

October 26, 2018

TO: Enforcement Committee Members

FROM: Larry Goldzband, Executive Director, (415/352-3653; larry.goldzband@bcdc.ca.gov)
Marc Zeppetello, Chief Counsel, (415/352-3655; marc.zeppetello@bcdc.ca.gov)

SUBJECT: Executive Director's Recommended Enforcement Decision Regarding Westpoint Harbor; Proposed Settlement Agreement between the Commission and Westpoint Harbor, LLC
(For Committee consideration on November 8, 2018)

Executive Director's Recommendation

I. PROCEDURAL HISTORY, PERMIT AMENDMENT TEN, AND PROPOSED SETTLEMENT AGREEMENT

A. BCDC Permit No. 2002.002.00, as amended through October 26, 2018 (BCDC Permit No. 2002.002.10), authorizes construction, use, and maintenance of the Westpoint Harbor and Marina Project in Redwood City, San Mateo County ("Site") which includes, but is not limited to, a marina and associated facilities, public walkways and trails, public access improvements, a boatyard, and undeveloped areas reserved for future commercial development. (For convenience, the term "Permit" is used herein to refer to the amendment to BCDC Permit No. 2002.002.00 in effect in the past or to the amendment currently in effect, depending on the context.) Westpoint Harbor, LLC owns the Site and operates the Westpoint Marina.

B. On July 24, 2017, the Executive Director initiated enforcement proceedings by issuing a Violation Report and Complaint for the Imposition of Administrative Civil Penalties ("Violation Report") to Mark Sanders and Westpoint Harbor, LLC (collectively "Westpoint Harbor"). The Violation Report alleged a number of violations of the Permit and the McAteer-Petris Act at the Site which are discussed below in Section II of this memorandum.

C. On October 20, 2017, Westpoint Harbor submitted its Statement of Defense and accompanying supporting documents. In the Statement of Defense, Westpoint Harbor generally denied the alleged factual and legal bases, as well as any liability for, the violations alleged in the Violation Report.

D. On November 16, 2017, the Enforcement Committee held a noticed public hearing and adopted the Executive Director's recommended enforcement decision, as modified at the hearing, including a proposed cease and desist and civil penalty order.

E. On January 18, 2018, the Enforcement Committee held a noticed public hearing to consider the Executive Director's modified recommended enforcement decision. The Enforcement Committee declined to consider the Executive Director's modified recommended enforcement decision and upheld its November 16, 2017 decision and recommendation.

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F. On March 15, 2018, at a noticed public meeting, the Commission considered the Enforcement Committee's recommended enforcement decision. The Commission adopted a motion to remand the matter to the Enforcement Committee for further consideration.

G. From late-March to late-October, BCDC staff and Westpoint Harbor engaged in confidential settlement discussions in an effort to resolve the violations alleged in the Violation Report and other issues, including certain modifications to the Permit requested by Westpoint Harbor. As a result of those discussions, the Executive Director and Westpoint Harbor agreed on a number of modifications to the Permit that are included in Permit Amendment Ten (BCDC Permit No. 2002.002.10) ("Amendment Ten"), which has been issued by the Executive Director and executed by Westpoint Harbor. Amendment Ten incorporates agreements reached by BCDC staff and Westpoint Harbor to resolve certain alleged violations and makes other modifications to the Permit requested by Westpoint Harbor. The Executive Director and Westpoint Harbor have also agreed to the terms of a proposed settlement agreement, subject to approval of the agreement by the Commission. (The proposed settlement agreement is attached to this memorandum as Attachment A, and Amendment Ten is attached to the proposed settlement agreement as Exhibit A.)

H. Section II of this memorandum summarizes the agreements reached between the Executive Director and Westpoint Harbor that are incorporated into Amendment Ten. Section III of this memorandum discusses Westpoint Harbor's claims against BCDC under the California Public Records Act, the mutual general releases of BCDC's and Westpoint Harbor's claims that would be provided under the proposed settlement agreement, and BCDC's reservation of rights. Section IV describes the payments that would be made by Westpoint Harbor under the proposed settlement agreement.

