncoordinated manner.
7 The documents end up in the file but there isn't a
8 compliance or enforcement overview to perhaps look at the
9 rest of the compliance conditions to see if they are also
10 being adhered to and fulfilled in advance of the project
11 starting.

12 So those are the two permit steps that I will talk
13 about.

14 Now, how are violations discovered?

15 As you might expect when permit analysts are amending
16 permits, which you know we do very frequently, they will
17 notice absences or they will know that the previous project
18 is underway and they will realize, oh, there aren't any
19 plans and they'll let us know. They will also go do site
20 visits; we all do site visits. Often they need to go look
21 at the site to understand the project in front of them and
22 they may notice that the public access area isn't looking so
23 great and they'll let us know.

24 Externally we get phone calls and emails from the
25 public, in public access areas our phone number is on the

1 sign. And they'll call us up, 'Hey, I notice that there are
2 the same cars parked in these public shore parking places
3 every day when I walk my dog. I don't think it's a public
4 shore trail user.' Neighbors contact us regarding their
5 neighbors' behavior or unauthorized activities that they are
6 concerned about. We get calls from contractors, other
7 public agencies and sometimes even permittees will self-
8 report.

9 How do we catalogue the reports of violations when they
10 come in?

11 We have an Enforcement Report form. All staff knows
12 where to find that, how to fill it out, they place it in a
13 box. We do not have a set schedule for logging those
14 reports but we get around to it once a month or so.

15 Then the enforcement staff has to do a little bit of
16 research to sort of validate the violation. The reports are
17 not always clear enough for us to be able to understand
18 where it is and so forth. So we need a certain amount of
19 basic information before we can log that or catalogue that
20 report into an Excel spreadsheet. That is as sophisticated
21 as our data tracking is.

22 So how do we select violations?

23 We don't have a formal case selection system. We use
24 our best professional judgment based on, does it seem
25 urgent, have we gotten multiple calls? Sometimes interest,

1 we try and kind of have a geographic reach. We have 190
2 cases and 3 staff people and a really big backlog.

3 So how do we discover violations? I'm sorry, how do we
4 resolve violations?

5 We have to do more fact finding. We should never be
6 making allegations if we are not certain that they're true
7 so we have to review the permits, take site visits, make
8 sure that we have looked at all the documents.

9 Once we have figured that out we'll issue a violation
10 notice which starts an administrative penalty accrual clock.

11 Usually that will get a response and we then have to
12 do, as you have seen this morning, a lot of follow-up to the
13 responses. They require review and the enforcement analyst
14 will be the lead, even if they need technical assistance
15 from a colleague.

16 That interchange will result in the resolution of the
17 physical onsite violations as well as any paper violations.

18 Depending on the amount of time that that case has
19 taken to resolve, there will be a penalty that has accrued.
20 We will then indicate the total amount of the penalty to the
21 responsible party, indicate that it is due. This comes
22 straight out of your regulations. The penalties are
23 standardized fines. We just calculate the penalty based on
24 the duration of days. And we indicate that that is owed and
25 also that the party has an ability to appeal the amount of

1 the fine. That review is done by the Executive Director and
2 the Chairman, who can reduce the amount. Generally the
3 amount is reduced for good cause by some appropriate amount,
4 based on some input from staff.

5 And that will resolve the case and we will update that
6 Excel spreadsheet and move on. And this is what we do for
7 95 percent of our work.

8 The average duration of that process is about 20
9 months. We apply a pretty systematic application of the
10 administrative civil penalties. Although with the duration
11 I do want to point out that the extremes are not really
12 reflected in that. The number comes from taking a look at
13 150 closed cases over a 10 year period. And just to break
14 down that 20 month period, it's an average of 5 months
15 between the report coming and the case getting picked up to
16 be handled, these are the ones we're dealing with, not the
17 ones we are not dealing with, and about 15 months to resolve
18 the case when we're actively working on it. We have cases
19 that can sit around for 5 years and we have others that take
20 longer to resolve. We do have cases dating back to the
21 1990s.

22 So as you have seen this morning, your role in the
23 enforcement process comes into play when that standardized
24 fine, bread and butter process that we use, doesn't work.
25 And we have gotten better about turning the table to you

1 when things aren't resolving and that's something we should
2 keep doing. Now I'm getting ahead of myself.

3 So that's what we do.

4 I've touched on some of the gaps. It's a little
5 artificial to completely segregate the two.

6 So permit preparation gaps. As you have seen, the
7 permits are long and complex, they're dense. We have a lot
8 of policies that we need to apply when issuing permits.

9 The permit organization can make the permits difficult
10 to comply with.

11 The special conditions are not always enforceable.

12 And if there is an absence of or unclear findings, that
13 can complicate an enforcement matter if a certain issue has
14 come to light.

15 So once we issue the permit, as I said, the gap is that
16 we don't really have dedicated compliance staff; no one is
17 really owning compliance.

18 We don't have a site inspection program to make sure
19 that when permits are supposed to be done that the project
20 has been fully implemented. In an ideal world you get a
21 Notice of Completion and you'd go check and make sure that
22 everything was consistent with the plans that you had
23 previously approved.

24 We don't have a project tracking system that would
25 facilitate this to let us know when items are due to be done

1 or a year after a permit issuance, for example. Maybe it's
2 time to pull the file out and find out, have they given us
3 any documents? Do they need a time extension? How are they
4 going with their project development schedule?

5 And the compliance documents that do come in are
6 handled differently, as I mentioned earlier.

7 The gaps in discovering the violations are that we
8 don't have, as I said, a site inspection to verify proper
9 implementation.

10 The completeness of the report form varies, which means
11 that there can be a lot of work to do to understand the
12 problem.

13 We don't have the report form on our website and it has
14 information gaps. We need to update the form.

15 The cataloguing gaps. As I said, we need to include
16 some additional questions to solicit information.

17 And the fact finding takes time. We have to validate
18 the complaint, figure out who own the property. The person
19 calling it in doesn't necessarily have that information. If
20 we don't have an exact location it can be hard using the one
21 database that we do have, which is a geo-reference database
22 showing our permits issued, to figure out exactly which
23 permit is affiliated with the alleged violation. And it is
24 important to understand whether there is a history of
25 violations by this party or at this location and so we have

1 to also look in a different location to figure that out.

