

SAN FRANCISCO BAY CONSERVATION  
AND DEVELOPMENT COMMISSION

ENFORCEMENT COMMITTEE MEETING  
PARTIAL TRANSCRIPT - ITEMS 6-7

HYBRID IN-PERSON/TELECONFERENCE MEETING  
HOSTED BY THE SAN FRANCISCO BAY  
CONSERVATION AND DEVELOPMENT COMMISSION  
375 BEALE STREET  
SAN FRANCISCO, CALIFORNIA

THURSDAY, NOVEMBER 14, 2024  
2:00 P.M.

Reported by: John Cota

APPEARANCESEnforcement Committee

Marie Gilmore, Chair

Letty Belin

Rebecca Eisen

Sanjay Ranchod

John Vasquez

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Margie Malan, Legal Secretary

Matthew Trujillo, Enforcement Policy Manager

Respondent

Robert Bylsma  
Union Pacific

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PROCEEDINGS

2:09 p.m.

COMMITTEE CHAIR GILMORE: We will move on to Item number 6, which is a public hearing and a vote on a Recommended Enforcement Decision to resolve Enforcement Case ER2023.019.00. So, our next agenda item is a presentation and a vote on a proposed recommended decision that includes a proposed Cease and Desist and Civil Penalty Order to resolve enforcement case number ER2023.019.00 against the Union Pacific Railroad Company for unauthorized activities occurring at its property consisting of fill in the San Francisco Bay and use of the shoreline for camping in the vicinity of the mouth of Rodeo Creek in Rodeo, Contra Costa County.

If this Committee votes to adopt this Recommended Enforcement Decision, it will be put up for a vote of approval or rejection by the full Commission at an upcoming meeting, date to be announced.

After BCDC staff gives its presentation, the Respondents will be invited to present any remarks they wish to enter into the record. Then I will allow public comment on this item. Then afterward we, the Committee, shall hold our discussion and vote on the staff's recommendation. Presentations made by the parties as well as any public comments to follow shall be limited to

1 responding to the evidence already made part of the  
2 enforcement record. This Committee shall not allow the  
3 introduction of new evidence or oral testimony by any  
4 party.

5 So, at this time will the Respondents, if present,  
6 please identify themselves for the record.

7 MR. BYLSMA: Robert Bylsma for Union Pacific.

8 CHAIR GILMORE: I am sorry, could you state that  
9 again, please, I had trouble hearing you.

10 MR. BYLSMA: Sure. Robert Bylsma, B-Y-L-S-M-A.

11 CHAIR GILMORE: For Union Pacific, correct?

12 MR. BYLSMA: Correct.

13 CHAIR GILMORE: Thank you and welcome.

14 MR. BYLSMA: Thank you.

15 CHAIR GILMORE: Okay. We will start by hearing a  
16 presentation by the staff. I am going to invite Lead  
17 Enforcement Attorney Bella Castrodale to give her remarks.  
18 Bella.

19 MS. CASTRODALE: Thank you, Chair Gilmore. I will  
20 just take a second to share my screen. Good afternoon,  
21 Chair Gilmore and Committee Members. Today I will present  
22 enforcement case ER2023.019.00, for which the Respondent is  
23 Union Pacific Railroad. This case involves the placement  
24 of unauthorized fill consisting of an estimated several  
25 tons of waste and debris, including automotive tires,

1 shopping carts, plastic, other trash and a shelter, within  
2 the Bay and shoreline band on Union Pacific property,  
3 beginning in February 2008 and continuing to the present.

4 I will begin by discussing the location of the  
5 violation and then I will turn to the timeline of events.  
6 I will provide a summary of the violations before  
7 addressing the Respondent's defenses and providing a staff  
8 recommendation.

9 The two violations occurred in Contra Costa County  
10 near Rodeo Creek where it connects with San Pablo Bay,  
11 between Lone Tree Point and the Rodeo Sanitary Water  
12 District treatment plant. As you can see in this image,  
13 Rodeo Creek is here in the center, as indicated with the  
14 red arrow, and the railroad tracks directly above the  
15 water.

16 This next image depicts the same area with the same  
17 orientation. Again, you can see Rodeo Creek here at the  
18 center of the image, and Lone Tree Point and the treatment  
19 plant to the left and right of the image. You can see that  
20 a portion of land juts out just to the right of Rodeo  
21 Creek, which I will refer to as the Spit. The orange lines  
22 that overlay this visual indicate the boundary lines of  
23 different properties in this area, and this is derived from  
24 a GIS tool provided by the county. The area circled in red  
25 is controlled by the Respondent as indicated by this parcel

1 map. This image is from Book 357, Page 2, of the Contra  
2 Costa Assessor's parcel maps. It is called Tideland Survey  
3 No. 58. It depicts the same area with the same orientation  
4 that we have been reviewing. As before, Rodeo Creek is  
5 depicted in the center here, and the Railroad is depicted  
6 with SPRR or Southern Pacific Railroad noted in the  
7 relevant areas, the presumed predecessor to Union Pacific.

8 And finally, this image shows the same parcel map  
9 but with the area controlled by the Respondent circled in  
10 red.