II. SUMMARY OF AGREEMENTS INCORPORATED INTO AMENDMENT TEN

The following paragraphs summarize the agreements reached by BCDC staff and Westpoint Harbor, as incorporated into Amendment Ten, to resolve certain violations alleged in the Violation Report and other issues, including certain modifications to the Permit requested by Westpoint Harbor.

A. **Failure to Make Required Public Access Areas Available to the Public.** The Violation Report alleged that Westpoint Harbor failed to make required public access areas at the Site available to the public for many years after the time required by the Permit. However, the Violation Report also noted that by July 5, 2017, Westpoint Harbor had opened all public access areas, with one exception (the guest docks, which are discussed below), and had removed all unauthorized signs restricting public access.

B. **Guest Docks.** The Violation Report alleged that Westpoint Harbor had violated the Permit by prohibiting public access to the guest docks located along the west side of the marina basin, which are part of the dedicated public access area. As had been previously agreed during the discussions between BCDC staff and Westpoint Harbor regarding proposed Amendment Five, Amendment Ten provides, that Westpoint Harbor may restrict access to the guest docks to tenants of the marina and guests, including boats and boaters visiting the marina, and may

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prohibit public access by pedestrians to the guest docks. In addition, Westpoint Harbor may allow the City of Redwood City's Police Boat, the City of Redwood City's Fire Boat, or any other public agency boats to be moored at the guest docks without express authorization in the Permit. Amendment Ten further provides, as also previously agreed during the discussions regarding proposed Amendment Five, that Westpoint Harbor shall allow public access by pedestrians to both the service dock on the east side of the marina basin and to the boat landing dock adjacent to the public boat launch. In addition, Westpoint Harbor shall provide viewing decks at the top of each gangway to the private docks for public viewing of the boats in the harbor.

C. Public Boat Launch and Area for Launching Non-Motorized Water Craft. The Violation Report alleged that Westpoint Harbor failed to make the public boat launch available for many years after the time required by the Permit. Westpoint Harbor made the public boat launch available by no later than July 2017. However, an issue was raised during the enforcement proceedings, following BCDC staff's receipt of a complaint from a member of the public, as to whether the public boat launch is required to be available to the public to launch kayaks and other non-motorized water craft. Amendment Ten provides that Westpoint Harbor may restrict use of the public boat launch to only motorized watercraft launched from trailers and further provides that Westpoint Harbor may require a reasonable, low-cost fee and a permit from the harbormaster's office for use of the public boat launch by such boats.

In addition, within eight months of the issuance of Amendment Ten, Westpoint Harbor will install approximately 150 cubic yards of gravel, crushed oyster shell, or other appropriate material over approximately 7,000 to 12,000 square feet for slope stability at the area of slope failure located between the harbormaster's building and the public boat launch. This area will include an approximately 25-foot-wide portion for use by the public, free of charge, for launching hand-launched, non-motorized water craft. Use of this 25-foot-wide area may be subject to any reasonable safety conditions set by Westpoint Harbor, such as requiring check-in with the harbormaster's office. However, Amendment Ten provides that under no circumstances shall a member of the public, after check-in, be denied use of the public hand-launch boat area, or be required to obtain a permit from Westpoint Harbor for use of this area.

D. Access to the Public Restrooms, Hours of Public Access to Public Access Improvements and Public Access Areas. The Violation Report alleged that Westpoint Harbor failed to make the public restrooms within the harbormaster's building available to the public for many years after the time required by the Permit. Amendment Ten provides that Westpoint Harbor may restrict the hours of public access to the public restrooms as follows. The public restroom located in the harbormaster's building may be locked at all times, but a sign shall be displayed near the restroom doors stating that a key is available in the harbormaster's office. Westpoint Harbor shall make a key to that restroom available to the public in the harbormaster's office during the harbormaster's business hours. In addition, a sign shall be displayed near the restroom doors in the harbormaster's building informing the public that an unlocked restroom

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is available near the boat launch. The public restroom located near the public boat launch shall be unlocked from 5 a.m. to 9 p.m. during the months of April through October and from 6 a.m. to 8 p.m. during the months of November through March. The public restroom located near the boatyard may be locked at all other times.