2 So that gets to the next point which is that we have
3 various logs with different types of information but they
4 are not linked to each other or necessarily located in the
5 same place.

6 And I did mention the GIS database that we have, it's
7 very, very useful, we have become very dependent on it, but
8 we don't yet have an enforcement layer which would help
9 cross-reference violation history.

10 So in terms of choosing which of the 190 cases we
11 should be working on, we don't really have a selection
12 process. We need a way to figure out of all those
13 allegations which ones matter the most. Which ones should
14 rise to the top and should we be handling now and which ones
15 does it matter less if they sit in the bin.

16 So we don't know if we are resolving the violations,
17 whether there is harm occurring to the resources or public
18 access isn't being provided as required by the permit.

19 And again, should we be looking at -- are we really
20 distributing our touch throughout the region or by type of
21 project? Do we spend too much time on single-family
22 residences and not enough time on mixed-use commercial
23 development? Are certain permittees causing more problems
24 than others and should we be touching those permits more
25 often?

1 And just in case it's not clear, a good 75 percent of
2 the work is not being addressed.

3 In terms of gaps for resolving violations.

4 The process for taking care of active cases is very
5 effective. We have good tools and they work really well
6 when we use them properly. It means that we are treating
7 cases consistently and I believe that is the keystone of a
8 strong enforcement program. One thing that we have done
9 since the adoption of the Strategic Plan goal is to limit
10 the number of cases that each of us own. That's where this
11 bin came from. That means that we don't start and stop
12 working on something. Once we pick it up we stick with it
13 until it is done and that's working really, really well.

14 Resolving cases, as you saw this morning, takes a lot
15 of time and focused attention, both by the permittees and
16 also by staff. And that is not just the enforcement staff
17 but it's the legal staff, the engineer, the Bay Design
18 Analyst, the senior staff.

19 Occasionally the tools fail us and I will talk about
20 that in a moment.

21 Decision-making at the staff and Commission level can
22 be very challenging.

23 Imposing penalties is never easy.

24 So on to solutions.

25 So for permit preparation we have some ideas for

1 improving permit organization. We could group conditions
2 where the permittees have actions to take in the same
3 section of the permit and title it, you know, "action
4 required" as opposed to the admonition conditions which are,
5 you know, "don't pollute the Bay" and other things.

6 We could make the special conditions more consistently
7 enforceable, possibly by expanding the type of review that
8 the permits have, just get a fresh eye looking exclusively
9 for that particular point, and making sure that there are
10 supportive findings. And training is always and ever an
11 important part of any regulatory program, as is sharing
12 lessons learned. A lot of us remember mistakes and use them
13 as a practice key for better action later.

14 And our Exhibit As are not always as legible as they
15 should be. We are dependent on the applicants. We have
16 deadlines to meet. Our Bay Design Analyst who just left had
17 made dedicated efforts to specifically review that and make
18 sure that it was clear and legible and complete and that is
19 a really important solution that we need to continue to
20 implement.

21 Solutions for the gap in permit compliance.

22 We could possibly amend our regulations to slightly
23 modify what the permittee obtains when the Commission votes.
24 They wouldn't necessarily have an issued permit; they would
25 have a notice of intent to issue a permit and they would

1 have to comply with some paper requirements in advance of
2 getting permission to start work. So that could -- that
3 would put the ball in the permittee's court, that could
4 help.

5 At the staff level we could really use a dedicated
6 permit compliance analyst.

7 We could do more permit compliance and less enforcement
8 actions.

9 And if we had a project tracking database that
10 centralized all of our data and told us, 'That permit was
11 issued three months ago, go check and see if you got an
12 executed original,' or 'That permit expires in three months,
13 why don't you look at the file and find out where they're
14 at.' That could be really helpful too.

15 On to violations, solutions for improving the discovery
16 process.

17 We, as I mentioned, need to revise the report form,
18 post it on our website.

19 We could consider requiring electronic forms from the
20 public with a minimum level of information, without which we
21 would be unable to pursue the violation, I have seen that
22 done by other agencies.

23 Internally we do have instructions for completing the
24 report form but I need to be more regular about reminding
25 people to follow those instructions when they are taking

1 calls from the public.

2 Once we update the report form I'll need to also update
3 the instructions so that they work well together.

4 So solutions for cataloguing; I have mentioned this a
5 number of times.

6 We would really like to centralize our data sources
7 with a project tracking database. That is something the
8 agency has long wanted. We haven't had the funding to
9 develop one. The closest we got, unfortunately the program
10 that we were using became obsolete by the time we were ready
11 to -- we spent a lot of money building it and it was
12 obsolete. Staff training, creating work instructions and
13 completing our GIS enforcement will help with the
14 cataloguing phase of things.

15 And for case selection. This is the area of the
16 strategy that we have dedicated most of our effort to so far
17 to develop a prioritization system for all of the violations
18 so that we know we're working on the right one.

19 So what we have done is develop two different
20 categories. We have to divide the violations by two
21 different categories. We have to divide the violations into
22 their location. Not the county but just, is the violation
23 taking place in the Bay or the shoreline band or the Suisun
24 Marsh? And depending on one of those three gross
25 categories, then we do another review for physical

1 violations. And we look at those six attributes and we have
2 developed criteria against which we analyze each of the
3 allegations -- against which we score each of the
4 allegations and we have a relative ranking system.

5 So we have associated each of these categories with a
6 level of importance. A total score is given to us and the
7 cases are ranked relative to each other in severity. So we
8 have developed the criteria, we've tested it out on a number
9 of cases, we've improved it and modified it and we're
10 working our way through the 190. I think we're up to about
11 somewhere around 100. It's time consuming, it has to be
12 done, and once we get there we'll have to sort of figure out
13 how many of those can we handle. We'll come back to you
14 with that information.

