

SAN FRANCISCO BAY CONSERVATION
AND DEVELOPMENT COMMISSION

COMMISSION MEETING
PARTIAL TRANSCRIPT
ITEM 10

BAY AREA METRO CENTER
375 BEALE STREET
BOARD ROOM, FIRST FLOOR
SAN FRANCISCO, CALIFORNIA

THURSDAY, DECEMBER 6, 2018

3:42 P.M.

Reported by: John Cota

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PROCEEDINGS

3:42 p.m.

CHAIR WASSERMAN: We are back in session and therefore I'm taking my hat off. We have completed the closed session regarding Westpoint Harbor and we did not take a reportable action.

10. Consideration of and Possible Vote on the Enforcement Committee's Recommended Enforcement Decision Regarding Westpoint Harbor; Proposed Settlement Agreement between the Commission and Westpoint Harbor, LLC

That brings us to Item 10, which is Consideration and Possible Vote on the Enforcement Committee's Recommended Enforcement Decision Regarding Westpoint Harbor; Proposed Settlement Agreement between the Commission and Westpoint Harbor, LLC.

The Enforcement Committee's recommendation will be introduced by Greg, Commissioner Greg Scharff, who is Chair of the Enforcement Committee.

COMMISSIONER SCHARFF: Thank you. Our recommended decision was to adopt the Executive Director's Recommended Enforcement Decision which was dated October 26, 2018 and the four attachments to that decision.

CHAIR WASSERMAN: Sorry.

EXECUTIVE DIRECTOR GOLDZBAND (OFF MIC): I apologize, that was my fault.

1 COMMISSIONER SCHARFF: Okay. You don't need me to
2 repeat that, do you?

3 EXECUTIVE DIRECTOR GOLDZBAND (OFF MIC): (Inaudible).

4 COMMISSIONER SCHARFF: That's fine. I just said our
5 recommended enforcement decision was to adopt your
6 recommended enforcement decision. I assume there is no
7 objection to that? (Laughter.)

8 CHAIR WASSERMAN: Marc, will you please make the staff
9 presentation.

10 MR. ZEPPETELLO: Yes. Good afternoon, Commissioners.

11 After the Commission considered this matter on March
12 15th you remanded it to the Enforcement Committee.

13 BCDC staff and Westpoint Harbor engaged in a series of
14 meetings and discussions in an effort to see if we could
15 resolve the matter or at least narrow the issues. We met a
16 number of times and engaged in protracted discussions and
17 slowly but surely one issue after another we did come to an
18 agreement on two documents, one was an amendment to the
19 permit for Westpoint Harbor, which is referred to as
20 Amendment Ten, and the second was a proposed settlement
21 agreement which is before you today.

22 The settlement is a compromise of disputed claims and a
23 lot of issues. It is not necessarily perfect and not
24 necessarily everybody -- I think both sides were not happy
25 with all aspects of it but on balance we think it's a fair

1 and reasonable resolution of the claims.

2 I will touch briefly just on a few points related to
3 Amendment Ten and then summarize the key provisions of the
4 proposed settlement agreement.

5 Amendment Ten is an attachment to the proposed
6 settlement agreement. It has been signed by Westpoint
7 Harbor and also by the Executive Director, issued as a non-
8 material amendment, just as all the prior amendments to this
9 permit; it was only the very original permit in 2001 that
10 was a major permit that was voted on by the Commission.

11 But I would also note that the settlement agreement
12 contains a provision in Paragraph 16 that if the Commission
13 provides comments or recommendations that it believes should
14 be addressed in the permit that the parties will negotiate
15 in good faith to address those concerns.

16 I am not going to go through each and every aspect of
17 the changes that were made in the permit amendment but there
18 were a couple of issues that the Enforcement Committee
19 discussed and asked for some follow-up and so I'd like to
20 address those and then one other issue.

21 One issue was it was unclear at the Enforcement
22 Committee regarding the channel markers and the No Wake Zone
23 signs in Westpoint Slough. Westpoint Harbor submitted a
24 supplemental letter yesterday with documentation on this
25 point and with information -- photographs showing the signs

1 and showing the channel markers and in our view has
2 addressed that concern. I believe that counsel for
3 Westpoint Harbor will show some photographs and address that
4 issue in more detail.

5 The second issue that the Committee asked for some
6 follow-up on was the issue of shorebird roost habitat in
7 what is known as Pond 10 immediately south of Westpoint
8 Harbor.

9 On that, again, Westpoint Harbor in the letter we got
10 yesterday they submitted some documentation, some
11 photographs as well as a letter from an environmental
12 consulting firm, a biologist who talks about both literature
13 review and visual observations from a visit that documents
14 that in fact this remainder of Pond 10 is today providing
15 shorebird roost habitat. And I will let Westpoint Harbor,
16 they will go over that a little bit in more detail and show
17 you some pictures.

18 But I'd like to just give a little bit more background
19 at this point just for the Commission's benefit.

20 The permit requires that shorebird roost habitat be
21 provided as a permit condition to compensate for the loss of
22 some shorebird roost habitat that was lost when the marina
23 was created.

24 In its statement of defense Westpoint Harbor submitted
25 a memorandum from Cargill from 2003 in which Cargill said

1 that they were managing Pond 10 and would manage Pond 10 for
2 birds, they would modify the water levels to address
3 concerns.

4 So after -- when we were going through our negotiations
5 in April we reached out to Cargill, staff did, and --
6 Cargill essentially, in my view, repudiated their position
7 that they had taken in 2003. They said that the memo was
8 not a firm commitment, that they expected Westpoint Harbor
9 to come back and negotiate a further agreement. Which may
10 have been the case but when pushed they went on to say that
11 looking forward they were not willing to make any
12 commitments or enter in any discussions going forward that
13 they would manage Pond 10 in a certain way.

14 So we felt that certainly the proposed penalty for that
15 violation should not be imposed and further that equitably
16 it wouldn't be right to require Westpoint Harbor to look for
17 off-site mitigation. If you look at the permit findings on
18 page 49 and 50 as well as Redwood City's use permit it's
19 clear that everyone envisioned that this mitigation would be
20 provided just south of Westpoint Harbor at this remainder of
21 Pond 10. So that's that issue.

22 The final issue that I'd like to address is dredging.
23 The amended permit authorizes a limited amount of dredging,
24 150,000 cubic yards over a two year period. This is one
25 example of how the resolution of this dispute goes far

1 beyond just resolving the enforcement action. Westpoint
2 Harbor had submitted a dredging application in April of
3 2017.

4 Staff had indicated last November that we felt that an
5 environmental assessment was needed and Westpoint Harbor
6 declined to do that and their counsel submitted a letter
7 disputing our view and saying that they didn't feel that an
8 environmental assessment was required under CEQA.

9 So we went back and forth on that but eventually
10 reached agreement when Westpoint Harbor agreed to
11 substantially reduce the scope of the dredging project. The
12 original project was 500,000 cubic yards over a ten year
13 period. The reduced project that is authorized is 150,000
14 cubic yards over a two year period and so we felt with that
15 change that we were comfortable concluding that that project
16 was categorically exempt under CEQA as a minor alteration to
17 land.