In the course of the settlement discussions with BCDC staff, Westpoint Harbor raised the issue of restricting the hours of public access to the public access areas and public access improvements at the Site. Westpoint Harbor noted that BCDC staff had previously approved reasonable rules and restrictions for the adjacent Pacific Shores Center ("PSC") development, allowing PCS to limited public access to only daylight hours. Westpoint Harbor argued that public access should be similarly limited at Westpoint Harbor given the relatively isolated location of both the PCS development and Westpoint Harbor. Amendment Ten provides that, until December 31, 2021, Westpoint Harbor may restrict the hours of public access to the Site (including all public access improvements and all public access areas) from 9 p.m. to 5 a.m. during April through October of each year, and from 8 p.m. to 6 a.m. during November through March of each year. After December 31, 2021, BCDC staff or the Commission may reevaluate the appropriateness of, and may extend, revoke, or modify these reasonable rules and restrictions on public access based on consideration of the following factors: levels of use of the public access areas at the Site and nearby locations including PSC; further development of the Site and associated on-Site activities, including the Phase 3 commercial and retail areas; public safety; the number and type of criminal incidents that occur at PSC and the Site; and any modification of the rules and restriction applicable to the PSC.

E. Installation and Maintenance of Public Access Improvements. The Violation Report alleged that Westpoint Harbor failed to obtain plan review approval for various required public access improvements (including signs, public pathways, landscaping, and Site furnishings), and failed to install such improvements in accordance with approved plans. To resolve these alleged violations, BCDC staff and Westpoint Harbor have agreed on a set of plans for signage, Site furnishing, and landscaping that are attached as exhibits to Amendment Ten. Within eight months of the issuance of Amendment Ten, Westpoint Harbor shall install the signs, Site furnishings, and landscaping specified in these plans and shall also provide to BCDC "as-built" drawings for all these public access improvements.

Prior to Amendment Ten, the Permit required 12 to 15-foot wide pathways around the marina basin. The pathways on the east and west side of the marina basin are 12-foot wide, but the paths on the south side of the basin and on the two peninsular paths along the slough leading to the harbor entrance are 10-foot wide. Amendment Ten authorizes the existing width of all pathways by providing that the pathways shall be 10 to 15-foot wide.

F. Resolution of Allegations Regarding Unauthorized Placement of Fill or Construction of Unauthorized Improvements. The Violation Report included a number of allegations regarding the unauthorized placement of fill or construction of unauthorized improvements. Each of those alleged violations has been resolved as follows.

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1. **Fences at Northwestern Portion of the Site.** Westpoint Harbor has agreed, upon the concurrence of PSC, to remove the unauthorized fences at the northwestern portion of the Site, where the public path crosses the PSC property line. Westpoint Harbor has already removed the gate formerly attached to one of those fences.
2. **Rowers Dock.** Amendment Ten authorizes the existing rower's dock and associated gangway along the west side of the marina basin which is currently leased to Westpoint Harbor's tenant 101 Surf Sports. Amendment Ten also authorizes Westpoint Harbor to install, use, and maintain portable structures totaling up to 1,500 square feet of area associated with use of the rower's dock by 101 Surf Sport to be located near the top of the gangway, within a portion of the Phase 3 future development area but not within any designated public access area or view corridor. Such accessory structures may include those used for office space, classroom space, changing rooms, portable toilets, and racks for storing hand-launched crafts.
3. **PG&E Transformers, Utility Boxes, and Other Site Infrastructure.** Amendment Ten authorizes any existing utility equipment or structures (including electrical transformers, switchboxes, fire hydrants, water stand pipes, or underground utilities) including such equipment or structures placed in a public access area or partially obstructing a public access pathway.
4. **Gates, Gangways, and Observation Decks.** Amendment Ten authorizes the existing gates, observation decks, and gangways leading to the private boat docks. The gates leading to the private boat docks and to the guest docks may be locked to prevent public access by pedestrians.
5. **Floating Docks for Securing Floating Equipment or Vessels.** Amendment Ten authorizes Westpoint Harbor to use existing authorized floating docks for securing floating equipment or vessels such as boat lifts and other floats intended to keep watercraft out of the water or otherwise protected from the elements while docked at the marina.
6. **Garden and Storage Shed in Public Access Area Along Southern Levee.** Amendment 10 authorizes the existing approximately 1,300-square-foot fenced area that contains a community garden for the marina tenants, which is located in a public access area on the levee south of the parking lot. Amendment Ten also authorizes the existing approximately 150-square-foot wooden storage shed that is used to store booms and absorbents for potential fuel and oil spills, as well as gardening equipment and supplies, which is also located in a public access area on the levee south of the parking lot.
7. **Materials Storage Area.** Westpoint Harbor has agreed to consolidate the storage of construction materials, "K" rails, unused planters, and other miscellaneous materials or debris in an authorized materials storage area located in the boatyard's dry storage area.