15 Let me just skip ahead.

16 Yes, we don't have a prioritization system yet for all
17 violations.

18 We haven't ranked the paper violations yet.

19 Because I am quite sure that we'll still have more work
20 to do than capacity that rises to some threshold of
21 importance we'll need other sieves, if you will, to sift the
22 cases and figure out which ones we will handle.

23 And we need some way to address the backlog. Do we
24 just close all the cases that don't, we don't have time to
25 work on? Do we give amnesty? Do we do something besides

1 closing them but just call them unresolved? We have ideas,
2 none of them are entirely satisfying to me.

3 So for case resolution I did emphasize that we have
4 good tools and the process works well.

5 The limitations that we encounter, I'll give you a few
6 examples: The standardized fines generally fine folks about
7 \$100 a day and for certain types of easy-to-fix violations
8 that is just not enough and it would be helpful to increase
9 that daily amount by some amount.

10 There is a provision amount for a repeat violation when
11 a fine has been paid in the past. The future fine would
12 accrue at a double rate. But that time period for that to
13 happen is five years, which seems like a long time. The few
14 times that I have wanted to invoke this it has been six
15 years or seven years so just past that mark. So I wonder,
16 maybe we need to extend that five year limit as an incentive
17 to continue to comply with the permit requirements.

18 In terms of amending the laws, ideas that we have
19 discussed are possibly to modify the McAteer-Petris Act to
20 obtain the ability to impose a notice of violation on title
21 if we were working on a case and became aware that the
22 property was up for sale. This would ensure that the new
23 owner was aware of the violations that they might be
24 inheriting because the violations do run with the land as
25 opposed to the owner.

1 The administrative civil penalty maximum is \$30,000.
2 That's not always enough.

3 The daily amount is \$2,000 per violation and again,
4 that is not always enough.

5 We have no administrative civil penalty authority in
6 the Suisun Marsh Protection Act jurisdiction.

7 It's the tool, for better or worse, that regulatory
8 agencies are given to incentivize resolution and we lack
9 that tool.

10 So where do we go from here?

11 I just wanted to emphasize five actions that we plan to
12 take:

13 We would like to improve the report form and post it on
14 our website.

15 We are very close to achieving implementation of an
16 enforcement GIS layer.

17 We will continue working on the prioritization system,
18 which will maximize our effectiveness.

19 And we somehow need to improve the compliance
20 assistance process. A couple of ideas that we have are to
21 create a single email address for permittees to submit those
22 documents. That will centralize the incoming pipe and
23 enable our secretaries to at least record the receipt of
24 those documents.

25 And something that -- we have done a lot of background

1 work that I haven't bored you with but we have discovered
2 that we don't really review the monitoring reports that are
3 required of our permittees for marsh restoration. Those
4 marsh restorations are offsetting Bay fill impacts. And
5 without reviewing those documents we don't know if the
6 resource impacts are being offset by resource benefits.

7 So this is a real gap that we've identified as a high-
8 priority gap that we need to fix. So we have created a
9 little team called the Wetland Habitat Assessment Team and
10 we are working on getting some information out of those
11 reports for improving permits in the future.

12 So in conclusion, we don't have a final strategy.

13 The process has been and will continue to be
14 beneficial.

15 We are still teasing apart each piece of the process
16 and looking for gaps and solutions.

17 As I think I have made clear, we do have capacity
18 limitations.

19 This is a long-term and positive undertaking.

20 We have made changes that are beneficial and we look
21 forward to continuing that process.

22 So we would like to know what you think about what
23 we're doing, about the process that I've described, the
24 issues that we've identified and the solutions that we have
25 put on the table for your consideration and other solutions

1 that we may not have thought of.

2 We would like to know what matters most to you.

3 We do and are currently seeking more regulatory staff.

4 That is certainly something we hope you will support.

5 Should we bring -- we would like to discuss at the
6 appropriate time, changes to the regulations and statutes.

7 And when we bring formal enforcement proceedings
8 forward it means we couldn't do it at the staff level and we
9 need your help.

10 I just wanted to acknowledge Randy Roig, who offered
11 his pro bono assistance to me and the team and we couldn't
12 have gotten where we are without his help.

13 This has been a team effort, past and current staff are
14 integral to this process.

15 And that's all I've got. I look forward to your
16 questions.

17 COMMITTEE CHAIR SCHARFF: Thanks, that was great. Any
18 questions?

19 COMMITTEE MEMBER ADDIEGO: I don't think I have a
20 question, but Ms. Klein, you've obviously had this on your
21 mind for quite some time. It's a little overwhelming,
22 hearing it all at once. I'm certain that Mr. Goldzband can
23 be advocating for more staff. We're talking about an
24 enforcement staff of 3, including yourself?

25 MS. KLEIN: Correct.

1 COMMITTEE MEMBER ADDIEGO: And then how many hours does
2 the enforcement team pour into one of the subjects as we
3 just heard today? How many hours? Just something out of
4 the sky so I have an appreciation for where your time goes.

5 MS. KLEIN: Well, if it takes about a year and a half
6 to resolve one case and we're working on, you know, 5 to 10
7 or 15 of them at a time. Is that helpful? I think I
8 underestimated the hours in the Scott's matter. It takes a
9 lot of time.

10 COMMITTEE MEMBER ADDIEGO: So many hundreds of hours.

11 MS. KLEIN: There's a lot of document review, we do a
12 lot of follow-up, a lot of modifying projects. I think you
13 saw with both of the projects that we presented to you this
14 morning that there is a lot of back and forth and push and
15 pull and negotiation. That goes on at the staff level
16 before things end up in a formal enforcement proceeding. So
17 I am not giving you a good answer, maybe Brad wants to.

18 MR. McCREA: If I might. The answer it really varies
19 greatly. It varies on a couple of, a few different things.
20 One is the willingness of the violator. Some violators
21 address their violations head on and solve it very quickly
22 and that is not only appreciated, it also usually ends well
23 for everyone. So that's one thing.

24 The other thing is the tools that we use to resolve the
25 violation. For example, when we enter into a cease and

1 desist action, what we found is things move along much more
2 quickly. When we use our standardized fines it takes about
3 a year for the penalty to max out at \$30,000. Isn't that
4 right?

