

San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

Scott's Jack London Seafood, Inc.
1719 Bonanza Street
Walnut Creek, CA 94596

and

Port of Oakland
P.O. Box 2064
Oakland, CA 94604-2064

STIPULATED CEASE
AND DESIST AND
CIVIL PENALTY ORDER
NO. CCD 2016.03

Effective Date: November 3, 2016

The San Francisco Bay Conservations and Development Commission ("BCDC" or "Commission") and Scott's Jack London Seafood, Inc. ("Scott's") and the Port of Oakland ("Port") enter into this Stipulated Cease and Desist and Civil Penalty Order ("Order"), and the Commission issues the Order pursuant to Government Code Sections 66638 and 66641.6. The Commission, Scott's, and the Port are collectively referred to as "Parties." Scott's and the Port are sometimes jointly referred to as "Permittees."

I. FINDINGS

A. BCDC Permit No. 1985.019.09B, as amended through October 7, 1997 ("the Permit"), issued jointly to Scott's and the Port, authorizes the construction, use, and maintenance of a 4,400-square-foot pavilion, in a portion of the Franklin Street Plaza at Jack London Square in Oakland, for shared public and private use at a ratio of 80% public to 20% private, and the installation of café seating, benches, lighting, and other site furnishings within the pavilion and larger approximately 23,000-square-foot plaza.

B. BCDC Permit No. 1985.019.020, as amended through April 10, 2008 ("the Port's Permit"), issued to the Port, authorized certain development activities along a six-block section of the Port's waterfront property between Jefferson and Harrison Streets at Jack London Square.

C. In or about December 2011, Scott's contacted BCDC staff regarding certain modifications to the pavilion proposed by Scott's. Between December 2011 and November 2012, BCDC staff and Scott's continued to discuss, BCDC staff provided comments on, and Scott's sought BCDC staff approval of various potential modifications to the pavilion proposed by Scott's. As of November 2012, Scott's had not obtained BCDC staff approval of its proposed pavilion modifications.

D. In December 2012, BCDC staff learned that Scott's had commenced construction of certain modifications to the pavilion without obtaining approval from BCDC staff or the Commission, which upon completion in March 2013, included an unauthorized permanent metal-frame doorway and new retractable wall panel system, and that Scott's had also installed planters in a public access area without authorization.

**Stipulated Cease and Desist and
Civil Penalty Order No. CCD 2016.03**

Page 2

E. On May 16, 2013, BCDC's Chief of Enforcement issued, pursuant to section 11386 of the Commission's regulations (14 C.C.R. § 11386), an enforcement letter to the Permittees describing a number of alleged violations of the McAteer-Petris Act ("MPA") and/or the Permit including:

1. Construction of an unauthorized metal-framed doorway, storage area, and stage, and installation of multiple planters, in a public access area;
2. Failure to obtain BCDC staff approval of design and construction plans prior to replacing the former tent walls with a retractable wall panel system used to enclose the pavilion;
3. Failure to provide six years of reports of private events in the pavilion;
4. Failure to permanently guarantee all the public access improvements at the pavilion; and
5. Failing to install and maintain all the public access improvements at the pavilion for at least 292 days per year.

F. The May 16, 2013, enforcement letter directed the Permittees to take certain actions to retain the opportunity to resolve the alleged violations with standardized fines, as specified in 14 C.C.R. § 11386, including:

1. Remove the metal-framed doorway, storage area, and planters from the public access area;
2. Submit and obtain BCDC staff approval of a full set of plans for the retractable wall panel system;
3. Submit six years of past due reports of private events for the pavilion meeting the requirements of the Permit; and
4. Submit and obtain BCDC staff approval of a legal instrument to dedicate the public access area; and
5. Install and repair certain public access improvements.

G. Following receipt of the May 16, 2013, enforcement letter, the Permittees did not remove the unauthorized structures and improvements. Instead, Scott's continued to use the pavilion for private events and engaged in discussions with BCDC staff over an approximately two-year period regarding the possibility of obtaining after-the-fact approval of some or all of the unauthorized structures or improvements either by BCDC staff, through plan review and approval, or by potential amendments to the Permit and the Port's Permit. The Permittees made two presentations regarding their various proposals to BCDC's Design Review Board, on February 10, 2014 and April 16, 2015. As of the date of this Order, Permittees have not submitted a complete application to amend the Permit or the Port's Permit, and have not removed or obtained approval of the unauthorized construction of the metal-framed entry doorway, storage area and stage, or retractable wall panel system, or of the unauthorized installation of the multiple planters in the public access area.

**Stipulated Cease and Desist and
Civil Penalty Order No. CCD 2016.03**

Page 3

H. After learning of Scott's unauthorized construction activities in a dedicated public access area, BCDC staff continued its enforcement investigation. That investigation revealed numerous additional alleged violations of the Permit or the Port's Permit, including but not limited to, Scott's extensive non-Permit complaint use of the pavilion for private events over an approximately 11-year period.

I. In summary, the violations or categories of violation of the Permit or the Port's Permit documented by BCDC staff's enforcement investigation include the following:

1. Unpermitted development by unauthorized construction in public access areas of a metal-framed entry doorway, wood and metal-framed wall, multiple moveable wall panels and ceiling tracks in the pavilion; storage area and stage; roof extension.
2. Non-Permit compliant use of the pavilion, in violation of Special Condition II.B.2.c, Event Schedule Reporting, including Permit Exhibit A, Guidelines for Private Use of Public Pavilion, during the period 2004-2015:
 - a. Providing fewer than 292 public use days per year;
 - b. Providing, on average per month during winter season, fewer than five (5) public use weekend days and nights;
 - c. Holding, on average per month during winter season, more than four (4) private use weekend days and nights;
 - d. Holding, on average per month during summer season, more than three (3) private use weekend days and nights;
 - e. Providing fewer than three (3) public use weekend days and nights per month; and
 - f. Holding more than two consecutive private use days.
3. Unpermitted use of the Franklin and Broadway Street plazas by placing tents and stanchions, storing event related equipment (including planters), and displaying promotional vehicles;
4. Untimely submittal of private event schedules as required by Special Condition II.B.2.c, Event Schedule Reporting, including Permit Exhibit A, Guidelines for Private Use of Public Pavilion;
5. Failure to dedicate the pavilion public access area prior to commencement of construction, as required by Special Condition II-B-3, Permanent Guarantee;
6. Failure to provide all required public access improvements during public use days, as required by Special Condition II.B.5, Improvements Within the Public Access Area; and
7. Failure to obtain plan approval prior to installation of public access improvements, as required by Special Condition II.A, Specific Plans and Plan Review.

**Stipulated Cease and Desist and
Civil Penalty Order No. CCD 2016.03**

Page 4

The additional findings set forth in Attachment A to this Order, and incorporated by reference herein, more fully describe each of these violations or categories of violation, and include information regarding the dates of violation and references to supporting evidence.

J. In or about September 2015, BCDC staff informed the Permittees that the Executive Director intended to initiate an enforcement proceeding regarding the numerous violations of the Permit or the Port's Permit, including, but not limited to the unresolved issues regarding Scott's unauthorized construction in a public access area, that would likely result in the Commission issuing a cease and desist and administrative civil penalty order against the Permittees. The Permittees requested an opportunity to seek to negotiate a proposed settlement with BCDC that would:

1. Resolve the violations, including specification of the measures to be taken by the Permittee to come into compliance with the Permit and the Port's Permit;
2. Provide for payment of an appropriate administrative civil penalty; and
3. Specify the matters to be addressed by the Permittees in applications to amend the Permit and the Port's permit, and a schedule for submitting those applications.

K. On July 19, 2016, the Parties agreed to a settlement in principle on the terms of this Order, subject to review and approval of this Order by the Commission's Enforcement Committee, at a public hearing, and by the Commission, at a public meeting. If the Enforcement Committee recommends or the Commission directs modification of any of the terms of this Order as proposed by the Parties, the Permittees have the option of accepting those modifications or declining to enter into the Order. If the Permittees decline to agree to this Order as the result of any modification recommended by the Enforcement Committee or directed by the Commission, the Executive Director shall initiate an enforcement proceeding against the Permittees regarding the violations described herein.

L. On October 20, 2016, the Enforcement Committee held a noticed public hearing to consider this Order and all comments pertaining to this Order. Upon the recommendation of the Enforcement Committee, the Commission considered and approved this Order at a public meeting on November 3, 2016.

M. The Commission and the Permittees enter into this Order to settle the claims alleged against the Permittees as summarized in Paragraph I.I, above, and described more fully in the additional findings set forth in Attachment A to this Order, which is incorporated by reference herein. The Parties consider this Order to constitute a reasonable settlement of disputed claims, which will result in full compliance with the Permit and the Port's Permit.

N. In stipulating to this Order, neither Scott's nor the Port admits liability for any claim or alleged violation, or admits any fact or Commission finding relating to such alleged liability, except that Scott's admits that it constructed the pavilion's metal-frame entry door, retractable wall panel system, and stage, and the adjacent storage area and roof extension without Commission authorization.

II. CEASE AND DESIST ORDER

A. Pursuant to California Government Code Section 66638, the Commission orders Scott's and the Port, and Scott's and the Port hereby agree to comply fully with the following conditions of this Order.

B. On and after the Effective Date of this Order, the Permittees shall cease and desist from all activity in violation of the Permit and the Port's Permit.

C. The Permittees shall make the pavilion and all other public access areas around the pavilion available to the public for unrestricted public access, as required by Special Condition II.B.1 of the Permit and Special Condition B.II.1 of the Port's Permit, except as otherwise provided in accordance with Special Condition II.B.2 of the Permit. On and after the Effective Date of this Order, Scott's shall cease and desist from storing, and shall not store, any restaurant equipment or site furnishings in any required public access areas at any time, and shall cease and desist from using, and shall not use, any portion of the Franklin and Broadway plazas for private events, to store any restaurant equipment or site furnishings, or to display promotional materials.

D. No later than 75 days after the Effective Date of this Order, Scott's shall remove the permanent door structure and metal framing at the entrance to the pavilion and shall integrate new entrance doors into the pavilion's retractable wall panel system, as it has proposed on Sheet A.2.1 of the plans presented to the Design Review Board on April 6, 2015. No later than 14 days after the Effective Date of this Order, Scott's shall submit to BCDC staff for plan review and approval final plans for the new entrance doors and any modifications to the retractable wall panel system necessary to integrate the doors into that system.

E. No later than 15 days after the Effective Date of this Order, Scott's shall permanently remove all planters from the area around the pavilion with the exception of one planter that shall remain at all times outside the permanent wall on the north side of the pavilion. No later than seven days after the Effective Date of this Order, Scott's shall submit to BCDC staff for plan review and approval a plan showing the proposed location of the one planter to remain outside the permanent wall on the north side of the pavilion. In applying for amendments to the Permit, pursuant to Paragraph II.G, below, as part of their public access plan Permittees may request authorization to place moveable planters outside of the pavilion when the pavilion is used for private events.

F. On and after the Effective Date of this Order, the Permittees shall comply fully with Special Condition II.B.2 of the Permit, Public Use of the Pavilion, and shall use the pavilion for private events only as specified in Exhibit A to the Permit, Guidelines for Private Use of the Public Pavilion. In applying for amendments to the Permit, pursuant to Paragraph II.G, below, Permittees may request authorization for increased use of the pavilion for private events, provided that their application shall propose a calendar/scheduling framework for the pavilion that includes the provisions set forth in Paragraph V.A, below.