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8. **Asphalt Pad.** Amendment Ten authorizes the existing approximately 2,525 square-foot asphalt pad that is used occasionally as a helicopter landing pad in connection with the State Coastal Conservancy's non-native *Spartina* eradication program and which is located in a public access area in the eastern portion of the Site.
9. **Trees Planted Adjacent to Westpoint Slough.** After consulting with the U.S. Fish and Wildlife Service ("USFWS") staff of the Don Edwards San Francisco Bay National Wildlife Refuge ("Refuge"), BCDC staff has determined that it is not necessary for Westpoint Harbor to remove the trees planted without authorization along and adjacent to Westpoint Slough.

G. Signage to Inform the Public of Greco Island Access Restrictions; Identification of "No Wake" Zone. The Violation Report alleged that Westpoint Harbor failed to install and maintain, as required by Permit Special Condition II.H: (1) buoys and signs to inform the public of access restrictions on Greco Island and other areas of the Refuge; and (2) buoys identifying a "no wake" zone in Westpoint Slough. As had been previously agreed during the discussions between BCDC staff and Westpoint Harbor regarding proposed Amendment Five, Amendment Ten amends Special Condition II.H to require Westpoint Harbor to install signs to identify Westpoint Slough as a "no wake" zone and install channel markers to restrict boats to the center of the channel. As also previously agreed during the discussions regarding proposed Amendment Five, and following consultation with USFWS Refuge staff, Amendment Ten further amends Permit Special Condition II.H to require Westpoint Harbor to coordinate with the USFWS Refuge staff to install and maintain signs along the edge of Greco Island along Westpoint Slough up to its confluence with Redwood Creek to inform the public that public access into the marshlands of the Refuge is prohibited. Amendment Ten adds a provision to Special Condition II.H to require Westpoint Harbor to perform a visual inspection of the signs installed along Greco Island every two years and to submit a report regarding the number, condition, and need for maintenance of such signs. Following submission of each inspection report, Westpoint Harbor will coordinate with the Refuge to perform any necessary or replacement of such signs.

H. Provide Visual Barriers to Adjacent Salt Pond. The Violation Report alleged that Westpoint Harbor had failed to install required visual barriers between the active marina area (*i.e.*, parking lot) and the adjacent salt pond to the south, referred to as Pond 10. Westpoint Harbor has agreed to install landscaping along the levee south of the parking lot to provide a low visual barrier to the adjacent salt pond, as shown in the landscaping plan which is included as an exhibit to Amendment Ten.