5 MS. KLEIN: Yes.

6 MR. McCREA: And once it maxes out there is really no
7 incentive to resolve it after that because it is not still
8 accruing and those can go on forever. And again, it depends
9 on the willingness of the violator, et cetera. So there is
10 no easy answer to that except that I would say probably on
11 average it's hundreds of hours a case if I had to pick a
12 number out of the sky.

13 MS. KLEIN: Yes. We have to get really familiar with
14 the permit requirements. If we are -- if one violation of a
15 permit is brought to our attention we don't just go after
16 that violation. We read the whole permit. We might as
17 well, you know, bring the whole permit into compliance while
18 we are at it. So there is the file review, there is the
19 site visit. Sometimes you have to do more than one site
20 visit. Something Matthew Trujillo has really brought to the
21 program is getting out in the field. There is nothing like
22 seeing the project. So if you don't know what you're
23 talking about you can't really work with the permittee and
24 fix the problem; and maybe you're going to spend a lot of
25 time and not even identify all of the issues and solve them

1 all. So site visits and then drafting a letter.

2 Sometimes we have concerns, we have to get senior staff
3 involved. So there's a lot of internal decision-making and
4 research that goes on.

5 And then it doesn't actually make sense to me why it
6 can be so difficult for people to do things that seem fairly
7 simple but it just, it's difficult for people to comply with
8 our permit conditions. And there's a lot of, you know, the
9 rounds of review for each legal instrument and all of the
10 plans. And we're just looking for, you know, we'll get a
11 good set of plans but it won't have any public shore signs
12 on it and for some reason they don't come in next week, they
13 come in 90 days later. And it's easy to move on to
14 something else and then you have to get your head back in
15 this.

16 COMMITTEE MEMBER ADDIEGO: I have one last question.
17 In municipal government, sometimes when we're talking about
18 funding, anything from parking and traffic to code
19 enforcement, you're aware of backlogs, you're aware of
20 potential revenue, and then you balance your staffing
21 according to the needs of the community. Yet this today,
22 the funds that we assess go into a Bay Fill Cleanup Fund,
23 not into some type of a general fund, and so is that a
24 limitation that we are under where you can't use fines to
25 supplement the budget?

1 MS. KLEIN: That's a really great question,
2 Commissioner Addiego. In fact, under former Deputy Director
3 Steve McAdam, during difficult state budget times and a
4 potential state layoff, a layoff of state employees, he
5 asked the Legislature, BCDC asked the Legislature to use the
6 Bay Fill Fund to fund enforcement staff and that is the
7 reason that this agency has had an enforcement program on a
8 regular staff basis in the past decade. Without that we
9 would have not, we would have not had enforcement staff.
10 Enforcement staff is traditionally pulled to permits because
11 there are Permit Streamlining Act deadlines that need to be
12 met. But under Larry's leadership he has secured funding
13 for all of the staff through the general fund, which opens
14 up the Bay Fill Fund for, hopefully, Bay Fill cleanup. But
15 if you saw otherwise that certainly could be considered.

16 MR. McCREA: To answer it slightly differently saying
17 the same thing, and that is that the Bay Fill Cleanup and
18 Abatement Fund, the legislation identifies it for the
19 purpose of doing just that, cleaning up the Bay and removing
20 fill. As Adrienne just said, at a time the Department of
21 Finance allowed us to use some of that money for staffing,
22 however that is not the intent of that fund. It is not
23 supposed to be used for staffing. So as she said, Larry has
24 weaned us off of that account.

25 Now the money, for example, the penalties from this

1 morning's activity will go into the fund and we have to
2 determine, as Larry shared with the Commission a few weeks
3 ago, we have to determine how we are going to expend those
4 funds. Are we going to use a grant program, are we going to
5 -- what is going to be the vehicle for spending down the Bay
6 Fill Cleanup and Abatement funds actually for projects?

7 The Department of General Services and Finance have
8 asked us about the penalties and said -- because they're
9 looking at our general fund budget and they're hearing the
10 problems that we have with regards to staffing and doing the
11 job we need to do and they're saying, they're asking us,
12 maybe there is some way that those penalties can be used.

13 Larry, would you like to put a finer point on that?

14 EXECUTIVE DIRECTOR GOLDZBAND: I think Brad and
15 Adrienne are answering your question probably from 10
16 degrees different but I think they're heading to the same
17 place. There was never an attempt by BCDC, as far as I
18 know, to use the Bay Fill Cleanup and Abatement funds to add
19 staff. It was simply that there was so little general fund
20 available, in order not to lay people off, no matter who it
21 would have been. Who knows whom Trav and the senior staff
22 would have said should be laid off; I have no idea, I wasn't
23 Executive Director at the time. But that discussion was
24 waylaid to a great extent because so much of the money was
25 able to be paid for enforcement staff, which relieved

1 pressure in other places.

2 I think that one of the things that the Department of
3 Finance has recognized during the past 6 to 12 months is
4 that if we were to bulk up our enforcement staff you'd have
5 more funds coming in, so I think we have gotten over that
6 hurdle. Whether the Department of Finance, much less the
7 Legislature, which has the authority to take a look at our
8 oversight and determine whether we're spending the money in
9 the right way, would ever agree to using those funds
10 differently than the physical aspect of what those funds are
11 supposed to be used for, not only, number one, I can't
12 predict, but number two, I'm not sure that that's what you
13 want to have happen.

14 One of the things that we're going to have to ask the
15 Commission is how you want to spend those monies, and there
16 are probably as many different answers as there are
17 Commissioners. So we will end up going through that process
18 during this fiscal year in preparation for next fiscal
19 year's budget.

20 COMMITTEE MEMBER ADDIEGO: I think earlier today
21 Mr. Ranchod brought up the point that maybe 1,000 hours have
22 gone into, 1,000 hours of staff time have gone into some of
23 these reviews of violations. At a minimum it seems there
24 would be some reasonableness in recouping the dollars that
25 were expended to bring this to conclusion.