**Stipulated Cease and Desist and
Civil Penalty Order No. CCD 2016.03**

Page 6

G. No later than 56 days after the Effective Date of this Order, the Permittees shall submit to the Executive Director a fully completed and properly executed application to amend the Permit, and the Port shall submit to the Executive Director a fully completed and properly executed application to amend the Port's Permit. Those applications shall include but may not be limited to the following:

1. The Permittees' application to amend the Permit shall request after-the-fact authorization for the following structural components of the pavilion that Scott's constructed without authorization in public access areas: (1) the permanent wall and retractable wall panel system along portions of the exterior of the pavilion; (2) the stage along the western interior boundary of the pavilion; (3) the storage area behind the stage; and (4) the structure that connects the roof of the pavilion to the roof of the restaurant. The application shall also request authorization for new entrance doors into the pavilion, which shall be integrated into the retractable wall panel system and installed by Scott's in accordance with Paragraph II.D, above, to replace the existing permanent door structure and metal framing at the entrance to the pavilion that Scott's constructed without authorization.
2. A public access plan for the pavilion and the public access areas around the pavilion based on the conceptual plan that Scott's proposed, and BCDC staff modified, during a meeting on August 28, 2015, that takes advantage of existing elements, considers factors pertaining to existing limitations, and attempts to unify the public space inside and outside of the pavilion. The plan shall provide high quality chairs placed both inside and outside the pavilion; repair existing paving beneath the pavilion and toward Water Street (some areas have been poorly patched and require replacement pavers); in the plaza east of the pavilion and north of Kincaid's, remove trees, use vertical lights to create an angled "procession" towards the water, incorporate a few simple permanent concrete seawalls around an area with decomposed granite paving (and place tables and chairs within this area), provide benches in a line along the water facing east toward Pescatore restaurant, and provide planted screens around Kincaid's walls and trash areas. The applications to amend the Permit and the Port's permit shall request authorization for one planter that shall remain at all times outside the permanent wall on the north side of the pavilion, and may request authorization to place moveable planters outside of the pavilion when the pavilion is used for private events.
3. The Permittees' application to amend the Permit may request authorization for increased use of the pavilion for private events. If the Permittees make such a request, their application shall propose a calendar/scheduling framework for the pavilion that includes the provisions set forth in Paragraph V.A, below.

H. No later than 30 days after the Effective Date of this Order, the Permittees shall provide all improvements within the public access area required by Special Condition II.B.5 of the Permit including: (1) at least four public access signs, two permanent and two temporary, to

**Stipulated Cease and Desist and
Civil Penalty Order No. CCD 2016.03**

Page 7

facilitate shoreline public access between Franklin Street and Broadway on the Bay side of Scott's; and (2) at least 15 tables and 35 chairs that are to be in place at all times except when the pavilion is in use for private events or other approved events, as authorized by the Permit.

I. No later than 30 days after the Effective Date of this Order, excluding the time period(s) during which the draft guarantee is held by staff counsel for review, the Permittees shall submit proof of recordation with Alameda County of a legal instrument that permanently guarantees the public access area required by Special Condition II.B.2 of the Permit, in accordance with Special Conditions II.B.3 and II.B.4 of the Permit. For reference purposes, the public access area to be permanently guaranteed by Special Condition II.B.2 of the Permit is shown on Exhibit A of the Port's Permit as "Scotts Pavilion."

J. No later than 30 days after the Effective Date of this Order, Scott's shall submit to both the Port and BCDC all past-due quarterly event schedules, as required by Special Condition II.B.2.c of the Permit.

III. CIVIL PENALTY ORDER

A. Pursuant to California Government Code Sections 66641.5 through 66641.9, the Commission hereby assesses and orders Scott's and the Port jointly to pay a civil penalty of \$250,000, which Scott's and the Port agree to pay in settlement of this matter. This penalty payment shall constitute Scott's and the Port's full and complete satisfaction of their liability for civil penalties for all alleged violations summarized in Paragraph I.H and described more fully in Attachment A, through the date of this Order.

B. Pursuant to Government Code Section 66647, within 14 days of the Effective Date of this Order, Scott's and the Port shall remit the penalty payment to the Commission by cashier's check, in the amounts of \$250,000, payable to the San Francisco Bay Conservation and Development Commission – Bay Fill Clean-Up and Abatement Fund.

IV. STIPULATED PENALTIES

A. Upon written demand by the Executive Director listing specific violations of this Order, Scott's and the Port jointly shall pay stipulated penalties in accordance with the following schedule for each failure to comply in a timely manner with the following requirements of this Order:

1. Failure to remove the permanent door structure and metal framing at the entrance to the pavilion and to integrate new entrance doors into the pavilion's retractable wall panel system, as specified in Paragraph II.D.

1 to 7 days late: \$1,000 per day

8 to 21 days late: \$2,000 per day

22 and more days late: \$3,000 per day

**Stipulated Cease and Desist and
Civil Penalty Order No. CCD 2016.03**

Page 8

2. Failure to remove all planters from the area around the pavilion with the exception of one planter that shall remain at all times outside the permanent wall on the north side of the pavilion, as specified in Paragraph II.E.

1 to 7 days late: \$200 per day per planter

8 and more days late: \$500 per day per planter

3. Failure to submit to the Executive Director two fully complete and properly executed applications to amend the Permit and the Port's Permit, respectively, as specified in Paragraph II.G.

1 to 7 days late: \$500 per day per application

8 to 21 days late: \$1,000 per day per application

22 and more days late: \$2,000 per day per application

Stipulated penalties shall not accrue under this Paragraphs IV.A.3 during the time period BCDC staff reviews the Permittees' applications to amend the Permit and the Ports Permit (provided said applications are submitted within the time specified in Paragraph II.G), but shall accrue if and when the Executive Director provides notice that the applications, or either of them, are not fully complete or properly executed. If the Executive Director determines that either application is not fully complete due solely to circumstances arising from a cause beyond the control of Scott's or the Port, the Executive Director may suspend the accrual of stipulated penalties under this Paragraph IV.A.3 for such period as the Executive Director determines is reasonably necessary for Scott's or the Port, exercising good-faith and diligent efforts to minimize any delay, to provide the information or documentation necessary to fully complete the application.

4. Failure to provide all improvements within the public access area required by Special Condition II.B.5.d of the Permit, as specified in Paragraph II.H.

1 to 7 days late: \$500 per day

8 and more days late: \$1,00 per day

5. Failure to submit proof of recordation by Alameda County of a staff-approved legal instrument that permanently guarantee the public access area required by Special Condition II.B.4 of the Permit, in accordance with Special Conditions II.B.3 and II.B.4 of the Permit, as specified in Paragraph II. I.

1 to 7 days late: \$500 per day

8 and more days late: \$1,000 per day

**Stipulated Cease and Desist and
Civil Penalty Order No. CCD 2016.03**

Page 9

6. Failure to submit to both the Port and BCDC all past-due quarterly event schedules required by Special Condition II.B.2.c of the Permit, as specified in Paragraph II.J.

1 to 7 days late: \$500 per day

8 and more days late: \$1,000 per day

B. Scott's and the Port shall jointly pay stipulated penalties, upon written demand by the Executive Director, by cashier's check payable to the San Francisco Bay Conservation and Development Commission Bay Fill Clean-Up and Abatement Fund, no later than 30 days after receipt of such demand. Payment of stipulated penalties shall not relieve Scott's and the Port of any other obligation or liability to comply with the requirements of this Order, the Permit, or the Port's Permit except that payment of stipulated penalties shall constitute full and complete satisfaction of Scott's and the Port's liability for civil penalties for the violation of this Order giving rise to the penalty.

C. If the Executive Director demands stipulated penalties in the amounts stated above for any delay in compliance with this Order, Scott's and the Port hereby waive the right to seek judicial review of their liability for such stipulated penalties.

D. If the Permittees fail to comply with any of the above-referenced requirements of Paragraphs II.D, II.E, II.G, II.H, II.I or II.J for 30 or more days, the Commission reserves the right to request that the Attorney General petition the superior court for the issuance of a preliminary or permanent injunction, or both, to compel immediate compliance with this Order and for the imposition of civil penalties for any violations of this Order. In determining appropriate civil penalties, the court shall take into consideration all relevant circumstances, in accordance with Government Code Section 66641(b), and shall not apply the stipulated penalties specified in Paragraph IV.A of this Order, which are intended solely for the purpose of providing an expeditious procedure for securing timely compliance with this Order as an alternative to the remedies provided by the statute. If the Commission files a court action to seek penalties greater than the amounts stated herein, for any delay in compliance of 30 or more days, Scott's and the Port reserve the right to seek judicial review of their liability for such penalties.

V. PERMITTEES' REQUEST TO AMEND THE PERMIT REGARDING PAVILION USE

A. In negotiating resolution of the violations that are the subject of this Order, the Permittees requested the opportunity to seek amendments to Special Condition II.B.2 of the Permit, Public Use of the Pavilion, and Exhibit A to the Permit, Guidelines for Private Use of the Public Pavilion, to authorize increased use of the pavilion for private events. Staff agreed to recommend approval of such amendments to the Permit provided that the application to amend the Permit, which shall be submitted not later than 56 days after the Effective Date of this Order, pursuant to Paragraph II.G, above, includes the following proposed calendar/scheduling framework:

**Stipulated Cease and Desist and
Civil Penalty Order No. CCD 2016.03**

Page 10

1. The Permittees may request authorization to use the pavilion for a maximum of 104 for-profit events during a calendar year and a maximum of 20 “community-based charitable events,” held “at cost,” during a calendar year, for a total of a maximum of 124 private events per calendar year.
2. No event, whether for-profit or community based charitable, shall exceed a duration of 10 hours, except that a maximum of 10 events per calendar year may exceed a duration of 10 hours and no such event shall exceed a duration of 14 hours.
3. For each event, whether for-profit or community-based charitable, the pavilion walls shall not be closed earlier than two hours before the start of the event, to accommodate set-up, and shall be opened and placed in their stored (folded) position no later than two hours after the conclusion of the event. At all times other than those during which events occur or when the Permittees are engaged in set-up or breakdown activities for an event: (a) the pavilion’s moveable walls must be placed and maintained in their open, stored (folded) position, (b) all improvements within the public access area required by Special Condition II.B.5 of the Permit shall be in place and available for public use, and (c) no restaurant equipment or site furnishings shall be temporarily stored or remain in any public access area.
4. The Permittees shall not be authorized to use the pavilion, for either for-profit or community-based charitable events: (a) during both a Saturday and Sunday of the same weekend; or (b) for more than three events during any single 7-day, Sunday-to-Saturday, calendar week.
5. Scotts shall install, maintain, and monitor a camera to record the pavilion’s use 24 hours per day, seven days per week. Scott’s shall retain the daily recordings of that camera for no less than one year, and upon request shall, within five business days, make such recordings available to the Commission or its staff.
6. Scotts’ shall create, use, and keep up to date a real-time web-based calendar of events at the pavilion, and shall make such calendar available at all times to the Commission or its staff, the Port, and its property manager, the CIM Group, and the public.

