

San Francisco Bay Conservation and Development Commission

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November 22, 2016

TO: All Commissioners and Alternates

FROM: Lawrence J. Goldzband, Executive Director (415/352-3653; larry.goldzband@bcdc.ca.gov)
Sharon Louie, Director, Administrative & Technology Services (415/352-3638; sharon.louie@bcdc.ca.gov)

SUBJECT: Approved Minutes of November 17, 2016 Commission Meeting

1. Call to Order. The meeting was called to order by Chair Wasserman at the Ferry Building, Port of San Francisco Board Room, Second Floor, San Francisco, California at 1:02 p.m.

2. Roll Call. Present were: Chair Wasserman, Vice Chair Halsted, Commissioners Bates (arrived at 1:16 p.m. / departed at 4:13 p.m.), Cortese (represented by Alternate Scharff – departed at 4:20 p.m.), DeLaRosa (departed at 4:17 pm.), Gibbs (arrived at 1:20 p.m. / departed at 4:14 p.m.), Hicks (represented by Alternate Galacatos – departed at 4:17 p.m.), Kim (represented by Alternate Peskin – departed at 4:12 p.m.), Lucchesi (represented by Alternate Pemberton), McGrath (arrived at 1:07 p.m.), Nelson, Randolph (arrived at 1:17 p.m. / departed at 4:12 p.m.), Sartipi (departed at 4:12 p.m.), Sears (departed at 4:15 p.m.), Spring (represented by Alternate Vasquez), Techel (departed at 4:10 p.m), Wagenknecht (departed at 4:10 p.m.) and Ziegler (represented by Alternate Brush).

Chair Wasserman announced that a quorum was present.

Not present were Commissioners: Association of Bay Area Governments (Addiego), Alameda County (Chan), Department of Finance (Finn), Contra Costa County (Gioia), Sonoma County (Gorin), San Mateo County (Pine), Governor (Zwissler).

3. Public Comment Period. Chair Wasserman called for public comment on subjects that were not on the agenda.

Brianne Riley from the Bay Planning Coalition announced their upcoming annual luncheon to be held Friday, December 9th at the Saint Francis Yacht Club. More information can be accessed at their website: bayplanningcoalition.org.

Chair Wasserman moved to Approval of the Minutes.

4. Approval of Minutes of the October 6,2016 Meeting. Chair Wasserman asked for a motion and a second to adopt the minutes of November 3, 2016.

MOTION: Commissioner Wagenknecht moved approval of the Minutes, seconded by Commissioner Scharff.

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BCDC MINUTES
November 17, 2016

VOTE: The motion carried with a vote of 17-0-1 with Commissioners Bates, DeLaRosa, Gibbs, Galacatos, Peskin, Pemberton, McGrath, Nelson, Randolph, Scharff, Sears, Vasquez, Techel, Wagenknecht, Brush, Vice Chair Halsted and Chair Wasserman voting, "YES", no "NO", votes and Commissioner Sartipi abstaining.

5. Report of the Chair. Chair Wasserman reported on the following:

a. **New Business.** Does anyone have any new business they would like to request we consider at one of our next meetings? (No comments were voiced)

b. **Bay Fill Policies Working Group.** I would now ask Commissioner Nelson to give us a brief account of the Bay Fill Policies Working Group that was held earlier today.

Commissioner Nelson reported the following: We had an interesting discussion about the challenge posed around the Bay by low-lying areas, areas that either lie behind levees and would be subject to flooding as a result of rising sea levels or of fluvial flooding, flooding from our watersheds or a combination thereof and the challenges that they pose for us. And staff presented us a number of examples of places where we are likely to see in the not-to-distant future some pretty sobering examples of substantial increased risk of flooding.

And also we walked through what we had talked about as the island effect. As shoreline developers recognize the risk of sea level rise and raise their building pads or modify their buildings in ways that they are more flood resilient that may help that building but it may not help adjacent buildings and those buildings may be flood resistant but increasingly over time some of those buildings are going to suffer from a lack of transportation and other infrastructure serving them.

It was a sobering conversation that ties in very nicely with the work ART is doing and raised a number of interesting questions about the workshops that we are going to be planning for next year.

Chair Wasserman commented: It certainly seems that the Chinese blessing, we are cursed to live in interesting times is truer than it ever has been; and cursed to live in very uncertain times. As we have talked about before unfortunately in many ways neither climate change nor rising sea level got a whole lot of attention in the political debates that were concluded earlier this month. And it is unclear what the national policy on those may be. That makes it even more important that we focus locally, which for us means regionally, on the plans for our Bay and what we can do to address rising sea levels.

We are making significant strides based on the plans that we have adopted and over the next months we are going to be bringing up a set of reports and actions back to all of us. We really need to dig in and make sure we are doing all that we can; make sure our staff is doing all we can. Probably more importantly is making sure all of our regional, local, state and federal partners are doing all they can which is going to be an ever-broadening campaign. My own mantra is hunker down, stay focused locally and prepare for the future.

It is said that if you appear at Daniel Webster's gravesite you will hear a voice calling out, how stands the Union? And you are required to answer, she stands as she stood rock bottom then copper sheathed one and indivisible. I think it is as true today as it was then.

c. **Next BCDC Meeting.** At our December 1st meeting we will hold a Rising Sea Level Workshop to consider next steps to implement what we agreed upon. This will be our first meeting at the regional headquarters, 375 Beale. We expect most all of our meetings will be held there going forward. I want to encourage all of you to attend and to ask your Alternates to attend, as well.

d. **Ex-Parte Communications.** That completes my report. If anybody wishes to make on the record an ex-parte communication report now is the time to do it. You do need to submit those in writing as well.

Vice Chair Halsted reported: I have had an email communication with the Port of San Francisco on the matter coming before us today.

Chair Wasserman moved to the Executive Director's Report.

6. Report of the Executive Director. Executive Director Goldzband reported: Thank you very much Chair Wasserman. I am tempted to talk about what we all might have learned about all of us and all of our colleagues after the election but I am not sure what I have learned so I am just going to keep quiet.

But I did recall about a week ago when I was reading a book that I love that Frederick Douglass once wrote that there is no progress if there is no struggle. That admonition certainly applies to today's Commission meeting. The issues that you will face today will test you in several ways. The questions that staff will ask you to decide today are difficult in many respects. You may struggle to make some hard decisions. Fortunately, you always have demonstrated that ability and we expect that you will do so again today.

I am very pleased to announce that Lindy Lowe, our Acting Chief Planner, has accepted our offer to stop acting and become our real Chief Planner. (Applause) Lindy is not here right now because she is over at MTC being a Chief Planner. During the interview process Lindy was placed in the top rank and I selected her from the five candidates who interviewed for the position last month. We soon shall finalize a reorganization of the Planning Unit that Lindy led. We'll let you know of our success in doing so and move forward with Lindy as a tremendously successful part of senior staff.

I am also pleased to let you know that the Metropolitan Transportation Commission yesterday requested successfully that the Bay Area Headquarters Authority, which is responsible for 375 Beale Street – soon to be our new office building – approve a \$5,000,000 budget to outfit part of the building's fifth floor so that BCDC can occupy it next year. I can't promise that we'll move in before the end of the second quarter but that is my hope. Sharon, Anna, and Brad have been working incredibly hard to design a great floor plan and we are going to use a little bit of general fund dollars to hire a move consultant to help. We believe that will relieve all of us of some of the logistics and planning work. I'll keep you informed as we progress.

That being said, as Chair Wasserman reported, our next meeting will be held at 375 Beale Street. For next year we plan to have the following schedule: We will meet as usual on the first and third Thursdays of the month. The first Thursday generally will be your regular BCDC Commission meeting; permits, consistency determinations, briefings and all the exciting things that we generally bring before you. The second meeting to be held the third Thursday of the month, in general, will be a workshop for you and the public to help us all implement the recommendations and actions that you all approved last October as well as the recommendations and interesting issues that will be brought forth from the Bay Fill Policies Working Group.

Plan on being at 375 Beale on both Thursdays; know that we will have the first meeting in the Board Room and the second meeting across the hall in the big room. It will be open to the public and we will be seating you as we have before at the old MTC building.

The December 15th meeting will not be held at 375 Beale. This meeting will be held up the street at the Port Offices in their Bayside Conference Room.

That completes my report Chair Wasserman and I am happy to answer any questions anybody may have.

Chair Wasserman asked: Any questions for the Executive Director? (No comments were voiced)

7. Consideration of Administrative Matters. Chair Wasserman stated: Item 7 is Consideration of Administrative Matters. We have had a listing mailed to us on November 10th. Jaime Michaels of our staff is here to answer any questions any of us may have. (No comments were voiced)

8. Closed Session on Pending Litigation: (1) Point Buckler Club, LLC and John Donnelly Sweeney v. San Francisco Bay Conservation and Development Commission, Solano County Superior Court, Case No. FCS047083; and (2) Proposed Cease and Desist and Civil Penalty Order No. CCD 2016.002, Point Buckler Club, LLC and John D. Sweeney. Chair Wasserman announced: Item 8 is a closed session regarding potential litigation concerning Point Buckler. At this time I am asking everyone to leave the room except for Commissioners and our Attorney General's staff on this matter; that includes BCDC staff. We will ask you to rejoin us just as soon as we are finished. (The room was vacated by all those needing to do so.)

Chair Wasserman announced: We are back in session after our closed session. We did not take a reportable action. That brings us to Item 9.

9. Consideration of and Possible Vote on the Enforcement Committee's Recommended Enforcement Decision Involving Proposed Cease and Desist and Civil Penalty Order No. CCD 2016.002; Point Buckler Club, LLC and John D. Sweeney. Chair Wasserman stated: Item 9 is consideration and possible vote on the Enforcement Committee's recommended enforcement decision regarding a Cease and Desist and Civil Penalty Order No. CCD 2016.002 that would be issued to Point Buckler Club, LLC and John D. Sweeney. Marc Zeppetello will introduce the matter and then Commissioner Scharff will present the Enforcements Committee's recommendation and then we will proceed to hear from the rest of the speakers including the respondents.

Marc Zeppetello, Chief Counsel addressed the Commission: This matter involves alleged violations of the McAteer-Petris Act and the Suisun Marsh Preservation Act at Point Buckler Island which is located in Suisun Bay and in the primary management area of the Suisun Marsh. This enforcement action was commenced on April 22nd when the Executive Director issued a temporary cease and desist order to the respondents. That order was good for 90 days. It has been continued twice by stipulation between staff and respondents but will expire today. The Executive Director then issued a violation report and complaint for administrative penalties on May 23rd. The complaint proposed a penalty of \$952,000 for 35 violations of the McAteer-Petris Act.

Respondents submitted their statement of defense and accompanying documents on September 12th and generally denied liability.

The Enforcement Committee held a public hearing on October 6th and adopted the staff's recommended enforcement decision and proposed cease and desist order with one modification which was that the Committee reduced the proposed penalty by \$180,000 from \$952,000 to \$772,000. This completes my introduction.