11 I will now turn to the images, evidence of the  
12 violations here. So, this first photo was taken on March  
13 15, 2023 during a site visit by BCDC staff. This image is  
14 taken from the Spit that I pointed out on the previous  
15 slide and it faces to the east. So, to the left of the  
16 image is the Phillips 66 oil refinery and just beyond is  
17 the water treatment facility. At the top of the image you  
18 can see the railroad track. This photo was taken at low  
19 tide so the mud flats are exposed and you can see the  
20 discarded fill, especially the tires lining the railroad  
21 tracks here.

22 This next image was taken at the same time and faces  
23 the opposite direction towards Lone Tree Point. It was not  
24 taken on the Spit, but the Spit can be seen in the back  
25 left corner of the image. And on the Spit you can see a

1 red tarp that comprises part of a temporary shelter  
2 campsite.

3 And here is the same image zoomed in.

4 Finally, this image is from the same BCDC staff visit  
5 and a panoramic view which shows the full extent of trash  
6 strewn about the mud flats in this area. I have used a red  
7 arrow to point to a half-submerged shopping cart.

8 I will now turn to the Google Earth satellite imagery  
9 that BCDC staff used to estimate when the placement of  
10 unauthorized fill began. But the images are inherently  
11 limited in the sense that the resolution is poor, and the  
12 time of day that the images are taken varies, such that the  
13 tides are not always the same. This first image is a  
14 screen capture from Google Earth taken on February 2008 and  
15 you can see little circles aligning the railroad tracks  
16 that we believe indicate tire dumping has persisted along  
17 this property since at least 2008.

18 This next image is a screen capture from February  
19 2022. It is zoomed in on the Spit that was mentioned  
20 before, which demonstrates the beginning of the collection  
21 of materials that will later become a campsite.

22 And through the satellite imagery BCDC staff asserts  
23 that the unauthorized fill in this area has been  
24 longstanding. However, as I will address as a part of the  
25 discussion of the proposed administrative civil liability,



1 staff set the start date for both violations for the  
2 calculation of fines much later on February 1, 2023, around  
3 when the enforcement case was opened.

4 I will now provide a brief timeline of events.

5 In February 2023 BCDC staff received a report of waste  
6 in the form of tires and a homeless encampment on  
7 Respondent's property.

8 In March 2023 BCDC staff inspected the site and  
9 collected photographic evidence confirming the existence of  
10 the fill and those are the images which you just saw.

11 In February 2024 BCDC staff contacted Respondent  
12 initially and explained the tons of hazardous material that  
13 had been observed on Respondent's property within BCDC's  
14 permit jurisdiction.

15 In March 2024 BCDC staff met with Respondent's  
16 representative and reiterated the nature of the alleged  
17 violation. At Respondent's request BCDC staff provided  
18 photographs of the fill.

19 In June 2024 BCDC staff and Respondent met again over  
20 the phone and Respondent committed to providing an update  
21 during the first week of July. That update never came.

22 In August 2024 BCDC staff contacted Respondent again  
23 requesting an update on the removal of fill. At this point  
24 five months had passed since BCDC initially had contacted  
25 the Respondent. Respondent replied later in August and

1 indicated that scheduling removal of the fill was underway  
2 and that BCDC would receive an update when that schedule  
3 was complete.

4 But after six months had passed since BCDC staff  
5 initially contacted Respondent, BCDC staff resorted to  
6 initiating formal enforcement proceedings by issuing a  
7 Violation Report and Complaint for Civil Liability in  
8 September 2024.

9 Finally, in October 2024 staff observed the  
10 persistence of the unauthorized fill during a staff visit,  
11 although some removal had occurred.

12 I will now summarize the violations that BCDC staff  
13 have identified.

14 The first is that Respondent violated and is violating  
15 the McAteer-Petris Act by allowing dumping of an estimated  
16 tons of waste consisting of used automotive tires, shopping  
17 carts, plastic and trash within BCDC's Bay jurisdiction.

18 And second, the Respondent violated and is violating  
19 the McAteer-Petris Act by allowing the establishment of at  
20 least one encampment within the 100-foot shoreline band.

21 Respondent submitted a Statement of Defense form on  
22 October 24, 2024, in which it indiscriminately denied all  
23 allegations, and none are admitted.

24 I will now turn to Respondent's defenses and provide  
25 staff rebuttals.

1           At first Respondent argues that Union Pacific has no  
2 control over the establishment of encampments or the  
3 disposal of tires or any other materials present in the  
4 Bay, nor do they authorize such disposal.

5           Our response is that BCDC may hold a landowner  
6 responsible for unauthorized Bay fill placed on its  
7 property by unknown third persons. This legal principle is  
8 derived from *Leslie Salt Co. vs. San Francisco Bay*  
9 *Conservation Development Commission*, which is a California  
10 Court of Appeal case from 1984 and is provided us an  
11 Exhibit to the Recommended Enforcement Decision, Exhibit I.  
12 Recognizing that denying BCDC's ability to utilize its  
13 enforcement devices against landowners whose property  
14 contains fill placed there by others in violation of the  
15 Act would materially impair BCDC's ability to prevent and  
16 remedy haphazard and detrimental filling of the Bay. The  
17 court had concluded that BCDC's ability to use cease and  
18 desist orders extends to landowners, regardless of whether  
19 they actually placed the fill or know of its origin.

