San Francisco Bay Conservation and Development Commission
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Agenda Item #8

IN THE MATTER OF:	EXECUTIVE DIRECTOR'S RESPONSE TO:
Mark Sanders and Westpoint Harbor, LLC, Respondents. Proposed Commission Cease and Desist and Civil Penalty Order No. CDO 2018.01	(1) Respondents' Objections to Executive Director's Recommended Enforcement Decision and Attachments; and (2) Respondents' Objections to Executive Director's Modified Recommended Enforcement Decision and Attachments

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INTRODUCTION

On November 15, 2017, the day before the November 16th Enforcement Committee hearing, Respondents' counsel submitted an 18-page document entitled "Respondents' Objections to Executive Director's Recommended Enforcement Decision and Attachments." The three attachments included 42 pages of additional objections to certain documents and an 8-page response to staff's objections to the Declaration of Mark Sanders.

On January 16, 2018, two days before the January 18th Enforcement Committee hearing, Respondents' counsel again submitted a document entitled "Respondents' Objections to Executive Director's Modified Recommended Enforcement Decision and Attachments." Respondents' objections: (1) re-urged and resubmitted all of the objections initially submitted on November 15, 2017; (2) included additional objections to the Modification of the Executive Director's Recommended Enforcement Decision, dated January 8, 2018; and (3) re-urged Respondents' request to cross-examine 16 individuals identified in their Statement of Defense.

The Executive Director hereby responds to the foregoing objections of Respondents, to their renewed request to cross-examine 16 individuals, and to their response to staff's objections to the Sanders Declaration.

I. THE EXECUTIVE DIRECTOR HAS DISCRETION TO SUBMIT A MODIFIED RECOMMENDED ENFORCEMENT DECISION TO THE ENFORCEMENT COMMITTEE

On November 16, 2017, the Enforcement Committee held a public hearing to consider the Executive Director's recommended enforcement decision, dated November 6, 2017. At this hearing, the Enforcement Committee considered the evidence and arguments submitted by BCDC staff and Respondents, respectively, and all public comments pertaining to this matter. At the hearing, BCDC's Chief Counsel withdrew the proposed penalty of $30,000 for one of the violations, which reduced the total proposed penalty to $513,000. The Enforcement Committee adopted the Executive Director's recommended enforcement decision (as amended to reduce the total proposed penalty), including the proposed cease and desist and civil penalty order, subject to potential modification of the proposed order by mutual agreement of the parties. Specifically, if the parties agreed on appropriate modifications to the cease and desist provisions of the proposed order, the Committee authorized the Executive Director to submit to the full Commission a proposed order incorporating such agreed-upon modifications and also providing that: (1) Respondents would be required to pay 50% of the proposed penalty (*i.e., $*256,500) within 30 days of adoption of the proposed order by the Commission; and (2) Respondents would be entitled to a waiver of the remaining 50% of the proposed penalty (i.e., $256,500) if they complied with the requirements of the order within the agreed-upon time frames.

The parties were not able to agree on appropriate modifications to the proposed order. Notwithstanding this lack of agreement, the Executive Director nevertheless determined, in his discretion, to modify the proposed order he originally recommended to the Enforcement Committee by providing to the Committee, on January 6, 2018, a revised proposed cease and desist and civil penalty order. The revised proposed order incorporates certain provisions that the Enforcement Committee determined should be included if parties were able to reach an agreement. The revised proposed order also incorporates certain additional modifications that the Executive Director, in his discretion, believes are appropriate to provide more time and flexibility for Respondents to come into compliance with their permit and the McAteer-Petris Act, as well as to address certain evidentiary objections raised by Respondents at the November 16th hearing.

Thus, the revised proposed order includes the following revisions to the proposed order the Executive Director's originally proposed to the Committee: (1) revisions to the terms and conditions of the cease and desist provisions of the proposed order (Section III); (2) revisions to the Findings (Section II), including an updated and more complete description of the enforcement proceedings; and (3) revisions to the civil penalty provisions (Section IV), including the addition of terms by which Respondents may be entitled to a waiver of fifty percent of the total proposed penalty.

Respondents argue that the Executive Director "has a ministerial duty to send the Enforcement Committee's recommendation to the full Commission," and has no authority to "disregard" that recommendation by submitting a modified proposed order to the Committee for its further consideration. Respondents' Objections to Modified Recommended Enforcement Decision ("Objections") at 2:15-21. In support of their argument, Respondents cite only the Commission's regulations providing that, after the close of the enforcement hearing, the Enforcement Committee shall adopt a recommended enforcement decision, and that, at least 10 days prior to the full Commission's consideration of the Committee's recommended decision, staff shall mail the recommended decision to the Commission and all respondents. 14 C.C.R. §§ 11330 and 11331.

These regulations govern adoption and mailing of the Enforcement Committee's written recommended enforcement decision. They do not address, let alone establish, that the Executive Director has no discretion to prepare a modified recommended enforcement decision for further consideration by the Committee. On the contrary, prior to preparation and mailing of the Enforcement Committee's written recommended enforcement decision to the full Commission for its consideration, the Executive Director, as the prosecutor in an enforcement proceeding, has inherent discretion to request that the Committee consider adoption of a modified recommended decision at another duly noticed Committee hearing. See *Heckler v. Chaney*, 470 U.S. 821, 838 (1985) (agency's exercise of enforcement discretion not subject to judicial review as a matter of law).

The Executive Director's exercise of this inherent discretion is particularly appropriate in cases where, as here, the Committee itself had recommended adoption of some of the changes included in the Executive Director's revised proposed order (subject to the parties reaching agreement on other appropriate modifications to the proposed order). The Executive Director's revised proposed order did not "disregard" the Committee's prior, November 16, 2017 recommendation, but simply proposed another option for the Committee to consider prior to preparation and mailing of the Committee's written recommended enforcement decision. However, upon advice of counsel at the second Committee hearing on January 18, 2018, the Committee chose not to consider the Executive Director's revised proposed order but instead reaffirmed its original November 16, 2017 recommendation.