Commissioner Scharff was recognized: On October 6th the Enforcement Committee held a public hearing on this matter. We took substantial testimony. We listened to staff's presentation of its recommended enforcement decision which was to adopt the proposed order. We also listened to respondents' presentation which included testimony under oath by respondent John Sweeney.

We also considered public comment by a number of parties including testimony under oath by Dr. Stuart Siegel, an expert retained by the San Francisco Bay Regional Water Quality Control Board in connection with a separate enforcement action against respondents. Dr. Siegel was the author of the technical assessment report concerning this site.

We read the record. There were a substantial number of documents provided to us. We went through all of that. We listened to all of the testimony. We then deliberated and discussed many things; one of those was, there was some discussion with the parties and they went out of the room for a while to discuss settlement options and to try to resolve this matter amongst them.

They were unable at that hearing to resolve the matter. It was suggested they continue to try and work together to resolve this matter. At this point I understand they have not resolved the matter.

The Committee adopted the staff's enforcement decision with one modification as was suggested. The Committee determined that the placement of fill to close each of the seven tidal breaches of the remnant levee at the site should be treated as a single violation rather than the seven violations imposed by staff. On that basis the Committee reduced the penalty from \$952,000 to \$772,000. Otherwise the staff recommendation was adopted.

Chair Wasserman asked: Does staff wish to make a presentation on the recommendations?

Mr. Zeppetello replied: Adrienne Klein and I will make a presentation and would estimate 15 minutes to complete this presentation.

Deputy Attorney General Joel Jacobs addressed the Commission: One suggestion that I have is if the Commission is inclined to set time limits on testimony it should probably do that before either side has begun presenting its argument.

Chair Wasserman responded: I will take Mr. Zeppetello at his word and we will set 15 minutes for each side and we will give you three minute warning. I would note that we are not talking about testimony. This is for the presentation.

Mr. Larry Bazel spoke: My presentation is about a half hour and I would like that time.

Chair Wasserman responded: Would you kindly shrink it to 15 minutes please? You had a substantial amount of time to present to the Enforcement Committee for at least an hour. We are really only reviewing that recommendation. Fifteen minutes, sir.

Mr. Bazel replied: Okay. Thank you.

Mr. Zeppetello presented the following: This first slide is a summary of what has already been said. The Enforcement Committee held a hearing on this matter and it was a three and a half hour hearing. The staff made a presentation of approximately 45 minutes followed by a presentation by respondents that was equally as long. There was about an hour and a half of public comment, discussion, and questions from the Enforcement Committee.

This slide shows a map of the location of Point Buckler Island. It is in the Suisun Bay and also in the Primary Management area of the Suisun Marsh.

Mr. Sweeney purchased the Island in April of 2011 and later conveyed the property to a limited liability company, Point Buckler, LLC.

I would like to summarize the terms of the proposed order. The proposed order has two components; a cease and desist component and a civil penalty component. The cease and desist order would require the respondents to cease further violations of the McAteer-Petris Act and the Suisun Marsh Preservation Act at the site.

Secondly, by February 10, 2017, to submit a restoration plan to restore tidal flow and circulation to the Island and also by February 10, 2017, submit a mitigation monitoring plan to propose compensatory mitigation to compensate for impacts to waters of the state at the site.

These two requirements to submit these plans by February 10th of next year are identical to provisions in a cleanup and abatement order that was adopted by the San Francisco Bay Regional Water Quality Control Board on August 10th.

The order further requires that by March the third of next year, the respondents submit an application to BCDC for a permit to request authorization for work that respondents performed since 2011 when Mr. Sweeney purchased the property. The order would also require respondents to apply for a permit prior to any future development work at the site.

The civil penalty component would require a penalty for violations of the McAteer-Petris Act. In the complaint that the Executive Director issued there was a table setting forth the violations and setting forth the amount proposed within the penalty range for each of the violations. Many but not all of the violations maxed-out at \$30,000 which is the maximum allowed by the statute.

The Enforcement Committee reduced the penalty from that proposed by staff to \$772,000.

The Commission has jurisdiction under the McAteer-Petris Act and the Suisun Marsh Preservation Act. Jurisdiction is to be determined at the time that Mr. Sweeney purchased the island in April of 2011, and not at an earlier point in time or not as it exists today after unlawful modifications.

Jurisdiction extends under the McAteer-Petris Act to areas subject to tidal action and includes tidelands and marshlands where marsh vegetation is present up to an elevation of five feet above mean sea level.

This is a photograph of the island as it appeared in April of 2011 and you can see the tidal channels and various breaches and channels throughout large portions of the island.

This is a figure that was prepared by an expert retained by the Regional Board. The area in blue is the area that, according to the expert, is subject to your jurisdiction under the McAteer-Petris Act; approximately 30 acres of tidelands, 7.7 acres of marshland.

The area on the east side is the area that is possible non-jurisdictional areas, uplands, of approximately 0.54 acres.

Under the Suisun Marsh Preservation Act, Point Buckler is in the Primary Management area of the Marsh and therefore a permit from the Commission is required prior to any development as that term is broadly defined in the Act.

There is an exemption in the Public Resources Code. No permit is required for development that is specified in the Suisun Resource Conservation District's component of the local protection program (LPP). SRCD's component of the LPP includes individual management plans for managed wetlands; managed wetlands being defined as diked areas where the water inflow and outflow is artificially controlled or in which waterfowl plants are cultivated or both.

In 1984 the Commission adopted individual management plans for approximately 160 to 165 managed wetlands in Suisun Marsh including an IMP for this site that is called the Annie Mason IMP.

The island was not managed in accordance with the IMP for over 20 years before Mr. Sweeney purchased the property. The Annie Mason IMP called for frequent inspection and maintenance of the levees and emphasized the importance of maintaining the levees for water control.

There is substantial evidence in the record that the site was not managed in accordance with the IMP for over 20 years.

The Suisun Resource Conservation District maintains records of work done in accordance with the Corps of Engineers regional permit for managed wetlands in the Marsh and at least since 1994, when the records are available, there is no record of any work being done on Point Buckler Island.

In 1989 the former owner of the island applied to BCDC for a permit to place 50,000 cubic yards of fill at this site. Staff wrote a letter and said the application was incomplete, please submit more information. The information was never submitted. The permit was never issued.

The site was exposed to tides coming from the west for 20 years, to waves and winds, and as a result of that there were by the early 1990s seven breaches of the former remnant levee. The site reverted to tidal marsh. There was no effective water control. In fact, the tides and tidal hydrology prevailed and tidal marsh vegetation dominated the Island.

In staff's view when Mr. Sweeney purchased the site the Individual Management Plan did not apply and a permit was required for the work that he did.

I would mention briefly that there is another provision in the Public Resources Code that provides for an exemption from permit requirements. It is 29508(b); no permit is required for repair, replacement or reconstruction that does not result in the addition to or enlargement or expansion of the object being repaired. That exemption does not apply because in this case, the exemption for an Individual Management Plan, which is a more specific application of an exemption for managed wetlands, is what would govern. In any case, here the work was not reconstruction; it was a new levee.

According to the report prepared by the experts approximately 83 percent of the new levee that respondents constructed was located outside the footprint of the former remnant levee. Also, to the extent that the new levee was higher in elevation and larger in volume and mass than the old levee, it constituted an enlargement rather than reconstruction and therefore the exemption would not apply.

With that I will turn it over to Adrienne.

Chief of Enforcement Klein addressed the Commission: I have three slides with the timeline of events to show you. The property was purchased in 2011 by respondents and unauthorized work began about one year later. And between that period there was a permit obtained from the Corps of Engineers indicating knowledge of the requirements of at least one regulatory agency.

In January of 2015 BCDC staff, following a site visit, sent a letter asking for respondents to cease unauthorized work and apply for a permit.

In 2015 and 2016 respondents continued that work. In 2016 BCDC issued an Executive Director's cease and desist order expiring today.

The Regional Board also issued its own cleanup and abatement order.

The January 15th BCDC enforcement letter stated that the work that had occurred appeared not to be retroactively approvable; that site restoration was a very probable outcome. And it identified the existence of work windows to protect species because it was unclear that work had not occurred during those important periods of time.

Respondents continued work after receiving the BCDC stop work letter. They placed shipping containers, helicopter pads, built crescent ponds by excavating the interior of the tidal marsh, mowed marsh vegetation and constructed road bridges over a ditch.

This is one of many images from the expert's report. The green is showing you the daily tidal action distinct from the blue which is daily tidal inundation.

The inundation is direct tidal flow and the action is through sub-surface flows and occasional overtopping as well.

You can see the location of the original seven levee breaches. This is a close-up to give you the sense of the changes. You can see in the upper photo the pre-existing conditions and in the lower photo you can see the new levee. If you look at the difference in the color of the water in the bottom photo the absence of tidal action is clear. The brown water is tidally influenced and the water in the new levee is algae green indicating eutrophication in the absence of tidal action.

This image shows you the original 1985 levee alignment and you can see that the majority of the new levee in yellow does not overlap at all with the original levee alignment.

This image shows the ditch adjacent to the levee. Again, the majority of the new ditch is in a new location.

This is a photo comparing the pre-existing and new conditions at the site with circles indicating the locations of the former levee breaches.

You can see in total the new levee surrounding the ditch and the new levee surrounding the island.

This photo shows the new levee bisecting the former tidal channel. This shows the new borrow ditch and shipping containers in the background of the photograph.

This is an aerial image showing marsh vegetation mowing and the clubhouse areas and kite surfing layout areas. This shows one of several helicopter pads. This shows one of the four crescent ponds and in the foreground you can see that it connects to the interior end of one of the tidal channels in the center of the Island.

This is another photograph showing you marsh vegetation mowing and also a road bridge across the new interior levee ditch. The site supports many special status species, both state and federal. My final slide is showing you a combination of images; the pre-existing and current conditions.

With that the staff recommends that the Commission adopt the proposed order and I would like to point out two minor typos. On page three of the November 4th staff report in the third paragraph, we have typed LLP instead of Local Protection Program, "LPP." On the last page of the cease and desist order, the year of issuance is indicated as 2017 and it should be corrected to 2016.

I would also like to draw your attention to a letter of public comment from the Marin Audubon Society. Thank you.

Mr. Jacobs addressed the Commission: Before the respondent begins its presentation I do want to draw the Commission's attention to an evidentiary question.

The respondent has two binders of documents that have information pertaining to the financial condition of Mr. Sweeney that the respondents have asked the Commission to consider in connection with this proceeding. They were not part of the record before the Enforcement Committee. There is a prohibition in the regulations against the introduction of new evidence at this proceeding. The provision concerning late evidence, even when it applies, says that the Commission shall not accept into the record any evidence not filed in a timely manner unless the Commission finds that the person seeking to introduce the evidence made all reasonable efforts to obtain and submit the evidence in a timely manner and would be substantially harmed if the evidence were not admitted and that no other party would suffer substantial prejudice by its admission.