I. Shorebird Roost Habitat Mitigation. The Violation Report alleged that Westpoint Harbor had failed to provide shorebird roost habitat mitigation as required by Permit Special Condition II.F. Special Condition II.F. states that Westpoint Harbor "shall provide mitigation for the 2.3 acres of shorebird roost habitat lost as a result of this project with approximately 3.0 acres of replacement habitat with similar functions and benefits for shorebirds." In its Statement of Defense, Westpoint Harbor asserted that the required mitigation was achieved by a November 26, 2003 memorandum from Cargill's Manager of Real Property, addressed to both

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Mr. Sanders and the City of Redwood City, stating that: "Cargill, by management of pond levels, will create a similar habitat to the south, where it remains Pond 10 as before. By modifications in [Cargill's] operations an equivalent area of habitat will remain to provide the same functions and benefits.'" (A copy of Cargill's November 26, 2003 memorandum is included as part of Administrative Record Document 91 submitted with the Violation Report.)

In April 2018, BCDC staff contacted Cargill to discuss the requirements of Special Conditions II.F. By a letter dated June 22, 2018, Cargill informed BCDC staff that, after investigating the matter, Cargill: (1) interprets its November 26, 2003 memorandum as a description of Cargill's then-current operations, but not as a commitment to continue operating Pond 10 in any particular way; (2) never agreed to provide shorebird roost habitat in Pond 10; and (3) is unable to provide any such mitigation in Pond 10. (A copy of Cargill's June 22, 2018 letter is attached to this memorandum as Attachment B.)

BCDC staff believes that Westpoint Harbor reasonably relied on Cargill's November 26, 2003 memorandum to comply with Special Condition II.F. Because Cargill is not bound by the terms of the Permit, Amendment Ten provides that no further action is required by Westpoint Harbor as to the provisions of this Special Condition.

J. Non-tidal Wetland Mitigation. The Violation Report alleged that Westpoint Harbor had failed to provide non-tidal wetlands mitigation as required by Permit Special Condition II.G. With its Statement of Defense, Westpoint Harbor provided evidence that in 2003, it had submitted a mitigation and monitoring plan, including a plan for the wetland mitigation required by Permit Special Condition II.G to the Army Corps of Engineers ("Corps"), although the plan was not submitted to the Commission as required by the Permit. Westpoint Harbor also submitted evidence that: (1) it implemented the primary component of the plan by re-sloping the drainage ditch to a 3:1 slope; and (2) monitoring performed in October 2017 showed that the wetland mitigation exceeds the success criteria established by the plan. However, Westpoint Harbor did not implement certain components of the plan including: (1) placing flap gates on the downstream end of each of the two 24-inch culverts placed beneath the primary access ditch crossing; and (2) placing a 10-inch PVC pipe with a control valve approximately one-foot below the mean high water elevation to connect the marina basin with the ditch, which would allow tidal water to be introduced into the ditch during the dry season to extend the duration and area of soil saturation and/or inundation within the mitigation wetland.

In settlement discussions with staff, Westpoint Harbor provided information from Peter Bohley, the engineer that worked on both Westpoint Harbor and PSC, explaining why Westpoint Harbor did not install the flap gates on the culverts or the 10-inch pipe and control valve to connect marina basin with the ditch, as described in the wetland mitigation plan. As more fully discussed in a letter subsequently submitted by Mr. Bohley, dated October 17, 2018, the 10-inch pipe connecting the ditch to the marina basin, combined with flap gates on the culverts, would create problems for stormwater management at PSC and also interfere with operation of a Redwood City pump station located near the Site along Seaport Boulevard. Moreover, according to Mr. Bohley, a pipe connecting the marina basin to the ditch, to allow

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tidal water to be introduced to the ditch during the dry season, is unnecessary because: (1) the ditch is subject to tidal action from where the ditch enters the slough; and (2) the ditch receives irrigation water runoff during the dry summer from landscaping irrigation at PSC. (A copy of Mr. Bohley's October 17, 2018 letter is attached to this memorandum as Attachment C.) In addition, Amendment Ten provides that Westpoint Harbor shall submit a report to BCDC staff by no later than December 15, 2019, summarizing visual observations of the ditch taken on a semi-monthly basis during the months of July through November 2019 to document that water was present in the ditch throughout this period.