1 EXECUTIVE DIRECTOR GOLDZBAND: And I think the
2 Department of Finance loves the idea of being able to pay
3 for one's work. Which is why state agencies that were
4 created in the 1970s, '80s, '90s, permit fees actually go
5 back to the regulatory function, which would help pay for
6 the regulatory function. And BCDC's does not, which is why
7 in addition we agreed with the Department of Finance that we
8 will come to you with the idea of actually increasing the
9 permit fees because the Department of Finance is not going
10 to reduce its general fund allocation from us but they would
11 like us to be able to use permit fees to reduce the impact
12 further on the general fund. So we'll have to work through
13 that too.

14 COMMITTEE MEMBER RANCHOD: I have a couple of thoughts
15 on this. On that point about funding, it seems like we
16 would want to have more flexibility in the statute to
17 actually do some of this so that we weren't having to rely
18 on an agreement with Department of Finance about what we
19 could do; because maybe they're cooperative now but a
20 different administration could view it differently. So why
21 don't we explore the idea of legislation that would provide
22 more flexibility so that we could actually pay for the
23 regulatory work that needs to be done.

24 I don't like the idea of having to increase permit fees
25 on everybody, including businesses and local governments, to

1 pay for this stuff, when most permittees are probably doing
2 just fine and abiding by their permit conditions. It really
3 should be on the folks who are violating their permit
4 conditions or enforcement context, that that's where the
5 costs mount. And that number of 1,086 hours was in the
6 cease and desist order and you said that was a low estimate,
7 Adrienne, for the Scott's matter. So yes, it can add up and
8 I think that the people who are problematic should be the
9 ones bearing the additional burden of that, not everybody
10 who has to go through our process. So I'd suggest some
11 legislation.

12 It also just seems like a scaling issue here of, we are
13 never going to have a ton of enforcement staff, just given
14 the realities of the budget and there's so many permits out
15 there. One thing in here that I noticed was this idea of
16 stipulated penalties. So when you issue the permit actually
17 having the stick there ready to go if there are violations.
18 And maybe there are certain types of permits or aspects of
19 permits where you see the most violative behavior and you
20 actually want to put the stipulated penalties up front in
21 the permit so that when there is a violation you guys just
22 come and collect the check later as opposed to then going
23 through this whole process. I know there's down sides to
24 that, obviously.

25 And then the other thing is the awareness of

1 enforcement actions. So I am not suggesting that we
2 publicize when there is an enforcement action, but it would
3 be helpful, I think, for permittees to know that enforcement
4 actions occur and that there are six figure penalties that
5 are meted out by the Commission. So maybe you have an email
6 list of all the permittees and when an enforcement action is
7 taken, especially a big one, a summary is sent out to the
8 permittees, just FYI. It's not a press release where you're
9 shaming a permittee or something publicly but that there is
10 awareness that enforcement actions occur and then maybe that
11 encourages more compliant behavior.

12 MR. McCREA: Committee Member Ranchod.

13 COMMITTEE MEMBER ADDIEGO: A shot across the bow.

14 COMMITTEE CHAIR SCHARFF: Go ahead.

15 MR. McCREA: Chair, if I might? In discussing the
16 Scott's case with a member of the public the discussion
17 about BCDC's enforcement program came up. And in our
18 conversation this member of the public said exactly the same
19 thing you did, that there is a story here. That for many
20 years BCDC's enforcement program for a variety of different
21 reasons was sort of --

22 EXECUTIVE DIRECTOR GOLDZBAND: Languished.

23 MR. McCREA: Languished, yes. I was going to say
24 something else, but languished. Recently because of the
25 full complement of staffing, even notwithstanding the fact

1 that it might not be enough --

2 COMMITTEE CHAIR SCHARFF: I think it's our great
3 Executive Director's leadership.

4 MR. McCREA: Well that was my second point.

5 (Laughter.)

6 MR. McCREA: The leadership to direct the staff to get
7 to work, and a Commission and a Committee that's been
8 reconstituted, we have been able to actually make some
9 headway in this last year. And there is probably a story
10 there that the Bay Area public would be interested to know
11 about BCDC. It's not just sea level rise, we don't just
12 issue permits, but there is an enforcement program that is
13 functioning and robust.

14 COMMITTEE CHAIR SCHARFF: Larry?

15 EXECUTIVE DIRECTOR GOLDZBAND: No, go ahead.

16 COMMITTEE CHAIR SCHARFF: I was going to actually go
17 into a little bit of a different topic. Do you? No?

18 So I think there is also the issue of efficiency. I
19 don't know so I just really want to have that conversation.
20 It seemed to me, just sort of as an outsider watching this,
21 that we spend huge amounts of time negotiating, back and
22 forth. And the question is, I mean, I'd leave it up to
23 staff, but why not bring some of this stuff when you have a
24 deadlock to us and let us be the bad guys, you know.

25 MS. KLEIN: Music to my ears.

1 COMMITTEE CHAIR SCHARFF: Just make a decision. If you
2 have 170, some of this stuff maybe it's not hours. Here's
3 the violation stuff. You ask the people, 'Do they want to,'
4 they say, 'No' and you just bring it here and then we do
5 what we need to do. And we may or may not agree with you
6 but at least you move through that backlog quickly. So that
7 was one thought I had is why not just do more of that?

8 MR. McCREA: As I said earlier about the timing and how
9 long it takes to bring a case to closure, I said the cease
10 and desist order process is one of the ones that seems to be
11 the strongest. The process starts with the issuance of a
12 Violation Report where we make our allegations and the
13 evidence to support those allegations. There is a whole lot
14 of talking that can go on, but once we send out the
15 Violation Report everything changes, the talking stops and
16 the action starts.

17 And the threat of a violation report does almost as
18 good, but we have to be willing to sit down and write it.
19 So once we draft it there is either of two things can
20 happen: One, you can enter into a settlement agreement, or
21 it gets mailed out and we end up here. Either way we end up
22 here but it goes on to a cease and desist order, whether
23 it's stipulated or not.

24 As Adrienne said, we are so pleased to hear what you
25 just said because the willingness to quickly move into an

1 elevated enforcement proceeding will, I think, help this
2 process.