20           Second, Respondent argues that the cleanup was delayed  
21 by a need to determine whether a permit was required by the  
22 Army Corps and due to the illness of the individual  
23 coordinating the cleanup.

24           However, the Respondent did not indicate any  
25 extenuating circumstances to BCDC, and rather, no

1 substantive update was provided that indicated Respondent  
2 was actively pursuing the cleanup of this area. And this  
3 is reflected in the email communications that have been  
4 provided as Exhibits D through G to the Recommended  
5 Enforcement Decision.

6 Finally, Respondent argues that they have engaged a  
7 contractor and are proceeding with the work to remove the  
8 unauthorized fill, and that Union Pacific has been in  
9 contact with BCDC to allow staff to witness the cleanup.

10 And BCDC does commend Respondent for their work to  
11 engage a contractor and remove the unauthorized fill, but  
12 it was Respondent's failure to provide substantial updates  
13 concerning the scheduling or progress of the fill removal  
14 over six months that prompted the initiation of formal  
15 enforcement. And while a site visit was arranged in  
16 October, at the time a contractor had not been engaged and  
17 the removal was not complete.

18 I will now turn to the amount of administrative civil  
19 penalty proposed by BCDC staff for the two violations.

20 Appendix J of the Commission's regulations require  
21 staff to assess certain characteristics when setting fines,  
22 including the Respondent's degree of culpability, history  
23 of violations, any voluntary resolution efforts, economic  
24 benefit to the violator, the violator's ability to pay, and  
25 the cost to the state in pursuing the enforcement action,

1 and finally, other facts as justice may require.

2 Our analysis determined that for Violation 1, the  
3 unauthorized fill consisting of waste including tires,  
4 shopping carts and other trash in the Bay, the gravity of  
5 harm is major, and the extent of deviation from the  
6 statutory requirement to remove unauthorized fill is also  
7 major.

8 For Violation 2, the unauthorized fill consisting of  
9 an encampment on the shoreline band, staff has determined  
10 that the gravity of harm is moderate, and the extent of  
11 deviation from the statutory requirement to remove the  
12 unauthorized fill is major.

13 As previewed above, although satellite imagery  
14 suggests that the two violations began in 2008 and 2022  
15 respectively, staff set the start date for the calculation  
16 of daily violations for February 1, 2023, which is when  
17 BCDC first received a report of the unauthorized fill; and  
18 over 600 days have passed between February 1, 2023 and  
19 October 24, 2024 the date that Respondent submitted its  
20 Statement of Defense. Accordingly, the daily penalty per  
21 violation reached the administrative cap of \$30,000 after  
22 15 to 18 days respectively. And the fee calculation  
23 remained the same if the start date for the calculation was  
24 March 15, 2023, the date of the initial site visit,  
25 February 23, 2024, the date of initial contact with

1 Respondent, or August 20, 2024, the last promise from  
2 Respondent that scheduling was underway. Accordingly,  
3 staff proposes a penalty amount of \$60,000 for two  
4 violations.

5 Staff's Recommended Enforcement Decision.

6 BCDC staff recommend that the Enforcement Committee  
7 vote to recommend that the Commission authorizes the  
8 Executive Director to issue the proposed Cease and Desist  
9 and Civil Penalty Order number CCD2024.003, which would  
10 order Respondent to:

11 Cease and desist from violating the McAteer-Petris  
12 Act.

13 By January 1, 2025, submit a plan to remove all used  
14 automotive tires, shopping carts, plastic, any other  
15 unauthorized material floating or sunk from San Pablo Bay  
16 to a legal disposal site, as prepared by a professional of  
17 record such as an engineer or environmental scientist  
18 knowledgeable in site restoration.

19 By February 1, 2025, BCDC staff will review the  
20 professionally prepared fill removal plan and either  
21 approve, conditionally approve or deny the plan.

22 By March 1, 2025, the professional of record shall  
23 have made any required revisions to the plan directed by  
24 staff, resubmitted for staff review and obtained staff  
25 approval.

1 And by June 1, 2025, Respondent shall have fully  
2 implemented the fill removal plan.

3 Lastly, Respondent will pay \$60,000 in administrative  
4 civil liability within 30 days of the order issuance.

5 And that concludes the staff's presentation.

6 CHAIR GILMORE: Thank you. Before we go on to the  
7 Respondent's presentation I am going to ask Committee  
8 Members, do you have any clarifying questions of staff? We  
9 are not going to do discussion yet, but if there is  
10 anything you did not understand or want clarified let's do  
11 it now. I can't see any hands because I only see -- the  
12 screen is still being shared. So, Margie, is anybody  
13 raising their hand?

14 MS. MALAN: Yes, Commissioner Eisen.

15 CHAIR GILMORE: Commissioner Eisen.

16 COMMISSIONER EISEN: Yes, thank you. I don't know if  
17 this is a clarifying question, and I am assuming we are  
18 going to have time to talk about all of this in a minute,  
19 but I am not sure if what we are suggesting is that Union  
20 Pacific be penalized for allowing fill to occur in this  
21 area, or for failing to remove it once they were put on  
22 notice of the issue? Or maybe it is both. So, that is  
23 question number one.