18 I would just comment a number of the comment letters on
19 this have said, well, the original authorization was for
20 50,000 cubic yards a year over ten years, now we're
21 authorizing more than that, 75,000 cubic yards over two
22 years. But as the Commission may know, dredging doesn't
23 really work that way. The original authorization would have
24 authorized three episodes really in Years 1, 5 and 10, for
25 example, of 150,000 cubic yards each time. So this is --

1 what has been approved is one episode of dredging the harbor
2 and the entrance channel out to the main slough.

3 There have been some comments raised on the CEQA issues
4 related to that and all I can say is that we are well aware
5 of those CEQA issues, we carefully examined them, we
6 negotiated and argued with them about them with counsel for
7 Westpoint Harbor and that staff is comfortable that the
8 Executive Director properly determined that this work was
9 categorically exempt under CEQA.

10 I would also like to just briefly come back to the
11 issue of this being a non-material amendment that was
12 approved by the Executive Director.

13 Under the regulations, Section 10822, the Executive
14 Director shall approve a non-material amendment if it is
15 consistent with the Commission's laws and policies and will
16 not result in a material alteration of the project.

17 Here we don't think it was a material alteration of the
18 project because the amendment essentially modifies a number
19 of compliance dates for certain improvements, it makes minor
20 modifications to required public access. But in terms of
21 what is newly authorized, the amendment authorizes some
22 existing small structures, it authorizes relocation of
23 temporary structures associated with 101 Surf Sports, it
24 authorizes 150 cubic yards of fill to improve shoreline
25 appearance where Westpoint Harbor will construct a kayak

1 launch and stabilize an area where there had been a slope
2 failure and it authorizes the dredging as I just discussed.

3 One of the Commission's regulations on what is -- the
4 Commission's reg on what is non-material references two
5 other provisions, one for minor fill for improving shoreline
6 appearance and one of the examples is installation of
7 protective work such as rip-rap, which we think covers the
8 fill for the beach. And then for dredging an administrative
9 permit for new dredging may be authorized if it is less than
10 200,000 cubic yards of fill over ten years.

11 Just as a comparison, in October the staff issued as an
12 administrative permit to the Port of Redwood City a project
13 that would authorize new work dredging of 21,000 cubic yards
14 of new dredging and 200,000 cubic yards of maintenance
15 dredging. Another example from October of this year was to
16 the City and County of San Francisco for 22,000 cubic yards
17 of new work and over 400,000 cubic yards of maintenance
18 dredging. So again we're comfortable that this qualifies as
19 a non-material amendment.

20 Turning to the agreement, just the key terms.

21 One paragraph requires -- Westpoint Harbor agrees that
22 they will comply fully with the permit.

23 There is a provision in paragraph 2 that the
24 enforcement proceedings will be terminated if the Commission
25 approves the agreement. However, I would note that there is

1 a reservation of rights by which BCDC and -- the Executive
2 Director and the Commission reserve the right to take
3 appropriate enforcement action for future violations.

4 As I mentioned, the agreement encompasses much more
5 than resolution of the enforcement action; in particular it
6 resolves some litigation. Westpoint Harbor filed a lawsuit
7 against the Commission a year ago, actually August of --
8 well, that was when they submitted a PRA request, a Public
9 Records Act request. We responded, they felt the response
10 was inadequate and filed a lawsuit which remains pending in
11 San Francisco Superior Court. If the settlement is approved
12 that lawsuit would be dismissed.

13 In August of this year they submitted another set of
14 PRA requests that are very -- there were actually 15
15 separate requests. We have had some meet and confer
16 discussions on those requests but haven't fully, but haven't
17 really responded. We've deferred further discussion pending
18 this hearing but if the agreement is approved that would be
19 withdrawn, we wouldn't have to respond, whereas there is a
20 possibility that that could result in future litigation.

21 The agreement also provides for a joint statement by
22 the Commission and the Executive Director announcing the
23 settlement if it is approved by the Commission and the
24 Executive Director and Westpoint Harbor have, in fact,
25 agreed to a joint statement that will be released if the

1 Commission approves the agreement. The agreement also
2 provides that the parties will agree not to make further
3 public statements relating to the subject matter of the
4 agreement other than the joint statement.

5 So the last topic or the last subject matter in the
6 settlement is the issue of payments. The Enforcement
7 Committee in November of 2017 adopted the prior Executive
8 Director recommendation with a penalty of \$513,000 but also
9 allowed that there could be a possible waiver of 50 percent
10 of that penalty for full compliance.

11 The settlement agreement, under the settlement
12 agreement there would be a penalty -- excuse me, not a
13 penalty. It requires two payments by Westpoint Harbor in
14 the total amount of \$150,000; \$75,000 would go to the Bay
15 Fill Cleanup and Abatement Fund which BCDC would then
16 transfer to the California Coastal Conservancy to be used
17 however they desire, the second \$75,000 would be paid to the
18 Marine Science Institute, who were here earlier today.

19 In terms of the total payment amount: In settlement
20 discussions staff agreed that it would be appropriate to
21 withdraw proposed penalties for certain of the alleged
22 violations where we determined that no further action was
23 required such as the shorebird roost habitat and there were
24 a number of other issues. We also agreed that the penalty
25 or the payment amount should be reduced -- penalties should

1 be withdrawn, violations should be withdrawn, for violations
2 where we had agreed in Amendment Ten to authorize previously
3 unauthorized improvements or to amend the permit in ways
4 that were mutually acceptable.

5 So these payments are somewhat different than is
6 typical in resolving enforcement actions in that although
7 I've misspoke now perhaps twice, the payments are not a
8 penalty. They are not a penalty because first, if the
9 Commission approves the agreement the enforcement action
10 will be terminated, and second, that this is a settlement of
11 disputed claims with no admission of liability.

12 While it is not a penalty it is also not a charitable
13 contribution. Providing for payments rather than imposing a
14 penalty is unusual but it is not unique. In 2012 the
15 Commission entered into a settlement agreement to resolve an
16 enforcement action with an entity called Ford Point LLC and
17 the City of Richmond, which required the payment of a
18 contribution to the Bay Trail project.

19 So in conclusion I would note that many of the comments
20 that have been received on this matter relate to Amendment
21 Ten, but Amendment Ten is not actually before you today.
22 You may have questions about Amendment Ten that you would
23 like staff to address or Westpoint Harbor to address and we
24 are happy to do so, but what is before you today is the
25 proposed settlement agreement. That agreement, as I said,

1 is a compromise of disputed claims and a reasonable
2 resolution of many issues that include but go beyond the
3 enforcement action.

4 Staff's recommendation is to support the Enforcement
5 Committee and their recommendation and that the Commission
6 adopt the proposed settlement agreement between the
7 Commission and Westpoint Harbor. I'm happy to answer
8 questions at the appropriate time and thank you very much.

9 CHAIR WASSERMAN: Thank you, Marc. There may be
10 questions but I think we're going to take public comments.
11 Sorry, I'm sorry, I apologize. Westpoint Harbor, please.

12 MR. VICKERS: Commissioners, I have a slide show so
13 we'll pull that up. (Attempting to bring up slide show.)
14 Technological difficulties are the story of my life so this
15 makes sense.