3 COMMITTEE MEMBER TECHEL: When we do these processes it
4 would be helpful to know. We had the first one two weeks
5 ago which was an enforcement hearing. The two we had today
6 had agreements. Is there a difference in how those hearings
7 are held? In the one we had two weeks ago we had the folks
8 that were protesting it sitting at a table. It was clear
9 who were participants in that discussion, less clear today.
10 Is it different? Is it meant to be handled differently? At
11 one point somebody came up and said they want their card in
12 the pile that way. I'm going, 'Okay, that's kind of a red
13 alarm.' There's got to be a process where people come in
14 and things get handled. So I am kind of looking at this --
15 you've got the big picture, I've got the little picture,
16 what happens at this meeting when we're here?

17 COMMITTEE CHAIR SCHARFF: So I actually do think we
18 need that discussion.

19 EXECUTIVE DIRECTOR GOLDZBAND: Let me do two things.
20 First of all, beg for forgiveness if we didn't do it exactly
21 the way you think we ought to do it, and I mean that totally
22 seriously. But let me also second explain why, which is
23 that you all haven't met for six years. So we're doing this
24 to some extent - and, Chris, yell at me if I'm saying too
25 much - by the seat of our pants. We know how we think it

1 should work but we don't have an awful lot of experience in
2 making sure that you get what you need in a way that you
3 need it and that we set it up in a way that makes you feel
4 like you're getting in the most comfortable way possible and
5 the most efficient way possible what you need. So the more
6 you can tell us what you want and the more you can tell us
7 how you would like to either keep things, certain things the
8 same or change things, the better off we will be. Because
9 Adrienne works darn hard and Greg - where is Greg?

10 MR. McCREA: Behind us.

11 EXECUTIVE DIRECTOR GOLDZBAND: Greg is working to make
12 sure that we are getting the stuff physically right. And
13 then Marc who, of course, has now been with us for 13 months
14 and had not been in the public sector and, you know, looks
15 at this from his experience from the private sector having
16 appeared before bodies such as yours. So we are all working
17 together to try to figure out what the process should be
18 from a sort of physical perspective as well as a paper
19 perspective.

20 COMMITTEE CHAIR SCHARFF: So let me go through what I
21 thought the process --

22 EXECUTIVE DIRECTOR: Could you let Marc go first?

23 COMMITTEE CHAIR SCHARFF: Sure.

24 MR. ZEPPETELLO: I just wanted to add one thing in
25 response to Jill's comment and that is, something that makes

1 it perhaps a little bit awkward and we're feeling our way is
2 that these stipulated matters, we are coming into agreement
3 and we're supported by the other side and we're all together
4 supporting the staff's recommendation. But in the one that
5 you heard two weeks ago it was contested and we therefore
6 have an issue of being aware of ex parte and having to have
7 a separation between staff and so we can't really talk to
8 you in the same way. And it made it -- given that the Point
9 Buckler thing was really the first contested one we've had
10 and it's the second one that this Committee has had, we're
11 having to work out sort of how do we handle the procedure
12 and getting us all sort of up to speed. So hopefully we'll
13 do better as we go on, especially if we have more contested
14 proceedings.

15 COMMITTEE CHAIR SCHARFF: I don't think you have been
16 doing badly at all, I actually think you have been doing
17 fairly well, let's put that out there. I think these are
18 minor --

19 COMMITTEE MEMBER TECHEL: Right.

20 COMMITTEE CHAIR SCHARFF: -- minor changes, as opposed
21 to, you guys are doing it wrong. I think you're doing a
22 great job, I think it's all working out. I do think there
23 are huge differences between the contested and non-contested
24 ones so let's talk about the non-contested ones for a
25 moment.

1 I think what would have been helpful is to have a clear
2 understanding of who the permittees are and who is speaking
3 on their behalf and who is speaking on the public, and that
4 got mixed up today. I think the permittees and their staff.
5 Whoever their staff is, whoever is representing them, that's
6 one group. You guys go first, explain it, they then go.

7 And in many ways I think they should be encouraged on
8 the ones that are non-contested, they should just come
9 forward basically and say, 'We've worked hard with staff, we
10 really agree with staff, everyone is in agreement here, we
11 are really here to answer any questions. We're sorry for
12 what we did.' That's sort of the message that they should
13 have. If there are points of disagreement, like occurred a
14 little bit today where they tried to change the rules a
15 little bit in their favor, it's due process, if they want to
16 come and appeal and say, 'We've agreed with staff on
17 everything but this.'

18 And I'd actually encourage you on that too. If you
19 come to impasse on one or two things come forward and say,
20 all of this is agreed to. There are these two issues.
21 Focus on this. And then we'll make a decision on it and we
22 can focus on that. I think that would streamline the
23 process a lot and it would be helpful for us.

24 EXECUTIVE DIRECTOR GOLDZBAND: So one of the ways --
25 because I think a little bit -- I'm putting my former

1 Commissioner hat on. So it's almost as though, and maybe it
2 is as though, you really want two tables. And you really
3 want BCDC staff at one table, and whether it's contested or
4 not contested, you want the other folks at that table. So
5 you visually see and you literally work through that way.
6 Is that? And that's fine, I just want to -- does that help?

7 COMMITTEE CHAIR SCHARFF: I clearly want that in a
8 contested one. In a non-contested one I just want a clear
9 delineation between -- so when we ask a question of the
10 Permittee, what I thought was some member of the public,
11 doesn't jump up and answer. And it's unclear to me when
12 they say, 'Well, I'm advising them.' What?

13 EXECUTIVE DIRECTOR GOLDZBAND: I've got you.

14 COMMITTEE CHAIR SCHARFF: I don't necessarily have to
15 have the two tables.

16 And as I said, I'm happy to have staff say, 'Here is
17 what we did' and then the Permittee just get up and say,
18 literally, 'We agree with staff, we appreciate the
19 opportunity to work with staff, it's been a good process and
20 we are fully supportive.' And then we can move forward
21 quickly.