24 And then I do have a question, maybe it is something  
25 for a minute from now, to discuss the concept of an

1 encampment being fill. I am sure there is some precedent  
2 or some logic behind that that I think we should probably  
3 explore for the benefit of the other Commissioners that are  
4 going to look at this later.

5 So, those are the two things I have for now. I have  
6 several other littler things for later.

7 CHAIR GILMORE: Okay. So, I think your first question  
8 is pertinent for right now and we will park the other one  
9 for when we get to our discussion.

10 COMMISSIONER EISEN: That's fine, thanks.

11 CHAIR GILMORE: Okay. So does staff have an answer to  
12 Commissioner Eisen's first question about whether the  
13 Respondent is being penalized for allowing the fill and/or  
14 refusal to clean up the fill once contacted by BCDC.

15 MS. CASTRODALE: Yes, thank you for your question. To  
16 clarify, the violation as we understand it is for the  
17 unauthorized placement of fill without a permit within  
18 BCDC's permit jurisdiction, and that violation persisted  
19 each day that the Respondent did not remove the  
20 unauthorized fill.

21 CHAIR GILMORE: Okay, thank you.

22 So now let's hear from Union Pacific's representative.

23 MR. BYLSMA: Thank you, Madam Chair. What Union  
24 Pacific is really guilty of here is failure to communicate,  
25 not failure to act. The notion that we have had notice for



1 years of fill in the Bay, recognize the nature of our  
2 operations. Our operations in this area are running trains  
3 over tracks, not looking into the Bay to see what might,  
4 what might be there. And so I think that really the date,  
5 the date to begin looking at this as it relates to the fill  
6 is March of this year when staff contacted our  
7 representative.

8 And initially Union Pacific had to determine the  
9 property ownership issue. It is not, not common for us to  
10 have to look to see whether we own property within water --  
11 within coastal waterways. I know that that does happen at  
12 times, but that was not common. So, we determined that and  
13 then we began putting together, putting in place a plan to  
14 take action.

15 No one at Union Pacific was disputing our obligation  
16 to remove this material. It is hard to say that we allowed  
17 it. It is certainly, certainly not something that we  
18 allowed. You can, you can perhaps blame us for not  
19 removing it within the time frame that staff would have  
20 liked, but certainly there was nothing we did to promote  
21 this or encourage it.

22 Unfortunately, what happened was that the individual  
23 who was responsible, who had taken responsible for removing  
24 this material, who is one of our special agents, so he was  
25 going to take care of removing the encampment and also

1 removing the material in the Bay, he had a medical  
2 emergency, which made him completely unavailable. So,  
3 whatever resources he had lined up, and this was literally  
4 at the time this was to take place, that the removal was to  
5 take place, whatever resources he had available, made  
6 available, nobody could determine and so we started that  
7 from scratch. And again, we are guilty of not  
8 communicating to staff what was going on. There is no  
9 question about that.

10 But once, once we got past that hurdle and found  
11 additional parties to handle this internally, we removed  
12 the homeless encampment. And as to allowing a homeless  
13 encampment, the entire state of California is dealing with  
14 this issue. This is not unique to us. And we remove these  
15 encampments as frequently as we can, but it is not -- this  
16 is -- this isn't the only location and so that is  
17 definitely a resource-challenging issue. But that, that  
18 encampment was removed. And I believe, Judy, we have a  
19 photo of that showing the removal of the encampment? I  
20 guess she is not in participant mode. And I believe staff  
21 could probably confirm that that encampment has been  
22 removed. But as soon as they are removed, oftentimes they  
23 come back. So how long that encampment was actually there,  
24 we don't know, but that was removed.

25 Additionally, we had to explore whether or not a 404

1 permit from the Corps of Engineers was required, or a  
2 Section 10 Rivers and Harbors Navigation Act permit was  
3 required in order to remove this fill. And so what was  
4 finally determined was that as long -- and the need for  
5 those permits would have further delayed things, let me  
6 digress to that. So, what we determined was to actually  
7 physically have people go in the water to remove this  
8 rather than having further delays by putting in equipment  
9 to remove the material.

10 And at this point all the tires have been removed. I  
11 believe all the other trash has been removed. There are  
12 several shopping carts that are still in the waterway. And  
13 the problem that we are having removing those, I think I  
14 was told that it literally takes four people about a day to  
15 remove one and a half of those carts, that is at about the  
16 rate that they are, that they are being removed. There is  
17 definitely a safety issue doing it, by having people walk  
18 into the Bay. They literally sink into the Bay mud up to  
19 their waist and you have that suction behind it. So, we  
20 are still struggling through that to try to find a solution  
21 to the shopping carts.

22 But again, at this, at this point the cleanup is  
23 almost done. And as I said, this is not, this is not a  
24 situation where we believe we should be punished for  
25 inaction, but what you would really be imposing a penalty

1 for would be for our failure to communicate with staff.  
2 And I would just ask that the Commission take that into  
3 account in the event it determines to assess a penalty.

