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15
16 SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

17
18 IN THE MATTER OF:

19
20 VIOLATION REPORT/COMPLAINT FOR THE
21 IMPOSITION OF ADMINISTRATIVE CIVIL
22 PENALTIES No. ER2010.013

23
24 PROPOSED CEASE AND DESIST AND CIVIL
25 PENALTY ORDER No. CDO 2017.04

26
27 MARK SANDERS AND
28 WESTPOINT HARBOR, LLC
29

RESPONDENTS' OBJECTIONS TO EXECUTIVE
DIRECTOR'S RECOMMENDED ENFORCEMENT
DECISION AND ATTACHMENTS

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1 Respondents Mark Sanders and Westpoint Harbor, LLC (“Respondents”) submit the
2 following objections to the Executive Director’s Recommended Enforcement Decision
3 (“Recommended Enforcement Decision”) and attachments to the same.

4 **1. Objection to BCDC staff’s late addition of Allegation No. 23**

5 Sections III.B, V.J, VI.B, VI.C, and VI.I of the Recommended Enforcement Decision,
6 Paragraphs II.H, II.J, III.B, IV.D, IV.E, and IV.K of the attached Proposed Cease and Desist and
7 Civil Penalty Order No. CDO 2017.04 (“Proposed Order”), and the attached “Revised Penalty
8 Chart 2017.11.06” set forth or reference the completely new Allegation No. 23, which proposes a
9 \$30,000 penalty due to an allegedly unauthorized sign at the public boat launch. Allegation No.
10 23 was never asserted in the initial Violation Report/Complaint for the Imposition of
11 Administrative Civil Penalties (Enforcement Investigation No. ER2010.013) (“VR/C”). The
12 Revised Penalty Chart itself acknowledges that the alleged violation occurred after the VR/C had
13 already been issued. BCDC staff’s attempt to tack on this last-minute allegation on the evening
14 of November 6, 2017—a mere ten days before the Enforcement Hearing—violates BCDC’s
15 regulations. Among other violations, staff failed to provide necessary notice and deprived
16 Respondents of the opportunity to defend against the new allegation.

17 **A. BCDC must comply with its own regulations**

18 The law is clear that BCDC is required to comply with its own regulations. In particular,
19 “[a] public entity has a ministerial duty to comply with its own rules and regulations where they
20 are valid and unambiguous.” *Galzinski v. Somers*, 2 Cal. App. 5th 1164, 1171 (Cal. Ct. App.
21 2016); *see also Gregory v. State Bd. of Control*, 73 Cal. App. 4th 584, 595 (1999) (including
22 duties codified in the California Code of Regulations). A duty is ministerial when there is a
23 clearly defined rule. *Redwood Coast Watersheds All. v. State Bd. of Forestry & Fire Prot.*, 70

1 Cal. App. 4th 962, 970 (1999). The rules discussed below are valid, unambiguous, and clearly
2 defined, and therefore BCDC has a ministerial, rather than discretionary, duty to comply.

3 B. Violation of requirement to provide notice

4 Allegation No. 23 cannot be the subject of enforcement under Section 11386(e)(2) and
5 (3) of BCDC’s own regulations, which require a 35-day notice and opportunity to cure the
6 alleged violations, and no such notice or opportunity to cure has been provided.

7 Section 11386 of Title 14 of the California Code of Regulations applies to an
8 enforcement action if the Executive Director determines it is the case: “(1) that the alleged
9 violation is one of the types identified in subsection 11386(e); (2) that the alleged violation has
10 not resulted in significant harm to the Bay’s resources or to existing or future public access; and
11 (3) that the alleged violation can be corrected in a manner consistent with the Commission’s laws
12 and policies.” Cal. Code Regs. tit. 14, § 11386(a). If Section 11386 applies to an alleged
13 violation, “the Executive Director **shall** mail a written notice to the person(s) believed to be
14 responsible for the alleged violation[.]” Cal. Code Regs. tit. 14, § 11386(b) (emphasis added).