Based on the information provided by Westpoint Harbor, including the October 17, 2018 letter from Mr. Bohley, staff has determined that Westpoint Harbor has substantially complied with the requirement to provide non-tidal wetland mitigation and that no further action is required to comply with Special Condition II.G.

K. Annual Reports on Live-Aboard Boats. The Violation Report alleged that for a number of years Westpoint Harbor had failed to provide information regarding the number and location of live-aboard boats at the marina. Westpoint Harbor has submitted such reports for each of the past two years. Amendment Ten amends Permit Special Condition II.P.1 to provide that by no later than January 15, 2019, and annually by January 15 of each following year, Westpoint Harbor shall provide a report of the number and location of live-aboard boats at the marina.

L. Wholly Past Alleged Violations Not Addressed in Amendment Ten. The Violation Report included the following wholly past alleged violations that BCDC staff determined it was unnecessary to address in Amendment Ten:

1. Westpoint Harbor's past failure to provide a required certification of contractor review of the Permit and approved plans prior to commencing construction activities.
2. Westpoint Harbor's past failure to complete all authorized work by the deadline specified in the Permit or to obtain an appropriate extension of said deadline. Amendment Ten extends the deadline to complete all authorized construction from August 15, 2019, to November 30, 2023.
3. Westpoint Harbor's past failure to submit certain documentation required by the Permit in a timely manner including verification of submission of navigational documentation to the National Oceanic and Atmospheric Administrations. As noted in the Violation Report, Westpoint had complied with this documentation requirement by July 2011.

M. Dredging. On April 17, 2017, Westpoint Harbor submitted an application to amend the Permit to authorize dredging of up to 500,000 cubic yards ("cy") of sediment over a ten-year period. (This application, if approved, would have been Permit Amendment Eight.) The proposed work included dredging portions of the marina basin as well as dredging the marina's

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entrance channel and into Westpoint Slough, to the Slough channel. By letter dated November 29, 2017, BCDC staff informed Westpoint Harbor that the proposed project was not categorically exempt from review under the California Environmental Quality Act ("CEQA") and that in order to proceed with processing the application, it would be necessary to prepare an environmental assessment in accordance with the Commission's regulations.

Westpoint Harbor did not agree to the preparation of an environmental assessment and, by a letter from its counsel dated March 12, 2018, argued that Westpoint Harbor's proposed dredging project was categorically exempt from CEQA review on a number of grounds. Westpoint Harbor subsequently raised the dredging issue in its settlement discussions with BCDC staff regarding potential resolution of the violations alleged in the Violation Report and the other modifications to the Permit requested by Westpoint Harbor. In the course of those discussions, by a letter and accompanying memorandum dated June 1, 2018, BCDC staff reaffirmed its position that the proposed dredging project is not categorically exempt from CEQA review and that to proceed with processing the application for the project, it would be necessary to prepare an environmental assessment.

BCDC staff and Westpoint Harbor ultimately reached agreement for authorization of a more limited amount of dredging after Westpoint Harbor subsequently modified its application to reduce significantly the scope and duration of the proposed dredging project. In addition, Westpoint Harbor submitted a memorandum from its consultant, Anchor QEA, dated October 25, 2018, providing the consultant's opinion, based on both a recent modeling study performed for the Port of Redwood City and an analysis of historical aerial images of Westpoint Slough, that dredging of up to 150,000 cy of sediment from Westpoint Harbor would be "very unlikely to have a measurable effect on sedimentation rates at Greco Island or any other nearby marsh." (A copy of Anchor QEA's October 25, 2018 memorandum is attached to this memorandum as Attachment D.)