16 EXECUTIVE DIRECTOR GOLDZBAND: We see it.

17 MR. VICKERS: You do, on your screens, you see it?

18 CHAIR WASSERMAN: Yes, but it needs to be up there too.

19 EXECUTIVE DIRECTOR GOLDZBAND: Just so you know. There
20 it is.

21 MR. VICKERS: All good? So, Commissioners, my name is
22 Kevin Vickers, I'm here with my colleague Navi Dhillon on
23 behalf of Westpoint Harbor. I have just a few high-level
24 points and then I want to address some questions that were
25 raised at the Enforcement Committee meeting last month.

1 Some of this information, in fact all of the information
2 that is in the slide show is in your packets in the letter
3 that Chief Counsel Zeppetello referenced.

4 So high-level points. I'm not going to belabor this
5 but the site is an excellent site. It was named 2018 Marina
6 of the Year for all of North America just a couple of days
7 ago. It is a very impressive facility. I know that at the
8 Commission meeting in March a lot of this was covered so
9 again, I am not going to belabor it, I just want to
10 highlight that that's what we are talking about here.

11 The settlement agreement itself, the proposal before
12 you, it's a path forward. It's certainly not perfect from
13 Westpoint Harbor's point of view, we hotly contest the
14 issues in this case. Nonetheless, with a lot of work that
15 went into this, there were many months of meetings, we dove
16 into the details with staff, we reached a reasonable good
17 faith compromise to get where we are. I think that it is in
18 the public interest to approve this settlement agreement for
19 multiple reasons, not least of which it will conserve BCDC
20 staff resources, it will conserve Westpoint Harbor resources
21 so that both entities can focus on going forward protecting
22 the Bay, having public access for Bay Area communities.

23 To address the two issues that the Enforcement
24 Committee asked about last month:

25 The first one was no wake signage to alert boaters that

1 Westpoint Slough, the area just in front of the harbor
2 there, the channel just in front of the harbor there, is a
3 no wake zone. There are four signs - excuse me - five
4 signs - excuse me - four signs that alert boaters to that.
5 You can see the location of those signs in the orange dots
6 that are there on the map.

7 The other pins are navigational buoys that direct the
8 channel that boats must follow when coming into and leaving
9 the harbor. Those navigational buoys generally direct boats
10 away from Greco Island so not only is there no wake
11 protection, there is also navigation protection to keep
12 boats away from Greco Island.

13 This is a photo of the no wake buoy that is at the
14 intersection between Redwood Creek and Westpoint Slough.

15 This is a close-up of that same buoy.

16 I will note that there's two protections here. Number
17 one, there is a speed limit of 10 miles per hour. That is
18 set by Redwood City ordinance and it applies to all sloughs
19 within Redwood City jurisdiction. Number two, there is a no
20 wake limitation. Boats cannot violate either of those two
21 restrictions.

22 This is a photo of the no wake zone sign that is
23 located at the entrance to the marina.

24 This is a photo of the second no wake sign located very
25 near that first one at the entrance to the marina.

1 This is the third, same text, no wake zone sign.

2 This is a photo of the sign that's located at the boat
3 launch ramp where boats that are sometimes guests, sometimes
4 regular users of the marina, can launch from a trailer. The
5 sign contains several bullets but two that are of particular
6 relevance here say Westpoint Channel is a no wake zone and
7 it says public access is restricted on Greco Island.

8 This is a quote, and again, this is in the packet of
9 information you all have. This is a quote from the binding
10 contract that all boaters that have a slip at Westpoint
11 Harbor have to sign. It says that Westpoint Slough is a no
12 wake zone and it says that boaters must not approach Greco
13 Island. Again, violation of this is grounds for termination
14 of your slip rights at Westpoint Harbor.

15 The second issue that the Enforcement Committee asked
16 Westpoint Harbor to provide some information about was the
17 Pond 10 area south of Westpoint Harbor and whether it was
18 functioning as shorebird roost habitat.

19 This is just an overview, it shows where the Pond 10
20 area is, it's that large section that is partly underwater
21 and has some dry areas just south of the marina. There is a
22 report that details this and has many more photos but here
23 is a photo of - it's hard to say exactly how many - hundreds
24 of shorebirds roosting in Pond 10. This was a video that I
25 was going to play that showed shorebirds foraging and

1 roosting in Pond 10, but unfortunately, as I mentioned, I
2 have a lot of technological difficulties in my life and this
3 is one of them, it just appears as a photo. (Laughter.)

4 The same, another photo, shorebirds roosting in Pond
5 10. Again, there's more in the packet of information that
6 was provided.

7 We wanted to make sure there was no doubt that Pond 10
8 served as roost habitat so in addition to having the
9 photographic evidence of birds actually using it to roost we
10 commissioned a consultant to go out there and do an
11 assessment. The conclusion from the report is that Pond 10
12 continues to provide roost habitat for shorebirds adjacent
13 to Westpoint Harbor Marina.

14 That's it. I wanted to make sure that we addressed the
15 Enforcement Committee's requests completely. If you have
16 any questions we're available as a resource. We urge you to
17 adopt the recommended settlement. Again, it will conserve
18 resources, it will put us on the right path going forward;
19 Westpoint Harbor and BCDC can hopefully be partners in
20 public access and protection of the Bay.

21 CHAIR WASSERMAN: Thank you.

22 We will now hear from the public. I am going to start
23 with Arthur Feinstein and Brian Gaffney from the Sierra
24 Club. Gentlemen, I'm going to give you collectively eight
25 minutes, you may divide it up any way you like.

1 MR. GAFFNEY: Commissioners, Brian Gaffney for Citizens
2 Committee to Complete the Refuge.

3 The last time this matter was before you in March there
4 was a \$513,000 proposed penalty because of past historical
5 non-compliance with the permit conditions.

6 In October 26 we got notice that in ten days it would
7 be before the Enforcement Commission and things had
8 drastically changed. Now Permit Ten through an amendment
9 allows a helicopter pad to be installed, a 2600 square foot
10 helicopter. There will be elimination of the requirement
11 for three acres of Pond 10 mitigation, the mitigation is
12 gone. There will be elimination of a requirement to build a
13 fence on the south side. That requirement no longer stands
14 after all these years.

15 In addition the wake signage that you saw there allows
16 a -- it says 10 miles an hour. And there had been a
17 condition as well that there be buoys up 100 feet from Greco
18 Island and that's been eliminated.

19 In addition dredging will happen. Dredging which was
20 never permitted, dredging which Fish and Wildlife Service
21 commented when this installation was built in 2001 and 2002,
22 they recommended against it because of the environmental
23 impact.

24 So under the California Environmental Quality Act the
25 project is the whole of the action, so these are the

1 components of the action.

2 This is not a non-material or administrative amendment,
3 and the reasons for that are because of the significant
4 environmental impact your regulations say it's not. Because
5 it will modify existing permit conditions it cannot be a
6 non-material administrative permit and it is going to reduce
7 the public benefits because of the environmental impacts.

8 Now, location is important. In a categorical exemption
9 location matters and here you are right across from Greco
10 Island. We know that in the water there's endangered
11 species including long fin smelt, there's salmonids. We
12 know that there is the salt marsh harvest mouse which is
13 endangered of extinction, there is the clapper rail now
14 called Ridgway's rail, and there's the Least Tern.

15 And so under CEQA there needs to be environmental
16 review. Here we don't even know the basic elements. What
17 dredging will occur where we'll be told afterwards. What
18 the baseline is of what's out there, from information back
19 to 2006, will be in a report after the dredging happens.
20 And any environmental analysis, which has never happened,
21 this dredging project has never been looked at for its
22 environmental impacts, will happen after the fact.