There has been that request that you consider this information. The parties have also requested the opportunity to address the Commission on the specific evidentiary questions. It is within the Commission's discretion if you want to give him a brief opportunity to speak to it; you may do that.

One way or another the Commission needs to decide whether to consider this evidence. This is a good opportunity to do that because Mr. Bazel may want to refer to it in his presentation.

Chair Wasserman asked: Mr. Bazel would you like to address the issue of the evidence described by Mr. Jacobs?

Mr. Bazel spoke: Thank you Mr. Chair. What we submitted was a brief that we submitted to the Regional Board that was sent to the Regional Board and was due after the evidentiary hearing in this matter.

It is a brief along with some declarations and exhibits. The brief itself is not evidence and my first slide was to make the point that I am supposed to argue at this hearing. And the brief that we submitted to the Regional Board is argument; it is not evidence. The brief itself should be allowed up until now. We sent it a few weeks ago so there was plenty of time.

As far as the exhibits most of them were the same that were previously submitted. That is not new evidence. There were a few things that were new particularly related to the financial condition of Mr. Sweeney.

There is no surprise to BCDC staff. I think they actually invited the information. There was a comment during the Enforcement Committee meeting about disclosing financial information.

Our basic argument is that the brief we submitted could not have been submitted at the time because it was not written yet and it is all argument. Any evidence in there is kind of beside the point except as BCDC staff has requested it.

Chair Wasserman asked: Would staff like to address the issue?

Mr. Zeppetello replied: The main issue here with these additional documents is some information that is claimed to be confidential, personal financial information of Mr. Sweeney's. Respondents claim that they could not have responded sooner because they were responding to additional points made by the Regional Board regarding the Regional Board's analysis of Mr. Sweeney's ability to pay.

It is true that the staff relied on the Regional Board's analysis of ability to pay, but it is the respondents that have the information that can establish or not Mr. Sweeney and the other respondents', the limited liability corporation's, inability or ability to pay.

They could have but chose not to submit additional evidence on this issue with their statement of defense. In fact, they raised the inability-to-pay argument with their statement of defense.

I would note that the Enforcement Committee did direct the parties to try to attempt to reach a resolution and they noted that the financial information should be provided, but the context was for settlement discussions between the parties following the Enforcement Committee; not to supplement the record.

What staff asked for following the Enforcement Committee was Mr. Sweeney's, copies of his federal tax returns, copies of the LLC's federal tax returns, a financial statement from Mr. Sweeney and a financial statement from the LLC.

Respondents have declined to provide any of that information and instead they have sought to supplement the record here with the financial information that ultimately comes down to a few statements by Mr. Sweeney in a supplemental declaration regarding his finances.

In staff's view the supplemental information is not fundamentally different than the evidence and the argument they presented to the Enforcement Committee.

And finally, if the additional documents are admitted, in staff's view this matter must either be remanded to the Enforcement Committee or the Commission must hold a de novo hearing.

I am relying on our regulation 11332(b)(4). If the Commission decides to hold a de novo hearing it cannot be today because the matter under the regulations has to be scheduled to a future meeting and staff needs to have an opportunity to review and respond to the additional evidence.

For all those reasons, staff would urge the Commission to deny the request to supplement the record. Staff would have no objection to the brief as argument but we would object to redacting the paragraph or two that they identified as claiming to have confidential information. Thank you.

Chair Wasserman asked: Does any Commissioner have questions on the evidentiary issue?

Commissioner McGrath was recognized: What was the date of the Regional Board hearing where the question of capacity to pay was first raised?

Mr. Zeppetello answered: I do not believe that hearing has been held yet. There is a hearing on administrative liability scheduled before the Regional Board in December.

Commissioner McGrath continued: So this was not material from the first Regional Board hearing? This is from the prospective hearing?

Mr. Zeppetello replied: Correct.

Mr. Bazel added: That is correct.

Chair Wasserman continued: As I understand it we need to make a decision whether to accept the respondent's offer of the additional evidence. I would note that staff has said the brief, redacting any reference to the evidence itself, can be considered but that leaves the question of whether the supplemental evidence concerning financial ability which was not before the Enforcement Committee, should be considered or not.

MOTION: Commissioner Scharff moved to not accept any supplemental evidence, seconded by Commissioner Vasquez.

Chair Wasserman asked: Do you want us to take a hand vote or a voice vote?

Mr. Jacobs replied: It probably does not matter for this particular issue. On the actual enforcement decision there should be a roll call vote.

Chair Wasserman continued: All those in favor of the motion not to accept the additional evidence say, aye.

Any opposed? The motion passes unanimously.

The motion carried by a voice vote with no abstentions or objections.

Chair Wasserman asked: Are there any other preliminary matters before we hear from the --

Mr. Jacobs interjected: Not as far as I am concerned Mr. Chair.

Chair Wasserman recognized Mr. Bazel: I am Larry Bazel. I represent John Sweeney and Point Buckler Club. Here is what I was intending to talk about but I will cut this in half.

I will skip what happened, for the most part, and what should happen now and talk a little bit about the proposed penalty as too high. That is the main argument that I want to make and more specifically there are too many penalties because there are 29 penalties here.

The staff is focused on one or two issues; the levee repair, maybe the borrow ditch associated with the levee repair.

And if the levee repair is a violation that is fine but that is one \$30,000.00 violation. What has happened here is another 28 violations have been tacked on about things that do not warrant penalties at all.

I will also talk about the legal issues and the status of the settlement proposal.

This photograph shows that as far back as 1948 in aerial photographs there was a levee around the Island and there were ponds on the Island.

What should happen now? There has been a change in position. In the January 2015 letter we heard that none of this was permissible but we are now in discussions with staff here and with the Regional Board about restoring tidal flow and having a small pond.

Had Mr. Sweeney known, he would not have needed to restore the levee all the way around the Island although that is the way it was and that is the way it was going back to the 40s and maybe into the 1920s. He could have had a small duck pond and what that white oval is showing is a small duck pond with a levee around it; the rest of the island can be tidally open. It does not need to have the levee to maintain the water levels that you do in a duck pond.

What we are now talking about is getting permitting for a small duck pond, for a little kite boarding, for a little clubhouse and for restoring most of the island to tidal conditions.

If a penalty is imposed we request that it should be paid out over five years. Mr. Sweeney does not have the money to pay any penalty of any substantial size now and it should be reduced for money spent on restoring the Island.

We are not asking that it be reduced for money spent on creating a new duck pond but certainly for restoration because what money is available, and there is not much money available, it should be devoted to restoring the island. That seems to be the main way to protect and improve the environment.

The Enforcement Committee suggested a \$450,000 settlement and we have been talking a little bit with staff about that. I think staff is interested in your direction about whether staff should proceed along those lines. We request that you give staff that direction.

On the proposed penalties, the highest administrative penalty ever imposed by this Commission was \$220,000. It was required to be paid over five years. That is where we got the five years from.

Six of the top ten penalties were \$50,000 or less. In four of those penalties there were waivers. In two cases the penalty was completely waived and the other two it was partly waived and that is where we get the waiver from.

We have heard that the maximum allowed is \$30,000 per violation. Some of the penalties here are for things like removal of a broken tide gate, for parking trailers, for excavation of small ponds. By the way, on three of them we disagree. Two of the proposed penalties are for fill-related to roads. But there has not been fill on those roads. If there are roads there, the dead vegetation was knocked down by the driving back and forth. But those roads have not been graded or filled.

On one of them, a second tide gate; the accusation is that he replaced the tide gate, I think installed a new one, but instead, what he did was he repaired the flaps at the end of the tide gate.

The proposed penalty, the levee repair is now \$210,000 so that is seven violations but they are even more for trailers and containers, four crescent ponds at \$30,000 a pond for interior use, \$120,000, and for the dock \$60,000.

Compared with other penalties in the Suisun Marsh, no penalty has ever been imposed on a duck club. No penalty has ever been imposed for trailers and containers in Suisun Marsh.

And previous counsel for Mr. Sweeney submitted 67 photographs showing huge numbers of containers and trailers at many, many duck clubs. In this photo there are 20 shipping containers and 12 trailers. In this one there are seven shipping containers and one trailer and in this one there are bunk houses and shipping containers.

We saw that the clubhouse area consisted of flat beds, containers and trailers. That is really one area. That is one facility. It should be one penalty at most, not eight.

The crescent ponds; the only purpose for those ponds was to create duck ponds. Trees were planted, decoys were installed. The trees died. The duck ponds were too small. Mr. Sweeney is an enthusiast. He loves the Marsh and he wants to restore a duck club but he is not an expert at it.

The duck ponds are important. They are environmentally important. The Suisun Marsh Protection Plan and the U.S.G.S. say that waterfowl prefer duck ponds over natural marsh and that is because vegetation is grown that provide duck food. Mr. Sweeney brought a disc and a roller. He intended to disc the soil and plant duck food and then roll it. He never got around to that. The Agency stepped in and told him to stop. Duck ponds are vital. This is also from the Suisun Marsh Protection Plan. They are critical habitats and they deserve special protection. Digging for small duck ponds should not be a \$120,000 violation. The harm created by these duck ponds; none has been identified in the staff report.

For the interior use, we disagree with the claim that fill was placed to make two roads. We think \$60,000.00 of the penalty should be dropped.

Vegetation; there was vegetation that was cut. Most of it grew back; not all of it. There is a penalty for that. There is no comparison. We do not know of any other case where people have been penalized for cutting vegetation.

Kite boarding; and this is just for the recreational act, a \$30,000 penalty. We do not think people should be penalized for recreation. We have not found any comparison and there is no harm that has been identified.

The dock that replaced an existing dock; it was one dock cut to conform to the piers. No enforcement against docks elsewhere in the Marsh.

The legal issues; we think there are many legal issues. First of all there are the penalty factors that I think you are aware of. The Commission is required to look into many kinds of penalty factors. I am just going to focus on two, the gravity of the situation, of the activity, and the ability to pay. The gravity of the harm was not considered for most penalties. And they are obviously not grave; kite boarding, tide gates, parking trailers, things like that.

The ability to pay; Mr. Sweeney has little cash and no income. He has some other assets but they are not liquid; one that was identified in the Enforcement Committee is a landing craft listed for \$895,000 for three years. It has not sold. The price has been reduced to \$850,000 but it is a valuable asset. It is worth something but it is hard to say what it is worth because no one is buying it. It is not very liquid.

Mr. Sweeney needs money to restore the island. He needs to be able to raise the money to implement the restoration plan. He does not have the cash to pay a penalty now. Forcing him to pay money now does not do any good. It just interferes with his ability to restore the island. That is why we are asking for penalties to be paid over time.

We think there is no liability here, at least on many of these for various reasons. In some of them there was substantial change in use asserted. We do not think any changes are substantial.

There has been some talk about the exemption for work specified in an IMP or a club plan. The 29508 Mr. Zeppetello referred to; no permit required for repair, replacement, reconstruction or maintenance, we think this fits exactly. It is certainly replacement or reconstruction. There is nothing that says the levee has to be in the exact same footprint. And the reason it was not in the exact same footprint is because the island eroded away. Where there was not a base of the levee to add to, Mr. Sweeney went inland.