Amendment Ten authorizes Westpoint Harbor to dredge up to 150,000 cy from the marina and from the marina's entrance channel and into Westpoint Slough, to the Slough channel. The dredging may be performed in multiple episodes but shall be completed within 24 months after commencement. In addition, Westpoint Harbor shall collect information during a "survey period" extending from January 2006 through 36 months following the completion of dredging. Westpoint Harbor shall use all reasonably available data, including existing aerial and bathymetric surveys, for the period of time prior to the completion of dredging. During the post-dredging period, Westpoint Harbor shall collect new data using appropriate survey techniques including either three annual aerial or bathymetric surveys or an adequate number of erosion pins that are surveyed at least annually to take scientific measurements. Within six months after the survey period, Westpoint Harbor shall submit a report, prepared by a consultant jointly selected by BCDC staff and Westpoint Harbor, that sets forth an analysis regarding the marsh footprint of Greco Island and the physical conditions along the margins of

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Westpoint Slough between the marina entrance and the western tip of Greco Island. The Executive Director has determined that the limited dredging authorized by Amendment Ten, and the associated information collection activities, are categorically exempt from CEQA review under 14 California Code of Regulations sections 15304 (Class 4 – minor alterations to land) and section 15306 (Class 6 – information collection).

II. WESTPOINT HARBOR’S CALIFORNIA PUBLIC RECORDS ACT REQUESTS AND LITIGATION AGAINST BCDC; MUTUAL RELEASES OF CLAIMS; AND BCDC’S RESERVATION OF RIGHTS

A. On August 7, 2017, Westpoint Harbor’s counsel submitted a California Public Records Act (“PRA”) request for all records that relate in any way to the alleged violations or the facts asserted in the Violation Report. BCDC staff promptly provided access to Westpoint Harbor’s counsel to inspect and copy the Westpoint Harbor Permit and enforcement files. BCDC staff and Westpoint Harbor’s counsel subsequently exchanged correspondence regarding the PRA request and BCDC produced additional responsive documents. On October 2, 2017, Westpoint Harbor filed an action against BCDC in the California Superior Court, County of San Francisco, alleging that BCDC had failed to comply fully with its obligations under the PRA. *Mark Sanders and Westpoint Harbor, LLC v. San Francisco Bay Conservation and Development Commission*, Case No. CPF-17-515880 (the “CPRA Action”). On November 8, 2017, BCDC filed an Answer in the CPRA Action, denying liability. The CPRA action remains pending in the Superior Court and the outcome of the litigation is uncertain (including BCDC’s potential liability for Westpoint Harbor’s attorneys’ fees should Westpoint Harbor prevail).

B. On August 23, 2018, Westpoint Harbor’s counsel requested additional public records pursuant to the PRA (the “August 2018 CPRA Request”). The August CPRA Request includes 15 separate requests for records on a wide range of matters including, but not limited to, BCDC’s policies and regulations, permit applications and files, BCDC’s jurisdiction, ex-parte communications involving present and past Commissioners, live-aboard boats, BCDC’s record retention policies and procedures for complying with the PRA, and all emails involving certain BCDC staff created. Many of the requests, including the request for emails involving certain staff, call for all records created after December 31, 1999. BCDC staff’s initial response to the August 2018 CPRA request provided a description of documents staff believes are responsive to the requests, notes whether certain responsive documents may be exempt from disclosure under the PRA, and requests clarification regarding certain aspects of the requests in order to identify responsive documents. BCDC staff and Westpoint Harbor’s counsel subsequently met and conferred regarding the requests and the development of a plan and the identification of priorities for BCDC staff to retrieve, copy, and produce responsive documents.

C. Under the proposed settlement agreement between the Commission and Westpoint Harbor, within three days of approval of the agreement by the Commission, Westpoint Harbor has agreed to file a request to dismiss the CPRA Action with prejudice, with each side bearing its own fees and costs incurred in that litigation. Westpoint Harbor has further agreed to withdraw its August 2018 CPRA Request and that no further response or production of records from BCDC is required.

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D. The proposed settlement agreement also includes mutual general releases. Thus, under the agreement: (1) BCDC would release Westpoint Harbor from any and all claims that were asserted or could have been asserted based upon or relating to the Permit or the allegations set forth in the Violation Report or any enforcement activities related thereto; and (2) Westpoint Harbor would release BCDC from any and all claims that were asserted or could have been asserted based upon or relating to the CPRA Action, the August 2018 CPRA Request, the Violation Report, or any or any enforcement activities related thereto.