23 And so the proper course of action here is for this
24 Commission to follow its own regulations and CEQA and that
25 would require that the applicant get all the local

1 discretionary permits before he approaches BCDC. That this
2 go out to all the state and federal resource agencies and
3 come before the Commission, and that there be an
4 environmental assessment of these serious impacts because of
5 the sensitive habitat area.

6 I could go on further. In fact, one point I might make
7 is that the helicopter pad, the enforcement decision said
8 that it was going to be justified because the helicopters
9 were going to be used to eradicate the Spartina weed. In
10 your packet there is a letter from the Coastal Conservancy
11 that said, no, we're not using helicopters, in 2016 we
12 stopped that. So we don't know what's causing this but this
13 is a big problem in your regulations and the McAteer-Petris
14 Act is not being followed.

15 CHAIR WASSERMAN: Thank you, sir.

16 MR. FEINSTEIN: Chairman and Commissioners, hi, I am
17 Arthur Feinstein and I am representing the Citizens
18 Committee to Complete the Refuge and also the Sierra Club.

19 At the enforcement hearing David Lewis made this
20 amazing statement to me -- to you. It was amazing because
21 it was so strong. But he was saying, this is an entity --

22 Well let me start of first, I've been coming to BCDC
23 for 30 years, 40 years. Trusted BCDC. Of all the agencies
24 to actually do something good for the Bay, and you used to,
25 no more after this because you've given away the store. But

1 David Lewis said, well, what's happened here, you have an
2 applicant to is willing to spend God knows how much money on
3 how many lawyers, it must be seven or eight, to plague you
4 constantly, has made numerous PRA requests and has sued over
5 that, has gone to Sacramento and you now have an audit
6 going, and you've turned tail and run away. And that's how
7 you're viewed here by any environmentalists you talk to.

8 And what we're expecting to see after this is that
9 anybody who has money is going to say, hey, BCDC is easy,
10 I've got lawyers, I've got political pull, we just threaten
11 them, bip, we've got our whole permit. And what did you do?
12 You gave them everything they wanted and the Bay gets
13 nothing.

14 Pond 10, nobody paid for anything. Cargill was just
15 using it as it was and now they've told you that they're not
16 going to manage it for the mitigation so, you know, all
17 those shorebirds in those pretty pictures, five years no
18 more, and you've got nothing you can do about it. So as
19 mitigation, you know, it's pathetic, it doesn't really
20 exist. It's just what is going to happen there and you have
21 no say in it.

22 The wake. Ten miles an hour you get a heck of a lot of
23 wake. Five mile an hour is what usually is asked in a no
24 wake zone. Why depend on Redwood City, who knows, but think
25 about where you are. Greco Island is one of the richest

1 resources in the entire Bay, one of the densest population
2 of clapper rails, it's got salt marsh harvest mouse, we've
3 got harbor port seals. I mean, the number of listed species
4 that is in that area is immense and wake causes a real, real
5 problem to wetlands and marshes.

6 Now when the marshes erode, which is what wake does,
7 not only is it destroying the marsh but there's lots of
8 studies now about greenhouse gases and how tidal marshes
9 sequester carbon. When they erode they release that carbon.
10 So by this permit you're actually encouraging greenhouse
11 gases because it is eroding now, you've seen the paper, I
12 think you have, that shows that Greco Island is actually
13 eroding as a result of wakes. Five miles an hour.

14 When the enforcement hearing came up there were no
15 signs out at the head of the channel. We brought that up.
16 We brought a picture that said - you could see, Baykeeper
17 took it - no buoy. That was part of the permit. Now you're
18 saying, permittee says he will fulfill all obligations.
19 This permittee has not fulfilled any of his obligations for
20 15 years and now you're giving him another shot and saying,
21 and we're not going to be able to do anything about it.

22 (Tone sounded.)

23 MR. FEINSTEIN: You can guess what I'm urging you to do
24 which is, do not accept this settlement, thank you.

25 COMMISSIONER VASQUEZ: I have a comment to the speaker.

1 First of all, sir, I don't know you and you don't know me.
2 But to characterize my decision as a coward, I don't
3 appreciate that at all.

4 MR. FEINSTEIN: Okay, you've --

5 CHAIR WASSERMAN: Wait, wait. We are not -- we are
6 not going to engage in dialogue, I'm sorry. I understand
7 the importance and force of your feeling. Arthur, we are
8 not going to engage in dialogue.

9 MR. FEINSTEIN: Okay.

10 CHAIR WASSERMAN: Thank you, sir.

11 MR. FEINSTEIN: I'm happy not to.

12 CHAIR WASSERMAN: Thank you.

13 The next speaker is Helen Wolter.

14 MS. WOLTER: Good afternoon, I'm Helen Wolter, I'm with
15 the Committee for Green Foothills.

16 CHAIR WASSERMAN: Okay.

17 MS. WOLTER: Hi, Helen Wolter with the Committee for
18 Green Foothills, thank you for your consideration on this
19 topic today.

20 I have been watching this issue for some time. We
21 recognize that it is a contentious issue, we realize that.
22 However, we are concerned by the environmental precedent
23 that would be set with this agreement. And I realize that
24 it is a compromise and everyone loses something in a
25 compromise, but to disregard CEQA does set quite a negative

1 precedent, particularly with the helicopter pad.

2 Shorebirds, the shorebirds that are on Greco Island and
3 how close, when you actually Google Map the helipad and see
4 how close it is to Greco Island, it's like your next door
5 neighbor, basically, you know, when they put up the fence
6 and you're cranky about the fence. Unfortunately Greco
7 Island doesn't have -- their birds can't come to the
8 meetings. And these birds are four ounce fluff balls. You
9 know, they're trying to gain weight to migrate and to breed.
10 So we need to make sure that, you know, that in a compromise
11 that the birds are protected as well so things like a
12 helipad should definitely be mitigated in some way or
13 removed.

14 You know, the other issues I'm concerned about for
15 precedent with any development coming into the Bay. You
16 guys understand that developers watch and see what they can
17 do and so to ignore CEQA in a compromise could set a
18 dangerous precedent. Thank you for your time.

19 CHAIR WASSERMAN: Thank you.

20 Sonya Boggs.

21 MS. BOGGS: Hello. I just want to thank the BCDC and
22 Westpoint Harbor for their efforts to reach a resolution. I
23 actually came today just to say that I wanted to voice my
24 support of the proposed settlement agreement without
25 modification but I would like to take this opportunity just

1 to clarify one thing that seems to be confusing people based
2 on the no wake zone and the ten mile per hour buoy.

3 When you're a mariner a no wake zone means that you
4 cannot exceed a speed that creates a wake, so for most
5 people they'll never exceed five miles per hour if they're
6 in a large boat because that means they're creating a wake
7 and therefore in violation. As Mr. Vickers tried to point
8 out, that sign is actually telling mariners two things, not
9 just that it's a ten mile per hour speed limit. Thank you.

10 CHAIR WASSERMAN: Thank you.

11 Doug Furman.

12 MR. FURMAN: Good afternoon, Commissioners. My name is
13 Doug Furman, I'm a harbormaster at Westpoint Harbor. This
14 has been a long process and I think it's time to put these
15 issues behind us. I would encourage you to support the
16 recommended settlement, thank you.