But again, here we are talking about what should be, at most, one violation.

Initially, this was not seen as the most egregious situation that ever took place that would require the largest penalty ever. Staff saw the levee repair in March 2014 when it was just beginning. They did not comment. They knew Mr. Sweeney. They had his phone number. They could have called him up. They did not.

When they finally visited the island at his invitation in November, when the levee repair was essentially complete, the staff said the repair was okay if it was consistent with the Club Plan. It was only in January 2015 that staff first said, you cannot do what you are doing. So this did not jump out early on as being a major problem.

In early 2015, the Corps showed up and it offered an after-the-fact permit. It had Mr. Sweeney sign some forms and it took it back. Those were not processed. But at the time in early 2015, the Corps also did not think this was a major issue.

There is evidence in the record that another duck club had levees that had been breached for 15 years; staff saying, no problem, you have another six months to repair.

The only time we heard of penalties was after we filed the lawsuit against the Regional Board. The Regional Board staff issued a cleanup and abatement order in September 2015 and it did not comply with due process requirements. We let that go and tried to negotiate until there was a refusal to extend time. And then to avoid violating the cleanup and abatement order we had to file suit and get a stay.

So we filed suit and got a stay because the Court agreed with us. The stay was issued on December 29th; on January 5th the Regional Board staff rescinded the cleanup and abatement order and on January 7th according to the Regional Board's records there was a three hour meeting and call with other agencies and with the consultants, some of whose work you have heard here today; we think BCDC was there – we do not know because we have not seen any of the documentation; but that, as far as we can tell, was the initiation of the process that led to the penalty proposals in May and that got us here today.

It sure seems to have been motivated to be a response to our suit against the Regional Board. And that raises issues related to constitutional rights and I would think that it also sends the wrong message, that if we file suit to protect our constitutional rights there should not be any penalty for that.

The legal issues are called First Amendment Retaliation or Constitutional Vindictiveness that is related to responding to the lawsuit.

There is also the problem here because Mr. Sweeney is a person. He is not a corporation. He does not have a big income stream that he can pay this penalty out just by taking a little bit off his profits. What you are doing along with the Regional Board is trying to take away everything he has and that raises all kinds of constitutional protections usually for criminal penalties.

And they should apply here because of the extreme nature of the penalty in conjunction with the Regional Board's penalty on Mr. Sweeney's assets. And neither staff here nor the Regional Board assert that he can pay the two penalties.

On the settlement proposal, the \$450,000, we came back to the Enforcement Committee and said we would settle for \$450,000 with conditions – the conditions were five years and credit. We have been talking with staff now about working out the details. But as I say, staff wants your direction and we think you should ask them to continue to discuss settlement.

Chair Wasserman continued: We do have some public speakers and we will hear them before we go into questions and comments from the Commissioners.

Ms. Nicole Sasaki was recognized: I am an associate attorney with San Francisco Baykeeper. Baykeeper has monitored the illegal fill activities at Point Buckler Island and the enforcement actions by both the Regional Water Quality Control Board and BCDC.

We appreciate the agencies efforts to restore the island's tidal marshlands. While Baykeeper supports the adoption of BCDC's cease and desist order for the alleged violations of the McAteer-Petris Act and the Suisun Marsh Preservation Act at the Island; we disagree with the Enforcement Committee's decision to reduce staff's originally proposed civil penalty of \$952,000 to \$772,000.

Baykeeper believes that staff properly counted the placement of fill to close the seven tidal levee breaches as seven separate and distinct violations of the McAteer-Petris Act. Lumping together several similar violations and then counting them as a single violation in order to strike a compromise sends the wrong message to respondents in this matter and future matters alike.

Illegally filling the seven tidal levee breaches and cutting off tidal action to the Island was arguably respondent's most egregious action in this matter and should not be improperly discounted.

Wetlands and tidal marshes are vital to a healthy Bay ecosystem. They will play an essential role in the Bay Area's resiliency to sea level rise. We cannot sit idly by and let existing tidal marshland be illegally filled.

BCDC needs to make it clear to the public that illegally filling wetlands and tidal marshlands is unacceptable and such action will not be tolerated.

In closing, Baykeeper appreciates BCDC's action to protect and restore Point Buckler Island and we ask that the Commissioners adopt the Enforcement Committee's recommendations and consider adopting staff's originally proposed civil penalty. Thank you.

Dr. Stuart Siegel addressed the Commission: I was the lead author for the technical assessment work that has been done on behalf of the Regional Water Board.

Primarily I want to let you know that I am available here today to answer questions for you. I do want to make a comment about this idea of change in use. The last time the tidal marshes in Suisun were diked for any other land use was about 100 years ago. I think in terms of the severity of this change in use, I want to bring that to the attention of the Commissioners. Thank you.

Dyan Whyte commented: I am with the San Francisco Bay Regional Water Quality Control Board. I am the Assistant Executive Officer and I serve as the prosecution team lead for this matter.

In August the Water Board adopted a cleanup and abatement order. And in adopting that order they found that John Sweeney and Point Buckler Club violated state water quality discharge prohibitions and the Clean Water Act by discharging fill into approximately three acres of tidal wetlands and channels and contributing to the degradation of 27 acres of tidal marsh habitat.

I am here to emphasize to you the harm to water quality and associated beneficial uses.

As you know Suisun Bay is in the Delta. The Delta is recognized as one of the most significant estuaries in North and South America, on the western coastlines.

And when you block off these tidal channels, what Mr. Sweeney is doing, and this action has blocked off over 10,000 feet of tidal channels, about five percent of the tidal channels in the area; these channels serve as the area when salmon are heading out to the Golden Gate, this is where they stop, they rest, they feed, they get their food reserves. This is where the longfin smelt spawn. These are the channels that export food and nutrients into the Bay, feeding the Delta smelt.

The Delta right now is at a really ecologically balanced delicate balance, and we are here to do what we can to preserve and protect that. Thank you for your time.

Chair Wasserman continued: Questions, comments from Commissioners?

Commissioner McGrath commented: Just to remind us that we are dealing with the record that we have. It has ample evidence both about the impact, and second I want to talk about a few of the false equivalencies that have been made by the representative of the landowner.

This is not at all comparable to talk about installation of a trailer or a container on a site which is high and dry to a site that is in a marsh. What we saw today and the evidence before us was that the entirety of the island was subject to our jurisdiction and wetlands.

And as Dyan Whyte said, this system had substantial value for endangered species, but the circulation within this system was also vital to the health of those species and also the vegetation.

I was struck by one of the comments by Mr. Sweeney's representative, that Mr. Sweeney is not an expert at this. To begin to do construction on this scale without consultation with experts when you are already a little bit sideways with the Corps on your actions on another island and where there is a requirement, if you are going to use the argument that there is a plan in place and that the Suisun Management Area or whatever the parent organization that is managing these; and to not consult with them is perhaps a little more egregious than just not being an expert.

And then finally, the comment about kite boarders; many of you know that I am on the San Francisco Board Sailing Association and I represent wind surfers, kite boarders and stand up paddlers in trying to secure and improve access and maintain access around the Bay. If this was a matter of somebody ticketing a wind surfer for wind surfing somewhere in the Bay, even somewhere arguably sensitive, I would be arguing against any penalties for that. There are arguments under the State Constitution about rights to use the navigable waters. And where those rights have been changed, and I have been involved in a number of occasions where that use does result in impacts, the agencies go through a process. I am confident that this is not a matter of someone being punished for wind surfing. This is a matter of installation of facilities in a wetland to encourage kite boarding and that is the issue.

I am comfortable with the actions of the Enforcement Committee. We could get into financial questions but there is not the record before us and I think the record that is before us is certainly sufficient to justify a substantial penalty.

As a final point I would note that construction did not stop when first noticed. And that would make both resolution of the violations and the question of penalties substantially less onerous.

MOTION: Commissioner Bates moved approval of the recommendation, seconded by Commissioner Wagenknecht.

VOTE: The motion carried with a vote of 16-0-2 with Commissioners Bates, Scharff, DeLaRosa, Gibbs, Peskin, Pemberton, McGrath, Nelson, Randolph, Sartipi, Sears, Vasquez, Techel, Wagenknecht, Vice Chair Halsted and Chair Wasserman voting, "YES", no "NO", votes and Commissioners Galacatos and Brush abstaining. Commissioners Galacatos and Brush represent Federal Agencies.

10. Public Hearing and Possible Vote on the San Francisco Bay Area Water Emergency Transportation Authority (WETA) and Port of San Francisco's Application for Permit Application No. 2016.001.00 for Expansion of Water Transit and Emergency Evacuation Facilities and Public Access Amenities within the San Francisco Ferry Terminal, in the City and County of San Francisco Chair Wasserman announced: Item 10 is a public hearing and vote on the WETA and Port of San Francisco proposed expansion of ferry terminals, emergency evacuation facilities and public access at the San Francisco Ferry Terminal. Jhon Arbelaez-Novak will introduce the project for BCDC.

Coastal Program Analyst Arbelaez-Novak presented the following: On November 4th you were mailed a staff summary on BCDC permit application No. 2106.001.00 for the proposed expansion of the San Francisco Ferry Terminal located at the south basin adjacent to the Ferry Building on its south side.

The project is located entirely in your Bay jurisdiction.

The co-applicants, the San Francisco Bay Area Water Emergency Transportation Authority or WETA and the Port of San Francisco propose to add two ferry gates, realign an existing gate and install facilities for vessel docking and passenger boarding, cueing and circulation. The project would remove Pier 2 on top of which Sinbad's Restaurant used to sit and include new and existing maintenance dredging with disposal to occur at the federal ocean disposal site located outside of the Commission's jurisdiction or at the permitted Montezuma Wetlands Beneficial Reuse Restoration site in Solano County. A 10,000 foot open-water lagoon would be filled to create the proposed Embarcadero Plaza. This map shows the general details of the project. It shows the existing areas that would be retained and improved and the new areas. Public access is required and would be improved under a different BCDC permit. Pier 2 would be removed and the east Bayside Promenade would be added along with the Embarcadero Plaza. The proposed facility is designed to withstand a major earthquake and also would serve as an emergency evacuation area therefore WETA and the Port developed a plan to access the terminal if the seawall collapses during an earthquake.