15 Here, Allegation No. 23 fits squarely within the category of Section 11386(e)(3), which
16 applies to “the failure to comply with any condition required by a Commission permit not
17 covered by subsections (e)(1) and (e)(2)[.]” Cal. Code Regs. tit. 14, § 11386(e)(3). Additionally,
18 the alleged violation has not resulted in significant harm, or indeed any harm, and, even if proved
19 true, could be corrected in a manner consistent with the Commission’s laws and policies.
20 Therefore, the regulations imposed a duty on the Executive Director to mail a written notice to
21 the Respondents for Allegation No. 23, which is a requirement that staff has failed to fulfill. The
22 written notice must comply with the requirements of § 11386(b).

1 The Recommended Enforcement Decision contends that none of the alleged violations
2 Respondents identified in their Statement of Defense as requiring 35-day notice letters fall in the
3 categories described by Section 11386, apparently for no other reason than because the
4 Executive Director said so: “§ 11386 gives the Executive Director discretion to make these
5 determinations, and he has made no such determination in this case.” (Recommended
6 Enforcement Decision, p. 40.)

7 BCDC’s reading of the law is clearly erroneous. Under California law, when an agency
8 makes a determination in accordance with rules and definitions established by regulations, the
9 duty imposed on the agency is not discretionary but ministerial. *Goonewardene v. ADP, LLC*, 5
10 Cal. App. 5th 154, 169 (Cal. Ct. App. 2016).

11 The California Code of Regulations imposes a duty on the Executive Director to
12 determine whether an alleged violation falls under Section 11386 **in accordance with**
13 **established rules**; the Executive Director’s “determination” is therefore necessarily constrained
14 as he is only deciding whether the facts of an alleged violation fit any of the definitions that
15 Section 11386 establishes for each category. Section 11386 provides valid, unambiguous, and
16 clearly defined rules for classifying alleged violations under each category, and therefore staff
17 had a ministerial duty to make determinations in accordance with those rules.

18 BCDC staff cannot instead claim that Section 11386 is intended to give the Executive
19 Director unfettered discretion to disregard the regulations and arbitrarily choose whether alleged
20 violations fall under Section 11386. Such an interpretation would render Section 11386
21 meaningless. Furthermore, the Executive Director’s supposed “determination” in this instance is
22 additionally suspect because the Executive Director provides no reasoning or evidence for why
23 Allegation No. 23 (or, for that matter, any of the allegations Respondents identified in their

1 Statement of Defense as requiring 35-day notice letters) does not fit within the category of
2 Section 11386(e)(3), which applies to “the failure to comply with any condition required by a
3 Commission permit not covered by subsections (e)(1) and (e)(2)[.]” Neither does the Executive
4 Director provide any explanation for why Allegation No. 23 or any other alleged violation has
5 resulted in significant harm or could not be corrected in a manner consistent with the
6 Commission’s laws and policies.

7 Staff also asserts that it provided notice sending an email on August 3, 2017, regarding
8 the public boat launch sign. (Recommended Enforcement Decision, p. 7.) However, BCDC’s
9 own regulations require that a notice letter must include each of the following:

10 (1) the nature of the alleged violation and each and every action that must be taken to
11 correct the alleged violation;

12 (2) the fact that if the alleged violation is fully **corrected within 35 days** of the mailing
13 of the notice, the Commission **shall not impose any civil penalty**; and

14 (3) the fact that if the alleged violation is not fully corrected within 35 days of mailing of
15 the notice, the person believed to be responsible for the alleged violation may be subject
16 to the payment of a civil penalty and may resolve the penalty portion of the alleged
17 violation by paying the standardized fine specified in subsections (e), and (f) without
18 having to go through a formal enforcement proceeding pursuant to Sections 11300
19 through 11385 except as provided in subsection (h).

20 Cal. Code Regs. tit. 14, § 11386(b) (emphasis added). The August 3, 2017 email did not include
21 notice that meets the requirements of paragraphs (2) and (3), and therefore does not constitute a
22 proper notice letter.

1 In addition, the email indicates that staff was aware of Allegation No. 23 as early as
2 August 2017, and could have followed the correct procedure of providing proper notice and
3 including the allegation in a revised VR/C or a separate violation report/complaint at the time,
4 but chose not to do so. Instead, staff waited more than three months after sending the email
5 before finally attempting to slip in Allegation No. 23 a mere ten days before the Enforcement
6 Hearing.

7 The Executive Director failed to send a proper 35-day notice letter to Respondents and
8 provide them with the opportunity to correct the alleged violation. Until the Executive Director
9 submits the 35-day notice letter, Allegation No. 23 cannot legally be the subject of an
10 enforcement action. Contrary to arguments in the Recommended Enforcement Decision, nothing
11 in BCDC's regulations allows staff to circumvent this requirement and simply tack on violations
12 at the eleventh hour without following proper procedure.