B. In recommending approval of amendments to the Permit to authorize increased use of the pavilion for private events, if requested by the Permittees in accordance with the proposed calendar/scheduling framework described in Paragraph V.A, above, staff shall also recommend that the amended Permit include provisions for more frequent reporting of pavilion usage for private events and stipulated penalties, as specified below, for each and every violation of any of the following pavilion usage limitations:

1. Exceedance of annual event limits or failure to record pavilion use: \$10,000 per violation.
 - a. If the pavilion is used for more than 104 for-profit events during a calendar year, each such event after an annual total of 104 shall be a separate violation;

**Stipulated Cease and Desist and
Civil Penalty Order No. CCD 2016.03**

Page 11

- b. If the pavilion is used for more than 20 community-based charitable events during a calendar year, each such event after an annual total of 20 shall be a separate violation;
 - c. If Scott's fails to record the pavilion's use 24 hours per day on a monitoring camera or fails to provide recordings of such use to BCDC staff upon request, any portion of a 24-hour period that is not recorded or not provided to BCDC staff shall be a separate violation.
2. Exceedance of weekly event limits: \$5,000 per violation
 - a. Any instance in which the pavilion is used, for either for-profit or community-based charitable events, during both a Saturday and Sunday of the same weekend shall be a separate violation;
 - b. Any instance in which the pavilion is used, for either for-profit or community-based charitable events, for more than three events during any single 7-day, Sunday-to-Saturday, calendar week shall be a separate violation.
3. Exceedance of daily duration limit: \$2,000 per violation
 - a. If the pavilion is used for more than 10 events per calendar year that exceed a duration of 10 hours, each such event after an annual total of 10 shall be a separate violation;
 - b. If the pavilion is used for any event that exceeds a duration of 14 hours, each such event shall be a separate violation; and
 - d. Any instance, other than when an event is occurring or when the Permittees are engaged in set-up (no longer than two hours before the start of an event) or breakdown (no longer than two hours after the conclusion of an event), in which all improvements within the public access area required by Special Condition II.B.5 of the permit are not in place and available for public use or in which any restaurant equipment or site furnishings are temporarily stored or remain in any public access area.

C. The Permittees understand and agree that the Commission shall have sole discretion regarding: (1) whether or not to amend the Permit to authorize increased use of the pavilion for private events in a manner consistent with the proposed calendar/scheduling framework described in Paragraph V.A, above, or in any other manner; and (2) whether or not the amended Permit shall include provisions for stipulated penalties for any violations of any of the pavilion usage limitations, as established by the amended Permit, and the amount of any such penalties.

VI. ADDITIONAL TERMS

A. **Notice.** All notices required or desired to be sent pursuant to this Order shall be provided to:

For the Commission:

Adrienne Klein, (415) 352-3609, adrienne.klein@bccdc.ca.gov
Marc Zeppetello, (415) 352-3655, marc.zeppetello@bccdc.ca.gov
San Francisco Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600
San Francisco, CA 94102

For Scott's

Liz Gallagher, (510) 302-0999, lizg@scottscorp.com
Scott's Corporate
2770 Camino Diablo, Suite B
Walnut Creek, CA 94597

For the Port:

Richard Sinkoff, (510) 627-1180, rsinkoff@portoakland.com
Danny Wan, (510) 627-1340, dwan@portoakland.com
Port of Oakland
530 Water Street
Oakland, CA 94604-2064

B. **Release.** This Order shall constitute a full settlement of the violations summarized in Paragraph I.I, and described in the additional findings set forth in Attachment A, through the date of this Order and a full release from further penalties with respect to such violations, but does not limit the Commission from taking appropriate enforcement action concerning other or future violations.

C. **Expiration.** This Order shall expire two years after the Commission issues amendments to the Permit and the Port Permit, upon consideration of the applications to amend submitted in accordance with Paragraph II.G, and after the Permittees have: (1) complied fully with the requirements of Paragraphs II.D, II.E, II.G, II.H, II.I and II.J; (2) maintained compliance for six consecutive months with the requirements of Paragraphs II.C and II.F; (3) paid all civil penalties due pursuant to Paragraphs III.A and III.B; and (4) paid all stipulated penalties demanded by the Executive Director pursuant to Paragraphs IV.A and V.B.

D. **Waiver.** Scott's and the Port hereby waive their right to seek judicial review of this Order.

E. **Binding Effect.** This Order shall apply to and be binding upon: (1) the Commission, its Executive Director, and staff; (2) Scott's and its officers, directors, employees and agents; and (3) the Port, its Commission, employees and agents.



F. **Disclaimer of Effect of Order on Private Rights or Laws and Regulations of Other Public Bodies.** This Order shall have no effect on any duties, rights, or obligations established by private agreement or by the laws and regulations of other governmental bodies.

G. **Disclaimer of Recognition of Property Rights.** This order shall not constitute any recognition of property rights.

H. **Strict Compliance Obligation and Possible Court Action For Noncompliance.** Strict compliance with this Order is required. Pursuant to the McAteer-Petris Act Sections 66640 and 66641.7(b), failure to comply with the terms of this Order or to pay all applicable administrative civil penalties may result in the Commission filing a lawsuit against Scott's and the Port. Pursuant to the McAteer-Petris Act, Section 66641, any person who intentionally or negligently violates a Commission cease and desist order may be liable civilly for up to \$6,000 for each day in which such violation persists. Prior to filing any lawsuit under this Section, the Commission will meet and confer with Scott's and the Port with the goal of resolving any alleged violation and avoiding litigation.

I. **Counterparts.** This Order may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

FOR THE SAN FRANCISCO BAY CONSERVATION
AND DEVELOPMENT COMMISSION

Dated: _____

LAWRENCE J. GOLDZBAND
Executive Director

FOR SCOTT'S JACK LONDON SEAFOOD, INC.

Dated: 9/28/2016

LIZ GALLAGHER
President

PORT OF OAKLAND

Dated: 9-28-2016

RICHARD SINKOFF
Director of Environmental
Programs and Planning

San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

ATTACHMENT A – ADDITIONAL FINDINGS STIPULATED CEASE AND DESIST AND CIVIL PENALTY ORDER NO. CCD 2016.03

In support of, and as the basis for, Stipulated Cease and Desist and Civil Penalty Order No. CCD 2016.03 (“Order”), the Commission hereby finds:

I. INTRODUCTION

1. The Administrative Record for this Order includes the relevant Commission permit and enforcement files (Permit File Nos. 1985.019.20 and 1985.019.09B; Enforcement File Nos. ER2013.009 and ER2004.010). The Administrative Record also includes the:

- A. Staff Report and Recommendation, dated October 7, 2016.
- B. Minutes of the October 20, 2016, Enforcement Committee meeting to consider this Order.

2. On March 6, 1986, the Commission issued to the Port BCDC Permit No. 1985.019.00 for development activities along a six-block section of the Port’s waterfront property between Jefferson and Harrison Streets known as Jack London Square.

3. On February 13, 1996, the Commission issued BCDC Permit No. 1985.019.08, which added Scott’s, a tenant of the Port, to the Port’s permit, and authorized the construction, use and maintenance of a 4,400-square-foot pavilion, in a portion of the Franklin Street Plaza, for shared public and private use, at a ratio of 80% public to 20% private, and the installation of café seating, benches, lighting and other site furnishings within the pavilion and the larger approximately 23,000-square-foot Franklin Street Plaza.

4. On July 8, 1997, the Commission split BCDC Permit No. 1985.019.08 into two permits:

- A. BCDC Permit 1985.019.08A (hereafter “the Port’s Permit”) issued solely to the Port pertains to all of Jack London Square except the pavilion; and
- B. BCDC Permit No. 1985.019.08B (hereinafter “the Permit”) issued to Scott’s and the Port pertains to only the pavilion.

5. On October 7, 1997, the Commission re-issued the Permit, as BCDC Permit No. 1985.19.09B, to correct the omission of a special condition that occurred during the permit split. The Permit has not been amended since that date.

II. ALLEGED VIOLATIONS

6. There are seven categories of alleged violations described in Sections A through G, below. The following information is provided for each category: (a) nature of the violations; (b) legal basis for the violation; and (c) description and evidence of violations.

A. Construction of Unpermitted Development

7. **Nature of Violations.** Construction of unpermitted development consisting of a:
 - a. Roof extension west of the pavilion;
 - b. Storage area and stage west of the pavilion; and
 - c. Metal-framed entry doorway, wood and metal-framed wall, multiple moveable wall panels and ceiling tracks in the pavilion.
8. **Legal Basis for Violation.** Under California Government Code Section 66632(a), any person or governmental agency wishing to place fill, to extract materials, or to make any substantial change in use of any water, land or structure, within the area of the commission's jurisdiction shall secure a permit from the commission.
9. **Description and Evidence of Violations.** Scott's conducted the following activities within the area of the Commission's jurisdiction without obtaining a permit or permit amendment:
 - a. **Roof Extension West of the Pavilion.** As evidenced by Port staff member Julie Braun's observations outlined in an email dated April 24, 2015, and as shown in Google Earth aerial imagery, on or about March, 2000, Scott's constructed a roof extension joining its building to the pavilion.
 - b. **Storage Area and Stage West of the Pavilion.** As evidenced by the observations of Ms. Braun, as described in an email, dated April 24, 2015, to Adrienne Klein, Chief of Enforcement, and as shown in photographs taken by Ellen Miramontes, Bay Design Analyst, during a site visit on March 12, 2013, on or about July, 2011, Scott's constructed a 255-square foot storage area.
 - c. **Metal-framed Entry Doorway, Wood and Metal-Framed Wall, Multiple Moveable Wall Panels and Ceiling Tracks in the Pavilion.** As evidenced by the observations of Tammy Borichevsky and Keith Miller, California Canoe and Kayak, in emails, dated February 25, March 3, and March 6, 2013, the first two of which included photographs, between December 28, 2012, and March 6, 2013, Scott's constructed a permanent wall in the northwest corner of the pavilion, a permanent metal-framed entry doorway on the east side of the pavilion and a retractable wall panel system to enclose the pavilion.

B. Non-permit Compliant Use of the Pavilion.

10. **Nature of Violations.** Non-permit compliant use of the pavilion through excessive private use:
- a. **Minimum Number of Public Use Days (annual).** Providing fewer than 292 public use days per year;
 - b. **Minimum Number of Public Use Weekend Days and Nights¹ (winter season average).** Providing, on average per month during winter season (January – April, November and December), fewer than five (5) public use weekend days and nights;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Holding, on average per month during winter season, more than four (4) private use weekend days and nights;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Holding, on average per month during summer season (May – October), more than three (3) private use weekend days and nights;
 - e. **Minimum Number of Public Use Weekend Days and Nights Per Month.** Providing fewer than three (3) public use weekend days and nights per month; and
 - f. **Maximum Number of Consecutive Private Use Days.** Holding more than two consecutive private use days.
11. **Legal Basis for Violations.** Special Condition II.B of the Permit and Permit Exhibit A, entitled “Guidelines for Private Use of Public Pavilion,” together set forth the following requirements:
- a. The pavilion must be publicly available for 292 days/year and may be privately occupied for a maximum of 73 days/year;
 - b. The pavilion must be available for public use an average of five (5) weekend days and nights per month during the winter season;
 - c. The average number of weekend days and nights for private use may not exceed four (4) weekend days and nights per month during the winter season;
 - d. The average number of weekend days and nights for private use may not exceed three (3) weekend days and nights per month during the summer season;

¹ Permit Exhibit A defines “weekend nights” as Friday and Saturday and “weekend days” as Saturday and Sunday, which this report collectively refers to as “weekend days and nights”.

- e. There must be at least three (3) weekend days and nights available for public use every month; and
 - f. There must not be more than two consecutive private use days.
12. **Description and Evidence of Violations.** Staff relied on data from the Port's property manager, who dispatched a security officer to monitor pavilion use on a daily basis, for the non-permit compliant uses of the pavilion that occurred in 2004 through 2007 and 2012 through 2015. Between 2008 and 2011, Port-generated data was not provided. In the absence of data from the Port's property manager, staff relied on data from Scott's for the non-permit compliant uses of the pavilion that occurred in 2008 through 2011.²
13. **2004.** As evidenced by the information contained in the report from Rhonda Hirata, Director, External Communications, Jack London Square Marketing, dated March 31, 2005, as adjusted by Commission staff:³
- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 268 of the required 292 days;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of five (5) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of seven (7) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;

² Commission staff believes that the data from Scott's for 2008, 2009, 2010, and 2011 under-reports private pavilion use because whenever two sets of data are available, the Port property manager's data shows more private pavilion use than Scott's data.