In the staff summary provided to you it was mentioned that the applicants would not install seismic instrumentation in the proposed ferry terminal. That issue has now been resolved. The proposed project will include seismic instrumentation to provide information on the effects of earthquakes on all kinds of soils to the California Geological Survey. The expected life of the project is 50 years therefore the project is to be constructed at an elevation above the 100 year flood level and future sea level rise estimates for 2068. The project would result in approximately 28,000 square feet of Bay fill. The applicants propose to remove an equal amount of fill at a former terminal in the city of Richmond; a project managed by the Coastal Conservancy. Consequently, the project would result in no net increase of fill in the Bay. The project includes public access improvements created in part by filling a 10,000 square foot open-water lagoon just south of the Ferry Building. The new Embarcadero Plaza would have amphitheater-style seating, lighting and decorative paving. The adjacent eastside promenade will be established primarily for cueing ferry passengers and will have protective canopies, seating and trash cans. A new overlook to see the Bay Bridge, Yerba Buena Island and Treasure Island would also be constructed. In total, the project will result in approximately 36,000 square feet of new and improved public access. The applicants have applied to use the newly filled area that replaces the lagoon to expand the Farmers Market.

Regulatory Director Brad McCrea addressed the Commission: Normally we would have the staff presentation followed by the applicants' project presentation and then public comment and then a staff recommendation. The reason that we are doing it slightly out of order is because there has been some last-minute negotiating around the conditions of approval that are in your staff recommendation. We will give the applicants a moment to speak but they asked that I clarify something ahead of them speaking. The matter that we are discussing is the use of the

Embarcadero Plaza for the uses of a Farmers Market. In the original recommendation before you we thought that a waiting period would be prudent; an 18 month waiting period where no use of the Plaza would take place. We would evaluate how it worked, after which we would recommend that you entertain possibly an amendment to the permit for the use of the Plaza for a Farmers Market.

In discussions with the permittees we have come to a new recommendation that will include a 12 month evaluation of the Embarcadero Plaza for Farmers Market use on Tuesdays only. That would be followed by another six months of evaluating the Embarcadero Plaza for a Farmers Market on Saturdays only. Following that we will recommend that you authorize a six month grace period during which the study results will be reviewed and a permit amendment may be considered during that period. So it would be a 24 month review and grace period. You will hear more about this as this unfolds. At this point I would like to have Jhon finish up with the details of the project and then have the applicant present its project. Thank you.

Mr. Arbelaez-Novak continued: Since mailing the staff summary on November 4th several minor errors have been discovered that need correcting. I have indicated in the errata sheet provided to you that these include the removal of a recommendation of the National Marine Fisheries Service regarding restoration of listed fish species habitat which the applicant is not proposing to implement as well as grammatical and spelling errors.

In considering the proposed project the Commission should assess whether the project meets the designated uses and policies of the Special Area Plan, meets the laws of policies of fill requirements including whether the proposed fill would be constructed in accordance with sound safety standards, is consistent with the Bay Plan policies on transportation, is consistent with Bay Plan policies on natural resources including water quality, fish, other aquatic organisms and wildlife, is consistent with the Bay Plan policies on dredging and material disposal, provides maximum feasible public access consistent with the project and is designed and would be managed to be resilient and adapt to impacts of sea level rise. I would like to introduce Michael Gougherty with WETA and Dan Hodapp with the Port.

Mr. Gougherty addressed the Commission: I want to acknowledge that we have members our project team from WETA and the Port here as well. I am the Project Manager with the Port of San Francisco.

I have been on this project since its inception in 2010. This project has been a close partnership between WETA and the Port of San Francisco. The San Francisco Bay Ferry is known as the Water Emergency Transportation Authority. The last part of the presentation will be made by Dan Hodapp with the Port of San Francisco.

San Francisco Bay Ferry is one of two agencies that operate public ferry service on San Francisco Bay in addition to the Golden Gate Ferry Service. We operate four routes three of which serve the San Francisco Ferry Building. Over the last four years our ridership has increased 77 percent. This has been a great problem for us because the resources that are limited at the Ferry Building have really been taxed and affect our ability to increase service and meet demand for those services.

We have an ambitious expansion plan which you will be seeing more of over the next few years. We have our Richmond Ferry Terminal project scheduled to open in 2018 and should be coming before the Commission in the next few months. We also have a project that we are partnering with the city of Alameda on; the Seaplane Lagoon. This project is slated to open in 2020 and has already gone to your Design and Review Board. There is the Treasure Island project which is a new project is under development which is a partnership between and the Port of San Francisco and the Mission Bay Ferry Terminal project. The start date of this is to be determined and the Port will be initiating the BCDC permitting process in the near-term future.

In addition to terminal expansion program we also have a suite of capital improvement projects which we refer to as our Core System Enhancement Program. This consists of three projects; two of these have already come before the Commission in the last two years; our North Bay and Central Bay Operations and Maintenance facilities. These are currently under construction. The third project in the suite is the project before you today; it is our Downtown Ferry Terminal expansion project.

As a whole this trio of projects represents our initiative to provide the infrastructure that we need to meet the demand for the existing services, account for the increased capacity needed to implement the expansion services and realize the mandate of the "E" in our name; the Emergency. It will give us the capacity we need in downtown San Francisco to fill our emergency response requirements to provide transit service in the event of the aftermath of a major earthquake.

The current terminal consists of facilities operated by WETA that were built in 2003 by the Port of San Francisco. Due to our increase in ridership we have expanded service. Most of our commute services now operate on 30 minute headways during the peak instead of 60 minutes. That is taxed at the land side existing capacity to support the waiting and cueing of passengers but also on the water side. We are running out of berth space to add the additional vessels that we need to meet demand for the existing services and certainly the planned expansion services. As part of the work that the Port did in 2003 that work included the construction of the existing facilities but also contemplation of a master plan for the ultimate build-out of the facility. WETA as the agency that secured funding for that phase of work has taken the work that the Port did in 2003 and advanced that into a master plan for the build-out of the facility. A lot of conditions have changed since those facilities were built in 2003 and certainly since the Golden Gate facilities were built in the 60s. Even since 2003 the area has become much more trafficked, much more intensely used creating a new design challenge for our project that was not quite essential to the 2003 improvements.

We need to build and design this facility to not only meet the needs of ferry users but to accommodate the needs of other users of the Ferry Building area more than ever. Moving forward with the Master Plan we have secured funding to build the south basin components of the project and that is the project that is included in the permit before you today. The other component of the Master Plan for expansion includes Gate E in the north basin. This is a project that WETA would pursue as demand warrants in the future and would be part of a separate permit application. The Demolition Plan includes the removal of Pier 2 which was a requirement of the original Downtown Ferry Terminal project. Another key part of the pre-construction phase

of the project will be protecting the historical resources in the area. These include the Agriculture Building which is in a very vulnerable condition, the sea wall which is in equally vulnerable condition in addition to the Ferry Building and other components of the Historic District in the area.

The Construction Plan calls for the construction of two new gates; we are calling these gates F and G. This will triple the berthing capacity we have available in the south basin. We also will be expanding the deck spaces available for the Ferry Terminal and these include a new promenade area on the Bayside of the Agriculture Building as well as what we are calling the Embarcadero Plaza; a new deck that would cover the lagoon. This would give us the landside capacity we need to support the waiting and cueing of future ferry passengers of the facility.

All these improvements would be designed and built to essential facility standard, which means we would expect them to be operational in the likely aftermath of an earthquake. Canopies are a needed component in terms of weather protection and we worked closely with the DRB in proposing our current concept for these. We feel we have a solution here that works for passengers as well as the aesthetics and view qualities of the area.

The canopies will also feature an array of solar panels on top, which will offset the expected energy consumption generated by the project. We raised the new plaza as a means to address the Commission's sea level rise requirements. We put a lot of effort in doing this in a delicate and artful way. We have created raised seating in an amphitheater-style fashion. This meets the sea level rise requirements and also provides a new and interesting public seating space. Our architect has developed a neat design concept for the Plaza where it features an outline of the San Francisco Bay Area. It has a very pleasing design aesthetic.

Our interest as WETA in the project was to design a project that first and foremost met the needs of our ferry users; current and future. This is a very heavily trafficked area with a multitude of users. We have worked closely with the Port of San Francisco to ensure that while the needs of ferry users are met at the facility, we could also incorporate design and programming aspects that encourage maximum public use and event programming to the extent possible.

Mr. Dan Hodapp addressed the Commission: I am with the Port of San Francisco, the Planning and Development Division. I am honored to be part of this very exciting project. It has been a long time coming and it is a great thing. From the Port's point of view this project really accomplishes three things. The first thing it accomplishes is it helps solidify the very authentic use of ferry service at the Downtown Ferry Terminal. This really helps anchor the existing Ferry Building and we are very proud to be part of that. The second thing it does is it makes riding the ferry a pleasant experience whether we are good economic times or not so good times. This project is meant to last and is designed for sea level rise. The third thing it will do is provide great public spaces and great public access. The Port is looking at the entire Ferry Building area in a larger view than just this project. This is one new plaza and it is an activity area. There is a Farmers Market behind the building on Saturdays and it has 220 delivery vehicles on a daily basis. There are places in front of the building that have restaurant uses, they transition, they change and there are some primary pedestrian circulation areas.

The Embarcadero Promenade at the bottom of the screen is a very heavily used pedestrian area. This project creates another promenade that extends along the back of the building. We are trying to figure out how this plaza fits into that mix. Most of the public access in this project will be new public access added to the existing public access. The amphitheater-style seating will accommodate 445 people. Below the passenger shelters there will be an additional bench seating of 120 people. This project is bringing 565 new seats to this area.

The Market brings an average of about 23,000 people to the waterfront on a Saturday. People come for the Market but they also come for the Bay. They come because there are both of them there and that is a very compatible benefit. We expect more of them to be coming by ferry in the future. It will be an easy destination from across the Bay and from other parts. Some of the components of making a great public space are adequate seating, sunlight, an identity of what it is and a culture of activities that happen on it.

The Port has problems with some of its public spaces where one user group occupies it to the detriment of others. We are talking about how this phenomena takes place and what we are hoping to do with a rotating market use is providing a public space that changes during the week and that no one group gets ownership and that is known for a culture of activities. We are very happy to have worked with BCDC staff and coming up with a compromise that we can really support and live with.

We will come back to you and inform you as to what we think is working and ask for your input. That is what some of the permit conditions are about. The Port thinks it is important to establish this culture of activities on the space. We want it to be one that changes. We believe this change-of-use strategy will be more equitable for all users.

Chair Wasserman announced: We will open the public hearing. I have a few public speaker cards.

Mr. Lee Koffler commented: I am a Board Member for CUESA which is the Center for Urban Education for Sustainable Agriculture. We run the Farmers Market that you heard about in the last presentation. In addition to being a Board Member responsible for the governance of the organization and its constituents and as a customer of the Farmers Markets I am also a father and a marathon runner. I believe the proposal that the staff has presented to you today is a good use of the Plaza. The current plaza area that is not being utilized is completely different when it is Farmers Market day. It is so full of life and so many educational activities are taking place that liven up the area and make it very enjoyable. I was thrilled to hear about the potential expansion of these activities to the new plaza and I am hopeful that you will approve what the staff has proposed.

Ms. Marcy Coburn was recognized: I am the Executive Director of CUESA. Thank you for considering the staff recommendation for this trial expansion of the Farmers Market onto this plaza. CUESA is different from a lot of farmers market organizations. We are not a for-profit organization that has markets all over the Bay Area. We have this one and we may have just

begun one in Jack London Square. We have a different focus and a different vision than other farmers market organizations. Our mission is cultivate a healthy food system through the operation of farmers markets but also through educational programming which is quite extensive.