13 C. Violation of requirement to issue allegations 45 days before Enforcement Hearing

14 In addition, under Section 11321(a) of BCDC's regulations, Allegation No. 23 cannot be
15 the subject of enforcement. Section 11321(a) requires that staff issued the VR/C asserting the
16 allegation at least 45 days prior to the Enforcement Hearing:

17 [T]he Executive Director **shall** commence Commission enforcement proceedings by
18 **issuing at least 45 days prior to holding an enforcement hearing** on the matter the
19 following materials:

- 20 (1) a violation report that complies with the format set out in Appendix H,
21 (2) a complaint for civil penalties that complies with the format set out in
22 Appendix H if the staff seeks civil penalties, and
23 (3) a statement of defense form that complies with the format set out in Appendix I.

1 Cal. Code Regs. tit. 14, § 11321(a) (emphasis added). The rule is valid, unambiguous, and
2 clearly defined that staff must issue materials (that comply with the format set out in Appendix H
3 of BCDC’s regulations) alleging Allegation No. 23 at least 45 days prior to the Enforcement
4 Hearing, and therefore staff had a ministerial duty to comply. Staff did no such thing. Instead,
5 staff has chosen to add the new violation only 10 days prior to the Enforcement Hearing.

6 In addition, by failing to comply with BCDC’s regulations, staff deprives Respondents of
7 the opportunity to respond to Allegation No. 23. Section 11322(a) and (c) provide for
8 Respondents to submit a defense to the allegations of a violation report/complaint within 35
9 days. Cal. Code Regs. tit. 14, § 11322(a), (c). Respondents have already submitted their
10 Statement of Defense and will be unable to provide a response to this new Allegation No. 23
11 before the date of the Enforcement Hearing. Even if they could, Respondents would not be given
12 the requisite 35 days to prepare a defense to Allegation No. 23 as provided for by BCDC’s
13 regulations.

14 As discussed, staff certainly had the opportunity to issue a revised VR/C or a separate
15 violation report/complaint 45 days in advance of the Enforcement Hearing, as staff mentioned
16 the alleged facts in emails as early as August 2017. Respondents should not be punished for
17 staff’s choice to delay three months in a failure to follow their own regulations, thereby
18 depriving Respondents of the basic right to defend against an allegation. Due to the violation of
19 Section 11321(a), Allegation No. 23 cannot legally be the subject of an enforcement action.

20 D. Violation of constitutional due process obligations

21 Due to staff’s violations of the procedures described above, BCDC staff has also violated
22 its constitutional due process obligations. The California Supreme Court has confirmed that the
23 requirements of due process extend to administrative adjudications. *Today’s Fresh Start, Inc. v.*

1 *Los Angeles Cty. Office of Educ.*, 57 Cal. 4th 197, 214 (2013). As stated by the Court, “when an
2 administrative agency conducts adjudicative proceedings, the constitutional guarantee of due
3 process of law requires a fair tribunal.” *Morongo Band of Mission Indians v. State Water Res.*
4 *Control Bd.*, 45 Cal. 4th 731, 737 (2009). It is also established law that “[t]he fundamental
5 requirement of due process is the opportunity to be heard at a meaningful time and in a
6 meaningful manner.” *People v. Litmon* 162 Cal. App. 4th 383, 395 (2008); *see also B. C. Cotton,*
7 *Inc. v. Voss*, 33 Cal. App. 4th 929, 954 (1995) (finding that “at a rock-bottom minimum due
8 process requires some form of notice and an opportunity to respond”). Yet BCDC staff’s actions
9 here have made it impossible for Respondents to have a meaningful opportunity to be heard.

10 Because BCDC regulations effectively limit Respondents’ right to present evidence to the
11 already submitted Statement of Defense, staff cannot now introduce new evidence that
12 Respondents do not have an opportunity to respond to. If staff wish to assert Allegation No. 23,
13 the proper procedure is for staff to withdraw the VR/C and begin the process again or to issue a
14 separate violation report/complaint. Otherwise, BCDC staff’s introduction of new evidence
15 constitutes a violation of Respondents’ due process rights in addition to violation of BCDC’s
16 regulations. For these reasons, Respondents request that the Enforcement Committee exclude
17 Allegation No. 23 as improperly proposed, and strike the inclusion and reference of Allegation
18 No. 23 from Sections III.B, V.J, VI.B, VI.C, and VI.I of the Recommended Enforcement
19 Decision, Paragraphs II.H, II.J, III.B, IV.D, IV.E, and IV.K of the attached Proposed Order, and
20 the attached “Revised Penalty Chart 2017.11.06.”