³ In calculating the minimum number of public use days, the Port's property manager counted two private events that occurred on the same day as two days of non-public use. BCDC staff has counted each of these 11 dual-event days as a single private use day, resulting in 11 more public access days than calculated by the Port's property manager.

In calculating the three monthly averages, the Port's property manager and the staff conducted their calculations differently yet reached the same or similar conclusions. The minor deviations in these results do not affect the determination of whether or not a violation has occurred.

The Port's property manager did not calculate the minimum number of public use weekend days and nights per month nor the maximum number of consecutive private use days.

- e. **Minimum Number of Public Use Weekend Days and Nights (per month).** In May, there were only two (2) [vs. the minimum three (3)] required public use weekend days and nights; and
 - f. **Maximum Number of Consecutive Private Use Days.** In May, there were six (6) more than two consecutive private use days. In June, there were four (4) more than two consecutive private use days. In August, there were two (2) more than two consecutive private use days.
14. **2005.** As evidenced by the information contained in the report from Rhonda Hirata, Director, External Communications, Jack London Square Marketing, dated March 31, 2006, as adjusted by staff:⁴
- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 255 of the required 292 days;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of six and a half (6.5) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of seven and six tenths (7.6) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
 - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
 - f. **Maximum Number of Consecutive Private Use Days.** In April there were six (6) more than two consecutive private use days. In May there were eight (8) more than two consecutive private use days. In June, there were two (2) more than two consecutive private use days. In October, there was one (1) more than two consecutive private use days. In November there were two (2) more than two consecutive private use days. In December there were nineteen (19) more than two consecutive private use days.

⁴ In calculating the three monthly averages, Port's property manager and the staff conducted their calculations differently yet reached the same or similar conclusions. The minor deviations in these results do not affect the determination of whether or not a violation has occurred.

The Port's property manager did not calculate the minimum number of public use weekend days and nights per month nor the maximum number of consecutive private use days.

15. **2006.** As evidenced by the information contained in the report from Rhonda Hirata, Director, External Communications, Jack London Square Marketing, dated February 22, 2007, as adjusted by Commission staff:⁵
- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 266 of the required 292 days;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of five and a half (5.5) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of six and a half (6.5) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
 - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
 - f. **Maximum Number of Consecutive Private Use Days.** In March there were eight (8) more than two consecutive private use days. In May, there was one (1) more than two consecutive private use days. In October, there were two (2) more than two consecutive private use days. In November, there were two (2) more than two consecutive private use days. In December, there were three (3) more than two consecutive private use days.
16. **2007.** As evidenced by the information contained in the report from Rhonda Hirata, Director, External Communications, Jack London Square Marketing, dated April 7, 2008, as adjusted by Commission staff:⁶

⁵ In calculating the minimum number of public use days, the Port's property manager determined that there were 286 public use days whereas staff, reviewing the same data, determined that there were 266 public use days.

In calculating the three monthly averages, the Port's property manager and the staff conducted their calculations differently yet reached the same or similar conclusions. The minor deviations in these results do not affect the determination of whether or not a violation has occurred.

The Port's property manager did not calculate the minimum number of public use weekend days and nights per month nor the maximum number of consecutive private use days.

⁶ In calculating the minimum number of public use days, the Port's property manager determined that there were 258 public use days whereas staff, reviewing the same data, determined that there were 278 public use days.

In calculating the three monthly averages, the Port's property manager and the staff conducted their calculations differently yet reached the same or similar conclusions. The minor deviations in these results do not affect the determination of whether or not a violation has occurred.

- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 278 of the required 292 days;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of four and a half (4.5) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of four and a half (4.5) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
 - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
 - f. **Maximum Number of Consecutive Private Use Days.** In February there was one (1) more than two consecutive private use days. In May, there were two (2) more than two consecutive private use days. In December, there were six (6) more than two consecutive private use days.
17. **2008.** As evidenced by the information contained in the report prepared by Steve Hanson, Scott's consultant, dated July 19, 2013, as modified by Commission staff's calculations:⁷
- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 273 of the required 292 days;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of four and eight tenths (4.8) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;

The Port's property manager did not calculate the maximum number of consecutive private use days.

⁷ Scott's data consist of a list of 107 events, the date on which the event occurred, and the hours of duration of each event. The report totals the number of hours that the 107 events lasted and, based on this, concludes that the pavilion was occupied for a 19-day period, or at 5.35% of capacity. Scott's reached this conclusion by calculating the total number of hours the pavilion was used for private events and divided that number by 24 hours. Scott's methodology for calculating private pavilion use is flawed because any day the pavilion is subject to any private use for any amount of time counts as a private use day. Staff conducted independent calculations and reached significantly different conclusions.

- d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of five and eight tenths (5.8) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
 - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
 - f. **Maximum Number of Consecutive Private Use Days.** In March there was one (1) more than two consecutive private use days. In April, there were two (2) more than two consecutive private use days. In May there was one (1) more than two consecutive private use days. In August, there were three (3) more than two consecutive private use days. In October, there were two (2) more than two consecutive private use days. In December, there were two (2) more than two consecutive private use days.
18. **2009.** As evidenced by the information contained in the undated report from Scott's submitted by John Briscoe with a letter, dated June 20, 2013, as adjusted by Commission staff:⁸
- a. **Minimum Number of Public Use Days (annual).** No violation;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** No Violation;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of three and eight tenths (3.8) [vs. the maximum of three (3)] weekend days and nights in the months of May through October:
 - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
 - f. **Maximum Number of Consecutive Private Use Days.** In October there were two (2) more than two consecutive private use days. In December, there was one (1) more than two consecutive private use days.
19. **2010.** As evidenced by the information contained in the undated report from Scott's submitted by John Briscoe with a letter, dated June 20, 2013, as adjusted by Commission staff:⁹

⁸ Scott's data consist of a list of un-numbered events, and the date on which the event occurred. Staff conducted independent calculations to reach the conclusions cited herein.

⁹ Scott's data consist of a list of un-numbered events and the date on which the event occurred. Staff conducted independent calculations to reach the conclusions cited herein.

- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 277 of the required 292 days;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** No Violation;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of four (4) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
 - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
 - f. **Maximum Number of Consecutive Private Use Days.** In April, there were for two (2) more than two consecutive private use days. In May there was one (1) more than two consecutive private use days. In June there was one (1) more than two consecutive private use days. In October, there were for four (4) more than two consecutive private use days. In November, there was one (1) more than two consecutive private use days. In December, there was one (1) more than two consecutive private use days.
20. **2011.** As evidenced by the information contained in the undated report from Scott's submitted by John Briscoe with a letter, dated June 20, 2013, as adjusted by Commission staff:¹⁰
- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 280 of the required 292 days;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** No Violation;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of five and one tenth (5.1) [vs. the maximum of three (3)] weekend days and nights in the months of May through October; and
 - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and

¹⁰ Scott's data consist of a list of un-numbered events and the date on which the event occurred. Staff conducted independent calculations to reach the conclusions cited herein.

- f. **Maximum Number of Consecutive Private Use Days.** In March there was one (1) more than two consecutive private use days. In May, there were two (2) more than two consecutive private use days. In July there was one (1) more than two consecutive private use days. In September, there were two (2) more than two consecutive private use days. In November, there was one (1) more than two consecutive private use days. In December, there were two (2) more than two consecutive private use days.
21. **2012.** As evidenced by the information contained in the report from Michael Meyer, Director, Cushman & Wakefield of California, Inc., dated April 18, 2013, as adjusted by Commission staff.¹¹
- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 171 of the required 292 days;
- b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
- c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of nine (9) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
- d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of eight and half (8.5) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
- e. **Minimum Number of Public Use Weekend Days and Nights (per month).** In March, there was only one (1) [vs. the minimum three (3)] required public use weekend days and nights. In May, there were zero (0) [vs. the minimum three (3)] required public use weekend days and nights. In September, there were only two (2) [vs. the minimum three (3)] required public use weekend days and nights. In December, there were zero (0) [vs. the minimum three (3)] required public use weekend days and nights; and
- f. **Maximum Number of Consecutive Private Use Days.** In January, there was one (1) more than two consecutive private use days. In February, there were two (2) more than two consecutive private use days. In March, there were 15 more than two consecutive private use days. In April, there were 10 more than two consecutive private use days. In May, there were 19 more than two

¹¹ The Port's property manager determined that there were 182 private use days. The Port's property manager did not calculate the minimum number of public use days. The Port's property manager states that Scott's exceeded the number of consecutive private use days but did not provide this or any other calculations. Staff conducted independent calculations to reach the conclusions cited herein.

consecutive private use days. In June, there were two (2) more than two consecutive private use days. In July, there were six (6) more than two consecutive private use days. In August, there were four (4) more than two consecutive private use days. In September, there were 15 more than two consecutive private use days. In October, there were four (4) more than two consecutive private use days. In November, there were six (6) more than two consecutive private use days. In December, when construction of the new pavilion enclosure commenced, there were twenty-nine (29) more than two consecutive private use days.

22. **2013.** As evidenced by the information contained in the report from Jennifer Koidal, General Manager, Cushman & Wakefield of California, Inc., dated March 12, 2014, as adjusted by Commission staff:¹²
- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 207 of the required 292 days;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** On average, Scott's provided only four and six tenths (4.6) [vs. the minimum of five (5)] publicly available weekend days and nights in the months of January, February, March, April, November and December;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of eight and six tenths (8.6) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of six and one tenths (6.1) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
 - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** In January, there were zero (0) [vs. the minimum three (3)] required public use weekend days and nights. In February, there were zero (0) [vs. the minimum three (3)] required public use weekend days and nights; and
 - f. **Maximum Number of Consecutive Private Use Days.** In January, there were twenty-nine (29) more than two consecutive private use days. In February, there were twenty-eight (28) more than two consecutive private use days. In

¹² The Port's property manager determined that there were 153 private use days. The Port's property manager did not calculate the minimum number of public use days. The Port's property manager states the number of weekend days and nights that the pavilion was in private use but it does not calculate the required averages. It states that Scott's exceeded the number of consecutive private use days but did not provide this or any other calculations. Staff conducted independent calculations to reach the conclusions cited herein.

March, when construction of the new pavilion enclosure was completed, there were eleven (11) more than two consecutive private use days. In April, there were five (5) more than two consecutive private use days. In October, there were three (3) more than two consecutive private use days. In November, there was one (1) more than two consecutive private use days. In December, there were sixteen (16) more than two consecutive private use days.

23. **2014.** As evidenced by the information contained in the report from Michael Meyer, Director, Cushman & Wakefield of California, Inc., dated March 16, 2015, as adjusted by Commission staff.¹³
- a. **Minimum Number of Public Use Days (annual).** The pavilion was open for public use only 271 of the required 292 days;
 - b. **Minimum Number of Public Use Weekend Days and Nights (winter season average).** No Violation;
 - c. **Maximum Number of Private Use Weekend Days and Nights (winter season average).** Scott's used the pavilion an average of five (5) [vs. the maximum of four (4)] weekend days and nights in the months of January, February, March, April, November and December;
 - d. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of four and five tenths (4.5) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
 - e. **Minimum Number of Public Use Weekend Days and Nights (per month).** No Violation; and
 - f. **Maximum Number of Consecutive Private Use Days.** In April, there were five (5) more than two consecutive private use days. In May, there were three (3) more than two consecutive private use days. In June, there was one (1) more than two consecutive private use days. In October, there were three (3) more than two consecutive private use days. In November, there was one (1) more than two consecutive private use days. In December, there were five (5) more than two consecutive private use days.