As support for their argument that, under sections 11330 and 11331 of the Commission's regulations, the Executive Director had a "ministerial duty to send the Enforcement Committee's [November 16, 2017] recommendation to the full Commission," Respondents appear to implicitly assert that the Committee's written recommended enforcement decision was prepared at the conclusion of the November 16, 2017 hearing, presumably via the transcript of that hearing. But this was not the case, because section 11330 of the Commission's regulations requires the Enforcement Committee's recommended enforcement decision to include specified information in addition to a proposed order. *See* 14 C.C.R. §§ 11326(b), 11330. Moreover, the recommended decision that the Enforcement Committee orally adopted on November 16, 2017 required certain modifications to be incorporated into the Committee's written recommended enforcement decision before Commission staff could mail that recommended decision to the full Commission for its consideration, as required by section 11331 of the regulations. These modifications included elimination of an alleged violation that BCDC's Chief Counsel withdrew at the November 16 hearing and an associated reduction of the total proposed penalty amount, an update to the description of the enforcement proceedings, and a revision of the due date for the first annual report for the live-aboard boats (Section III.L) (because the Commission would not have been able to adopt the recommended decision before January 15, 2018).

Finally, the Executive Director provided his proposed recommended decision, including the revised proposed order, to the Enforcement Committee, Respondents, and the public at least 10 days prior to the January 18, 2018 Enforcement Committee hearing, as required by 14 C.C.R. § 11323(b), and all interested parties had an adequate opportunity to review and comment on the modified recommendation prior to and at the hearing. The Enforcement Committee had the option of considering and adopting the revised proposed order, with or without further modifications, or declining to do so, and instead affirming the Committee's November 16, 2017 adoption of the Executive Director's original recommended enforcement decision with modifications. As discussed above, it chose the latter course of action.

For all the foregoing reasons, the Executive Director did not violate any "ministerial duty" by preparing a modified recommended decision and presenting it to the Committee for its consideration at a duly noticed further Committee hearing.

II. THE EXECUTIVE DIRECTOR DID NOT VIOLATE EVIDENCE CODE SECTION 1152 OR RESPONDENTS' DUE PROCESS RIGHTS BY PREPARING A MODIFIED RECOMMENDED DECISION

Respondents argue the Executive Director violated Evidence Code Section 1152 by preparing a revised proposed order that was based on settlement discussions between BCDC's counsel and Respondents' counsel. Respondents also object to the Executive Director's decision to modify his recommended enforcement decision on the basis of information that purportedly was wholly outside the administrative record, and argue that this violated Respondents' due process rights. Objections, at 3:5-18. There is no merit to either of Respondents' objections.

First, Evidence Code Section 1152 is not a privilege *per se*, but merely establishes a prohibition on the admissibility of evidence of an offer to compromise in an adjudicative proceeding.[1] Although the Executive Director developed his modified recommended enforcement decision as a result of settlement discussions between BCDC's counsel and

[1] Evidence Code § 1152(a) provides:
Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.

Respondents' counsel, the modified recommended decision does not disclose the substance of any of those discussions or anything that was said by anyone involved. In particular, the modified recommended enforcement decision does not disclose any offer to compromise, or even any proposal made, by Respondents' counsel. Rather, it includes proposals developed solely by the Executive Director in his discretion, in an effort to encourage Respondents' compliance with their permit and the McAteer-Petris Act and to resolve this ongoing dispute.

Second, the Executive Director's modified recommended enforcement decision is not based on any information outside of the administrative record for these proceedings, but rather is based on the same documents and other evidence as his original recommended decision, and that is already included in the record and fully available to Respondents and other interested parties. To the extent that Respondents are concerned that the modified proposed order is based on settlement discussions of counsel, as Respondents' counsel argued at the November 16, 2017, Enforcement Committee hearing, "what lawyers say is not evidence. And that includes me, what I say is not evidence, what Mr. Zeppetello said is not evidence either." Reporter's Transcript, at 44:14-16. Thus, the settlement discussions among counsel following the November 16, 2017 hearing are not "evidence" that is outside the administrative record.

As discussed above, Respondents, the public, and the Enforcement Committee all had an adequate opportunity to review and comment on – and in Respondents' case, object to -- the Executive Director's modified recommended enforcement decision. The Executive Director did not violate Respondents' due process rights by preparing a modified recommended decision, which did not rely on evidence outside the administrative record, for the Enforcement Committee's further consideration at a duly noticed public hearing.

III. BCDC HAS NOT FAILED TO PROVIDE RESPONDENTS WITH A FAIR TRIAL

Respondents argue that BCDC did not provide Respondents with a fair trial because the Executive Director not only issued the Violation Report/Complaint for the Imposition of Administrative Civil Penalties ("Violation Report" or "VR"), but also "prepare[d] a 'recommended enforcement decision,' Cal. Code Regs. tit. 14, §§ 11324, 11326, which is the province of the advisory team and the decision-makers." Objections at 4:4-11. According to

Respondents, "[a]n agency violates a party's constitutional due process right to an impartial trial when 'rules mandating that an agency's internal separation of functions and prohibiting ex party (sic) communications' are not observed, or when the totality of the circumstances creates an unacceptable risk of bias." *Id.* at 3:21-4:1.