21 **2. Objection to late addition of information concerning “asphalt pad of unknown purpose”**

22 Section VI.Q of the Recommended Enforcement Decision and Paragraph III.F of the
23 Proposed Order reference an allegedly unauthorized asphalt pad. In the VR/C, BCDC staff

1 provided no information or evidence concerning this condition beyond referring to it as “an
2 asphalt pad of unknown purpose.” Because Respondents could not identify this supposed asphalt
3 pad based solely on this ambiguous description, they denied that such a condition exists. BCDC
4 staff now claims that the photograph showing this alleged asphalt pad was “inadvertently not
5 included” and that to “correct this error” BCDC has added Exhibit B to the Recommended
6 Enforcement Decision, which purports to be a photograph showing this asphalt pad.
7 Respondents object to BCDC staff’s submittal of additional evidence in an attempt to “correct
8 this error” after Respondents have filed the Statement of Defense.

9 Under Section 11321(b) of BCDC’s regulations, the VR/C must “refer to all documents
10 on which the staff relies to provide a prima facie case[.]” Exhibit B was not included with the
11 VR/C. By failing to comply with BCDC’s regulations, staff deprives Respondents of the
12 opportunity to adequately respond to the allegation concerning this “asphalt pad of unknown
13 purpose.” As discussed above, because BCDC regulations effectively limit Respondents’ right
14 to present evidence to the already submitted Statement of Defense, staff cannot now introduce
15 new evidence that Respondents do not have an opportunity to respond to. If staff wish to provide
16 additional evidence concerning this “asphalt pad of unknown purpose[.]” the proper procedure is
17 for staff to withdraw the VR/C and begin the process again. Otherwise, BCDC staff’s
18 introduction of new evidence constitutes a violation of Respondents’ due process rights in
19 addition to violation of BCDC’s regulations.

20 **3. Objection to BCDC staff’s use of hearsay evidence**

21 Respondents object to the hearsay evidence included in the Proposed Order. The
22 Recommended Enforcement Decision states: “in light of Respondents’ objections, **none of the**
23 **hearsay statements to which Respondents object is included in the findings in the proposed**

1 **cease and desist and civil penalty order** that is part of the Recommended Enforcement
2 Decision.” Despite this claim, three Paragraphs of the Proposed Order include the very facts that
3 Respondents objected to as hearsay in the Statement of Defense:

- 4 • “Photographs taken on April 9, 2017, document that: (a) there is a single sign
5 adjacent to Greco Island stating, “Sensitive Wildlife Habitat / Do Not Enter,” but the
6 sign is so faded that it is almost illegible; (b) there are two other faded signs on Greco
7 Island with no writing visible; and (c) there is no evidence of signs along the majority
8 of the perimeter of Greco Island.” (Proposed Order, ¶ II.R.)
- 9 • “Photographs taken on June 5, 2016 and April 9, 2017, show a buoy in the Slough
10 marked “Slow 10 MPH,” and two photographs taken on June 6, 2016, show a ferry in
11 the Slough generating a substantial wake.” (Proposed Order, ¶ II.S.)
- 12 • “By letter dated March 24, 2017, an interested organization, the Citizen’s Committee
13 to Complete the Refuge (“CCCR”), brought to BCDC staff’s attention alleged
14 violations of the following two permit conditions requiring Sanders to provide
15 mitigation for project impacts:
 - 16 1. Shorebird Roost Habitat Mitigation. Permit Special Condition II.F
17 requires Sanders to provide, prior to commencement of work authorized
18 under Phase 2 (i.e., the boatyard), approximately 3.0 acres of shorebird
19 roost habitat mitigation, to replace such habitat lost as a result of the
20 project. Special Condition II.F. provides that the habitat creation plans
21 shall be reviewed and approved by or on behalf of the Commission after
22 consultation with the U.S. Fish and Wildlife Service and California
23 Department of Fish and Wildlife.