17 CHAIR WASSERMAN: Thank you, sir.

18 Bob Wilson.

19 MR. WILSON: Thank you. I'm Bob Wilson, co-founder of
20 the San Francisco Bay Stewardship Alliance. The Alliance
21 promotes informed conservation and responsible development
22 of the San Francisco Bay shoreline for the enjoyment of all
23 today and for future generations.

24 A great 20th Century philosopher said, sometimes you
25 can't get everything you want but sometimes you can get what

1 you need. (Laughter.)

2 The Alliance recommends that the Commission adopt the
3 Westpoint Harbor settlement as is because we need it. We
4 need it as a community, we need it for our environment. It
5 is not in the public's interest, it's not in the
6 environment's interest to continue the dispute nor to
7 further delay and even more wasted resources by making any
8 modifications to this agreement.

9 Both sides, both sides have worked in good faith since
10 the last time we were here and they have found an equitable
11 resolution. The proposed contributions to the nonprofits
12 shouldn't be ignored. This agreement is a creative way to
13 ensure both the environment and our community benefit
14 directly from this settlement.

15 We would also like to thank the Friends of Westpoint
16 Harbor and the over 5,300 people who signed their petition
17 calling for an end to this disagreement.

18 The Alliance also wants to thank Dave Pine, who has
19 left, for helping bring both sides to the table. His
20 leadership helped break the deadlock and hammer out a fair
21 settlement.

22 The Alliance also wants to thank the staff, the BCDC
23 staff, for working with Mr. Sanders and Westpoint Harbor
24 over many months to create this solution. The dispute has
25 dragged on for far too long, costing millions of dollars to

1 be needlessly wasted in private and public funds. It is
2 time now to move forward and for both sides to focus on
3 continuing their good work to improve the San Francisco Bay
4 Estuary, the public's access to it, for now and for
5 generations to come. Thank you.

6 CHAIR WASSERMAN: Thank you, sir.

7 Maureen O'Connor Sanders.

8 MS. O'CONNOR SANDERS: BCDC Commissioners, thank you
9 for this opportunity. I am Maureen O'Connor Sanders; my
10 husband Mark Sanders owns Westpoint Harbor.

11 Last March the Commission tasked BCDC staff and
12 Westpoint Harbor with a seemingly insurmountable task, work
13 together to resolve longstanding permit errors and
14 inconsistencies and alleged permit violations.

15 BCDC staff and Westpoint Harbor met for the past nine
16 months to do just that. I was invited to sit in and did so
17 at most but not all of the meetings. The process was very
18 challenging. The actual meetings, of course, but also
19 trying to understand each issue, the other's point of view
20 and supporting evidence. Hundreds of hours have been spent
21 researching the permit details, BCDC-Westpoint Harbor
22 history, documents, time lines, CEQA, federal state and
23 maritime law and the onsite marina facility itself.

24 These people, the BCDC and Westpoint Harbor teams,
25 understand the big picture and the minutiae better than

1 anyone else in this room. I believe they should be thanked
2 and congratulated on crafting an amendment and settlement
3 agreement that provides a framework for moving forward
4 productively. God knows, both parties have better things to
5 do with their time and resources than to dwell on problems
6 that they've resolved.

7 I ask that the Commissioners pay most attention to,
8 give most credence to, the BCDC staff and Westpoint Harbor
9 team's input. They are saying the impasse was not
10 insurmountable and they did what they were asked to do.
11 They crafted Amendment Ten that clears up and cleans up the
12 permit and a settlement agreement that both parties can live
13 with and move forward. Please vote to approve the agreement
14 without modification or delay. There is nothing to be
15 gained by snatching defeat from the jaws of victory. Thank
16 you.

17 CHAIR WASSERMAN: Thank you.

18 Peter Blackmore.

19 MR. BLACKMORE: Chair Wasserman, Commissioners, thank
20 you for your time. I am Peter Blackmore, one of the co-
21 founders of the San Francisco Bay Stewardship Alliance,
22 you've heard from Bob our role.

23 The Alliance firmly recommends the Commission adopt the
24 Westpoint Harbor settlement without modifications.

25 As you've heard, both parties have spent many months

1 and millions of dollars getting to this point. In the case
2 of Westpoint, over \$1.4 million from them, it's a huge
3 amount of money. In addition, both sides worked diligently
4 since the Enforcement Committee hearing a month ago to
5 review the few items that were raised there. People have
6 been working very hard. Our view is it clearly is not in
7 the public's interest to continue this dispute which would
8 cause obviously further unnecessary delay and further cost.

9 Importantly I would remind everyone that Westpoint
10 Harbor is a model marina with the highest standards to
11 protect the environment. We encourage anyone who thinks
12 differently to visit the marina and see for themselves.

13 The fact the marina was just presented with the
14 prestigious North America Harbor of the Year award this week
15 speaks volumes. That is an award which is fought over very
16 hard. And please note that environmental standards are the
17 key criteria of many in this award.

18 The Alliance thanks the BCDC staff and Mr. Sanders and
19 the Westpoint Harbor team for the work over the many months
20 to create the settlement. It is now time to move forward
21 and for both sides to focus on continuing to improve the
22 whole estuary.

23 The Alliance urges you to approve this settlement
24 without further delay and without any change. Thank you
25 very much for your time.

1 CHAIR WASSERMAN: Thank you, sir.

2 John Zucker.

3 MR. ZUCKER: Good afternoon. I'm John Zucker and I'm
4 with Friends of Westpoint Harbor.

5 I'll say I had the same ten days to read that document
6 that everybody else had and I thought it was pretty
7 creative. There were some new twists in there that I hadn't
8 seen before and I thought the whole thing was very
9 reasonable. It represented quite a good work product
10 between Westpoint Harbor and your staff and I think they
11 should be commended on the work that they did and thank you
12 very much for all that.

13 Regarding the roosting habitat. We've seen a lot of
14 evidence that a contractual provision for replacement
15 habitat is not necessary. If the habitat, or anything else
16 for that matter, becomes a problem in the future I think we
17 have a newfound spirit of cooperation that we can rely on
18 that can be addressed by BCDC and Westpoint Harbor working
19 together to handle just about anything that comes up. We
20 don't need to make a provision for every little thing in
21 every contract that we make.

22 In the meantime I agree with Maureen. You instructed
23 the Enforcement Committee and Westpoint Harbor to go back to
24 the drawing board and come to a compromise and they did
25 that, they produced a work product known as Amendment Ten.

1 We have agreement. We hope you will acknowledge it today by
2 accepting Amendment Ten as it is. Thank you.

3 CHAIR WASSERMAN: Thank you, sir.

4 The last speaker is Kenneth Parker. Mr. Parker?

5 MR. PARKER: As you may guess I'm a little more
6 comfortable behind the camera than out here.

7 What I'd like to start with is a video because Kevin
8 couldn't show his. And this is roosting habitat, this year,
9 at Pond 10.

10 (A video was shown.)

11 MR. PARKER: I just wanted that to be fairly short and
12 sweet but just this is current, as it exists, roost habitat
13 at Pond 10. I won't go into detail about, you know,
14 crawling through the mud to get the close-up of the bird,
15 I'll leave that one alone.