The Executive Director did not violate any rules mandating separation of functions by preparing his recommended enforcement decision. Under the Commission's regulations, the Executive Director is required to prepare a recommended enforcement decision containing specified information which includes, but is not limited to, "a recommendation on what action the Commission should take," and, "the proposed text of any cease and desist order ... or civil penalty order that the Executive Director recommends that the Commission issue." 14 C.C.R. §§ 11326(b)(1)-(5). The regulations clearly state that the Executive Director must prepare a recommended enforcement decision, not an "advisory team" to the Enforcement Committee, as Respondents claim. The regulations do not call for the Executive Director to "effectively serv[e] as a special advisor to the Enforcement Committee," as Respondents claim. Objections at 4:10-11.[2]

Respondents further argue they were not provided a fair trial because the Executive Director is responsible for providing an analysis of all unresolved issues, which they claim is a "decision-making function" that should be performed by a neutral decision maker or its advisors. Objections at 5:1-4. This unsupported claim also is contrary to the Commission's regulations.

As noted above, the regulations require the Executive Director, and not a neutral decision maker or advisor, to prepare a recommended enforcement decision. Among the information to be included in the recommended decision is "a summary and analysis of all unresolved issues." 14 C.C.R. § 11326(b)(2). As required, the Executive Director's recommended decision included

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[2] Respondents' further argument that the process violates the separation of functions requirement in practice because "the Enforcement Committee members will be inclined to follow" the Executive Director's recommendation has no basis in fact. Objections at 4:12-20. As the record in this case demonstrates, the Enforcement Committee did not simply blindly follow the Executive Director's recommendation at either the November 16, 2017 or January 18, 2018 enforcement hearings. Rather, the Committee stated it would adopt significant changes to the Executive Director's recommendation in November 2017, including a waiver of 50% of the proposed penalty if the parties were able to reach an agreement on appropriate modifications to the proposed order, and did not follow the Executive Director's modified recommendation in any respect in January 2018.

such a summary and analysis. Recommended Enforcement Decision (Nov. 6, 2017) ("Recommended ED"), at 40-46 (Section VI). If Respondents disagreed with the Executive Director's summary and analysis, or considered it to be incomplete or inaccurate, they had a full and fair opportunity to comment on, and in fact did comment on, the Executive Director's recommended decision at the November 16, 2017 Enforcement Committee hearing. But more importantly, the Commission's regulations also require the Enforcement Committee to prepare its own recommended decision, including a summary and analysis of all unresolved issues. *See* 14 C.C.R. § 11330(a) (Committee's recommended enforcement decision must address "all of the matters required by Section 11326," including "a summary and analysis of all unresolved issues"), § 11326(b)(2).

Finally, Respondents argue that their right to a fair trial has been violated because the Enforcement Committee "arbitrarily and capriciously" determined the penalty amount recommended to the Commission and did not properly consider mandated statutory factors under Government Code Section 66641.9. Objections at 5:7-17. This claim also is without merit.

Both the Executive Director's recommended enforcement decision and the proposed cease and desist order, as orally adopted by the Enforcement Committee on November 16, 2017 with modifications, contain an analysis of the statutory penalty factors required to be considered under Government Code Section 66641.9. The discussion of the penalty factors in those documents fully supports the penalty recommended by the Enforcement Committee. Moreover, the Enforcement Committee did not act arbitrarily when it discussed the possibility of a waiver of a portion of the penalty and the potential amount or percentage of such waiver. The Enforcement Committee reasonably considered providing a significant incentive to resolving the current dispute, without the need for litigation directly threatened by Respondents' counsel at the November 16, 2017 hearing, by providing for a 50% reduction in the proposed penalty in exchange for Respondents' timely compliance with the substantive

terms of an agreed-upon cease and desist order.[3] But even without such a penalty reduction, the recommended penalty is fully supported by the evidence and application of the statutory penalty factors, and, therefore, the Enforcement Committee did not act arbitrarily.

Furthermore, the totality of the circumstances certainly does not show an unacceptable bias against Respondent. The record reflects that the Enforcement Committee made its own determination regarding the appropriate penalty in this case and did not simply follow the Executive Director's recommendation.

IV. RESPONDENTS' OBJECTION TO BCDC STAFF'S LATE ADDITION OF ALLEGATION NO. 23 IS MOOT

Respondents argue that staff improperly included in the Executive Director's recommended enforcement decision a "completely new Allegation No. 23, which relates to an alleged unauthorized sign at the public boat launch" that was never asserted in the Violation Report. Objections at 5:20-24.

As explained in the Executive Director's recommended enforcement decision, on August 1, 2017 about a week after issuance of the Violation Report, BCDC's Chief Counsel Marc Zeppetello informed Respondents' counsel by email of additional permit violations that had been called to BCDC staff's attention the previous week by a member of the public. Specifically, Mr. Zeppetello notified Respondents' counsel that "Mr. Sanders has installed an unauthorized 'Westpoint Harbor Boat Launch' sign that violates the Permit's public access requirements" by requiring a permit from the harbor master's office and charging a fee to use this required public access improvement. Recommended ED, at 7 (Section III.B).

After receiving no response from Respondents or their counsel, in a second email, on August 3, 2017, Mr. Zeppetello: (1) directed Respondents to remove the unauthorized sign or to effectively cover the portion of the sign requiring a permit and the payment of a fee to use the public boat launch; and (2) notified Respondents that if they failed to comply with this request,

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[3] Respondents also cite to one Committee member's question whether it "is bad precedent to go below 50 percent of the fines." (Objections at 5:15-16.) This statement reflects a legitimate concern that reducing Respondents' proposed penalty *too* significantly would send an inappropriate signal to other would-be violators that a permit can be violated with impunity for years, but the Committee nevertheless might recommend a significant reduction in the penalties if a violator decides to come into compliance at the eleventh hour after initiation of enforcement proceedings against that violator. This certainly was an appropriate consideration when the Committee was deciding how much to reduce the penalties assessed against Respondents if they agreed to come into compliance with their permit.

staff would allege that continued maintenance of the unauthorized sign, which impermissibly required both a permit and a fee to use the public boat launch, is a separate violation from the other violations alleged in the Violation Report and that staff would seek additional penalties for this separate violation. After Respondents failed to respond to this new notice of violation or to correct the situation by removing the sign or covering the portion of the sign requiring a permit and the payment of a fee, the Executive Director included this violation in his recommended enforcement decision as a new violation.