1 2. Non-tidal Wetland Mitigation. Permit Special Condition II.G requires
2 Sanders to provide mitigation for the loss of 0.27 acres of non-tidal
3 wetlands located in a drainage ditch on the Site by enlarging the wetlands
4 in the remainder in the ditch and creating additional wetlands for a
5 replacement ratio of at least 1:1. Special Condition II.G. provides that the
6 habitat enhancement plans shall be reviewed and approved by the U.S.
7 Fish and Wildlife Service, California Department of Fish and Wildlife,
8 and by or on behalf of the Commission.” (Proposed Order, ¶ II.V.)

9 In regards to Paragraphs R and S, BCDC staff relies heavily on the hearsay statements
10 and photographs provided by CCCR that purport to demonstrate an absence of signage. As
11 BCDC regulations make clear, inadmissible hearsay evidence alone is not sufficient in itself to
12 support a finding of fact. Cal. Code Regs. tit. 14, § 13329. Additionally, these photos cannot, and
13 do not, capture the entirety of Greco Island (as the photos, by their nature, only show a portion of
14 a large area and do not show the entire perimeter, or even a majority of, the perimeter of Greco
15 Island). BCDC staff has not provided any evidence that can support a finding that these signs are
16 not in place. Paragraph V suffers from the same defects, as the “evidence” contained in the letter
17 is inadmissible hearsay that cannot be used alone to support a finding of fact. *Id.* Indeed, the
18 letter from Mr. Gaffney contains hearsay within hearsay, as Mr. Gaffney purports to explain
19 findings by other members of this citizen group. And, notably, Mr. Gaffney’s letter does not
20 even provide any proof that the mitigation was not complete.

21 BCDC staff continues to base their allegations on improper hearsay evidence despite
22 claiming that that very same hearsay evidence would be removed. Respondents request that the
23 Enforcement Committee strike the hearsay evidence relied on in Paragraphs R, S, and V.

1 Respondents also object to BCDC staff’s reliance on improper hearsay evidence to
2 support the factual claim that “Respondents’ long-standing violations of the Permit’s public
3 access requirements have resulted in the complete denial and loss of the public access areas and
4 improvements at the Site for an approximately eight-year period, from September 2009 to July
5 2017” and the Recommended Enforcement Decision’s repeated claims of an adverse effect on
6 public access. (Recommended Enforcement Decision, p. 42; Proposed Order, ¶ IV.E.1.) BCDC
7 staff relies only on years-old hearsay (and hearsay within hearsay) from “Laurence Frank,” “Matt
8 Leddy,” and other unidentified “members of the public” who are not witnesses at this
9 proceeding. Respondents therefore request that the Enforcement Committee strike Paragraph
10 IV.E.1. of the Proposed Order.

11 **4. Objections to BCDC staff’s assertions of unverified factual claims**

12 The Recommended Enforcement Decision and the Proposed Order contain many
13 unverified factual claims that are inadmissible statements because they are speculative assertions,
14 improper expert opinion, and not based on any evidence in the enforcement record. Respondents’
15 objections to the factual claims include:

16 Unverified Fact No. 1: BCDC staff repeatedly makes the factual claim that Monterey
17 Cypress and Poplar trees serve as habitats to raptors that allegedly prey on endangered birds.
18 (Recommended Enforcement Decision, pp. 6, 20-21, 23, 43; Proposed Order, ¶¶ II.U, IV.E.3.)
19 Only documents referred to in the VR/C may be relied on by staff to establish a prima facie case,
20 and the VR/C did not refer to any documents supporting this alleged fact. Cal. Code Regs. tit. 14,
21 § 11321(b). The Administrative Record contains absolutely no evidence that Monterey Cypress
22 and Poplar trees serve as habitats to raptors that allegedly prey on endangered birds.¹ BCDC staff

¹ Any supposed evidence relied upon by BCDC staff to demonstrate environmental harm in the VR/C is inadmissible hearsay, as discussed here and in the Statement of Defense.

1 has not established any evidentiary support for this factual claim, and therefore the claim is
2 speculative, unverified, and conclusory. The claim is also an improper opinion because BCDC
3 staff has not established any expertise regarding the habitats of raptors or endangered birds.