4 CHAIR GILMORE: Thank you very much.

5 At this time do any Commissioners have any clarifying  
6 questions for Mr. Bylsma?

7 MS. MALAN: Commissioner Eisen.

8 CHAIR GILMORE: Go ahead.

9 COMMISSIONER EISEN: Gosh, I wish we could get that  
10 camera over here. Could you tell me, Mr. Bylsma. When you  
11 said that, we removed the encampment and that we can remove  
12 encampments when we can. How do you do that? Do you look  
13 to local law enforcement or do you literally send some of  
14 your staff in there to move stuff and folks out? How do  
15 you do that?

16 MR. BYLSMA: Commissioner, our -- we have our own  
17 police force, so we have, we have special agents. It is  
18 sort of a unique situation of the railroad that we actually  
19 have peace officers who work for the railroads and they are  
20 referred to as special agents. And so they will go out,  
21 and I believe they often go out with local law enforcement  
22 as well, and physically clear these homeless encampments.  
23 Much, much as a city or county would do on public land.

24 COMMISSIONER EISEN: I see. Thank you.

25 CHAIR GILMORE: Okay, so I just have to share this. I

1 am having visions of the old trains in the wild, wild west  
2 with the special agents who are trying to protect the  
3 trains from, you know, being robbed by outlaws. That is  
4 kind of what your words are invoking here.

5 MR. BYLSMA: Madam Chair, that is really essentially  
6 the origin of that practice.

7 CHAIR GILMORE: Well, you learn something new every  
8 day, thank you. All right, let's see. So, before we start  
9 our -- Commissioner Ranchod, is this a clarifying question?

10 COMMISSIONER RANCHOD: I believe so. It wasn't clear  
11 to me, Mr. Bylsma, from your remarks, if you are indicating  
12 that there is any practice of Union Pacific reviewing the  
13 status of property such as this.

14 MR. BYLSMA: I don't. I will try to answer your  
15 question, and if I don't answer it, please follow up. The  
16 situation here, as it relates to the material in the Bay is  
17 the fact that Union Pacific owns a lot of property that is  
18 not operating right of way. And we would not typically  
19 have any of our real estate people looking at property that  
20 is actually in a waterway. So, the only view that you are,  
21 that you are having in terms of inspections of this  
22 property are going to be either from trainmen whose  
23 responsibility is to keep that train on the rails, or track  
24 maintenance personnel, again whose responsibility is to  
25 keep that operating corridor working properly to prevent

1 derailments, things of that nature. So, people are really  
2 going to be focused in terms of anyone going through there  
3 on about 15 side -- 15 feet to the side of either track,  
4 maybe less than that. So, you are simply not having people  
5 who are out looking into the Bay to see what is out there,  
6 nor would they even know that that property was owned by  
7 Union Pacific.

8 COMMISSIONER RANCHOD: That is helpful, thank you.

9 MR. BYLSMA: Does that answer your question?

10 COMMISSIONER RANCHOD: Thanks.

11 CHAIR GILMORE: Okay, any other Committee questions?  
12 Okay, I am not seeing any hands.

13 Margie, do we have any public comment either in the  
14 room or online?

15 MS. MALAN: We don't have any commenters, Chair  
16 Gilmore.

17 CHAIR GILMORE: Okay, thank you. All right, so no  
18 public comment.

19 So, let's start our discussion among the Committee  
20 Members; and I am going to open the floor to the first hand  
21 I see. And Commissioner Eisen, I can't see your hand, is  
22 it up?

23 COMMISSIONER EISEN: Might as well be, yes. Yes, I  
24 definitely have some questions. So, sort of back to the  
25 issue that you suggested we park until now. So, it is a

1 peculiar situation that Union Pacific has these lines that  
2 run alongside the edge of the Bay; and with that, of  
3 course, comes this obligation, because the edge of the Bay  
4 is protected, and protected from fill among other things.

5       So, I am assuming that because this has train tracks  
6 literally within feet of the Bay that there is no public  
7 access issues here, that there really is no public access  
8 to these areas. So, if you are going to have the  
9 permission to own land that close to the Bay then it comes  
10 with these obligations. I know that -- I did not know we  
11 were still using terms like trainmen, I am, I am objecting  
12 to that, trainpersons. But it comes with an obligation to,  
13 and I know it is not typical to be looking out for whether  
14 things have happened along the edge of your property, but  
15 that is, that is the obligation you have when you have  
16 property like that. So, none of that troubles me.

17       I don't think we can say that everybody gets off  
18 because somebody got sick when they were supposed to be  
19 tending to this, or we would be hearing that, you know,  
20 that or some other set of reasons ad nauseam.

21       But I am concerned. They have, Union Pacific has, as  
22 we just learned, these special officers who are capable of  
23 managing an encampment. But we have lots and lots of  
24 permits out there to folks who find themselves with  
25 encampments on their property. And what they are supposed

1 to do about that, and whether that constitutes fill within  
2 that very technical meaning that the BCDC would apply to  
3 that, those are the issues I think we should discuss.  
4 Because it is not just a little isolated case here that  
5 could possibly spill over to others who have this  
6 situation. And, you know, we always try to provide  
7 guidance to what people should be doing. What if they  
8 can't do anything. They don't have special officers. What  
9 is, what is our position? Are they strictly liable for  
10 having an encampment on the edge of the Bay? Those are the  
11 issues that I am concerned about.