16 But realistically, for the last 15 years Pond 10 has
17 been this way. And the roost habitat exists now. And if I
18 understand this process correctly, and I'm sure you guys
19 would correct me if I'm wrong, if there is going to be a
20 permit issued for the remainder of Pond 10 will they not
21 have to get permission from you to do it? So that you, in
22 fact, the BCDC Commissioners will be the ones who decide
23 whether or not they must then have mitigation for the entire
24 Pond 10 anyway. So it exists now. If they're going to
25 change it they have to get your permission to do it.

1 There is one other factual point that some other people
2 brought up - and I'm a detail-obsessed specifist, I
3 apologize - but the helipad that everybody is so upset over,
4 that's not at Westpoint Harbor. That's on Cargill property,
5 not Westpoint Harbor, Mark doesn't own that. So that was my
6 brief bit.

7 I said this at the enforcement hearing and I think it
8 deserves to be said again which is, last March you guys
9 charged the Enforcement Committee and enforcement staff with
10 a task. You said, go back, fix this, find a solution, get
11 the job done. They took you at your word. They went out
12 and they did it.

13 (Tone sounded.)

14 MR. PARKER: So I think that's laudable. And I just
15 want to thank all of you for your service because this is
16 how our government works and I appreciate it.

17 CHAIR WASSERMAN: Before entertaining Commissioners'
18 questions I want to make a couple of things clear both to
19 the public and to the Commission.

20 MR. ZEPPETELLO: Close the public hearing?

21 CHAIR WASSERMAN: I'm sorry?

22 MR. ZEPPETELLO: Close the public hearing?

23 CHAIR WASSERMAN: There is no public hearing.

24 MR. ZEPPETELLO: Oh, that's right.

25 CHAIR WASSERMAN: And if we should have had a public

1 hearing you let me blow it. (Laughter.)

2 I want to make a couple of things clear. One, the
3 issue before the Commission this afternoon is the
4 recommendation of the Enforcement Committee, not Amendment
5 Ten which has been issued.

6 Two, the settlement agreement, which is part of the
7 Enforcement Committee's recommendation, does call for
8 potential comments from the Commission on Amendment Ten. I
9 want to divide our discussion this afternoon and focus first
10 on the action on the recommendation; and once we have taken
11 that then if there are comments that people wish to make
12 today on Amendment Ten, to do so. This is not the last
13 opportunity to do that and there are a number of forums to
14 do that.

15 The other thing I would like to do before we open it to
16 the Commission to ask questions is to be clear about what
17 our choices of action are this afternoon because they are
18 fairly limited in this context of a recommendation from the
19 Enforcement Committee. Take it away, David.

20 MR. ALDERSON: David Alderson with the California
21 Attorney General's Office.

22 You have several options today. The first one is you
23 can adopt the Enforcement Committee's Recommended
24 Enforcement Decision without any change; two, you can just
25 dismiss this whole proceeding entirely; three, you can

1 remand the matter to the Enforcement Committee for further
2 action as you would direct; and four, you can reject the
3 Recommended Enforcement Decision and decide to consider the
4 entire matter de novo, presumably at a later date.

5 CHAIR WASSERMAN: Presumably.

6 MR. ALDERSON: Those are the options.

7 CHAIR WASSERMAN: I will now entertain questions from
8 the Commission. I'm going to start from the right this time
9 just to be different. There are none. There is one,
10 Commissioner Nelson.

11 COMMISSIONER NELSON: Just trying to clarify. I hear
12 you, Chair Wasserman, and I just want to make sure that I
13 have the right issues in the right buckets.

14 So Mr. Gaffney and some of the folks testifying have
15 talked about dredging and impacts regarding to Greco Island,
16 wake issues, issues about fencing and about the helicopter,
17 those are laid out in Mr. Gaffney's letter.

18 My understanding is that those are all related to the
19 amendment, not to the settlement. I just want to make sure
20 that those issues, you're bifurcating our discussion here
21 and those issues are -- I have comments but I'm going to
22 hold off on those, right?

23 CHAIR WASSERMAN: I appreciate that. My answer is yes
24 but I would defer to an attorney representing us.

25 MR. ZEPPETELLO: That's correct.

1 CHAIR WASSERMAN: Thank you.

2 COMMISSIONER NELSON: The second issue that I'm less
3 clear about and that is exactly who is responsible for the
4 ongoing management of Pond 10, of the roosting habitat? Is
5 that --

6 CHAIR WASSERMAN: That's a second bucket question.

7 COMMISSIONER NELSON: Okay. Then my first comment
8 on -- and my only comment on the settlement, the first half
9 of this discussion, is that my instincts honestly are that
10 this enforcement action, these violations have gone on for
11 so long that my instincts are to ask staff to proceed,
12 frankly, pretty aggressively. There are -- once a decade or
13 so we see a violation that takes a long time to resolve and
14 I am really concerned about that. Our permits are only as
15 good as the enforcement of those permits. So my instincts
16 are that we should be very aggressive in enforcing a
17 violation that goes on so long. That said, I am going to
18 wait for the discussion to decide how to vote on the motion.

19 CHAIR WASSERMAN: Any other comments or questions?

20 COMMISSIONER SCHARFF: Is it time for a motion?

21 CHAIR WASSERMAN: Sure.

22 COMMISSIONER SCHARFF: I'll move that we approve the
23 Enforcement Committee's decision.

24 COMMITTEE MEMBER TECHEL: Second.

25 SPEAKER: Moving to approve or adopt?

1 COMMISSIONER SCHARFF: Adopt, adopt is the correct
2 word.

3 CHAIR WASSERMAN: Any discussion on the motion? Well
4 just so we don't disappoint Commissioner Nelson. I
5 certainly share Commissioner Nelson's concern. This is
6 obviously, as a number of the speakers have said, a very
7 difficult situation. It is not a situation in which fault
8 is only on one side, you don't get settlements when that's
9 the case. I want to recognize and say that certainly for me
10 and my vote, which will be to support the motion, the
11 efforts of staff - who I do not believe are 100 percent
12 thrilled with this - and you've heard the applicant's
13 representative say that the applicant is not 100 percent
14 thrilled with this. I also want to note the very
15 significant efforts of Commissioner Pine to bring resolution
16 to this, so strenuous that the lawyers decided he couldn't
17 participate in the actual decision, a position I do not like
18 I will say for the record, and the efforts of the
19 Enforcement Committee.

20 I agree that compromises are not satisfactory to
21 everybody and they are not fully satisfactory to everybody.
22 I think this is a time where this compromise is appropriate
23 and so I will be supporting the motion.

24 Any other comments?

25 COMMISSIONER McGRATH: For those of you who don't know,

1 I am not only a boater/windsurfer I represent windsurfers
2 and I actually reported this violation from a complaint that
3 I got many years ago. I'm not happy that it took eight
4 years after construction started for public access for those
5 that I work with to finally be realized but now that it has
6 I am going to support this. There is a significant dis-
7 incentive here fiscally in the amount of work. It may not
8 be what I would have voted for or argued for on the
9 Enforcement Committee, but given a choice -- and I remember
10 very clearly the last time this was before, I thought the
11 staff was over-reaching in some areas where -- the areas
12 where I did agree they weren't in compliance with the
13 permit. But it didn't matter all that much and I think
14 there have been significant concessions on that.