4 Unverified Fact No. 2: BCDC staff repeatedly makes the factual claim that the alleged
5 lack of visual barriers between the marina and the salt pond causes disturbance to water birds and
6 affects sensitive habitats. (Recommended Enforcement Decision, pp. 5, 7, 27, 43; Proposed
7 Order, ¶¶ II.B.5, II.T, IV.E.3.) Only documents referred to in the VR/C may be relied on by staff
8 to establish a prima facie case, and the VR/C did not refer to any documents supporting this
9 alleged fact. Cal. Code Regs. tit. 14, § 11321(b). The Administrative Record contains absolutely
10 no evidence that the alleged lack of visual barriers has disturbed water birds or negatively
11 affected sensitive habitats. BCDC staff has not established any evidentiary support for this
12 factual claim, and therefore the claim is speculative, unverified, and conclusory. The claim is
13 also an improper opinion because BCDC staff has not established any expertise regarding the
14 water birds or habitats in question.

15 Unverified Fact No. 3: BCDC staff makes the factual claim that the current shorebird
16 roost habitat does not provide the same functions and benefits for shorebirds as before. BCDC
17 staff further asserts that “there is no way to remove or compensate for the past impacts to
18 wildlife that have results from...the project’s adverse impacts to shorebird roosting habitat.”
19 (Recommended Enforcement Decision, pp. 27-28, 43; Proposed Order, ¶¶ IV.E.3, IV.F.) Only
20 documents referred to in the VR/C may be relied on by staff to establish a prima facie case, and
21 the VR/C did not refer to any documents supporting these alleged facts. Cal. Code Regs. tit. 14, §
22 11321(b). The Administrative Record contains absolutely no evidence that the current shorebird
23 roost habitat does not provide the same functions and benefits for shorebirds, that there have

1 been any negative impacts to wildlife, or that the project has had an adverse impact on shorebird
2 roosting habitat. BCDC staff has not established any evidentiary support for these factual claims,
3 and therefore the claims are speculative, unverified, and conclusory. The claims are also
4 improper opinion because BCDC staff has not established any expertise regarding shorebird
5 roost habitats.

6 Unverified Fact No. 4: BCDC staff makes the factual claim that the alleged lack of buoys
7 and signage results in “significant adverse impacts” to wildlife and sensitive habitats.
8 (Recommended Enforcement Decision, pp. 7, 25-27, 42; Proposed Order, ¶¶ II.B.4, IV.E.3.)
9 Only documents referred to in the VR/C may be relied on by staff to establish a prima facie case,
10 and the VR/C did not refer to any documents supporting this alleged fact. Cal. Code Regs. tit. 14,
11 § 11321(b). The Administrative Record contains absolutely no evidence that there have been
12 “significant adverse impacts” to wildlife and sensitive habitats. BCDC staff has not established
13 any evidentiary support for this factual claim, and therefore the claim is speculative, unverified,
14 and conclusory. The claim is also an improper opinion because BCDC staff has not established
15 any expertise regarding the wildlife and sensitive habits in the marina.

16 Unverified Fact No. 5: BCDC staff makes the factual claim that the alleged lack of buoys
17 identifying a “no wake” zone results in “significant adverse impacts” to wildlife and sensitive
18 habitats. (Recommended Enforcement Decision, pp. 7, 25, 42; Proposed Order, ¶¶ II.B.4,
19 IV.E.3.) Only documents referred to in the VR/C may be relied on by staff to establish a prima
20 facie case, and the VR/C did not refer to any documents supporting this alleged fact. Cal. Code
21 Regs. tit. 14, § 11321(b). The Administrative Record contains absolutely no evidence that there
22 have been “significant adverse impacts” to wildlife and sensitive habitats. BCDC staff has not
23 established any evidentiary support for this factual claim, and therefore the claim is speculative,

1 unverified, and conclusory. The claim is also an improper opinion because BCDC staff has not
2 established any expertise regarding the wildlife and sensitive habits in the marina.