12 CHAIR GILMORE: Can I, can I just -- hold on a second,  
13 Shari. The interesting thing about this case is, following  
14 up on what you just said, Commissioner Eisen, is that in  
15 most cases where we have jurisdiction and there are  
16 encampments it becomes an issue of public access. My  
17 recollection is that that is most of our cases. This one  
18 seems to me to be kind of the oddball where we have an  
19 encampment within our jurisdiction, but because of the  
20 nature of the business, the railroad tracks, there is no  
21 public access. It seems to me like those two cases are  
22 very distinguishable. That is just the first thought off  
23 the top of my head. Shari.

24 MS. POSNER: I was just going to note, and it is  
25 really for the Chair maybe to comment more on this, but I



1 think the questions that Commissioner Eisen is asking are  
2 really good ones, but I am not sure they are for the  
3 context of this particular, specific enforcement matter.  
4 It might be something perhaps that if the Enforcement  
5 Committee is interested, staff could prepare something on.  
6 But the broader, those broader questions I am not sure are  
7 within this particular agenda item.

8 COMMISSIONER EISEN: Thank you, Shari. And I totally  
9 agree with you. But in order to decide whether there has  
10 been a violation here don't we have to be satisfied that  
11 having an encampment on your property constitutes fill?

12 MS. POSNER: I think maybe I would turn to Enforcement  
13 staff to talk about what they consider fill. I think  
14 anything physically sitting on top of a property within the  
15 jurisdiction can be considered fill but I think I am not  
16 the best person to ask that, but I understand your  
17 question.

18 CHAIR GILMORE: Staff, do you want to take that one?

19 MS. CASTRODALE: Yes, thank you. Just looking at  
20 66632(a) of the McAteer-Petris Act, I believe fill is  
21 defined very broadly to encompass any substance or material  
22 with a value of greater than \$20. And so the reference to  
23 the homeless encampment as fill doesn't refer to the  
24 individuals but rather the accumulation of materials within  
25 our jurisdiction. Which can take many different forms, but

1 in our view are encompassed by this broad term of substance  
2 or material.

3 COMMISSIONER EISEN: So, I just have one follow-up  
4 then to that, which makes sense to me that accumulation of  
5 tents or whatever could constitute fill. But have we had a  
6 situation, a prior situation where we took the position  
7 that the stuff that accumulates in a homeless encampment  
8 constitutes fill? Have we taken that position in prior  
9 cases?

10 CHAIR GILMORE: John and I are shaking our heads yes,  
11 but I would like some confirmation from staff.

12 MR. TRUJILLO: I would say that yes, we have. If you  
13 are asking me for a specific citation, that would be a  
14 little harder to draw from at the moment. We have dealt  
15 with, for example, you are very familiar with the issues of  
16 the --

17 CHAIR GILMORE: Sorry, sorry, can I interrupt? Since  
18 I can't see who is speaking from the Board Room and I don't  
19 think the other Commissioners can, can you identify  
20 yourself for the record, please?

21 MR. TRUJILLO: Sure, sorry, Matthew Trujillo. Let me  
22 try and --

23 CHAIR GILMORE: Sorry, Matthew. Because I am seeing,  
24 I am seeing you on my screen. There you go. Thank you.

25 MR. TRUJILLO: Better? Okay. Yes. So you are

1 familiar with -- you are all very familiar with the issues  
2 we have had along the Oakland and Alameda Estuary. That is  
3 a area of the region that is rife with issues having to do  
4 with encampments as well as the detritus that results from  
5 that. At the staff level I know that we have dealt with  
6 many cases in those areas. As for cases brought before  
7 this Committee, I can't think of one that comes to mind.  
8 And that is only to say that for the most part we have been  
9 able to resolve these matters at the staff level. I won't  
10 speak to active cases, but there are cases currently in the  
11 pipeline that also speak to this issue. One moment.

12 Okay. So, you might have seen in the local media, I  
13 would say in the last year or so, issues with regard to --  
14 or issues of homeless encampments at Toll Plaza Beach in  
15 Oakland at the entranceway to the Bay Bridge. That is one  
16 of the cases that we are, that we have addressed. The  
17 reason I hesitated to bring that up is because it is still  
18 ongoing and it may come before you, but that is another.  
19 In terms of the homelessness matter and the trash around  
20 that, that is something that we have been able to address  
21 at the staff level.

22 CHAIR GILMORE: Thank you.

23 COMMISSIONER EISEN: But to Chair Gilmore's point,  
24 aren't those cases public access cases where the permit is  
25 being violated because the public access is not what it

1 ought to be?

2 MR. TRUJILLO: Not in every case. It is often an  
3 overlapping problem. Oftentimes encampments will be, say,  
4 on the side of a public access trail, whereas the trash or  
5 the detritus from the encampment could easily be clogging  
6 up the public access trail. In the case of Toll Plaza  
7 Beach, sorry, yes, Toll Plaza Beach, there actually is no  
8 public access, formal BCDC public access. It is a matter  
9 of this beach that has traditionally been a public beach  
10 being basically taken over by a lot of toxic waste and  
11 other trash as well as encampments that just, you know,  
12 they fall within our jurisdiction and therefore within our  
13 purview to address.