In response to Respondents' objections regarding the alleged late addition of this violation, Mr. Zeppetello withdrew the penalty for this violation at the Enforcement Committee hearing on November 16, 2017. Respondents' counsel acknowledged this fact during the Enforcement Committee hearing, conceding, "I know they have withdrawn the boat launch issue." Despite this acknowledgment, in their objections to the Executive Director's modified recommended decision, Respondents continue to argue at length that staff has violated the Commission's regulations by adding this now withdrawn allegation. However, because Allegation 23 has been withdrawn for purposes of the present enforcement proceedings, it is no longer at issue in this matter, and Respondents' objections therefore are moot.

V. RESPONDENTS WERE NOT DENIED THE OPPORTUNITY TO RESPOND TO THE ALLEGATION CONCERNING THE UNAUTHORIZED ASPHALT PAD

Respondents next claim that staff "deprived Respondents of the opportunity to adequately respond to the allegation concerning [an] 'asphalt pad of unknown purpose,'" by failing to include a photograph of the asphalt pad in the Violation Report and instead including such a photograph as "Exhibit B" to the Executive Director's recommended enforcement decision. Objections at 12:24-13:2. Respondents admit that the Violation Report included an allegation regarding an unauthorized asphalt pad, but complain that they were unable to identify the alleged violation based on staff's "ambiguous description." *Id.* at 12:12-15. Respondents' objection lacks merit.

The Violation Report clearly states on page 28 that the unauthorized asphalt pad in question is located in a public access area. The designated public access areas at Westpoint Harbor are identified in the legal instrument executed and recorded by Mr. Sanders. Moreover,

Respondents are deemed to be familiar with the condition of their property. While Respondent's counsel may not have been able to identify the *precise* location or size of the asphalt pad simply from reading the Violation Report, the presence of the pad and its location should have been known or readily identifiable to anyone familiar with the site, particularly Respondents, who are the site owners and operators.

The Violation Report refers to the attached site photographs to identify the unauthorized asphalt pad. It is true that, as explained in the Executive Director's recommend enforcement decision, the photograph showing the unauthorized asphalt pad was inadvertently not included in the exhibits to the Violation Report. To correct this error, and in response to Respondents' claim that they could not identify this violation, the referenced photograph instead was attached to the Executive Director's recommended decision, which was sent to Respondents on November 6, 2017. Thus, even if Respondents could reasonably claim they were not previously aware of the precise location of the asphalt pad, they were adequately informed of this location sufficiently in advance of the November 16, 2017 Enforcement Committee hearing and had ample opportunity to respond at the hearing to staff's allegations regarding this violation.

VI. THE PROPOSED ORDER DOES NOT IMPROPERLY INCLUDE HEARSAY EVIDENCE

Respondents object to the inclusion of certain evidence in the proposed order that they contend is inadmissible hearsay.[4] Objections at 13:10-14: 6. Specifically, Respondents request that the Enforcement Committee "strike the hearsay evidence relied on in Paragraph R, S, and V," of the proposed order (*id*. at 15:14-15), which includes photographs taken by a member of the public, Matthew Leddy, as well as a public comment letter submitted by the Citizens' Committee to Complete the Refuge ("CCCR") concerning the alleged violations at Westpoint Harbor. Respondents also argue that Commission staff has allegedly relied on "improper hearsay evidence to support the factual claim that 'Respondents' violations of the Permit's public access requirements have resulted in the denial and loss of public access areas and improvements at the Site for an approximately eight year period....'" *Id.* at 15:16-19.

[4] Evidence Code Section 1200 defines hearsay as "evidence of a statement that was made other that by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated."

A. Photographic Evidence and Leddy Declaration. Mr. Leddy submitted a letter to Commission staff dated March 10, 2017, regarding alleged violations at Westpoint Harbor, along with supporting photographs that he states he took at and near the site. AR Doc. 77. These photographs show Mr. Leddy's observations at Westpoint Harbor from 2012 through 2017, including: an absence of required buoys in Westpoint Slough; a ferry in the slough generating a substantial wake; an absence of information signs at the public boat launch; and an absence, or the deteriorated condition, of signs at Greco Island. In addition, a letter submitted by CCCR's counsel dated May 24, 2017 included additional photographs taken by Mr. Leddy on April 9, 2017 showing, among other things, that none of the three buoys he observed in Westpoint Slough state "No Wake" as required by the permit, but one buoy states "Slow, 10 MPH," in violation of the permit. AR Doc. 85.

In their Statement of Defense ("SOD"), Respondents objected to Mr. Leddy's photographs as hearsay. SOD at 67:7. In apparent response to this objection, on or about November 3, 2017, prior to the November 16, 2017 Enforcement Committee hearing, Mr. Leddy submitted, as a public comment, a declaration under penalty of perjury properly authenticating his photographs and making several other statements based on his own personal knowledge and lay opinion. Despite Mr. Leddy's sworn declaration, Respondents continue to object to consideration of the photographs as hearsay. Respondents' multiple objections to the Leddy Declaration, based on alleged lack of foundation and personal knowledge, improper speculation and expert opinion, hearsay, and lack of authentication, are not well taken.