¹³ The Port's property manager determined that there were 97 private use days. The Port's property manager did not calculate the minimum number of public use days. The Port's property manager states the number of weekend days and nights that the pavilion was in private use but it does not calculate the required averages. It states that Scott's exceeded the number of consecutive private use days but did not provide this or any other calculations. Staff conducted independent calculations to reach the conclusions cited herein.

24. **2015.** As evidenced by the information contained in the report from Jennifer Koidal, Vice President and General Manager, CIM Group, dated July 18, 2016, as adjusted by Commission staff:¹⁴

- a. **Maximum Number of Private Use Weekend Days and Nights (summer season average).** Scott's used the pavilion an average of three and six tenths (3.6) [vs. the maximum of three (3)] weekend days and nights in the months of May through October;
- b. **Maximum Number of Consecutive Private Use Days.** In February, there was one (1) more than two consecutive private use days. In May, there were three (3) more than two consecutive private use days. In October, there were four (4) more than two consecutive private use days. In December, there was one (1) more than two consecutive private use days.

C. **Unpermitted Use of the Franklin and Broadway Street Plazas**¹⁵

25. **Nature of Violations.** The installation, storage or display of unauthorized structures as follows:

- a. Unauthorized use of the Broadway Street Plaza by displaying a promotional vehicle adjacent to the main restaurant entrance.
- b. Unauthorized use of the Franklin Street Plaza (outside the pavilion boundary) by installing event tents, stanchions, and planters and by storing event-related equipment including planters.

26. **Legal Basis for Violations.** Under California Government Code Section 66632(a), any person or governmental agency wishing to place fill, to extract materials, or to make any substantial change in use of any water, land or structure, within the area of the commission's jurisdiction shall secure a permit from the commission.

27. **Description and Evidence of Violations.** Scott's conducted the following activities within the area of the Commission's jurisdiction without obtaining a permit or permit amendment:

- a. As evidenced by an email from Steve Fagalde, Senior Vice President, Scott's, to Julie Braun, dated December 16, 2011, for a 30-day period each summer of the years 2000 through 2011, Scott's parked a promotional vehicle in the Broadway Street Plaza. This totals 330 days.

¹⁴ The Port's property manager did not calculate the required average number of weekend days and nights that the pavilion was in private use, but it does not calculate the required averages. It states that Scott's exceeded the number of consecutive private use days, closed the retractable wall panels too soon before some events and opened them too long after the end of some events, and lapsed in maintenance of floor and furniture. Staff conducted independent calculations to reach the conclusions cited herein.

¹⁵ Both the Franklin and Broadway Street Plazas are dedicated public access areas subject to the requirements of the Port's Permit.

- b. As evidenced by the photographs contained in the report from Rhonda Hirata, Director, External Communications, Jack London Square Marketing, dated March 31, 2005:
 - On May 8, 2003, Scott's installed a tent in the Franklin Street Plaza.
 - On May 9, 2003, Scott's installed a tent and stanchions in the Franklin Street Plaza.
 - On May 10, 2003, Scott's installed a tent, stanchions and planters in the Franklin Street Plaza.
 - On May 23, 2003, Scott's installed a tent and stanchions in the Franklin Street Plaza.
 - On May 25, 2003, Scott's installed a tent in the Franklin Street Plaza.
 - On September 20, 2003, Scott's installed a tent, stanchions and planters in the Franklin Street Plaza.
- c. For a five-day period between 9:00 am on December 7, and 9:00 am on December 12, 2012, Scott's installed a tent in the Franklin Street Plaza, as evidenced by: (a) Security Officer Tim Crosby's notes contained in the report submitted by Jennifer Koidal, General Manager, Cushman and Wakefield, dated March 12, 2014; and (b) A photograph attached to an email, dated December 19, 2012, from Maryann Starn, General Manager, Cushman and Wakefield to BCDC staff.
- d. As evidenced by a photograph attached to an email of the same date to Mr. Fagalde from Ms. Starn, Cushman and Wakefield, on December 19, 2012, Scott's installed an entry doorway and carpeted walkway with railings in the Franklin Street Plaza adjacent to the pavilion.
- e. As evidenced by photographs taken by Lee Huo, San Francisco Bay Trail, attached to an email of the same date, on February 10, 2014, Scott's stored event related equipment and placed planters in the Franklin Street Plaza.
- f. As evidenced by photographs taken by Keith Miller, California Canoe and Kayak, sometime before February 25, 2013, Scott's installed a tent in the Franklin Street Plaza, apparently for construction staging.
- g. As evidenced by photographs taken by Mr. Miller, California Canoe and Kayak, on April 28, 2013, Scott's installed planters in the Franklin Street Plaza.

- h. On April 30 and May 1, 2013, Scott's installed tents in the Franklin Street Plaza, as evidenced by: (a) Universal Protection Services' Security Officer Alan Humphrey's notes in the report submitted by Ms. Koidal, Cushman and Wakefield, dated March 12, 2014; and (b) Photographs taken by Mr. Miller, California Canoe and Kayak.
- i. As evidenced by four photographs taken by Security Officer Humphrey, submitted to Julie Braun, Port, by email, dated May 22, 2013, for a 26-hour period beginning on May 19, 2013, and ending on May 20, 2013, Scott's erected a tent in the Franklin Street Plaza.
- j. As evidenced by Universal Protection Services' Security Officer Dominic Wade's notes in the report submitted by Ms. Koidal, Cushman and Wakefield, dated March 12, 2014, for a 24-hour period beginning at 7:00 am on June 8, 2013, and ending on June 9, 2013, Scott's erected a tent in the Franklin Street Plaza.
- k. As evidenced by observations of the staff of the Port of Oakland and summarized in a letter dated July 18, 2013, from Adrienne Klein, BCDC's Chief of Enforcement, to John Briscoe, Briscoe, Ivester and Bazel LLP, Scott's former counsel, for at least a 36-day period from June 12th to July 18, 2013, Scott's staged a promotional vehicle in the Broadway Plaza.
- l. As evidenced by a photograph attached to a letter dated December 19, 2013, to Mr. Fagalde from Ms. Koidal, General Manager, Cushman and Wakefield, on December 18, 2013, Scott's erected a tent in the Franklin Street Plaza.
- m. As evidenced by photographs taken by Ms. Klein during a site visit, on January 21, 2014, unauthorized planters and other equipment, including the public tables and chairs, were stored in the Franklin Street Plaza.
- n. On April 28, 2014, Scott's erected a tent in the Franklin Street Plaza (south of the pavilion) and also placed pipes and ladders in the Franklin Street Plaza, creating non-public conditions, as evidenced by: (a) the photograph attached to the letter, dated April 30, 2014, to Mr. Fagalde from Jennifer Koidal, Cushman and Wakefield; (b) observations by Sean Palmer, General Manager, Kincaid's Restaurant; and (c) observations by Tammy Borichevsky, California Canoe and Kayak, in an email dated April 28, 2014.
- o. As evidenced by the letter to Mr. Fagalde, dated July 2, 2014, from Monique Scott, Assistant Property Manager, Cushman and Wakefield, on July 2, 2014, Scott's staged a promotional vehicle in the Broadway Street Plaza.
- p. As evidenced by Ms. Klein's observations during a site visit on September 19, 2014, and documented with photographs, the following conditions existed at the public pavilion:

- Despite being publicly available, two of the retractable wall panels were in place along the southern, waterside of the pavilion;
 - Seven unauthorized planters were in place, two next to the stage/storage area and five in the Port's public access area near the southern exit door from the restaurant;
 - Several unauthorized benches were located inside the pavilion in line with the structural support columns; and
 - An hydraulic jack was stored in the northwest corner of the pavilion.
- q. For approximately 40 hours beginning at 8:20 am on December 7, 2014, and ending at midnight on December 8, 2014, Scott's erected a tent in the Franklin Street Plaza and placed planters and stanchions, as evidenced by: (a) Universal Protection Services' Security Officer Rashema Jacobs' notes in the report, dated March 16, 2015, from Ms. Koidal, Cushman and Wakefield; and (b) three photographs submitted by Mr. Miller, California Canoe and Kayak, via email on December 8, 2014.
- r. As evidenced by Security Officer Rashema Jacobs' notes in the report, dated March 16, 2015, from Ms. Koidal, Cushman and Wakefield, for approximately 15 hours beginning at 8:25 am on December 16, 2014, Scott's erected a tent in the Franklin Street Plaza.
- s. As evidenced by Keith Miller's and Jennifer Koidal's observations on September 21, 2015, Scott's erected a red carpet, stanchions and dining tables in the Franklin Street Plaza.
- t. As evidenced by photographs taken by Ade Barari on August 14, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, Scott's placed eleven planters (10 terra cotta and one metal) in the Franklin Street Plaza.
- u. As evidenced by photographs taken by Tammy Borichevsky and submitted by Keith Miller on August 15, 2016, Scott's stored four stacks of private dining tables, two serving tables, one mechanical lift, and placed seven planters (five terracotta and one metal) in the Franklin Street Plaza.
- v. As evidenced by photographs taken by Mark Madamba on August 16, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, Scott's placed eight terra cotta planters and one mechanical lift in the Franklin Street Plaza.
- w. As evidenced by photographs taken by Mark Madamba on August 17, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, Scott's placed four terra cotta planters and one mechanical lift in the Franklin Street Plaza.

D. Untimely Submittal of Private Event Schedules

28. Nature of Violations

- a. Failure by Scott's to submit to the Port by the 1st of January, April, July and October of each year, a quarterly calendar of events; and
- b. Failure by the Port to submit to BCDC by March 1st of every year, a summary of the scheduled events for the previous year; and
- c. Holding unscheduled events.

29. Legal Basis For Violations. Special Condition II.B of the permit including Permit Exhibit A, entitled "Guidelines for Private Use of Public Pavilion," sets forth the following requirements:

- a. **Quarterly Calendar of Events.** By the 1st of January, April, July and October of each year, Scott's must submit a quarterly calendar of events to the Port.
- b. **Annual Summary of Events.** By March 1st of every year, the Port must submit a summary of the scheduled events for the previous year to BCDC.
- c. **Unscheduled Events.** The holding of an event within the pavilion or public access plaza not listed in the schedule of events, or the approval of a schedule of events that is inconsistent with the Permit Exhibit A, Guidelines for Private Use of the Pavilion, is prohibited.