14 CHAIR GILMORE: Okay. I think this is a very  
15 worthwhile discussion, but I am going to cut it off for  
16 this afternoon. I am going to ask staff to do some more  
17 digging around this issue, what constitutes fill and what  
18 happens if there is fill but it is not an issue of public  
19 access. Does that make sense? Does staff understand?

20 MR. TRUJILLO: Yes.

21 CHAIR GILMORE: Okay. And Commissioner Eisen, does  
22 that get to the root of your question?

23 COMMISSIONER EISEN: It does. I think we can decide  
24 it even without that only because of all of the tires and  
25 shopping carts and other things that may or may not be

1 related to encampments. But I do think that we are going  
2 to -- if we bring this to the whole Commission there will  
3 be, there will be questions about that and it would be good  
4 to have that research done so to help our fellow  
5 Commissioners.

6 CHAIR GILMORE: I was actually thinking about it in  
7 terms of the Enforcement Committee on cases going forward.  
8 I agree that I don't think it is something that is  
9 necessarily pertinent for today's action given the  
10 circumstances. Any other Commissioner comments?  
11 Commissioner Ranchod.

12 COMMISSIONER RANCHOD: I agree it would be helpful for  
13 purposes of consistency with respect to other matters that  
14 come before the Commission to better understand that.

15 Could I ask staff if you can elaborate on the position  
16 in the recommendation with respect to the second violation.  
17 I understand Violation 1. There are two different  
18 violations, each with a proposed penalty of \$30,000.  
19 Violation 1 is the fill consisting of weights, the tires  
20 and the shopping carts, other trash. And there is a  
21 determination of the gravity of harm associated with that  
22 fill is major and the extent of deviation to remove it is  
23 major. And I appreciated the documents that were included  
24 in the materials supporting the recommendation that  
25 demonstrate that including potential impacts from the tires

1 on protected species such as coho salmon, et cetera.

2 With respect to the second violation, could you  
3 elaborate on the position as to the gravity of harm  
4 associated with that violation? Which I understand is  
5 effectively the homeless encampment and failure to remove  
6 it.

7 MS. CASTRODALE: Yes, thank you for your question.  
8 Our determination was that the gravity of harm for  
9 Violation 2 was moderate, and we made that determination  
10 using a six-factor scoring system that is provided by  
11 Appendix J of the regulations, which considers the habitat  
12 value, the durability, the toxicity, the size, the nature  
13 of the violation and the visibility. And because the  
14 length of time that this violation persisted and the  
15 potential toxicity was much lesser than that of the dumping  
16 of tires, the determination was made that it was a moderate  
17 rather than a major -- the gravity of harm was moderate  
18 rather than major.

19 COMMISSIONER RANCHOD: Thank you. It does seem to me  
20 that the gravity of harm associated with the first  
21 violation is significantly greater. That those materials  
22 had been there, and we have documentary evidence that they  
23 had, at least some of them had been there for many more  
24 years, even if the Respondent wasn't put on notice of these  
25 violations until more recently. In that it seems to me,

1 just in the equity between the two violations, that given  
2 that there is no public access issue in that, it is unclear  
3 what additional harm may have occurred from the second  
4 alleged violation, that the Committee may wish to look at  
5 those two differently.

6 CHAIR GILMORE: Thank you. Any other comments by  
7 Commissioners?

8 MS. MALAN: Commissioner Eisen.

9 CHAIR GILMORE: Thank you.

10 COMMISSIONER EISEN: This is, this is really a nit.  
11 But in the Recommended Decision it says that the Respondent  
12 should be ordered to, and then there is a list of five  
13 things. But the third thing is not actually something that  
14 the Respondent is supposed to do, it is something we are  
15 supposed to do in terms of reviewing and getting back to  
16 the Respondent. So, I don't know if it should be phrased  
17 differently, because the way it reads is the Respondent is  
18 ordered to review something that the BCDC is reviewing.  
19 So, a nit, as I am acknowledging.

20 MS. CASTRODALE: Thank you for pointing that out. I  
21 believe we could make a revision to clarify that that would  
22 only implicate the timing for the response by the  
23 Respondent but not the Respondent's action.

24 CHAIR GILMORE: Okay. I meant to make a comment on  
25 the failure to communicate. I just wanted to say that

1 while in the abstract I have sympathy for you because life  
2 happened for the Respondent. Because life happens, things  
3 happen. But I think, as one of the Commissioners pointed  
4 out, is that we hear these reasons all the time from  
5 Respondents who come before us. And, you know, some have  
6 better reasons than others. Some just did not get to it.  
7 You know, whatever the reason may be.