We have a \$2 million annual budget. We raise money through fundraising, grants and private donations. The lion's share of that money is spent on educational programming for elementary school kids, for high school kids, for adults who want to learn about cooking and farming, for farm tours, for connecting our farmers to the local community, educating them about where food is grown, how it is grown, where it comes from and talking about the history of agriculture in this area. We have one of the best farmers markets in the world and is regularly brought up in the press and the media.

Thank you so much for this opportunity.

Ms. Janet Griggs commented: I am a past president of CUESA. During the years of my tenure we worked very hard to create a strong organization whose mission was education. This is an opportunity that we all worked for. We whole heartedly support the staff recommendation. I am Treasurer of SS Travel. The importance of this proposal to educating our tourists and making them aware of what is important with respect to our food systems helps them take that message back with them when they return home.

Mr. Jon Ballesteros was recognized: I represent San Francisco Travel Association. We are here in support of the proposal to use the raised area as a culinary and food educational venue. Last year San Francisco welcomed 24.6 million visitors and they spent \$9.3 billion. Those expenditures support 75,500 jobs and contribute more than \$738 million to the General Fund of San Francisco.

We know that more than 55 percent of our visitors are day visitors that come from areas 50 miles or beyond the City limits. For these visitors educational, cultural and culinary attractions are major drivers that bring them into the City. The CUESA Farmers Market is a significant contributor to this visitor set. We know that 25 percent of their patrons are from outside of San Francisco.

We believe that the proposal to use the raised plaza to expand culinary and food education opportunities will only greatly enhance the visitor experience of our City overall. For these reasons we hope this Commission will look favorably upon the proposal. Thank you.

Marina Secchitano, I am Regional Director of the Inland Boatmen's Union, we are the Marine Division of the ILWU and we represent deckhands on ferries. We speak in favor of granting this permit. Over the last four years our ferry services have expanded tremendously. We have doubled our crews in the last few years. These are great middle class jobs for our members. I am excited to see our vision come into fruition. We are hopeful that will make this a great terminal. Thank you.

Chair Wasserman continued: That concludes the public speakers. I would entertain a motion to close the public hearing.

MOTION: Commissioner Peskin moved to close the public hearing, seconded by Commissioner Techel.

VOTE: The motion carried with a vote of 16-0-0 with Commissioners Bates, Scharff, DeLaRosa, Gibbs, Peskin, Pemberton, McGrath, Nelson, Randolph, Sartipi, Sears, Vasquez, Techel, Wagenknecht, Brush, Vice Chair Halsted and Chair Wasserman voting, "YES", no "NO", votes and no abstentions.

Commissioner Peskin had questions: I have a design question as to the where the Plaza will be. Is that at grade at the east side or where is the ADA access for that?

Mr. Gougherty answered: There are two ADA access ramps. Raising the Plaza for sea level rise while conforming to the grades outside of the project was a challenge. We have accomplished the ADA grade access along the driveway area by Gate E.

Commissioner Peskin continued: So at the eastern side at the east promenade at the back of the Plaza those two areas are level? Is that area at the same level as the Plaza there?

Mr. Gougherty replied: Yes, correct. This span down here is at the same elevation as the Plaza.

Commissioner Peskin asked: Relative to the off-site fill removal in Richmond; was any consideration given to fill removal within the Special Area Plan area?

Mr. Arbelaez-Novak explained: The San Francisco Waterfront Special Area Plan requires fill removal within the general northeastern waterfront. Staff asked the applicant and the Port to search for opportunities to do fill removal in the area but they were not able to locate any opportunities or the fill was already designated for removal for other projects. That is why staff accepted fill removal of the Terminal 4 project in Richmond.

Commissioner Peskin clarified: So you are saying that from China Basin to Fisherman's Wharf under the Special Area Plan there are no other areas identified for fill removal?

Mr. Gougherty answered: That is correct. We had the initial proposal to remove the fill that we were proposing to remove in Richmond. We took it to BCDC staff and they stated exactly what you are asking, isn't there something in San Francisco you can remove? We coordinated closely with several departments at the Port of San Francisco and the likely areas that were potential candidates for removal have already been spoken for.

On the scale of what we were proposing to remove as mitigation for this project the Port had nothing available to offer and the BCDC staff concurred with that finding.

Commissioner Peskin continued: Can we hear from BCDC staff? What about Piers 30, 32?

Chief of Permits Jaime Michael replied: I want to reiterate what Mike Gougherty said from WETA. We did ask them if they could remove anything from the city and the county of San Francisco and we heard back that there was nothing available. The proposal that we got was to remove fill across the Bay in the city of Richmond at Terminal 4 and we accepted that because it was a feasible removal alternative. We did not explore 30/32. That was not part of the proposal from WETA.

Commissioner Peskin added: If we go back to early on in the Will Travis days and the tri-part tide between Save the Bay, BCDC and the Port that led to the Special Area Plan circa 2000; I think the last time we reviewed we found that they had been slow in meeting certain terms of the Special Area Plan including but not limited to fill removal within the Plan area. It seems a little odd to me that BCDC staff is saying, well they said that there was nothing available and so Richmond was fine.

Have you independently analyzed whether or not you believe to be true?

Ms. Michael answered: No we did not. I do want to add that a part of the proposal is to remove Pier 2 at the project site; the pier on which Sinbad's Restaurant sits.

Commissioner Peskin interjected: If I recall correctly that was part of a separate permit that this Commission issued. I am delighted by the whole project. We all love the Ferry Building. We all love the Farmers Market. This is a water-oriented use. All of that is great but minus the fact that the fill removal which I believe should under our Plan objectives be in the Plan area is on the other side of the Bay miles and miles away.

Ms. Michael stated: Our preference would have been something in the city of San Francisco as well. That is what the policies require but according to both of the applicants there was nothing in the City to remove except for Pier 2 which is at the project site.

Commissioner Peskin clarified: I used to be on the Advisory Board of WETA or pre-WETA; WETA does not control seven miles of San Francisco's waterfront, the Port of San Francisco does.

Mr. Gougherty commented: Beyond just having the square footage be available this is a requirement not only of BCDC but also of the National Marine Fisheries Service and we need to remove the fill. So this has to be a project that can be accomplished within prior to the completion of construction.

You mentioned 30/32 as a potential option. I can't know for sure why that was not offered to us as an option but one of the reasons may have been it was not going to be feasible to remove prior to the completion of construction.

Commissioner Peskin had more questions: What about all of the derelict pilings down by Mission Bay south of Mission Bay; all of those down by the Ramp Restaurant? Have those been removed yet?

Mr. Gougherty replied: I cannot answer. Maybe someone from the Port can speak on that one.

Mr. Byron Rhett answered: I am the Planning and Development Director for the Port. Those piles in that area that you just referred to are being removed now and are being removed as part of a different project.

We can be able to provide to staff specifically what fill is scheduled or planned for removal and under what other projects we are doing that and be clear with staff what, if any, might be available to address this.

Obviously, Piers 30/32 is a lot larger than the amount of fill that is required to be removed for this project. At this point we do not have the resources to remove 30/32; that might have been why it was not considered but there may be other fill that might be available for this. That is something we could provide to your staff.

Chair Wasserman chimed in: In the nature of new business; out of order, I would like for Port staff and BCDC staff to work together and do a presentation to us on precisely that issue including the very difficult issue of Piers 30 and 32.

Vice Chair Halsted commented: I would like to say how pleased I am that this project is moving ahead and I think it is great and so is the right balance of public access. I hope that the experiment will demonstrate a good balance.

In the Ferry Building we put in that sign that shows when ferries are leaving. What kind of signage is being incorporated into this project that would reflect the style and continue that kind of theme and information so that people know where to find what ferry?

Mr. Gougherty replied: Unfortunately I am afraid a sign like that would not survive in the marine conditions. We were an early participant in the MTC Hub Signage program and we found that typology to work very well for our terminals. We would like to expand and continue that sign typology.

Vice Chair Halsted stated: The major thing I was involved with was trying to find the right locations for them and we had a hard time doing this. I am concerned that we get it done as well as we can in these new locations before we build it.

Mr. Gougherty stated: I was somewhat involved in that project and the difficulty was we were placing signage in the lease holds controlled by others. We are working with the Port for an internal lease for the properties. WETA agrees to place signage on our own behalf in the lease hold.

We work closely with MTC's Transit and Wayfinding Coordinator that administers the HUB Signage program.

Vice Chair Halsted added: It is a big problem in the Bay Area actually. This looks like an invitation to skateboarders to me and I don't think we are designing a skate board park. I wonder how you are thinking about that.

Mr. Gougherty replied: This is absolutely a concern. You see this happened very close to the project area in the median of the Embarcadero. One of goals is to activate the space beyond just a public access and public use perspective. We see having traffic in this space, having activities planned there as a natural low-impact design way to prevent certain groups from taking ownership of the facility. The skateboarders' ownership of this area would have a detriment to the public at large.

We see this space being thoroughly activated during its uses for ferry terminal purposes. We have worked collaboratively with the Port to propose some uses that would disrupt the space enough to not allow certain groups to expropriate it.

Vice Chair Halsted asked: So there is no physical design issue, which would make it difficult for skateboarders to dominate it?

Mr. Gougherty replied: We will have some kind of skateboarder abatement; little metal notches. We will have some handrails as well. If the facility is not occupied and activated as a public space to provide the kind of physical design obstacles that would eliminate the potential of the skateboard use; I am not sure those would be compatible with a multi-use public space.

Vice Chair Halsted added: I am not sure what the answer is. It is a concern because they can keep other people away and they do destroy things.

Mr. Gougherty commented: BCDC staff and the Port has mentioned this evaluation period that we are doing with the Farmers Market; one of the things we will have an opportunity to look at is that it does not just have to be an evaluation of the Farmers Market, our other public uses of the space being functioning, other design treatments that we can do to make it a better experience for everyone one of which may be some detriment to skateboarding.

Vice Chair Halsted had another question: We talk about the Market on Tuesdays and then on Saturdays; the Market is generally there from 9:00 to 2:00 or so, isn't it?

Mr. Gougherty answered: I am hearing 10:00 to 2:00.

Vice Chair Halsted continued: So it is not at the peak rush hour for the ferries so it not as disruptive as that period as it might be.

Mr. Gougherty added: One thing to reinforce here; WETA has worked very closely with the Port and the Port was very cognizant that this has to function as a ferries facility first and foremost. While the Farmers Market is going to be available on a trial basis, there are self-imposed parameters that we have established.

There is a spatial parameter where the events will be limited to the Plaza area. There are temporal restrictions as well. So they are not going to be able to operate the ferry terminal during the peak hours of commute.