As an initial matter, to the extent Respondents object to Mr. Leddy's photographs showing an absence of or the deteriorated condition of signs at Westpoint Slough or Greco Island (Objections at 13:10 – 14:2), those objections do not relate to a material issue in dispute. Special Condition II.H of the permit requires Mr. Sanders install a buoy system with signs 100 feet from Greco Island to inform the boaters that public access to the marshlands of the national wildlife refuge is prohibited, and Respondents do not dispute that they have not installed such a buoy system with signs. Similarly, Respondents' objections to Mr. Leddy photographs depicting a "Slow 10 MPH" sign on a buoy and a ferry generating a substantial

wake in the slough do not relate to a material issue. Permit Special Condition II.H requires Mr. Sanders to install buoys in the slough identifying a "no-wake" zone, and Respondents do not contend that they installed such buoys.

In any case, photographs such as those taken by Mr. Leddy can be properly admitted as probative evidence of what the photographs depict. *See People v. Bowley,* 59 Cal.2d 855, 860-861 (1963)("a photograph may, in a proper case, be admitted into evidence ... as probative evidence in itself of what it shows"). A photograph can be properly authenticated by providing "the testimony of a person who was present at the time the picture was taken" that the photo is an accurate representation of what it purports to show. *Id*. at 862. Mr. Leddy's Declaration is sufficient to authenticate the photographs he took at Westpoint Harbor, as it clearly states the date and time and location from which he took the photographs in question, and that these photographs accurately reflect the conditions at Westpoint Harbor at the time and place they were taken. Therefore, it was permissible for the Enforcement Committee to consider the photographic evidence provided by Mr. Leddy and for the proposed order to reference his photographs, and these photographs are not impermissible hearsay evidence.

Finally, in their further objections to Mr. Leddy's Declaration as set forth in Attachment C to their Objections, Respondents complain that the Leddy Declaration is being used to introduce purportedly new evidence that should have been included with the Violation Report, and that they should have had an opportunity to address this evidence in their Statement of Defense. First, as discussed, Mr. Leddy originally submitted the majority of his photographs by letter dated March 10, 2017, and CCCR's counsel submitted the additional Leddy photographs by letter dated May 24, 2017; Respondents had, and took, the opportunity to address the photographs in their Statement of Defense.

Second, Mr. Leddy's Declaration was submitted as a public comment in apparent response to the hearsay objections raised by Respondents in their Statement of Defense. The Leddy Declaration was not evidence relied on by staff in preparing the Violation Report and was not part of the record when the Violation Report was issued. Respondents had and took the opportunity to address the Leddy Declaration through their written objections, filed prior to each of the two Enforcement Committee hearings, and also had the opportunity to address the declaration in their comments at the hearings.

Finally, even if Mr. Leddy's photographs are hearsay, which they are not, under the Commission's regulations "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence." 14 C.C.R. § 11329(b). Although the regulation goes on to state that hearsay "shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action" (*id.*), the administrative record is replete with evidence documenting the many permit violations at Westpoint Harbor. At a minimum, the Leddy photographs provide supplemental evidence that the Enforcement Committee was free to consider and give whatever weight it deemed appropriate. *Id.* § 11329(a) ("[a]ny relevant evidence shall be admitted".)

B. The CCCR's Letters Dated March 24, 2017 and November 3, 2017. The CCCR letter dated March 24, 2017, was properly considered by the Enforcement Committee and referenced in the Executive Director's proposed order. The CCCR letter is not hearsay because it was not being offered in the Violation Report, or in the proposed order, to prove that Mr. Sanders had in fact violated certain permit conditions. On the contrary, the Violation Report simply states that the CCCR "letter raised questions whether Sanders had failed to comply with" two permit conditions – those requiring shorebird roost habitat mitigation and non-tidal wetland mitigation. VR at 32 (Section VI.AAA). Because the CCCR letter is not being offered to prove any violations, it is not hearsay as Respondents claim.[5]

In their further objections set forth in Attachment C to their Objections, Respondents complain about another letter from CCCR, dated November 3, 2017, submitted as a public comment after issuance of the Violation Report and submission of Respondents' Statement of Defense. Respondents argue that this CCCR letter is being used to introduce purportedly new evidence that should have been included with the Violation Report, and that they should have had an opportunity to address this evidence in their Statement of Defense. However, the

[5] After receiving the CCCR's March 24th letter, staff investigated the alleged violations and independently determined, based on other evidence in the record, that Respondents had, in fact, violated those permit conditions requiring mitigation for project impacts. *See* Executive Director's Recommended Decision (Nov. 6, 2017) at Exhibit E (proposed order) at 9-10, ¶¶ II.W-II.Z).

November 3, 2017 CCCR letter was submitted as a public comment in apparent response, at least in part, to the objections raised by Respondents in their Statement of Defense to the earlier letters from CCCR and Mr. Leddy.

The November 3, 2017 CCCR letter was not relied on by staff in preparing the Violation Report and was not part of record when the Violation Report was issued. Respondents had, and took, the opportunity to address the November 3rd CCCR letter by their written objections, filed prior to each of the two Enforcement Committee hearings, and also had the opportunity to address that letter in their comments at the hearings. The Enforcement Committee was free to give whatever weight it considered warranted to the CCCR letter, as it was free to give whatever weight it deemed appropriate to the many other public comments submitted in this matter.

C. Substantial Evidence Demonstrating the Denial of Public Access. Respondents argue that Commission staff improperly relied only on hearsay, and hearsay within hearsay, from certain identified and unidentified members of the public to support the factual claim that Respondents' violations of the permit's public access requirements resulted in the loss and denial of public access areas and public access improvements at Westpoint Harbor. Objections 15-21-23. Respondents are incorrect.