8 But from the point of view of the BCDC staff, it looks  
9 like we contacted you. We told you what it was that was  
10 wrong. We were willing to work with you to resolve the  
11 issue. You dragged your feet. Said you would get back to  
12 us. You did not get back to us for whatever reason,  
13 because this happens all the time. And then it was only  
14 when we filed an enforcement case that you got serious  
15 about dealing with us. And I can say having been on this  
16 Committee for a long time, this happens in the overwhelming  
17 majority of cases. So, while I may have some sympathy for  
18 you in the abstract, in the very practical point of view  
19 from staff having to deal with entities or people or  
20 corporations, this happens all the time. And I really,  
21 from my point of view, it is not a winning argument. That  
22 is all I wanted to say.

23 Anybody else have any other comments? Okay.

24 COMMISSIONER RANCHOD: Sorry, I do have a follow-up  
25 question, Chair.



1 CHAIR GILMORE: Yes.

2 COMMISSIONER RANCHOD: With respect to the assessment  
3 of penalties on the second violation. Could staff explain  
4 how that would be different, if at all, if the  
5 determination of the harm associated with the second  
6 violation was downgraded. I know you have proposed that it  
7 is a moderate level of harm, I believe.

8 MS. CASTRODALE: Yes, thank you for your question. If  
9 the second violation was downgraded from moderate to minor  
10 for gravity of harm, but the extent of deviation from the  
11 legal requirement remained the same, the range of the per  
12 day penalty amount would be \$800 a day to \$1,200 a day, and  
13 staff would select a figure within that range.

14 And the reason that I did not propose changing the  
15 factor for the extent of deviation from the legal  
16 requirement is because the legal requirement is the absence  
17 of the fill; and so it can only be characterized as major  
18 as opposed to a case where there is a minor noncompliance  
19 with a permit condition, for instance, where the extent of  
20 deviation from the legal requirement could then be  
21 characterized as minor I see.

22 COMMISSIONER RANCHOD: I see. Thank you. I would  
23 feel more comfortable, Chair, with that assessment of the  
24 nature of the harm, because to me it seems like whatever  
25 harm is occurring should be tried -- we should try to

1 assess cumulatively -- sorry, separately from the harm that  
2 has occurred as a result of Violation 1, which there is a  
3 fair amount of documented evidence for to support the  
4 proposed gravity of harm being major.

5 CHAIR GILMORE: Thank you. My comment to staff about  
6 that one is, even if we downgraded the severity, I mean,  
7 the -- I'm sorry. Even if we downgraded it, wouldn't the  
8 amount of time that the harm, over which the harm occurred,  
9 would that necessitate a change in the amount? Because the  
10 amount is \$30,000 but it is calculated per day and I think  
11 we are calculating over a year's period of time.

12 MS. CASTRODALE: That's right, Chair Gilmore. At the  
13 lower end if the penalties were assessed at the minimum  
14 range of \$800 a day, we would have reached the \$30,000 cap  
15 for Violation 2 in about 40 days.

16 CHAIR GILMORE: So, I guess what I am saying is that  
17 even if we downgrade it, the statutory penalty doesn't  
18 change. Commissioner Vasquez.

19 COMMISSIONER VASQUEZ: Thank you, Marie. Kind of  
20 along the line of your questioning. I think the  
21 representative from Union Pacific said they had one  
22 individual working on this and lost that person, or I don't  
23 remember exactly what happened, so it kind of fell through  
24 the cracks. And I am just wondering, Union Pacific has  
25 31,000 employees. You would have thought they could have

1 found one more employee to take care of that. So, I am not  
2 in favor of reducing anything and I will make the motion  
3 that we recommend staff's recommendation is forwarded to  
4 the entire Commission.

5 CHAIR GILMORE: Do we have a second?

6 COMMISSIONER EISEN: Second.

7 CHAIR GILMORE: That was Commissioner Eisen for the  
8 record. Okay, so we have a motion and a second to approve  
9 the Executive Director's Recommended Enforcement Decision,  
10 and so now we need a roll call vote. Matthew. You are  
11 muted.

12 MR. TRUJILLO: Thank you. Sorry. Commissioner Belin?

13 COMMISSIONER BELIN: Here.

14 MR. TRUJILLO: Is that a yea or a nay?

15 COMMISSIONER BELIN: That is a yea, sorry.

16 MR. TRUJILLO: Thank you. Commissioner Eisen?

17 COMMISSIONER EISEN: Yes.

18 MR. TRUJILLO: Commissioner Ranchod?

19 COMMISSIONER RANCHOD: Yes.

20 MR. TRUJILLO: Commissioner Vasquez?

21 COMMISSIONER VASQUEZ: Yes.

22 MR. TRUJILLO: Chair Gilmore?

23 CHAIR GILMORE: Yes. Thank you all. The motion  
24 carries unanimously, and this will be sent on to a vote of  
25 the full Commission at a date to determined.

1           Thank you everyone for attending today. Respondent,  
2 thank you for being here and staff.

3           We are going to adjourn this meeting. Thank you.

4           (Thereupon, the Enforcement Committee meeting was  
5 adjourned at 3:01 p.m.)

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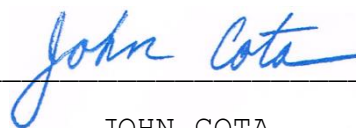
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that it was thereafter transcribed.

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

IN WITNESS WHEREOF, I have hereunto set my hand this  
20th day of November, 2024.



JOHN COTA

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November 20, 2024

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