Vice Chair had additional commentary: My enthusiasm about this has to do CUESA's strength in programming and doing a great job of promoting local agriculture. If it were a bunch of coffee carts and hotdog stands I would not feel the same way about it. I ask CUESA not to lose its values and its consistency.

Commissioner Scharff spoke: I am really pleased with the notion of activating that space and having lots of activity there. I do run up and down the Embarcadero a lot and I like to do that and have breakfast at the Ferry Building. I would agree that this concrete area behind when it is not being used for anything can be a little depressing looking out there as opposed to when it is full of activity.

I had some real concerns with No. 5 on the Special Conditions. I thought a lot of those Special Conditions were unnecessary and would deactivate the Plaza and deactivate the area rather than activate it.

I understand why you would not want to have private events because that is antithetical to the idea of public access. I do not think commercial events are antithetical to the idea of public access; they often bring large numbers of people down.

I really took issue with the notion of why would we limit large public events? Large public events bring lots of people. For me that is purely an issue of we don't want to interfere with the ferry operations but I don't know why that would have to be so stringent as to require Commission approval 30 days beforehand or the designee.

I sort of felt the same way about tables and chairs. I thought we should be much more flexible and staff should be encouraged to activate the Plaza and encouraged to bring as many people down there as possible as long as we do not interfere with ferry operations. To me that is what public access is all about.

I think about this in terms of what it is like in my city of Palo Alto. When we have a public plaza where we allow nothing to occur on it because the public is supposed to be there, no one actually uses it. When we have tables and chairs set up and we allow food there is it well activated.

I also think about Europe; when you go to their public plazas they are more fun than our public plazas in America. They have these restaurants ringing them. There is a lot of activity.

I actually would take issue with Condition 5 as we discuss it.

Mr. McCrea commented: The challenge that the staff often finds is how to find that balance between developing these areas for commercial purposes to activate them and conserving them for the public access areas for the use of everyone.

This balance is something that we undertake every day. In this Ferry Building area by the Port's own website 15 million people travel along this waterfront. Three million people a day pass this area just in front of the building.

The ferries will bring 28,000 additional people a day. The Farmers Market has 23,000 people on Saturdays.

The staff believes that this Plaza should be conserved for open space; that in this area it is important to have a relief valve, have a space where people can just relax and that it does not all have to be activated.

However, we are willing to explore the use of this intensive Farmers Market on this Plaza when 23,000 people are here and three additional ferries are running. We will see how it works.

That is independent from all of the other things that you mentioned that we completely support which is tables and chairs, vendors that come and go, small musical events and different types of incidental activation that does bring the life to the City as opposed to large-scale programmed regular events that may or may not have an adverse impact on the public access. And we will find out over the next couple of years.

Ms. Michaels commented: I want to clarify one point on the Special Condition; that Special Condition is not written to mean that we have to bring every special event and every table and chair back to you for your approval. We can do that at the staff level but we make that approval on your behalf.

Commissioner Scharff opined: I would say that it is written in a way that seems to indicate that you should not do it as opposed to being more open to it. The way it is written seems to be very negative towards those types of events.

Commissioner Nelson had questions for staff: The first question for staff is if you can walk us through exactly how the grace period works and what sort of evaluation will help us during that period determine whether our experiments have succeeded or failed with public access.

Mr. McCrea responded: I am going to start the Authorization Section on page 3; we will add an authorization that allows the Farmers Market. It will be Authorization L and it will say something like, consistent with Special Condition O use for 24 months the Embarcadero Plaza will accommodate a Farmers Market. Then we will change on page 14 Special Condition O(5) that was just being referenced and we will strike much of that language.

I have some notes here on generally the intent of a new special condition. What we would request is that the Commission direct the staff to finalize this language in a manner that is consistent with this intent that I am about to read.

I am going to start with, following the completion and use of the ferry terminal and the public access and the use of the public access would be reviewed by San Francisco Emergency Services officials to make sure that the tables and tents of a Farmers Market don't impede evacuation of the City during emergencies.

Chair Wasserman interjected: I am going to cut this short and I apologize. I am going to make a very quick suggestion which I think will take care of most of the issues and I am going to ask for a vote otherwise we are not going to be able to vote on this.

I am going to suggest that as a monitoring piece this comes back to us in 12 months with some fairly detailed report on what has been taking place there so that we have a sense of what activation and what use when there is nothing there has gone on.

If that was acceptable as an addition I think we know what the staff recommendation is as modified by the deal that was presented and if I have a motion for that and if the applicant accepts. That is an affirmative from the applicant and we shall have a roll call vote

MOTION: Vice Chair Halsted moved approval of the staff recommendation, seconded by Commissioner Pemberton.

VOTE: The motion carried with a vote of 14-0-0 with Commissioners Bates, Scharff, DeLaRosa, Gibbs, Peskin, Pemberton, McGrath, Nelson, Randolph, Sartipi, Sears, Vasquez, Vice Chair Halsted and Chair Wasserman voting, "YES", no "NO", votes and no abstentions.

Commissioner Gibbs was recognized: I just wanted to point out that this is Mayor Tom Bates' last BCDC meeting.

Commissioner Bates added: This is true and not only is this my last meeting, but I am now leaving. (Laughter) I wanted to say how much I appreciated being here and have the opportunity to serve on this Commission. I think it is an amazing Commission and a lot of great stuff has happened. I think we have a fabulous staff and I think the Board is doing a good job. Good luck in the future. (Applause)

Commissioner Gibbs added: He always got to the point and he was always in a good mood and we will miss him.

Chair Wasserman agreed: We will miss him very much. We have lost a quorum therefore de facto we have adjourned the Commission and we will go into a committee meeting.

13. Adjournment. The Commission meeting was adjourned at 4:14 p.m. and continued as a Committee.

11. Briefing on the U.S. Army Corps of Engineers' Transfer of a Portion of the Oakland Inner Harbor Tidal Canal to the City of Alameda. Jhon Arbelaez-Novak introduced Item 11: Today you are scheduled to receive a briefing on the proposed transfer of lands owned by the U.S. Army Corps of Engineers. I will provide a brief introduction and then introduce the city of Alameda staff.

This is a map of the Oakland Inner Harbor Tidal Canal. The U.S. Army Corps of Engineers owns a 1.8 mile long 400 meter wide section of the Canal. The Corps plans to transfer its ownership of this entire area on both sides of the Canal which is also known as the Oakland Estuary. On July 19th of this year as required by the Coastal Zone Management Act the Corps requested that the BCDC staff concur with the Corps' negative determination regarding the subdivision and transfer of the Corps-owned submerged tidal and adjacent upland areas of the Canal. On the Oakland side of the Tidal Canal the Corps is planning to transfer its property to the East Bay Regional Park District. On the Alameda side of the Tidal Canal the Corps plans to transfer its property to the city of Alameda which in turn would re-transfer the property to 92 separate property owners along the Bay shoreline. The majority of the parcels are in the water although some parcels contain parts of the shoreline. The project area includes residential and commercial industrial property.

Based in the information in the negative determination that was provided by the Corps on September 19th the Commission staff determined that the proposed property transfer by the city of Alameda to private property owners would significantly reduce if not eliminate the possibility of public access to the Bay over such property. The staff stated that the Corps' negative determination failed to show that the transfer would have no effect on the coastal zone or its resources for the purposes of the CZMA. The Commission staff also determined it would be necessary for the Corps to submit a federal consistency determination to fully evaluate the transfer project particularly its effects on future public access to the shoreline and the Bay.

Two weeks later on October 4, 2016 the Corps resubmitted the negative determination and included changes to the subdivision of land and to ownership transfers in an attempt to address the staff's concern regarding public access. Under these changes the city of Alameda will maintain ownership of three water parcels which will be connected to three existing public walkways that currently link Fernside Boulevard to the shoreline.

However, the ability to access the water from these public walkways remains in question as the city of Alameda does not yet have a firm plan for future public use of the three water parcels. Because the project involves transferring 1.8 miles of federal public property into private ownership we have scheduled this matter to the full Commission for education and discussion.

No Commission action is scheduled for today. As required by federal law the staff must act on the Army Corps' submittal no later than December 2nd.

I would now like to introduce Andrico Penick, Andrew Thomas and Jillian Blanchard with the city of Alameda who will present additional information on the project.

Ms. Jillian Blanchard addressed the Commission: I am outside counsel to the city of Alameda. I wanted to provide a brief overview on the exciting things happening in the city of Alameda. After many previous efforts by many people we are very close to resolving a longstanding issue on the Alameda waterfront. Through this presentation we hope to clarify a couple of things that have been presented to you.

I will talk about the health, safety and property concerns that are going to be addressed by this tidal canal transfer. In 1882 the Army Corps of Engineers obtained this property through a condemnation action. It was all uplands and they obtained it to dredge the uplands to create a tidal canal for tidal action. For the next 10 to 15 years they dredged the Canal out of uplands to create the canal that you see here. The Canal is about 85 acres and approximately 400 feet wide.

The Corps has owned it exclusively for the past 100 years and during that time they have authorized the construction of house boats, docks and a lot of maritime-related structures all along the Canal. There are about 100 private property owners that live adjacent to the Canal.

In 1990 Congress directed the Corps to transfer the Tidal Canal. They no longer wanted to keep this type of property on their books. In the Water Resources Development Act they authorized the Corps to transfer half of the Tidal Canal to the city of Alameda and half to the city of Oakland. Through subsequent amendments to WRDA they also authorized the transfer of the Tidal Canal to adjacent property owners. There was not that much interest by the city of Oakland or Alameda to take ownership. Not much happened after 1990.

Until 2000 the Corps of Engineers in an effort to entice the cities to take a closer look and consider accepting the property they instituted a permitting moratorium. This prevented any regulatory approvals by the Corps of Engineers along that 1.8 miles of waterfront.

As a result it prevented new construction, maintenance and repair of the existing structures except in extreme circumstances.

What that has resulted in over the past 16 years is an ongoing health and safety concern. The City has been unable to effectively regulate because if they were to bring an enforcement action for code safety violations there would be no way for the property owner to complete the improvements because of the permitting moratorium. Resources agencies such as BCDC and the Regional Board have been unable to effectively regulate the waterfront.

This has led to deferred maintenance, dilapidated structures and there are also property issues attached to it because these structures are immediately adjacent to private property. Either the property owner or their predecessor has constructed the structure and there is this assumption that they own the structure. So when they transfer the property to subsequent owners there is title confusion. Realtors have been sued over this. It has been a big problem.

After 2000 the property owners that live there got very concerned. They were having lots of issues as I have described. They were concerned enough that they got together and formed a voluntary homeowner's association to address the problem. They have been lobbying the City and in September of 2014 this particular City Council of Alameda said, it's enough, we are going to address this problem, let's figure it out.

They had public meetings in March of 2015 and September of 2015 to workshop with the community on what is the best approach for dealing with this. The goals that they used to direct the staff were: We need to lift the permitting moratorium, we need to allow effective local, state and federal regulation along the waterfront, we need to resolve title issues but at the same time we need to limit the City's liability as a potential property owner of existing private property.