First, under the Commission's regulations, "[a]ny relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of such evidence over objection in civil actions." 14 C.C.R § 11329(a). Written complaints submitted to Commission staff by members of the public, stating that the complainant was denied public access, are relevant and admissible to show that there was in fact a denial of public access at Westpoint Harbor at the time the complaints were made. Further, such complaints from members of the public are the sort of evidence that both the Enforcement Committee and the Commission are accustomed to rely on to show potential permit violations. Respondents' objection goes to the weight of the evidence, but not its admissibility. The Enforcement Committee was free to consider the complaints from members of the public regarding the denial of public access and give them whatever weight it deemed appropriate.

Second, in asserting that Respondents' violations of the permit have resulted in a denial of public access at Westpoint Harbor, Commission staff also relied on their own observations during numerous site visits over a period of years, as documented in staff memoranda, photographs taken by staff, and correspondence to Mr. Sanders. *See, e.g.,* AR Docs. 15, 17, 25, 60, 66, 68, and 74. These documents constitute business records and/or official agency records for which there are applicable exceptions to the hearsay rule. Evidence Code §§ 1271, 1280.

Finally, Respondents do not dispute that they were required to provide all required Phase 1B public access areas and improvements prior to their use of the Phase 1B marina berths or that they had installed and begun using such berths by no later than September 2009. Respondents also do not dispute that they did not open the majority of the required Phase 1B public access areas and many of the required Phase 1B public access improvements until July 2017. Thus, declarations under penalty of perjury are not necessary to establish that Respondents failed to provide, and thereby denied, required public access for an approximately eight-year period in violation of the permit's requirements.

VII. OBJECTIONS TO BCDC STAFF'S ALLEGEDLY UNVERIFIED FACTUAL CLAIMS

Respondents argue that certain "unverified factual claims" were improperly added to the recommended enforcement decision and the proposed order because they are "speculative assertions, improper expert opinion, and not based on any evidence in the enforcement record." Objections at16:13-15.

As explained above, "[a]ny relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of such evidence over objection in civil actions." 14 C.C.R § 11329(a). The factual assertions in question are relevant evidence of alleged violations at Westpoint Harbor. Respondents' objection goes to the weight of the evidence that the Enforcement Committee may consider, and not the admissibility of this evidence. The Enforcement Committee was within its power to consider the "unverified factual claims" in question and give them whatever weight it deemed appropriate.

Further, the factual claims in question are not being used to establish permit violations. For example, Respondents object to staff's assertion in the proposed order that "Monterey Cypress and Poplar trees serve as habitat to raptors that allegedly prey on endangered birds." Objections at 16:17-18. But the charged permit violation was based on Respondents' planting of Monterey Cypress and Poplar trees without prior approval of a landscaping plan, as required by the permit, and failure to remove those trees when directed to do so by Commission staff, not on whether these trees in fact serve as raptor habitat. In any event, Respondents' objections to this statement ring hollow, as they themselves assert that they did not install parking signs on posts purportedly to avoid the potential problem of raptor perching and predation. Objections at 24:13-15.

Another example is Respondents' objection to staff's factual claim that, the "lack of visual barriers between the marina and the salt ponds causes disturbances to water birds and affects sensitive habitats." Objections at 17:5-7. Again, this claim is not being used to establish Respondents' violation of their permit. Under the permit, Respondents were required to "provide visual barriers between the active marina areas and the adjacent salt pond to reduce disturbances to water birds using the salt pond." *See* Permit Special Condition II.K. Respondents do not dispute that they did not provide the visual barriers as required. Therefore, Respondents' objection is irrelevant.

Furthermore, the environmental and ecological harms that Respondents claim are unverified can be inferred from Respondents' undisputed continued violations of their permit conditions. Permit conditions are included in BCDC permits specifically to avoid environmental and ecological harm. If a permittee violates these conditions, it is presumed that harm to the environment will occur. Courts have held that civil penalties, unlike damages, require no showing of actual harm per se. *See Kizer v. County of San Mateo*, 53 Cal.3d 139, 147 (1991). Moreover, "[u]nlike damages, the civil penalties are imposed according to a range set by statute irrespective of actual damage suffered," and "civil penalties, unlike punitive damages, are imposed without regard to motive and require no showing of malfeasance or intent to injure." *Id*. Because Respondents have continued to violate these conditions designed to avoid harms to the environment, staff permissibly concluded that these violations caused environmental harm.

Respondents also object that Commission staff has not established any evidentiary support for staff's determination that there has been any adverse impact on public access at Westpoint Harbor as a result of Respondents' permit violations. Objections at 19:21-20:4. However, as discussed above, the administrative record includes substantial evidence of Respondents' failure to provide and denial of public access at Westpoint Harbor. Furthermore, Respondents have not produced any evidence that they have complied with the permit's public access requirements at any time prior to July 2017. As stated in the permit's findings, the specified public access areas and improvements were required to provide the maximum feasible public access to the Bay consistent with the project, as required by the McAteer-Petris Act. Permit Section III, Findings and Declarations, Section D, Public Access; Gov't Code, §§ 66602.1, 66632.4. Because Respondents failed to comply with these requirements in a timely manner, the loss and denial of public access and associated adverse impacts on public access may be presumed. Respondents have not introduced any evidence rebutting that presumption.

Respondents requested that the Enforcement Committee strike what Respondents argue are unsupported "factual claims improperly contained in the Recommended Enforcement Decision and Proposed Order." Objections at 20:17-18. To address certain of Respondents' objections in this regard, Commission staff modified the Executive Director's recommended enforcement decision by preparing a modified revised proposed order for the Enforcement Committee's consideration on January 18, 2018, that eliminated much if not all of the language to which Respondents objected. However, Respondents' counsel objected to the Enforcement Committee's consideration of the revised proposed order.