30. Description and Evidence of Violations.

- a. **Quarterly Calendar of Events¹⁶:**
 - Scott's did not submit a 2013 first quarter calendar of events. On April 5, 2013 (and again on October 1, 2013, revised), Scott's submitted a "committed" calendar of events from April 3rd through December 2013, as evidenced by an email from Jennifer Koidal, dated July 13, 2015, which renders these four reports a cumulative total of 97 days late, as of July 1, 2016;
 - On January 13, 2014, Scott's submitted its first quarter calendar of events. On March 5, 2014, Scott's submitted its second quarter calendar of events. On October 1, 2014, Scott's submitted a third and fourth

¹⁶ Following the issuance of an enforcement letter, dated May 16, 2013, the Permittees submitted the annual reports for Years 2008 through 2012 on June 20, 2013, ranging from five years to three months past due. As described in staff's response to this submittal, dated July 18, 2013, staff accepted the annual reports as retroactive fulfillment of the requirement to provide the quarterly reports and the Permittees accrued no standardized fines for these 24 violations because they submitted the reports within 35 days of staff's enforcement letter, dated May 16, 2013.

quarterly “activity report”, as evidenced by an email from Jennifer Koidal, dated July 13, 2015, which renders these four reports a cumulative total of 104 days late;

- On January 16, 2015, Scott’s submitted its first quarter calendar of events. On June 9, 2015, Scott’s submitted its second quarter calendar of events. On July 1, 2015, Scott’s submitted its third quarter calendar of events. Scott’s did not submit a 2015 fourth quarter calendar of events, as evidenced by an email from Jennifer Koidal, dated July 13, 2015, which renders these three reports a cumulative total of 357 days late, as of July 1, 2016.
- Scott’s did not submit a 2016 first quarter calendar of events. On April 27, 2016 (and again on May 18, 2016, revised), Scott’s submitted its second quarter calendar of events. On April 27, 2016, Scott’s submitted its third¹⁷ quarter calendars of events, as evidenced by an email from Jennifer Koidal, dated July 18, 2016, which renders these three reports a cumulative total of 208 days late, as of July 1, 2016.

b. **Annual Summary of Events.** The cumulative total number of days late that the Permittees have submitted the annual summaries of events is 230 days as outlined below:

- In 2003, the Permittees submitted the annual summary of events 54 days late, as evidenced by the letter, dated April 23, 2004, from Rhonda Hirata, Cushman and Wakefield, to Adrienne Klein.
- In 2004, the Permittees submitted the annual summary of events 30 days late, as evidenced by the letter, dated March 31, 2005, from Rhonda Hirata, Jack London Square Marketing, to Adrienne Klein.
- In 2005, the Permittees submitted the annual summary of events 30 days late, as evidenced by the letter, dated March 31, 2006, from Rhonda Hirata, Jack London Square Marketing, to Adrienne Klein.
- In 2006, the Permittees submitted the annual summary of events 53 days late, as evidenced by the letter, dated February 22, 2007, from Rhonda Hirata, Jack London Square Marketing, to Adrienne Klein.
- In 2007, the Permittees submitted the annual summary of events 37 days late, as evidenced by the letter, dated April 7, 2008, from Brian Lee, Cushman and Wakefield, to Adrienne Klein.¹⁸

¹⁷ Scott’s also submitted its fourth quarter report on April 27, 2016.

¹⁸ Following the issuance of an enforcement letter, dated May 16, 2013, the Permittees submitted the annual reports for Years 2008 through 2012 on June 20, 2013, ranging from five years to three months past due. As described in staff’s of response to this submittal, dated July 18, 2013, the Permittees accrued no standardized fines

- In 2013, the Permittees submitted the annual summary of events 11 days late, as evidenced by the letter, dated March 12, 2014, from Jennifer Koidal, Cushman and Wakefield to Adrienne Klein.
- In 2014, the Permittees submitted the annual summary of events 15 days late, as evidenced by the letter, dated March 16, 2015, from Jennifer Koidal, Cushman and Wakefield to Adrienne Klein.
- In 2015, the Permittees submitted the annual summary of events 149 days late, as evidenced by the letter, dated July 18, 2016, from Jennifer Koidal, CIM Group to Adrienne Klein.

E. Failure to Dedicate the Pavilion Public Access Area

31. Nature of Violation. Failure to dedicate the required public access area before commencement of construction of the pavilion.

32. Legal Basis for Violation. Special Condition II.B.3, Permanent Guarantee, requires the Permittees to dedicate the 4,400-square-foot public access area known as the pavilion prior to the commencement of construction.

33. Description and Evidence of Violations.

- a. Sometime between February 13, 1996, the date of issuance of the permit amendment that authorized the pavilion and 2000, exact date unknown, the Permittees commenced and completed construction of the pavilion.
- b. By letter dated May 16, 2013, Ms. Klein notified the Permittees that they had failed to dedicate the 4,400-square-foot public access area.
- c. Following notification of this Permit violation, between May 16 and September 11, 2013, the Permittees prepared several draft legal instruments for staff's review.
- d. On September 11, 2013, BCDC Legal Intern Simran Mahal conditionally approved a draft legal instrument, as evidenced by an email of the same date to Peter Prows, Briscoe, Ivester & Bazel, LLP, counsel to Scott's.
- e. Between September 11 and December 13, 2013, the Permittees determined that the area covered by the lease between the Port and Scott's does not overlap with the boundary of the pavilion.
- f. In a series of email messages between April 18 and July 24, 2014, Deputy Port Attorney Joshua Safran raised a number of issues regarding the terms of the dedication of the pavilion as a public access area. The most significant of these issues was a proposal by Mr. Safran that, due to restrictions on the

for these violations because they submitted the reports within 35 days of staff's enforcement letter, which is a penalty-free period within which a violator may resolve a violation, as provided for by Commission Regulation 11386.

Port's ability to encumber tidal lands conveyed to it by the State of California, the term of the public access dedication to be made by Scott's and the Port be limited to 66-years. Commission Staff Counsel John Bowers responded to this proposal by pointing out that that Port's proposal was based on a misconception as to the term of the dedication required by the Permit, which Mr. Safran had characterized as "permanent" or "perpetual." As Mr. Bowers advised Mr. Safran, the term of the dedication required by the Permit is not in fact "permanent," but rather, pursuant to section 10503(c) of the Commission's regulations, is limited to the duration of the permit and of the improvements that it authorizes. Mr. Bowers further advised Mr. Safran that any change in the terms of the Permit, such as a change in the term or duration of the public access dedication required by the Permit, could only occur by means of an amendment to the Permit, and that any limitation on the term of the Permit's dedication requirement would need to be accompanied by a corresponding change or reduction in the term of the Permit itself.

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

F. Failure to Provide All of the Required Public Access Improvements During Public Use Days

34. **Nature of Violation.** Failure to install and maintain on a continuous basis since the date of issuance of the permit all of the required public access improvements when the pavilion was open.

35. Legal Basis of Violation

- a. Special Condition II.B.5.c, Public Access, requires the Permittees to install “[a]t least four...public access signs, two permanent and two temporary, to facilitate shoreline public access between Franklin Street and Broadway on the Bay side of Scott’s Restaurant. The temporary signs shall be installed and removed when approved private events are held.”¹⁹
- b. Special Condition II.B.5.d, Public Access, requires the Permittees to install “[a]t least 15 tables and 35 chairs...to be in place at all times, except when the pavilion is needed for approved private events or other approved public events.”

¹⁹ One public access sign shall be installed at the entrance to the gangway leading to the kayak launch float that describes the rules and hours for public use of the kayak launch float.

36. Description and Evidence of Violations.

- a. As evidenced by personal observations of Keith Miller, California Canoe and Kayak, and Julie Braun, Port, in emails dated April 16 and 24, 2015, respectively, Scott's failed to install all of the required tables, chairs and signs for a 13-year period from January 1, 2000 through July 22, 2013;
- b. As evidenced by a photograph, dated July 22, 2013, taken by Mr. Fagalde and submitted by Peter Prows, Briscoe, Ivester and Bazel LLP, former counsel to Scott's, on July 22, 2013, Scott's partially resolved this violation by installing tables and chairs;
- c. As evidenced by Ms. Klein's observations during a site visit on September 19, 2014 and documented with photographs, the required tables and chairs were not provided;
- d. As evidenced by two emails, dated April 16, 2014, and April 30, 2015, both from Keith Miller, Scott's has failed to install the moveable "Public Shore" signs alongside the public tables and chairs; and
- e. As evidenced by photographs taken by Robert Howard on August 13, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, the required moveable public shore signs were not located in the pavilion adjacent to the tables and chairs.
- f. As evidenced by photographs taken by Ade Bakari on August 14, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, the required moveable public shore signs were not located in the pavilion adjacent to the tables and chairs.
- g. As evidenced by photographs taken by Mark Madamba on August 15, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, the required moveable public shore signs were not located in the pavilion adjacent to the tables and chairs; one sign was placed bayward and outside the perimeter of the pavilion next to the bench overlooking the Bay.
- h. As evidenced by photographs taken by Mark Madamba on August 16, 2016, and submitted by Jennifer Koidal, CIM Group, on August 23, 2016, the required moveable public shore signs were not located in the pavilion adjacent to the tables and chairs.
- i. As evidenced by an email, dated August 16, 2016, from Tammy Borichevsky and Keith Miller, Scott's has failed to install both moveable "Public Shore" signs alongside the public tables and chairs.

G. Failure to Obtain Plan Approval Prior to Installation of Public Access Improvements

- 37. Nature of Violation.** Failure to obtain written plan approval from the BCDC staff in advance of installing public tables and chairs.

38. Legal Basis of Violations. Special Condition II.A, Specific Plans and Plan Review, of the Permit states, in part, that “[n]o work whatsoever shall be commenced...until final precise ...plan information for that portion of the work have been submitted to, reviewed and approved in writing by or on behalf of the Commission. The specific drawings and information required will be determined by the staff.”

39. Description and Evidence of Violations.

- a. As evidenced by the photograph, dated July 22, 2013, taken by Steve Fagalde and submitted by Mr. Prows, on July 22, 2013, Scott’s installed the required public access tables and chairs prior to receiving BCDC staff review and approval of the plans required by Special Condition II.A of the Permit.
- b. By email to Ms. Klein, dated September 19, 2013, Mr. Prows submitted a set of design specifications for the 15 public access tables and 35 chairs.
- c. By email to Ms. Klein, dated October 15, 2013, Mr. Prows submitted a proposed public access signage plan as required by Special Condition II.B.5.c of the Permit.²⁰
- d. By email to Ms. Klein, dated October 16, 2013, Mr. Prows submitted a plan-view illustration showing the proposed locations of the public furniture for staff’s review and approval.²¹
- e. By letter to Mr. Prows, dated October 18, 2013, Ms. Miramontes retroactively approved the design specifications for the public access tables and chairs and requested changes to the signage plan.
- f. By email to Ms. Miramontes, dated October 30, 2013, Mr. Prows submitted a revised signage plan.²²
- g. By letter to Mr. Prows dated November 19, 2013, Ms. Miramontes approved the signage plans, which resolved this violation.

²⁰ The plans, which are not dated and do not indicate who prepared them, have the following titles: “Public Pavilion Regulatory Signs: Location/Site Plan,” “Public Pavilion Regulatory Signs: Exhibit Plan” and “Public Pavilion Regulatory Signs: Exhibit Plan, Sign Specifications.”

²¹ The plans, which are not dated and do not indicate who prepared them, have the following titles: “Public Pavilion Table and Chair Exhibit” and “Public Pavilion Table and Chair Exhibit, Page 2.”

²² The plans are entitled “Public Pavilion Regulatory Sign Specifications,” dated October 22, 2013, and prepared by Steve Hanson.

III. ADMINISTRATIVE CIVIL PENALTY CONSIDERATIONS AND AMOUNT

40. Section 66641.9(a) of the McAteer-Petris Act states:

“In determining the amount of administrative civil liability, the commission shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the violation is susceptible to removal or resolution, the cost to the state in pursuing the enforcement action, and with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary removal or resolution efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require.”

41. **Nature of the Violations.** Scott's violated the requirements of the Permit repeatedly and consistently, as follows:

- a. **Non-permit Compliant Use of the Pavilion.** Scott's regularly held more private events than allowed by the Permit and operated the pavilion in numerous other ways that violate the requirements of the Permit.
 - As evidenced in five letters from the Jack London Square Partners to the Port of Oakland and BCDC and copied to Scott's, dated April 23, 2004, March 31, 2005, March 31, 2006, February 22, 2007, and April 7, 2008, Scott's was notified of its many and various non-permit compliant uses of the pavilion yet it continued to operate in violation of the McAteer-Petris Act and its permit.
 - Following the issuance on May 16, 2013, of a BCDC enforcement letter, Scott's did not cease its non-compliant actions as evidenced by it providing 85 fewer public access days than required in 2013, and 21 fewer public access days in 2014.
 - In a meeting on November 18, 2014, when staff cautioned Ray Gallagher, Founder and President, Scott's, not to hold more than 73 events that year, he asked if that meant he should cancel charity events.
 - At the Design Review Board meeting on April 6, 2015, Liz Gallagher informed Ms. Klein that she had instructed her staff not to accept more than 73 events per year. Therefore, it appears that Scott's may not have issued these instructions to its staff prior to this date.
- b. **Unauthorized Use of the Franklin and Broadway Street Plazas.** Scott's regularly displayed a promotional vehicle in the Broadway Street Plaza and stored event-related equipment including planters in the Franklin Street Plaza. Scott's was repeatedly notified that these activities were unauthorized yet they continued to commit the violations.