3 Unverified Fact No. 6: BCDC staff makes the general factual claim that “there is no way
4 to recover or compensate for the adverse impacts to listed species and sensitive habitat that have
5 occurred as a result of Respondents’ violations.” (Recommended Enforcement Decision, p. 43;
6 Proposed Order, ¶ IV.F.) Only documents referred to in the VR/C may be relied on by staff to
7 establish a prima facie case, and the VR/C did not refer to any documents supporting this alleged
8 fact. Cal. Code Regs. tit. 14, § 11321(b). The Administrative Record contains absolutely no
9 evidence that there have been adverse impacts to listed species and sensitive habitats. BCDC
10 staff has not established any evidentiary support for the claim that any adverse impacts have
11 occurred, and therefore the claim is speculative, unverified, and conclusory. The claim is also an
12 improper opinion because BCDC staff has not established any expertise regarding the wildlife
13 and sensitive habits in the marina.

14 Unverified Fact No. 7: BCDC staff makes the factual claim that “Respondents’ long-
15 standing violations of the Permit’s public access requirements have resulted in the complete
16 denial and loss of the public access areas and improvements at the Site for an approximately
17 eight-year period, from September 2009 to July 2017.” The Recommended Enforcement
18 Decision also repeatedly asserts a claim of adverse effect on public access. (Recommended
19 Enforcement Decision, p. 42; Proposed Order, ¶ IV.E.1.) The Administrative Record contains
20 absolutely no evidence that there has been a “complete denial and loss of the public access areas
21 and improvements[.]” BCDC staff has not established any evidentiary support for adverse
22 impact, nor any support of alleged “complete denial” of public access areas for eight years.

1 BCDC staff has cited to only five alleged incidents² of public access issues in the span of
2 fourteen years since the permit was granted, an exceptionally low number that does not support
3 an allegedly significant denial of public access. (VR/C, ¶¶ V, Y, X.) Therefore, this factual claim
4 is speculative, unverified, and conclusory.

5 Unverified Fact No. 8: BCDC staff repeatedly makes factual claims about the state of
6 mind of Respondents in allegedly failing to provide public access, such as the claim that
7 Respondents “knowingly and intentionally deceived and misled the public for years by
8 maintaining numerous unauthorized signs around the Site prohibiting public access.” BCDC staff
9 also makes the claim that Respondents “actively prevented and discouraged public access for
10 approximately eight years.” (Recommended Enforcement Decision, pp. 3, 6, 43; Proposed Order,
11 ¶¶ IV.E.2, IV.D, IV.K.). The Administrative Record contains absolutely no evidence that the
12 public access was negatively impacted.³ BCDC staff has not established any evidentiary support
13 for the assertion that public access was negatively impacted. Furthermore, BCDC staff has not
14 established any evidentiary support that Respondents “intentionally deceived” the public in
15 allegedly denying public access. Therefore, these factual claims are speculative, unverified, and
16 conclusory.

17 BCDC staff has presented no evidentiary support for their speculative, unverified, and
18 conclusory assertions of factual claims. Respondents request that the Enforcement Committee
19 strike these factual claims improperly contained in the Recommended Enforcement Decision and
20 the Proposed Order. In addition, Respondents reiterate their denial and objections made in

³ In support of these assertions, staff relies only on years-old hearsay (and hearsay within hearsay) from “Laurence Frank,” “Matt Leddy,” and other unidentified “members of the public” who are not witnesses at this proceeding. Even if this hearsay were admissible, which it is not, BCDC staff has cited to only a handful of alleged incidents of public access issues in the span of fourteen years since the permit was granted, an exceptionally low number that does not support an allegedly significant denial of public access. (See VR/C, ¶¶ V, Y, X.)

1 Respondents' Statement of Defense to BCDC's assertions of untrue or objectionable statements
2 of fact.

3 **5. Objection to BCDC staff's inclusion of alleged requirements by other agencies**

4 Respondents object to BCDC staff including findings in the Recommended Enforcement
5 Decision and the Proposed Order that relate to alleged requirements by other agencies such as
6 the U.S. Army Corps of Engineers and the Regional Water Quality Control Board. (*See*
7 Recommended Enforcement Decision, p. 28; Proposed Order, ¶ X). Such findings are irrelevant
8 in this proceeding. BCDC has no authority to assert violations on behalf of the U.S. Army Corps
9 of Engineers or the Regional Water Quality Control Board.