For the foregoing reasons, Respondents' objections to the alleged "unverified factual claims" are without merit.

VIII. OBJECTION TO BCDC STAFF'S ALLEGED INCLUSION OF REQUIREMENTS OF OTHER PUBLIC AGENCIES

Respondents object to "BCDC staff including findings in the recommended enforcement decision and the proposed order that relate to alleged requirements by other agencies... ." Respondents contend that these requirements are irrelevant in this proceeding, and that BCDC

does not have the authority to assert violations on behalf of other agencies. Objections at 21:4-8. Staff has not asserted any violations on behalf on other agencies. All alleged violations were based on Respondents' noncompliance with their BCDC permit, as explained below.

Respondents were required to provide mitigation for loss of wetlands habitat under both the U.S. Army Corps of Engineers ("Corps") permit and the San Francisco Bay Regional Water Quality Control Board ("Regional Board") permit, as well as under the Commission's permit. In addition, Respondents were required by both the Corps' permit and Regional Board's permit to submit annual monitoring reports of the wetlands mitigation performed at Westpoint Harbor. The absence of evidence that Respondents' submitted such reports to the Corps and Regional Board that is relevant to show that Respondents did not conduct or complete the wetlands mitigation required by the Commission's permit.

Similarly, Respondents were required under their Commission permit to provide shorebird roost habitat mitigation. As part of this permit condition, Respondents were required to have their proposed habitat creation plans reviewed and approved by the Commission after consultation with the U.S. Fish and Wildlife Service and the California Department of Fish and Wildlife. The absence of any evidence that Respondents consulted with either resource agency is relevant to establish that Respondents failed to provide a shorebird roosting habitat as required by their BCDC permit.

The foregoing evidence therefore was properly cited in the recommended enforcement decision and the proposed order.

IX. OBJECTION TO BCDC STAFF'S ALLEGED IMPROPER ASSERTION OF ADMISSIONS

Respondents object to certain admissions that Commission staff attribute to Respondents, claiming that staff's inclusion of such admissions demonstrates that they have not and cannot receive a fair trial. Objections at 21:11-14. Respondents fail to acknowledge that their Statement of Defense impliedly admits to certain violations by what it omits to state.

For example, Respondents argue that a reasonable reading of the permit requirement to install signs at the public boat launch ramp is that this requirement was to be met when the boat launch ramp is operational (SOD at 66:18-19), but they complain that staff has mischaracterized this assertion as an admission that the public boat launch ramp and all other required Phase 1B public access improvements were required by September 2009. However,

Respondents also acknowledged that the permit requires the Phase 1B public access improvements to be place "prior to the use of any structure authorized herein (including the marina berths) **under Phase 1B of the project.**" *Id.* at 34:10-12 (emphasis by Respondents). Although Respondents fail to identify when they began using the Phase 1B marina berths, a Google Earth image from September 2009 shows that by that time, Respondents had installed and were using two Phase 1B docks. Recommended ED, at Exhibit A. Thus, Respondents effectively admit that they were required to have completed all the Phase 1B public access areas and improvements, including the public boat launch and associated signage, by no later than September 2009.

As another example, Respondents object to the statement in the Executive Director's recommended enforcement decision that Respondents admit that they did not "provide access to the Phase 1B public access pathways until July 2017." However, this is an accurate characterization of Respondents' statement that they "promptly installed public access and Bay Trail signs around the Phase 3 area after Redwood City authorized Respondents to open the pathways in the area in July 2017." Recommended ED, at 11; SOD at 51:5-7. Such statement necessarily implies that Respondents admit that they did not provide the required public access to these pathways before that date.

As another example, Respondents object to the statement in the recommended enforcement decision that they admit there are three floating structures in the marina that are used to hold *(i.e., store*) personal watercraft, because, they claim, staff mischaracterizes it as Respondents' concession that they are not in compliance. However, Respondents refer to and discuss these three floating structures, and what they are used for, in their Statement of Defense. SOD at 82:7-23. Respondents argue, erroneously, that these floating structures are not unauthorized fill, but they do not dispute that these structures are present in the marina and that they are not identified in the authorization provisions of the permit.

Regardless, none of the findings in the proposed order objected to by Respondents were based solely on any alleged admissions by Mark Sanders. The Enforcement Committee and Commission may permissibly give whatever weight they deem warranted to Respondents' own statements in their Statement of Defense. *See* 14 C.C.R. § 11329(a) ("[a]ny relevant evidence shall be admitted ...).

X. OBJECTION TO IMPOSITION OF ALLEGEDLY EXCESSIVE FINES

Respondents claim the "proposed fines are excessive and not commensurate with the alleged harm." Objections at. 23:17-18. Respondents further assert that the penalty imposed does not rely on evidence in the administrative record, and that it is "not proper in light of the statutory factors that must be considered." *Id*. at 23:18-19.

Respondents' claims are unfounded. First, an agency does not have to prove that the amount of the penalty is commensurate with the environmental damage caused. "A penalty statute presupposes that its violation produces damage beyond that which is compensable." *State of California v. City & Cty. of San Francisco*, 94 Cal.App.3d 522, 531 (1979) (Water Code § 13385 "would have virtually no deterrent effect if the polluter were penalized only when the plaintiff could demonstrate quantifiable damage because water pollution results in severe unquantifiable damage").

Second, by law, administrative penalties assessed by the Commission "shall not be less than ten dollars ($10), nor more than two thousand dollars ($2,000), for each day in which that violation occurs or persists, but the commission may not administratively impose a fine of more than thirty thousand dollars ($30,000) for a single violation." Gov't Code § 66641.5(e). Here, in ten instances, Commission staff aggregated multiple separate violations as a single violation, and for four of the violations, staff did not propose any penalty at all, thereby substantially reducing the potential maximum penalty. *See* Recommended ED, at Exhibit C (Summary of Violations and Proposed Administrative Civil Penalties). If staff had not aggregated the multiple separate violations at Westpoint Harbor, the *minimum* administrative penalty required by statute would have been $567,550, with a potential maximum penalty of $873,000.