- c. **Event Schedules and Scheduling.** The Permittees habitually failed to submit quarterly reports and, to a lesser extent, annual summaries of scheduled events.
 - d. **Public Access Improvements.** Scott's failed to place the tables, chairs and signs in the pavilion when it was in public use almost continuously since 1998. As of the date of this Order, Scott's is posting only one of the two required moveable signs and the other one is not located in the pavilion where it is required to be located.
 - e. **Permanent Guarantee of the Public Access Area.** Following issuance of the May 16, 2013, BCDC enforcement notice, the Permittees came extremely close to resolving this issue but have yet to do so despite the fact that Commission staff provided all the information necessary to achieve compliance with this requirement in a letter, dated December 12, 2013.
 - f. **Failure to obtain plan approval for the public access improvements.** The Permittees failed to obtain plan approval for the public tables, chairs and signage prior to constructing the pavilion.
42. **Circumstances of the Violations.** On multiple occasions, BCDC staff described the permit requirements, the proper corrective actions and requested that actions and events remain within the authorized numbers. Despite these meetings and communications, the same unauthorized conduct continued. Circumstances of this matter support the conclusion that violating the BCDC permit was an intentional business decision by Scott's, whereby potential BCDC penalties may have been factored into decisions to proceed unabated over at least a 10-year period.
43. **Extent of Violations.** The non-permit compliant elements of the violations have both spatial and temporal components. The facts emphasize the long duration of these violations and the expansion of private use beyond the limits of the pavilion into the Broadway and Franklin Street Plazas.
44. **Gravity of the Violations.** The open views of the estuary afforded by the space occupied by the pavilion, which is located between the Scott's and Kincaid's Restaurant buildings, are the only unobstructed views of the estuary that are available to persons approaching from Franklin Street. Therefore, the obstruction of those public views by Scott's unauthorized private events is a significant detriment to the public.
- a. **Adverse Impacts on Public Access.** Each and every violation cited in this Order adversely impacts existing required physical and visual public access in and adjacent to the pavilion.
 - b. **Unauthorized Construction of the Pavilion Enclosure System.** Scott's knowingly and intentionally commenced and completed construction of its new pavilion enclosure system without the necessary Commission staff or Commission approval. As evidenced by 13 communications between staff and the Permittees, dated

December 14, 2011, February 1, March 9, March 12, March 26, July 10, August 23, September 12, October 28, and November 20, 2012 and January 9 and 16, March 3, and March 7, 2013:

- One year before commencing construction, Scott's informed Commission staff that it desired to replace the authorized tent with a new pavilion enclosure system.
 - Staff responded by giving Scott's timely and detailed feedback on its initial and subsequent proposals, which included participating in four meetings and responding to four sets of plans plus other communications.
 - Scott's initial, and all subsequent, proposals included a permanent-framed entry doorway on the east side of the pavilion and a 40-foot-long wall on the north side of the pavilion, to which staff stated in its initial, and all subsequent, communications could not be approved due to their inconsistency with existing public access requirements of the permit.
 - Nevertheless, between November 30, 2012, and March 7, 2013, Scott's constructed a new pavilion enclosure system absent the necessary Commission staff, or Commission, approval that included the very project elements that staff had repeatedly in meetings and letters told Scott's were inconsistent with the existing permit.
 - Scott's also acted in bad faith by constructing the roof connection and storage area in 2000 and 2011, respectively, without obtaining Commission staff, or Commission, approval.
- c. **Permit Application Filing Process.** The Permittees failed to submit two fileable applications to retroactively authorize those elements of this project eligible for retroactive approval. As evidenced by no fewer than 38 communications dated February 25, February 27, March 7, March 14, April 16, May 16, May 30, June 3, July 18, September 3, September 5, September 6, September 20, September 30, October 15, October 16, October 18, October 29, October 30, November 25 and December 12, 2013, and January 29, April 17, May 9, May 15, May 19, May 20, May 21, May 23, May 28, July 9, July 25, September 7, September 23, and November 18, 2014, and January 29, February 20, and April 6 (DRB meeting), 2015, the Permittees have not submitted a revised public access proposal:
- Following construction of the pavilion enclosure system between November 30, 2012 and March 7, 2013, Commission staff immediately and repeatedly notified the Permittees that they must submit project applications. Nevertheless, the initial application submittals were not forthcoming until September 30, 2013.
 - The applications requested permission for retroactive approval of the permanent metal-framed entry doorway and other elements that Commission staff had informed the Permittees it could not recommend approval of and should be

removed. Further, the applications lacked a public access component and were otherwise incomplete, preventing staff from scheduling the applications for a public hearing.

- By letter dated October 29, 2013, Commission staff informed the Permittees of the applications' deficiencies.
- On February 10, 2014, as part of the application review process, the Commission's Design Review Board (DRB) considered the proposed (and as-built) project, which lacked a public access component. The Permittees stated to the DRB that the project itself resulted in a public benefit, in disregard of the permit's findings and notwithstanding the fact that the project involves installation of permanent structures in a public access area allowed to be privately used only 20% of each year.
- During a meeting on April 17, 2014, Commission staff and Mr. Fagalde together reviewed the outstanding application filing requirements and the DRB's comments on the proposal to assist the Permittees in successfully filing both of their applications.
- Having not heard from the Permittees, Ms. Klein contacted Mr. Fagalde on May 9, 2014, to find out when they would submit revised applications.
- On May 15, 2014, Mr. Fagalde asked if it was true that the applications were incomplete.
- By letter dated May 16, 2014, Mr. Fagalde declined to follow the Design Review Board's recommendation from February 10, 2014, to remove the permanent metal-framed entry doorway from the project design. It remained part of the applications.
- By letter dated July 9, 2014, nearly nine months following issuance of the application-filing letter, dated October 29, 2013, the Permittees submitted two revised applications, which still included the metal-framed entry doorway and lacked a public access proposal.
- On September 23, 2014, during a face-to-face meeting with the Permittees, staff again informed the Permittees that it would recommend denial of the applications due to the presence of the metal-framed entry doorway and the absence of a public access proposal.
- On February 20, 2015, five months following the meeting on September 23, 2014, and two years following the unauthorized construction of the new pavilion, the Permittees heeded staff's longstanding advice and finally submitted plans that omitted the permanent metal-framed entry doorway and included a public access proposal.

- As such, between May 16, 2013 and February 20, 2015, the Permittees declined to invest in alternate designs for a pavilion entry that would not permanently occupy the east side of the pavilion.
- As such, between September 30, 2013 and February 20, 2015, the applications lacked a public access proposal to offset the adverse impacts of the proposed (and as-built) pavilion enclosure system.
- On April 6, 2015, Scott's presented its revised project that omitted the permanent metal-framed entry doorway and included a public access proposal to the Design Review Board. The Board made recommendations to Scott's for design modifications to its proposal.
- As of the date of this Order, the Permittees have yet to submit a revised public access proposal following the DRB meeting on April 6, 2015, or to file their applications as complete.

d. Failure to Cooperate:

- On May 30, 2013, during a site visit with the Commission's Executive Director, Mr. Fagalde stated he would not remove the permanent metal-framed entry doorway.
- During a meeting with Ms. Miramontes and Ms. Klein on April 17, 2014, Mr. Fagalde said he could not remove the permanent metal-framed entry doorway.
- During a meeting with Commission staff on November 18, 2014, Mr. Gallagher said he could not remove the permanent metal-framed entry doorway.
- As these communications show, it was not a matter of not being able to remove the permanent metal-framed entry doorway from the project for a 3.5-year period, but rather an unwillingness to remove it. This became apparent when, on February 20, 2015, the Permittees submitted a plan proposing to replace the permanent metal-framed entry doorway with additional retractable wall panels that include an entry doorway.

45. Susceptible to Removal or Resolution. Whether the violation is susceptible to removal or resolution:

- a. **Susceptible.** The unpermitted construction of the new pavilion enclosure system is susceptible to resolution through the combined removal of portions of the new pavilion enclosure system and after-the-fact approval of the remainder of it.

The failure to gain approval of a legal instrument to permanently guarantee the public access area and/or record an approved legal instrument is also susceptible to resolution by obtaining staff approval of a legal instrument and subsequently recording it.

Maintenance of public access areas free from storage of restaurant related equipment.

Provision of all required public access improvements (public access tables, chairs and signs).

Permit compliant use of the pavilion 292 days/year.

b. **Not Susceptible.** The following actions are not susceptible to removal or resolution:

- The multitude of past permit non-compliant uses, such as but not limited to the provision of fewer than 292 public access days at the pavilion, from 2004 through 2014 and continuing through the present;
- The past installation, storage and display of unauthorized structures and materials in the Broadway and Franklin Street Plazas;
- The past failure to submit quarterly reports of proposed events in a timely manner;
- The past failure to submit annual reports in a timely manner; and
- The failure to provide all of the required public access tables, chairs and signs between 2000 and the present.

46. **Cost to State.** The estimated cost to the state in pursuing this enforcement action currently totals at least 1,086 hours and a cost of over \$80,000 and accruing:

- a. BCDC's Executive Director has participated in one onsite meeting following construction of the unauthorized pavilion enclosure system and provided direction to staff on how to manage this enforcement case, totaling at least 100 hours to date.
- b. BCDC's Regulatory Director has participated in four onsite meetings, taken photographs of Scott's during multiple visits to Jack London Square, and provided direction to staff on how to manage this enforcement case, totaling at least 140 hours to date.
- c. BCDC's Bay Design Analyst, acting as lead design analyst, has participated in eight onsite meetings before and after construction of the unauthorized pavilion enclosure system, participated in at least four office meetings assisting with the design of a public access proposal, written at least four letters providing detailed design direction, provided direction on application filing requirements, officiated the preparation for and execution of two Design Review Board proceedings, written countless emails, and received and placed numerous telephone calls, totaling at least 190 hours to date.
- d. BCDC's Chief of Enforcement, acting as lead enforcement and permit analyst, has participated in four onsite meetings after construction of the unauthorized pavilion enclosure system, at least four office meetings assisting with the explanation of the violations and how to resolve them and permit application filing requirements,

- written at least four letters outlining the nature of the violations, and the enforcement options to resolve them including administrative civil penalties, participated in the preparation for and execution of two Design Review Board meetings, reviewed the permit and enforcement files, written countless emails, and received and placed numerous telephone calls, totaling at least 340 hours to date.
- e. BCDC's Staff Counsel and Chief Counsel have participated in at least six meetings with the Permittees, responded to draft legal instruments submitted to resolve one of the permit violations, assisted with the preparation of the this Order, and provided direction to staff on how to manage this enforcement case, totaling at least 220 hours.
 - f. BCDC's support staff has prepared all the correspondence between staff and the Permittees, conducted the associated filing of documents and various other support activities, totaling at least 96 hours.