22 MR. McCREA: It may be as easy as just making better
23 introductions at the beginning of the meeting.

24 COMMITTEE MEMBER TECHEL: I think the idea that we are
25 here for three hours and we've got what agendized. I think

1 Greg does a good job of looking at, okay, we've got this
2 many cards, this means you get two minutes. So if people
3 come in understanding they're going to be limited, it's much
4 better than if somebody comes in and thinks they're going to
5 get to present to you for an hour and a half.

6 COMMITTEE CHAIR SCHARFF: Especially on the non-
7 contested ones. I don't know how the rest of you feel but,
8 you know, I'd rather us hone in. Our job is really
9 oversight. You guys aren't giving away the store, you
10 aren't doing anything, or you are not being vindictive, and
11 it's really within that box. And most of the time I expect
12 you to be clearly within the box so I don't expect it to be
13 staff's, you know, we're going to override staff a lot of
14 the time unless there is an issue, right? So I think we
15 could streamline it here. You know, we could hear three of
16 these things if we didn't have an expectation that it's
17 going to be an hour and a half.

18 Now the contested one, that could have been a whole day
19 hearing, frankly, if we'd allowed it to be.

20 COMMITTEE MEMBER TECHEL: Yes.

21 COMMITTEE CHAIR SCHARFF: So the question is, how do we
22 balance due process concerns, which I strongly feel about,
23 the right of the public to participate on the fully
24 contested ones.

25 COMMITTEE MEMBER RANCHOD: It seems like the second of

1 the two matters we had today is and should be far more
2 typical of a non-contested matter. That went quickly,
3 everybody is in agreement, there were no issues. I was
4 surprised, frankly, when I went through the file on the
5 first one. There was a lot of stuff that jumped out at me
6 and I wanted to note it because it raised questions. So I
7 would expect the non-contested ones to go much more like the
8 second one.

9 COMMITTEE CHAIR SCHARFF: I would too. And that's why
10 I'd encourage you to put those on, break deadlocks, bring
11 them to us.

12 MS. KLEIN: We have and I believe Larry wants us to
13 continue in that direction.

14 MR. McCREA: If I might change the subject just a bit
15 because I am curious about prioritization, the idea of
16 selection. As you listened to Adrienne's presentation and
17 you saw the different categories of prioritization, the
18 different things that we have to decide, do you have any
19 direction with regards to what seems more important in the
20 large scheme of things around the region?

21 COMMITTEE CHAIR SCHARFF: I do but I'll let my fellow
22 committee members go first. Jill?

23 COMMITTEE MEMBER TECHEL: Safety, those kinds of
24 things. Bloom. It sounds to me like somebody complains and
25 it goes up the list and somebody complains again and it goes

1 up the list. And is that how things move up? Do groups of
2 people understand that and is that kind of what's moving
3 enforcement? Sometimes code enforcement with the City,
4 that's the biggest driver is somebody who is complaining
5 about something.

6 Like I think Adrienne explained very well, you know,
7 there's not a lot of eyes out there doing the monitoring,
8 seeing. So when you said this I said, 'Well, just create a
9 list of criteria' and then in your next slide you had a
10 list, it was perfect. So I think if you brought that to the
11 full board I think we'd look at that and say, yes, that's a
12 great list and use it. Buy the technology you need to use
13 all the tools that are out there.

14 MR. McCREA: Adrienne, correct me if I'm wrong, but I
15 would say in BCDC's enforcement program the squeaky wheel,
16 the complainer, that doesn't drive.

17 COMMITTEE MEMBER TECHEL: Okay.

18 MR. McCREA: That does not drive, that is not one of
19 the drivers.

20 COMMITTEE MEMBER ADDIEGO: That's great to hear because
21 it would seem of the three then the shoreline band is where
22 a lot of the eyes are and then that would rise those to the
23 top of the list, where in fact harm to the Bay or harm to
24 the Marsh seems environmentally where the concern should be
25 more focused. But I would have to understand what egregious

1 things might be happening in the middle of the Bay that you
2 did not have time to take care of.

3 COMMITTEE MEMBER RANCHOD: I would agree. In addition
4 to harm to the Bay and the Marsh and the kind of repeat,
5 focusing on repeat and intentional behavior. But it seems
6 like part of the interest in having enforcement activity
7 across different types of activity or permittees is to send
8 a signal that we are enforcing everywhere and nobody is
9 getting a free pass. That was why I made the suggestion
10 earlier that we actually inform permittees of permit
11 actions, because that can help accomplish the same goal, I
12 think, of letting people know that there is activity. And
13 even if your type of permittee hasn't seen any activity in
14 five years, it's occurring out there.

15 COMMITTEE MEMBER TECHEL: I just had a -- earlier did
16 you say in the Suisun Bay we don't have authority?

17 MS. KLEIN: Penalty, administrative penalty authority.

18 COMMITTEE MEMBER TECHEL: What was the one we had two
19 weeks ago, where was that?

20 MS. KLEIN: Well, it's located in both jurisdictions
21 and so the penalties imposed were under the McAteer-Petris
22 Act.

23 COMMITTEE MEMBER TECHEL: Okay.

24 MR. ZEPPETELLO: We have penalty authority in the Marsh
25 but not under the Marsh Act.

1 COMMITTEE MEMBER TECHEL: Okay. Because it seemed like
2 we penalized pretty good.

3 (Laughter.)

4 COMMITTEE CHAIR SCHARFF: So I would agree that harm to
5 the Bay is probably the number one. Who is harming the
6 most? And harm to public access, I actually think that is
7 really important too.

8 And then I think it's what you said. Let's get out
9 there the notion of some sort of -- we are enforcing across
10 all things and there is no free pass. Whereas paper
11 violations are probably much less important, you can't never
12 do a paper violation because then people will be like,
13 'Those don't matter.' And I liked your notion of somehow
14 getting it out there that this is occurring, so that people
15 take note. And especially in the legal community because,
16 you know, you go see your accountant, for instance, and your
17 accountant says, 'That's a really low, low concern on taking
18 that aggressive position on your taxes.' You don't want the
19 same thing when someone goes to see an attorney on BCDC and
20 say, 'A paper violation, really low concern, don't worry
21 about it, whereas if you do three things you're likely to
22 get in deep trouble.'