Moreover, as shown by staff's Summary of Violations and Proposed Administrative Civil Penalties (Recommended ED, at Exhibit C), staff proposed penalties of $1,000 per day, $200 per day, $100 per day, and $50 per day, depending on the nature of the particular violation and consideration of other statutory penalty factors. At the daily penalties proposed by staff, the penalties for all but one of the violations reached the statutory maximum of $30,000 for a single violation due to the long period of time (in many cases more than eight years) during

which most the violations occurred and persisted. But even at the minimum required statutory penalty of $10 per day per violation, and aggregating multiple separate violations as staff did, the minimum penalty required by statute would be $314,675.

An agency's determination of civil penalties is accorded a strong presumption of correctness that extends to all factual determinations and to the agency's construction of the penalty statute in question. *See Pacific Gas & Electric Co. v. Pub. Utils. Comm'n.*, 237 Cal.App.4th 812, 866 (2015). Staff's proposed penalty is well below the potential maximum penalty because staff aggregated multiple violations as a single violation for penalty purpose and did not propose any penalty for some violations. The penalty also is appropriate in light of staff's assessment of the statutory penalty factors discussed in the recommended enforcement decision and given the long duration of most of the violations. Therefore, staff's recommended proposed penalty amount of $513,000 is not excessive.

Finally, it is significant that, at the January 18, 2018 Enforcement Committee hearing, Respondents' counsel argued *against* adoption of the Executive Director's modified proposed cease and desist order, which would have reduced the total penalty by 50% in exchange for substantial compliance with the substantive terms of the order.

XI. RESPONDENT'S RENEWED REQUEST TO CROSS-EXAMINE WITNESSES

Respondents have renewed their request to cross-examine 16 individuals identified in their Statement of Defense (pages 123-127). As set forth in the Executive Director's recommended enforcement decision, Commission staff strongly objects to Respondents' request as both unwarranted and unnecessary.

Respondents purportedly desire to cross-examine sixteen individuals, including present and past BCDC staff and members of the public, regarding various documents, topics, and/or alleged facts. SOD at 123:1-127:32. However, the Commission's regulations governing enforcement hearing procedures allow for cross-examination only "of any witnesses whose declaration under penalty of perjury has become part of the enforcement record." *Id.* at § 11327(g). Because no declarations under penalty of perjury were submitted as part of the Violation Report/Complaint, as Respondents acknowledge (SOD at 123:2-3), Respondents are not entitled to cross-examine anyone.

Respondents actually seek to conduct direct examination of numerous individuals that they would like to call as witnesses, rather than to cross-examine those individuals as to sworn testimony provided in declarations in support of the Violation Report. Staff objects to Respondents' requests to examine each of the sixteen individuals they have identified as both completely unnecessary and inconsistent the Commission's regulations. Specifically, the regulations provide that presentations at the hearing:

> "shall be limited to responding to (1) evidence already made part of the enforcement record and (2) the policy implications of such evidence; the committee and Commission *shall not allow oral testimony unless the committee and Commission believes that such testimony is essential to resolve any factual issues that remain unresolved after reviewing the existing written record and whose resolution is essential to determining whether a violation has occurred or to determining what remedy is appropriate."* 14 C.C.R. § 11327(f) (emphasis added).

Respondents' counsel argues, based on the detailed allegations in both the Violation Report and their Statement of Defense, that there are numerous disputed factual issues that can best be addressed by cross-examination. However, the disputed facts identified by Respondents in requesting cross-examination are not material to this enforcement proceeding in that their resolution is not essential to the Enforcement Committee's or Commission's determination of whether a violation has occurred.[6] The disputed factual issues identified by Respondents relate to discussions between Respondents and staff or other agencies over the past several years regarding the violations and to information provided to staff by third parties. But those factual matters are not material to this proceeding because whether or not Respondents are liable for a particular violation depends solely on the terms and conditions of the existing permit and the evidence demonstrating whether or not Respondents have complied with the permit's requirements. Neither direct nor cross-examination is essential to resolve those factual issues.

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[6] *See Riverside County Community Association Facilities District No. 1 v. Bainbridge*, 77 Cal. App. 4th 644, 653 (1999) (to be material a fact must both relate to a claim or defense in issue *"and must also be essential to the judgment"*) (emphasis added).

XII. COMMISSION STAFF'S OBJECTION TO PORTIONS OF THE SANDERS DECLARATION AS UNSUPPORTED HEARSAY

In Attachment C to their Objections, Respondents' respond to Commission staff's objections to portions of the Declaration of Mark Sanders as hearsay. *See* Recommended ED, at 48 and Exhibit D. Respondents' responses do not overcome staff's hearsay objections.

Throughout the Statement of Defense, Respondents rely on a lengthy Declaration of Mark Sanders. While staff does not object to the admissibility of the Sanders Declaration, staff continues to object to the unsupported hearsay statements made by Mr. Sanders regarding statements, agreements, or objections allegedly made by other individuals or by agencies. Because Mr. Sanders was not subject to cross-examination at the Enforcement Committee hearings, his hearsay statements are not sufficient to support a finding. Thus, none of the hearsay statements in the Sanders Declaration is included in the findings in the proposed cease and desist and civil penalty order.

XIII. CONCLUSION

For the foregoing reasons, each of Respondents' Objections to the Executive Director's Recommended Enforcement Decision and Modified Recommended Enforcement Decision is without merit.

DATED: FEBRUARY 22, 2017

Respectfully submitted,

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