10 **6. Objection to BCDC staff's improper assertions of Respondents' admissions**

11 BCDC staff has attributed a number of admissions to Respondents that Respondents
12 never made, and such alleged admissions even conflict with Respondents' plain language in the
13 Statement of Defense. These improper assertions of Respondents' admissions include:

14 Improper Assertion No. 1: "Respondents admit that they did not provide access to the
15 Phase 1B public access pathways until July 2017." (Recommended Enforcement Decision,
16 p. 11.) As the basis for this supposed admission, BCDC staff cites to the Statement of Defense
17 51:5-7, which states: "Respondents promptly installed public access and Bay Trail signs around
18 the Phase 3 area after Redwood City authorized Respondents to open the pathways in the area in
19 July 2017." This statement by Respondents does not make the admission that BCDC staff
20 imagines. Rather, Respondents **specifically denied** BCDC's allegations concerning public access
21 pathways in the Statement of Defense 35:15-16. BCDC staff has chosen to willfully ignore this
22 denial, fabricating an admission from which BCDC staff then asserts "Respondents cannot
23 escape their admission that they did not provide access to the Phase 1B public pathways until

1 July 2017.” (Recommended Enforcement Decision, p. 17.) Respondents object to the assertion of
2 this alleged admission in its entirety.

3 Improper Assertion No. 2: “Respondents essentially admit that they did not install public
4 access signs while they were prohibiting access to the required Phase 1B public access areas.”
5 (Recommended Enforcement Decision, p. 22.) Contrary to this claim, Respondents explicitly
6 stated in the Statement of Defense that they maintained a sign near the Harbormaster’s office and
7 installed “future extension of the Bay Trail” signs. (Statement of Defense, 50:11-15.)
8 Respondents object to the assertion of this alleged admission in its entirety.

9 Improper Assertion No. 3: “[Respondents] concede that a reasonable reading of Permit is
10 that this requirement must be met when public boat launch is operational.” (Recommended
11 Enforcement Decision, p. 26.) Respondents object to this alleged admission because BCDC
12 mischaracterizes it as a concession that the public boat launch and all other Phase 1B public
13 access improvements were required by September 2009. *Id.* at 26. Respondents explicitly stated
14 otherwise: that the triggering date was instead July 2017. (Statement of Defense, 59:5-22.)

15 Improper Assertion No. 4: “Respondents admit that there are three floating structures, as
16 alleged by staff, that are used to hold (i.e., store) personal watercraft.” (Recommended
17 Enforcement Decision, p. 31.) Respondents object to this alleged admission because BCDC
18 mischaracterizes it as Respondents’ concession that they were not in compliance. Respondents
19 have stated that they are in compliance because the floats do not constitute fill under
20 Government Code § 66632(a). (Statement of Defense, 82:16-23.)

21 Improper Assertion No. 5: “Regardless of whether the structure is called a fuel dock or a
22 service dock, Respondents admit that they modified the dock in 2014.” (Recommended
23 Enforcement Decision, p. 32.) Respondents object to this alleged admission because it

1 mischaracterizes Respondents' statements. Respondents stated that they "shifted the [dock]
2 opening in the float sections for the future straddle lift bay," and that the "opening of the float
3 sections did not require changes to any permanent structures (i.e., pilings) and remained wholly
4 within the footprint of the dock as set out in the submitted plans." (Statement of Defense, 84:4-
5 13.)

6 Improper Assertion No. 6: "Special Condition II.AA. requires Respondents to provide the
7 Commission verification that Respondents had sent updated nautical charts to NOAA...
8 Respondents admit they failed to send staff the necessary verification timely." (Recommended
9 Enforcement Decision, p. 36.) Respondents object to this alleged admission because
10 Respondents stated they had worked with NOAA staff to submit the required information and
11 satisfy Special Condition II.AA. (Statement of Defense, 98:17-29.)

12 Conclusion

13 For the reasons set forth, Respondents object to the Recommended Enforcement Decision
14 and its attachments. Respondents request that the Enforcement Committee exclude Allegation
15 No. 23 as improperly proposed and strike inclusion of Allegation No. 23 from the Recommended
16 Enforcement Decision, the Proposed Order, and the Revised Penalty Chart; strike the hearsay
17 evidence improperly relied on in Paragraphs R, S, and V of the Proposed Order; strike alleged
18 admissions improperly attributed to Respondents in the Recommended Enforcement Decision;
19 strike unverified factual claims asserted in the Recommended Enforcement Decision and the
20 Proposed Order; and strike findings about alleged requirements by other agencies in the
21 Recommended Enforcement Decision and the Proposed Order.

Dated: November 15, 2017

Respectfully submitted,

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