23 COMMITTEE MEMBER RANCHOD: I've got to leave for
24 another meeting so I'm sorry, I've got to wrap up.

25 EXECUTIVE DIRECTOR GOLDZBAND: Before you go, I

1 apologize. Before you go I have a question from a
2 management perspective. And Sanjay, you do this for a
3 living in terms of developing strategies, implementing
4 strategies. And one of the really hard things that comes
5 with that is knowing how much time you have, how much time
6 you want to spend to actually figure out the strategy before
7 you start implementing it, versus doing the daily wash.
8 Getting out there and doing the site visits or preparing the
9 Violation Reports.

10 So one of the things that I want to hear from you is,
11 there are 5 days a week, we have 3 people, so we have 15
12 person-days per week. Does it make sense for BCDC to spend
13 a third of that time or 40 percent of that time actually
14 figuring out the strategy, getting your approval and knowing
15 that we are only going to spend 60 percent of the total time
16 actually doing the other enforcement stuff or should we
17 ratchet that back or do we move it up?

18 And I know I'm asking you this question. But you face
19 this, I have faced this, and I would like to get some sense
20 from the Committee about how willing you are to put aside
21 some daily enforcement stuff in order to get this done, the
22 long-term benefit.

23 COMMITTEE MEMBER RANCHOD: That's a good question,
24 Larry. I would say it does make sense to do that for a
25 defined period of time. Give yourself, maybe it's two

1 months, to back off of the enforcement activity in the day-
2 to-day stuff that's not egregious and focus on a strategy
3 and what you're going to prioritize. And maybe there are
4 some suggestions here about teeing up a request for greater
5 legislative flexibility and authority or how we publicize
6 things. Yes, spend some time on that because then it will
7 make whatever enforcement activity you take, I think, more
8 effective. But I wouldn't want to back off of -- there is
9 such a huge backlog that you can't ignore it, in fairness to
10 the people who are complying with their permits.

11 COMMITTEE CHAIR SCHARFF: I would agree with that. I
12 think we haven't addressed the backlog issue either, because
13 you asked a lot about what to do with the backlog. I
14 actually thought an -- I don't want to say an amnesty but
15 pay us X number of dollars. It's a much smaller fine than
16 if we have to deal with it. You know, on the ones that are
17 not super egregious. But you should be going after those
18 anyway. Clear the backlog quickly and then start over again
19 so we don't end up with a backlog. Because I don't know how
20 else you ever get through it. Three people, 190 cases.
21 You'll always have a backlog. So I think you need to come
22 up with an unsatisfactory --

23 (Laughter.)

24 COMMITTEE CHAIR SCHARFF: -- an unsatisfactory approach
25 that basically clears the backlog but doesn't just close the

1 case.

2 COMMITTEE MEMBER TECHEL: Yes.

3 COMMITTEE CHAIR SCHARFF: And if you don't accept it
4 then we go forward on that, and that offer is sort of a one-
5 time thing.

6 COMMITTEE MEMBER RANCHOD: I like that because it goes
7 also to the enforcement remedy and what we can get out of
8 it. So if we have got cases sitting from the 1990s, you've
9 got major equity and laches arguments on the other side. So
10 even if you were to pick that file up now and try to run it,
11 there would be big defenses, which drops the potential
12 penalty. So I agree, especially the old stuff, let's just
13 make some settlement proposals. Don't work the file up
14 entirely but try to clear it and get it off the books. At
15 least it sends the message that it is not being ignored.

16 And then we do have some high-profile and six figure
17 penalties that are being meted out here. If we can
18 publicize that maybe it would kill a couple of birds with
19 one stone, two stones.

20 MS. KLEIN: Thank you. That was extremely interesting
21 and helpful.

22 COMMITTEE CHAIR SCHARFF: All right, anybody want to
23 say anything else?

24 COMMITTEE MEMBER TECHEL: No, just do we have a next
25 meeting scheduled?

1 MS. KLEIN: We do not.

2 COMMITTEE MEMBER TECHEL: Okay. Does that mean how far
3 in advance we can say we aren't?

4 (Laughter.)

5 MS. KLEIN: We have nothing ready for you in the near-
6 term.

7 COMMITTEE MEMBER TECHEL: Okay.

8 MS. KLEIN: We have lots of things we'd love to bring
9 to you and we will do so as soon as we can get them to that
10 state.

11 EXECUTIVE DIRECTOR GOLDZBAND: Here is my proposal for
12 you, which is, the next time you hear about the strategy
13 will be probably January or February, which gives us three
14 to four months to sort of work through this and get back to
15 you on this.

16 COMMITTEE CHAIR SCHARFF: All right.

17 COMMITTEE MEMBER TECHEL: It shows real leadership
18 saying, 'We don't have great processes right now. Let's
19 figure out great processes, figure out how to make our work,
20 work.' I went to a Sanitation District long-term planning
21 10 years ago and they had 100 projects and I said, 'Okay,
22 how do you prioritize them?' And they said, 'Whatever the
23 engineer wants to work on next.' And I went, 'There's got
24 to be a better way.' So I don't know what the way is for
25 you but you guys sitting down with the tools you have and

1 thinking through it will make sense.

2 COMMITTEE CHAIR SCHARFF: Well thank you very much, the
3 meeting is adjourned.

4 (Thereupon, the Enforcement Committee
5 meeting was adjourned at 1:27 p.m.)

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1 CERTIFICATE OF REPORTER
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3 I, Ramona Cota, an Electronic Reporter and
4 Transcriber, do hereby certify that I am a disinterested
5 person herein; that I recorded the foregoing San Francisco
6 Bay Conservation and Development Commission, Enforcement
7 Committee Meeting and thereafter transcribed it.

8 I further certify that I am not of counsel or
9 attorney for any of the parties to said meeting, or in any
10 way interested in the outcome of said matter.

11 IN WITNESS WHEREOF, I have hereunto set my hand
12 this 3rd day of November, 2016.

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16 RAMONA COTA, CERT**478
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