E. The proposed settlement agreement also includes a reservation of rights by BCDC which provides Executive Director and the Commission reserve the right to take appropriate enforcement action in the event of any future violation of the Permit or the McAteer-Petris Act occurring after the date the agreement is approved by the Commission.

VI. PAYMENTS

A. On November 6, 2017, the Executive Director issued his initial recommended enforcement decision, which included an attached table entitled "Summary of Violations and Proposed Administrative Penalties." The table listed 23 alleged violations (many of which grouped between two to four specific violations as a single violation) and proposed a total penalty for 19 of violations of \$543,000 (no penalty was proposed for four of the violations). At the Enforcement Committee hearing on November 16, 2017, BCDC's Chief Counsel withdrew the proposed penalty for one of the violations, which reduced the total proposed penalty to \$513,000.

B. At the November 16, 2017 hearing, the Enforcement Committee adopted the Executive Director's recommended enforcement decision (as amended at the hearing), including the proposed cease and desist and civil penalty order, subject to potential modification by mutual agreement of BCDC staff and Westpoint Harbor. Specifically, if those parties agreed on modifications to the cease and desist provisions of the proposed order, the Committee authorized the Executive Director to submit to the Commission a proposed order incorporating such agreed-upon modifications and also providing that: (1) Westpoint Harbor would be required to pay 50% of the proposed penalty (i.e., \$256,500) within 30 days of adoption of the proposed order by the Commission; and (2) Westpoint Harbor would be entitled to a waiver of the remaining 50% of the proposed penalty (i.e., \$256,500) if it complied with the requirements of the order.

C. In the settlement discussions between BCDC staff and Westpoint Harbor, staff agreed that it was appropriate to withdraw the proposed penalties for certain alleged violations, including those for Westpoint Harbor's alleged failures to provide shorebird roost habitat mitigation and non-tidal wetland mitigation, for which staff had determined that no further action is required. Staff also determined that it was appropriate to withdraw or reduce the proposed penalties for certain violations where staff had agreed in Amendment Ten to authorize previously unauthorized improvements (including the rower's dock, community garden, and storage shed) or to amend certain Permit conditions in the manner that had been previously agreed to in the discussions between staff and Westpoint Harbor regarding proposed Amendment Five (such as requiring signs, rather than buoys, to inform the public of

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Greco Island access restrictions and to identify Westpoint Slough as a “no wake” zone, and allowing Westpoint Harbor to restrict public access by pedestrians to the guest docks). In addition, counsel for Westpoint Harbor argued that BCDC staff should take into account the litigation risk in the CPRA action and the Commission’s potential liability for Westpoint Harbor’s attorneys’ fees should Westpoint Harbor prevail in that action.

D. As agreed to by the Executive Director and Westpoint Harbor, to compromise and resolve the disputed claims regarding Westpoint Harbor’s potential liability for the alleged violations, the proposed settlement agreement requires WPH to make the following payments:

1. Within thirty days of approval of the agreement by the Commission, Westpoint Harbor shall remit payment to the Commission in the amount of \$75,000 payable to the San Francisco Bay Conservation and Development Commission – Bay Fill Cleanup-Up and Abatement Fund. Within thirty days of receipt, BCDC shall transfer the \$75,000 remitted by Westpoint Harbor to the California Coastal Conservancy to be used however the California Coastal Conservancy desires. The agreement further provides that BCDC and Westpoint Harbor shall jointly recommend to the California Coastal Conservancy that the \$75,000 be used only for the Invasive *Spartina* Project or other California Coastal Conservancy projects that the BCDC and Westpoint Harbor mutually agree upon.
2. Within thirty days of approval of the agreement by the Commission, Westpoint Harbor shall remit payment to in the amount of \$75,000 payable to the Marine Science Institute (MSI) to be used however MSI desires.

VII. STAFF RECOMMENDATION

Staff recommends that the Enforcement Committee adopt and recommend to the full Commission that the Commission approve the accompanying proposed settlement agreement between the Commission and Westpoint Harbor.