47. With Respect to the Violator:

- a. **Ability to Pay.** The majority of events that Scott's holds in the pavilion are for-profit events. While staff does not know the profit margin for each of these events, staff believes Scott's has the ability to, and should, pay a substantial penalty because the company has financially gained from conducting unauthorized private business in a public space that has been denied to the public for a total of 374 days between 2004 and the present (using the single criterion of days fewer than 292 per year that the pavilion was not publicly available).
- b. **Effect on Business.** Resolution of these violations will not impede Scott's ability to continue in business. Scott's business plan should not depend on revenue from unauthorized events. Long before it gained BCDC permission in 1998 to construct the pavilion, Scott's operated its business in an 18,000-square-foot building that included a dining room, six banquet rooms, and an outdoor dining area on the west side of the building (whereas the pavilion is located on the east side of the building). At the time of issuance of the authorization to construct the pavilion in a public access area in 1996, Scott's signed the permit with an understanding that the terms of use of the pavilion were limited to 73 days per year and that it must be publicly available 292 days per year. Scott's should not be allowed cost-recovery for the construction of unauthorized structures that in part support an illegal use. Should Scott's be required to remove any of the as-built and unauthorized structures, such as the permanent metal entry doorway, which could be replaced with retractable wall panels, the removal and reconstruction costs should not be considered as an impact on the ability to continue in business or to offset and administrative civil penalties. Scott's initiated this project to improve its business and must bear 100% of the costs of having undertaken this project illegally, which may include reconstruction costs and an administrative civil penalty.

- c. **Voluntary Removal or Resolution.** Staff finds no evidence that Scott's has made any effective effort to voluntarily remove the unauthorized structures. Instead the record demonstrates a steady pursuit of project completion and retention in direct contradiction to the information and direction provided by the BCDC staff, as outlined below:
- On December 19, 2012, Scott's installed a tent, walkway and stanchions in the Port's public access area. In response to being advised by Maryann Starn, Cushman and Wakefield, to remove these structures, Mr. Fagalde declined to take responsibility for his actions by directing Ms. Starn to speak directly with the client to whom he had rented the pavilion, which Ms. Starn declined to do as her contract is with Scott's and not its patrons. Following a refusal to remove the structures, Mr. Fagalde stated "[a]re we done?" (Email exchange between Ms. Starn to Mr. Fagalde, dated December 19, 2012).
 - On December 14, 2011, a full year prior to construction of the new pavilion enclosure system on December 28, 2013, Scott's voluntarily contacted and met with three members of the BCDC staff (Brad McCrea, Ellen Miramontes and Adrienne Klein) about its desire to replace the authorized canvas fabric panels with a combination of permanent and moveable wall panels and submitted design drawings. The initial design essentially depicted four permanent corner walls. In response, staff informed Scott's that the proposal could not be approved because it would block Bay views, obstruct physical public access and prevent free-flowing pedestrian movement through the Franklin Street Plaza.
 - During the ensuing 12-month-period, staff met with Scott's three more times (on February 1, March 9, and July 10, 2012) and issued four letters to Scott's (dated March 26, August 23, September 12, and November 20, 2012) following receipt of each of Scott's submittals (dated March 12, August 23, and October 28, 2012).
 - To a certain extent, Scott's proposal evolved positively with a system that tucked away well when not in use, compared with the original proposal, which would have permanently occupied the pavilion on all four sides when in public use mode.
 - However, in disregard of staff's direction, each of Scott's proposals continued to include a permanent metal-framed entry doorway on the east side of the pavilion.
 - The record shows that Scott's was determined to retain the permanent metal-framed entry doorway rather than invest resources in finding a solution that would preserve the open-air nature of the pavilion for the 80% of the time that the pavilion is required to be public, as follows:

- Mr. Fagalde stated “the pavilion is unused by the public” and expressed interest in eliminating the public access requirement and providing alternate public access elsewhere (Statement by Mr. Fagalde during an onsite meeting on July 10, 2013);
- Scott’s “tried with all the technology and design work available to address the...impediments to the public access and preserve public views” (Steve Hanson, Scott’s architect and representative, in a letter dated August 23, 2012);
- “[i]t is necessary to preserve the point of entry” (Mr. Hanson stated in a letter dated August 23, 2012);
- There are imperative time constraints and it would be “ideal if we could make these improvements before the winter banquet season” (Mr. Hanson in a letter dated August 23, 2012); and
- “We don’t believe there is an alternative to some sort of entry way that fronts Franklin Street and is visible to the public during functions. We also believe that our current design provides an unobtrusive and transparent structure during non-scheduled events at the pavilion” (Mr. Hanson in a letter dated August 23, 2012).
- By letter dated October 28, 2013, Mr. Hanson submitted the last set of plans prior to commencement of unauthorized construction of the new enclosure system, to which Ms. Miramontes responded by letter, dated November 20, 2015. As the project design had improved, she was supportive of the design, with the exception of the continued depiction of the permanent metal-framed entry doorway. She did not approve the project.
- In conclusion, not only did Scott’s ignore BCDC staff’s design direction, it built the very project that staff denied, while claiming it believed the construction was approved, as described below.
- Notwithstanding the afore-described year-long exchange, the new pavilion enclosure system was constructed between December 28, 2012, and March 7, 2013, absent BCDC plan approval or any form of communication from Scott’s or its representative that it intended to undertake construction or had commenced construction.
 - During this approximately 70-day period, Scott’s built the new enclosure system in several stages.
 - During the first phase of construction, Keith Miller, California Canoe and Kayak, notified BCDC staff of the ongoing and unauthorized construction. As a result of his call, on January 9, 2013, Ms. Miramontes notified Scott’s that

the construction it was undertaking was unauthorized because it lacked the necessary staff approval and that Scott's must immediately provide plans and an amendment request.

- Rather than heed staff's direction, Scott's continued construction and failed for three months, until April 16, 2013, to submit revised plans or an amendment request.
- On February 25, 2013, Mr. Miller again contacted BCDC staff and stated that Scott's had now constructed a tent adjacent to the still-closed pavilion (in the Franklin Street Plaza), behind which Scott's was constructing a permanent metal-framed entry doorway. On February 25, 2013, Ms. Miramontes again notified Scott's that its continued construction was unauthorized because it lacked the necessary staff approval, and she asked when Scott's would be providing the necessary plans and amendment request.
- On or about April 11, 2013, as evidenced by photographs taken and submitted by Mr. Miller, Scott's constructed and installed approximately 12 rectangular planters around the pavilion, stating that they were necessary to protect the pavilion. Scott's and its representatives had never discussed the planters with Ms. Miramontes or any member of the BCDC staff nor had it shown them on the many sets of plans it had provided to staff before or after the unauthorized pavilion construction project.
- Mr. Hanson, Scott's architect and representative, provided the following explanations for Scott's behavior during this period:
 - He admitted that Scott's was proceeding with construction absent the necessary BCDC review and approval and stated that the project was an evolving design-build project that necessitated the construction and installation of several mock-ups and trial and error systems (Letter to Ms. Miramontes dated January 16, 2013);
 - He stated, "...we simply made several trial and error efforts until we found something that met the requirements. So in essence...it has been a design build project which is why you will not see the typical plans and specifications that you might see for a public works project" (Email to Ms. Miramontes dated January 16, 2013);
 - He stated that Scott's believed it had obtained the necessary plan approval to proceed with construction of the retractable wall panel system (Letter dated February 27, 2013).

- In conclusion, it is not possible that Scott's or its representatives could have believed that the proposal was approved and eligible for construction. As for the storage area, roof extension and planters, Scott's simply constructed and installed these business related private assets, largely in public access areas, without ever consulting BCDC.
- More than two years since the staff notified Scott's that it must either remove the unauthorized pavilion enclosure system or submit two permit applications to retroactively approve the pavilion enclosure system, the Permittees have yet to file their permit application/s as complete:
 - The Permittees persisted in retaining the metal-framed entry doorway as part of their applications from April 16, 2013 until January 29, 2015, despite having been informed by two letters, each dated May 16, 2013, that the doorway proposal would render the project ineligible for a staff recommendation of approval to the Commission;
 - Their applications lacked a public access proposal until February 20, 2015, despite having been informed by letter, dated May 16, 2013, that the absence of one would render the project ineligible for a staff recommendation of approval to the Commission;
 - As of the date of issuance of this report and following the Design Review Board's review, on April 6, 2015, of the public access proposal, the Permittees have not submitted a revised public access proposal responsive to the Board's comments; and
 - The Permittees have also not yet submitted two documents from the City of Oakland, a CEQA determination and a discretionary approval or evidence that none is required, both of which were cited as necessary application filing requirements in a letter to the Permittees from staff, dated May 16, 2013.
- Since the commencement of BCDC's enforcement investigation in January, 2013, after staff notified Scott's of its permit non-compliant use of the pavilion, Scott's continued to provide fewer than 292 public access days in the pavilion, among the other permit non-compliant uses outlined in this Order, install unauthorized structures in the Franklin and Broadway Street Plazas, and failed to provide the public access tables, chairs and signs in the pavilion when it is in public use. The record clearly shows that Scott's has failed to voluntarily comply with the use requirements of the pavilion even when engaged in an active enforcement action by the BCDC staff and, therefore, cannot be expected nor trusted to voluntarily do so in the future.
- On February 5, 2016, Adrienne Klein, asked Alain Placio, City of Oakland Civil Engineer, Building Services Division, and Ed LaByog, City of Oakland Senior Specialty/Combination Inspector, Inspections and Code Enforcement Services, in

person, whether there are any local code requirements that necessitate the permanent metal entry doorway or whether another type of pavilion entry could meet the City's requirements for compliant egress, such as during an emergency. Both the building official and the planner stated that there other ways to construct a pavilion entry doorway that could meet the City's requirements for compliant egress. The City staff showed Ms. Klein a copy of the plans that Scott's had presented to BCDC's Design Review Board on April 6, 2015, that do not include the metal entry doorway, and stated that the City Planning Department would soon issue a discretionary approval of the proposal. As of the date of this Order, Scott's has not submitted any local discretionary approval.

- d. **Prior History.** The Permittees have been serially violating the McAteer-Petris Act and the Permit since at least 2000 as shown by the nature and extent of the failure to operate the pavilion in compliance with the permit.
 - e. **Culpability.** Scott's is fully responsible and thus culpable. Scott's executed the Permit, attesting that it understood the permit conditions, and has proceeded for 15 years to ignore the requirements of its permit and the McAteer-Petris Act and the direction from many members of the BCDC staff.
 - f. **Economic Savings.** The Commission is not in a position to assess whether the Permittees have had economic savings resulting from the violations. Conversely, staff believes Scott's profits from the events in excess of 73/year that it holds in the pavilion. While staff has not subpoenaed Scott's business records, during a meeting at the pavilion on March 9, 2012, at which Ray Gallagher, President, was present, Steve Fagalde informed Ms. Miramontes that the "current tent earnings" (i.e. the pavilion) garner \$800,000 per year and could increase to \$2.5 million.
 - g. **Such other matters as justice may require.** No other business located within BCDC's jurisdiction has made such extensive use of a dedicated public access for private profit. No other business within BCDC's jurisdiction has so flagrantly, extensively and knowingly violated the terms of its permit and the McAteer-Petris Act.
48. Section 66641.5(e) of the McAteer-Petris Act provides that the Commission may administratively impose civil liability for any violation of the Permit in an amount of which shall not be less than \$10 nor more than \$2,000 for each day in which the violation occurs or persists, but may not administratively impose a penalty of more than \$30,000 for a single violation.
49. **Administrative Civil Penalty Assessed By the Commission.** Based on consideration of the relevant factors set forth in Government Code Section 66641.9(a), the penalty amounts authorized by Government Code Section 66641.5(e), and the preceding findings, the Commission hereby finds that an administrative penalty of \$250,000 is justified to resolve this matter because the cumulative nature of the violations resulted in adverse impacts to the required public access, the violations are extensive in that they affect the entire public access area and there are many, rather than just a few,

violations of the Permit's conditions, and BCDC staff had to spend a significant amount of its limited resources to resolve these violations. The Permittees have negligently, or knowingly and intentionally, violated numerous terms of the Permit over a twelve-year period and failed to take voluntary and comprehensive action to correct the violations.