15 I think now that the public access is open, that's the
16 main goal. So for those reasons and the fact that there is
17 a significant economic penalty for having gone on - not as
18 significant as I would have argued for so maybe you never
19 want me on the Enforcement Committee even though I'm a
20 boater - because there might have been higher payments if
21 not a penalty.

22 Nonetheless I think it's important to put this behind
23 us and for that reason I'll support the work of my fellow
24 commissioners.

25 CHAIR WASSERMAN: Hearing or seeing no other hands --

1 hearing no other comments and seeing no other hands, call
2 the roll, please.

3 MS. ATWELL: Commissioner Addiego?

4 COMMISSIONER ADDIEGO: Yes.

5 MS. ATWELL: Commissioner Butt?

6 COMMISSIONER BUTT: Yes.

7 MS. ATWELL: Commissioner Gilmore?

8 COMMISSIONER GILMORE: Yes.

9 MS. ATWELL: Commissioner Scharff?

10 COMMISSIONER SCHARFF: Yes.

11 MS. ATWELL: Commissioner Gorin?

12 COMMISSIONER GORIN: Yes.

13 MS. ATWELL: Commissioner Pemberton?

14 COMMISSIONER PEMBERTON: Yes.

15 MS. ATWELL: Commissioner McGrath?

16 COMMISSIONER McGRATH: Yes.

17 MS. ATWELL: Commissioner Peskin?

18 (No response.)

19 MS. ATWELL: Oh-oh.

20 CHAIR WASSERMAN: Absent.

21 EXECUTIVE DIRECTOR GOLDZBAND: You just missed him.

22 You just missed him.

23 MS. ATWELL: Okay, hold on. Commissioner Nelson?

24 COMMISSIONER NELSON: Yes.

25 MS. ATWELL: Commissioner Randolph?

1 COMMISSIONER RANDOLPH: Yes.

2 MS. ATWELL: Commissioner Showalter?

3 COMMISSIONER SHOWALTER: Yes.

4 MS. ATWELL: Commissioner Vasquez?

5 COMMISSIONER VASQUEZ: Yes.

6 MS. ATWELL: Commissioner McElhinney?

7 COMMISSIONER McELHINNEY: Yes.

8 MS. ATWELL: Commissioner Techel?

9 COMMISSIONER TECHEL: Aye.

10 MS. ATWELL: Commissioner Holzman?

11 (No response.)

12 CHAIR WASSERMAN: Absent.

13 MS. ATWELL: Okay. Vice Chair Halsted?

14 VICE CHAIR HALSTED: Yes.

15 MS. ATWELL: And Chairman Wasserman?

16 CHAIR WASSERMAN: Yes.

17 MS. ATWELL: Fifteen votes yes.

18 CHAIR WASSERMAN: The motion passes. The
19 recommendation of the Enforcement Committee is adopted.

20 (Applause.)

21 We are going to postpone Item 12, the briefing on
22 Environmental Justice Bay Plan Amendment to our first
23 meeting in January.

24 I apologize. Now we can deal with the second bucket.
25 It is late, this is not your only opportunity, but if there

1 are comments or questions that you feel you want to make at
2 this time regarding the amendment that has been issued that
3 would be appropriate.

4 COMMISSIONER McGRATH: I do have one fairly brief
5 comment. I was concerned not about the narrowing of the
6 pathway, because very often a ten foot path can be narrow,
7 but the combination of narrowing a pathway and allowing
8 public utilities within it. I reread and I found under
9 Condition 15 the utilities within the public access area
10 that there is a limitation to the encroachment of 20
11 percent. So I want you guys to make sure that that occurs
12 and also as a practical matter make sure that there aren't
13 conflicts. It depends on heavy use. So that's something
14 that can be weighed if there are any other further
15 amendments if we might have to make an adjustment but at the
16 moment I'm assured that there is a protection for access on
17 that.

18 CHAIR WASSERMAN: Commissioner Nelson.

19 COMMISSIONER NELSON: Two questions for staff. The
20 first is, Mr. Gaffney's letter raises issues, concerns about
21 the categorical exemption on the amendment with regard to
22 helicopter, fencing, the wakes, dredging.

23 CHAIR WASSERMAN: Barry, can I hold?

24 Wait, Susan. Sorry, before you leave. We are going to
25 continue the comments but I am going to formally ask for the

1 motion to adjourn the meeting so that we have enough votes
2 to do so.

3 COMMISSIONER SCHARFF: So moved.

4 CHAIR WASSERMAN: We have a motion from Commissioner
5 Scharff.

6 COMMISSIONER NELSON: Second.

7 CHAIR WASSERMAN: Commissioner Nelson seconds. All
8 those in favor say "aye."

9 (Ayes.)

10 CHAIR WASSERMAN: All those opposed "no."

11 (No response.)

12 CHAIR WASSERMAN: And the abstentions can stay. But we
13 are going to stay for a couple more comments. Thank you,
14 Susan.

15 COMMISSIONER GORIN: Thank you.

16 CHAIR WASSERMAN: Go ahead, Barry.

17 COMMISSIONER NELSON: First, Marc, when you spoke about
18 the exemption you raised the issue -- raised examples of
19 other dredging permit applications that have been granted
20 administratively. Frankly, the applicant is correct, that
21 dredging in one area -- I'm sorry, the folks who testified
22 today are correct, dredging in one area may have very
23 different impacts from dredging in a different area. So can
24 you clarify for us staff's position with regard to the
25 categorical exemption concerns that Gaffney raised? Not

1 just with regard to dredging in general but dredging in this
2 location and helicopter, wakes, et cetera.

3 MR. ZEPPETELLO: Yes, I'll try to do that and if I
4 leave something out you can remind me.

5 In terms of the dredging, when we were arguing that the
6 project was not categorically exempt one of the things that
7 we did take into account was the location and the proximity
8 to the refuge. So we were concerned about that and we were
9 aware of that but again, we felt that with the reduction in
10 the scope of the project --

11 And also I didn't mention but it's in the packet that
12 the consultant for Westpoint Harbor, Anchor QEA, they
13 submitted a memorandum where they did an air photo analysis
14 of the shoreline of Greco Island over the time from before
15 the harbor was created until the present and came to the
16 conclusion that the operation of the harbor had not had any
17 impact. That the creation of the harbor and the dredging
18 that was associated with that at the time had not had any
19 impact.

20 You know, it's ultimately -- we believe it was within
21 the discretion of the agency and the -- you know, we did
22 take that into account. We are aware of the refuge next
23 door and that was part of our concern with the larger
24 project but we felt that it was addressed.

25 You know, another issue that is in the special

1 conditions that I didn't mention is that Westpoint Harbor
2 has agreed to do three years of data collection post-
3 dredging, bathymetric surveys and air photo analysis and to
4 prepare a report. Our thought was that that information
5 will be more useful probably than theoretical modeling.
6 When another request for dredging is raised in the future
7 we'll have some real information based on a study and a
8 report. So that's with respect to the dredging.