With that I will turn it over to Mr. Penick who will describe how the city of Alameda took the lead on coming up with a solution.

Mr. Andrico Penick addressed the Commission: I am an assistant city attorney with the city of Alameda. As Jillian has stated this is a longstanding problem whose creation was even longer in the making. The solution involves the City acting as an honest broker to facilitate a transfer of the Tidal Canal on the Alameda side from federal ownership into public and private ownership. This is a simultaneous transfer that is facilitated by the tentative, final map process. We have created a final map while the Army Corps is still in ownership. The Army Corps is going to transfer 94 parcels to the City. The City is going to retain two parcels. We call them the open-water parcels along the center of the Canal. We are going to keep those open for navigation and commerce. The remaining parcels are going to be offered for private ownership. This solution will lift the permitting moratorium and would allow for the effective regulation of the waterfront by the regulatory agencies. We have this disconnect where we have private property owners with private improvements on federal land. The City and other regulatory bodies can't effectively go after those private property owners because they are shielded by the federal government because it is on federal land.

The Army Corps has been reluctant or resistant to providing permission and facilitating the enforcement of local regulation on its property. This solution takes the federal government out the equation and now we would be dealing with private property owners with private improvements on private land and both the City and other regulatory agencies like BCDC can exercise their jurisdiction to clean up this longstanding problem.

It would also rectify the title issues where you wouldn't have private improvements owned by one person on public property owned by the federal government. This is first and foremost a real estate transaction and I am going to speak to the public access issue in a moment. I can't emphasize enough that what this project does is it is a very important first step in getting us to a position where we can start solving those problems. There is no fill. There is no development. There is no project and this transaction does not legalize, legitimize or grandfather any prior illegal activity.

If you have a dock or pier out there and it is permitted then God bless you. If you don't you are subject to the same regulatory authority and enforcement action that you would have if you had done this anywhere else in the city of Alameda. An unpermitted dock is an unpermitted dock.

What this does do is transfer a title. Once we eliminate the presence of the federal government as a property owner we can then use our regulatory authority in the way it should have been done. And this area will be subject to the same regulations as anywhere else in the City. The structure of the transaction is to provide this simultaneous transfer. We wanted to do this in order to eliminate the City's potential liability for hazardous materials or other conditions of the property. We also cleaned up the zoning. The zoning that we call the Estuary Zoning District is already limited to the maritime-dependent uses but we made that clear by making every use a discretionary approval.

Commissioner McGrath had a question: The zoning ordinance seems to be critical. The Corps of Engineers had indicated a pierhead line. And most of the structures are behind it but one or two extend seaward of it. Does your zoning ordinance capture the idea of a pierhead line in some sense; in other words, a limitation to how far out into the Canal structures can go?

Mr. Penick replied: It doesn't in that way. First the Estuary Zoning District goes from the high, high water mark to the jurisdictional limit line, basically the center of the Tidal Canal. It covers all of the water. There is a discretionary use and that would be for private property. So we have created a new property line. And we drew the boxes in this way. We have the uplands. We have houses and they have property lines that divide those houses. We took the existing property line and we extended it out into the Tidal Canal. We stopped where the docks and piers had already stopped. In other words, we created a new estuary property line that creates a box that captures those private improvements on one parcel.

Commissioner McGrath posed a hypothetical: So if you had legally a dock you could now purchase the property that contains your dock. And if you didn't or if that dock extended further seaward than would have been authorized you could not.

Mr. Penick agreed: That is correct. What we have done is we have created a box where the private improvements owned by one person are contained on one parcel. We didn't want to create a line that bisected an existing dock or pier. So whenever we ran into an obstruction we would deviate that line slightly to the left or right so we could capture the improvements all on one parcel.

Commissioner McGrath continued: And so looking at that red line if there were minor encroachments of the structural support for a house that has been there for 40 years those would not be altered in any way and they could have clear title to those areas.

Mr. Penick added: That is correct and our hope is that the person that has those encroachments into what is now federal property will buy their backyard. There will be common ownership between the two.

Commissioner McGrath stated: And that would be very similar to recognizing an existing non-conforming use.

Mr. Penick concurred: If it is permitted that is correct. Also they have the ability to merge those lots at a later date. Public access on this project comes in two forms. One form is outside of the project and one that is inside of the project. I am going to talk about the one that is outside of the project first. That is represented by the red area you see on the slide. The property line is the water's edge. These were created as view corridors that would allow the public to look out onto the Tidal Canal and across to Oakland. These are outside of the project area and are not affected by the project in any way. This project has highlighted the fact that the city of Alameda has not maintained those public access points to the level that it should have. There have been some encroachments by adjacent property owners. What the City is proposing to do is clean up those private encroachments on City property. The other thing that this project has with regards to public access was a desire to increase public access out into the water. The City never took any steps to request from the Army Corps access into the water. Unfortunately all of the other property owners did and we have all those improvements that we now have to deal with.

At the Planning Board level this issue came to the fore. There are a couple of schools of thought as to what we should do. There was a concern that by transferring the property into private ownership we may be foreclosing the opportunity for future public access into the water. Staff and the City Council are sensitive to this issue and a couple of options were discussed. One option was disposing of the property with an 18 foot public access easement. This would allow the City to be able to create public access into the water into the future. That met with resistance because since we had no plans one said, how could you know that 18 feet would be enough? The other solution would be to do a 35 foot public access easement. That posed an issue of, well what if that is too much? We did not want to be put in a position to make a snap judgment and find out later that we solved one problem just to create another. Both the Army Corps and the City have taken all of the actions they believe necessary in order to allow this project to go forward. We are hoping to close the first phase of this project by December 13th or shortly thereafter.

We do have strong support by the Regional Board, by the Army Corps of Engineers who is the seller of the property, the Regional Water Quality Control Board, State Lands, the city of Alameda, the community that asked the City to do this in the first place and also our efforts have facilitated the transfer on the other side to East Bay Regional Parks.

Commissioner Nelson had questions for staff: I am pretty familiar with the water side and the land side in this area. It is very constrained from the perspective of getting additional public access with the exception of those small access corridors. I wanted to ask if the staff is satisfied that the current proposal won't limit our ability to require appropriate public access down the road.

Chair Wasserman added: There was some reference to public access within the project and I think I have told that there is what is perceived to be public access now through some of these areas aside from those three identified areas. If that is correct how is that being preserved or dealt with in this transfer?

Mr. Arbelaez-Novak answered: There is some existing required public access up on the northern side of the Canal in some of the commercial properties. The staff's concern is that there is no guarantee that these areas will remain public. It may be possible that during the City planning process the City may decide, we don't want to deal with this anymore and let's just transfer it to the property owners as we have for the rest of the parcels. In that case there is concern that the Commission would lose access to areas that are publicly accessible.

Commissioner Nelson opined: But that would be a subsequent action, subsequent to this project.

Mr. Arbelaez-Novak agreed: Right. When we look at effects from the transfer and these are secondary effects and we are allowed to look at that under the CZMA.

Commissioner Nelson continued: The second question is whether this jurisdictional confusion has limited our ability on the ground to permit and do enforcement and whether we are going to wake up and find it is all a bunch of unpermitted structures here that we have to deal with from the perspective of looking forward at the burden on staff.

Chief Deputy Director Goldbeck commented: As the City told us, the transfer of this won't affect your legal ability to enforce anything and there are a lot of structures out there and they are going to have to come in and get permitted or we are going to have enforcement actions. What we are hoping to do is work with the City going forward because they have to deal with these things as well and hopefully we can coordinate our work so that we can figure out what we can all approve and on the other hand what we can't approve and what we have to work through.

Commissioner Nelson continued: So those are not mostly grandfathered facilities on the water?

Mr. Goldbeck replied: That still needs to be completely puzzled out. I believe there may be a few that got permitted in the past but I would bet that the vast majority of them are not permitted by BCDC.

Mr. Arbelaez-Novak added: The particular structures that are within the parcels of the City will keep in the water. We have checked in the records for those six different piers or docks and they are not permitted.

Commissioner McGrath commented: I am certainly aware that there are encroachments down there. But this is a complicated situation in that it is not a regionally part of the Bay. This was created land owned by a federal agency. It is certainly able to be regulated under our Act but we are never going to get access along that bulkhead unless this area has to be redeveloped as part of protection for sea level rise sometime in the future. From my perspective recognizing a legal non-conforming use as long as it was one is not problematic. I also think that you want to maintain access points where they exist; at least to the water and have consideration given the Water Trail legislation whether or not they are also appropriate. And it seems that the money generated by sale of this land and tax from it should be used for some public access. I see a pathway to consistency that recognizes that we can't go back in and fix what has been in there for 40 or 50 years but we can make sure that we get preservation and improvement of the public access areas.

Chair Wasserman voiced some observations: One, this has been a problem for a long time and it does look like this is moving towards a solution; that's good. I think there are a whole lot of complications that have not yet been thought out. In reality I am not sure we have a whole lot of control except on this issue of what we have the right to do and what we choose to do on property that was not in our jurisdiction because it was federally controlled and now will be. That is a blessing and a curse because this is a bloody headache for our staff. It is a headache for the property owners. I understand it is a headache for the City although I think you are moving towards some solutions. You talked about the property owners buying this property that was federally owned. Have you established a pricing mechanism and what happens if they don't want to pay it?

Mr. Penick replied: We wrestled with those questions. As to pricing, we had an independent appraisal. There are eight commercial parcels and there were 90 but now with the removal of the six there are 84. What we did was that each of the commercial parcels were appraised independent of each other at highest and best use. We had eight different values for the eight parcels. On the residential side we took them in the aggregate. We took the entire residential parcel guide of value and then divided it by the 90 so we have a per parcel pricing.

The actual per parcel price for the residential is \$10,000.00 and the City is capping the closing costs at \$1,000.00 so you are \$11,000.00 all in.

Given that price point and given the fact that it's in their backyard and will have immediate equity to their existing property we are anticipating high participation rates. We are requiring 100 percent participation and the HOA has agreed to buy hold out parcels.

We will not move forward with this transaction unless we have that 100 percent because otherwise it would expose the City to liability for trip falls et cetera.

Chair Wasserman continued: There were some earlier suggestions that looking to this problem which a number of people knew were going to come up that there might be a possibility of obtaining some state funding for a pilot project to figure out how to navigate through the regulatory problem for BCDC and potentially for the City as well.

It seems to me that issue is still there because if this is done piece-by-piece it is going to be a nightmare for everybody.

12. Briefing on Sand Mining Permit Compliance and Progress on Studies. This item was postponed.

13. Adjournment. Upon motion by Commissioner Nelson, seconded by Commissioner McGrath, the Commission meeting as a committee was adjourned at 4:53 p.m.

Respectfully submitted,

LAWRENCE J. GOLDZBAND
Executive Director

Approved, with no corrections, at the
San Francisco Bay Conservation and
Development Commission Meeting
of December 1, 2016

R. ZACHARY WASSERMAN, Chair