9 The fencing, actually I think that Mr. Gaffney is
10 incorrect. There is an authorization for fencing and it may
11 have been required by Westpoint Harbor but it was not
12 required by our permit. And in fact, one of the issues that
13 is resolved by this is that we had been -- one of the
14 alleged violations was failure to install a visual barrier
15 between the parking lot of the marina and the salt pond and
16 Westpoint Harbor has agreed to do that and that's shown in
17 the landscaping plans that are now an amendment to the
18 permit and there is a commitment and an obligation to do
19 that within eight months of the date of the permit.

20 The no wake zone, that was a -- there was a requirement
21 in the original permit to install buoys for a no wake zone.
22 What the amendment authorizes is signage instead of buoys.
23 The channel markers, the red and the green channel markers,
24 are placed, as you may remember from the photographs, well
25 to the -- they're closer to the Pacific Shores and Westpoint

1 Harbor side of the slough. So just by the nature of how
2 they're placed they keep the boats farther away from there.
3 Our view is that the signage accomplishes the same
4 objectives as the buoy system under the original permit.

5 With respect to the buoys warning people to stay away
6 from Greco Island, there had been signage. Mr. Sanders had
7 provided evidence that they installed signs. There was
8 evidence that the signs had disappeared. But in the
9 negotiations we approached the refuge folks and they agreed
10 that reinstalling the signs would be an acceptable option
11 and in their letter they say that they have been in touch
12 with Westpoint Harbor about reinstalling those signs in the
13 coming months. So again, we think the intent of the
14 original permit, there was no real fundamental change with
15 respect to potential environmental impacts.

16 The last issue is the helipad and let me, maybe, just
17 give a little background on that. The issue for us started
18 out as we -- when we did a site visit there's a concrete or
19 an asphalt pad out at the east end of the harbor and we
20 said, 'Well, you need to remove this pad, it's in a public
21 access area.' And we were told by Westpoint Harbor, 'Well,
22 that's used occasionally for this Spartina project.' So it
23 was a past use and an occasional use. It's not a helipad --
24 first of all, so it's existing. Whatever the past history
25 was this pad was installed and it had apparently been used

1 once a year for a three year period, five or six years ago.

2 So we -- in the negotiations we agreed to let the pad
3 remain. We didn't know -- we got the letter from the
4 Coastal Conservancy later, just last week or so, saying they
5 no longer need it and no longer use it. Westpoint Harbor,
6 they can comment if they like, but we have spoken about
7 this. There is actually -- they would require an
8 authorization from the aeronautics or aviation division of
9 Caltrans to operate a permitted helipad and they don't have
10 one. So in fact, although this permit authorizes this
11 concrete pad for a helipad they can't, in fact, operate a
12 permanent helipad there without getting further
13 authorizations.

14 COMMISSIONER NELSON: But not, but not from the
15 Commission.

16 MR. ZEPPETELLO: Right. But from the regulatory agency
17 that really cares and will pay attention to flight paths and
18 those issues. They would need to get that authorization to
19 actually operate a helipad.

20 COMMISSIONER NELSON: And then the last question is, a
21 separate question about the management of Pond 10. Can
22 staff, the question is not just is there habitat there but
23 who is responsible for making sure that that habitat is
24 appropriately maintained over time?

25 MR. ZEPPETELLO: Well, that's -- it's on Cargill's

1 property and Cargill said in 2003 that they would manage it
2 and take into account water levels for birds. What they
3 have said in 2018 is, 'We're going to continue to manage
4 Pond 10 as we manage it for our own business purposes and we
5 are not necessarily managing it for birds.' There in fact
6 is no real commitment or obligation on anyone to manage it
7 in a particular way. But I think it is true, the point that
8 was made by someone, that if that property is subsequently
9 developed, whoever were to develop that property would need
10 a permit from the Commission as well as from the Corps of
11 Engineers, so the opportunity to get mitigation for the loss
12 of that habitat should any subsequent development happen
13 would remain and we would be involved in that.

14 COMMISSIONER NELSON: But that's if someone chooses to
15 develop it. It's a different question of what happens if
16 Cargill chooses to simply manage it differently to eliminate
17 that habitat.

18 MR. ZEPPETELLO: The answer there is that there is no
19 hook. And that was part of the --

20 COMMISSIONER NELSON: Because we -- we don't have a
21 permit hook to try --

22 MR. ZEPPETELLO: Right, because they are not on the
23 permit. That's the problem that we faced in these
24 discussions is that Cargill said one thing 15 years ago and
25 they're something different now but there is no mechanism

1 because they are not on the permit. We don't have the
2 leverage to require them to do anything different.

3 CHAIR WASSERMAN: Small follow-up to that last
4 discussion. I think it would be worthwhile for staff to do
5 periodic, I don't know what the period should be,
6 inspections out there. You're going to be doing that of the
7 Westpoint Harbor anyway I am sure. But to make sure that
8 part of it is you're doing it at a time when you can observe
9 shoreline population and understand what it should be based
10 on seasonality or time of year. Because while we may not
11 have an enforcement mechanism there may be some alternatives
12 if we find there is a problem, either because Cargill has
13 changed the way they manage it or because they haven't
14 managed it at all and erosion or some other natural factors
15 have made it less attractive to the birds.

16 COMMISSIONER McGRATH: I puzzled with this issue for
17 quite a while but ultimately I back the staff, not only
18 because we were not clear enough about a requirement that I
19 felt that an enforcement stance was appropriate but also
20 because it was fairly clear that the City in approving this
21 and the staff in accepting the City's recommendation had
22 felt this was the area.

23 Now as a practical matter in any future CEQA
24 activities, this is part of the existing environment so it
25 gets evaluated. And the water is there, frankly, not

1 because of any active management but it's a pond and it
2 ponds rainwater and it will vary seasonally. But those
3 kinds of variations, which you find around the Bay in other
4 locations not caught up in permit fights, in fact provide
5 tremendous seasonal habitat, not by design but by
6 happenstance and I just think we should recognize that.

7 I don't think Cargill is going to go out there, buy a
8 bunch of pumps and pump it dry for long enough so that when
9 there is a CEQA analysis there won't be an existing habitat.
10 The issues that they would have to deal with it in
11 developing that site are a lot bigger than that.

12 So I puzzled -- and this is for Arthur's benefit, you
13 know. I mean, I puzzled as to was this an unacceptable
14 concession given the context and I concluded ultimately that
15 it was not. That the reliance of Westpoint Harbor on the
16 earlier letters was in fact a reasonable accommodation and I
17 agreed with the staff on this one. But it's going to be
18 wet. I mean, it's just a pond, the water can't get out.

19 (The Committee meeting concluded at 5:00 p.m.)

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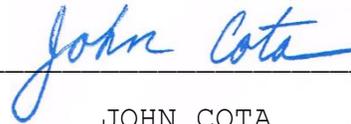
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1 CERTIFICATE OF REPORTER
2

3 I, John Cota, an Electronic Reporter, do hereby certify
4 that I am a disinterested person herein; that I recorded the
5 foregoing San Francisco Bay Conservation and Development
6 Commission meeting and the recording was thereafter
7 transcribed.

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

11 IN WITNESS WHEREOF, I have hereunto set my hand this
12 11th day of December, 2018

13
14 
15

16 JOHN COTA

17 CERTIFICATE OF TRANSCRIBER
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19 I, RAMONA COTA, a Certified Electronic Reporter and
20 Transcriber, certify that the foregoing is a correct
21 transcript, to the best of my ability, from the electronic
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25 _____ December 11, 2018

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