

San Francisco Bay Conservation and Development Commission

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

June 15, 2018

TO: All Commissioners and Alternates

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

SUBJECT: Approved Minutes of May 17, 2018 Commission Meeting

1. **Call to Order.** The meeting was called to order by Chair Wasserman at the Bay Area Metro Center, 375 Beale Street, Yerba Buena Room, First Floor, San Francisco, California at 1:02 p.m.

2. **Roll Call.** Present were: Chair Wasserman, Vice Chair Halsted (represented by Alternate Chappell), Commissioners Addiego, Ahn, Alvarado, Bottoms (represented by Alternate Galacatos), Butt (departed at 3:30 p.m.), Chan (represented by Alternate Gilmore), Cortese (represented by Alternate Scharff), Davis (represented by Alternate McElhinney), Lucchesi (represented by Alternate Pemberton), McGrath (departed at 3:54 p.m.), Peskin, Pine (arrived at 1:17 p.m.), Sears, Showalter (arrived at 1:11 p.m.), Wagenknecht, Ziegler (represented by Alternate Brush) and Zwissler.

Chair Wasserman announced that a quorum was present.

Not present were Commissioners: Association of Bay Area Governments (Techel), Department of Finance (Finn), Contra Costa County (Gioia), Sonoma County (Gorin), Governor (Ranchod, Randolph), Secretary for Resources (Jahns) and Solano County (Spering)

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

(No public comment was made)

Chair Wasserman moved to Approval of the Minutes.

4. **Approval of Minutes of the April 19, 2018 Meeting.** Chair Wasserman asked for a motion and a second to adopt the minutes of April 19, 2018.

No public speakers addressed the Commission.

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

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VOTE: The motion carried by a vote of 16-0-1 with Commissioners Addiego, Ahn, Alvarado, Galacatos, Butt, Gilmore, Scharff, McElhinney, Pemberton, McGrath, Peskin, Sears, Wagenknecht, Brush, Vice Chair Chappell and Chair Wasserman voting, "YES", no "NO", votes and Commissioner Zwissler abstaining.

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

a. I would like to welcome Theresa Alvarado who has been appointed for a number of meetings. We welcome you and would you like to tell us anything?

Commissioner Alvarado replied: What would you like to hear? (Laughter) Thank you. I am Theresa Alvarado and I am the San Jose Director of SPUR. I was on the board of SPUR for several years while I was an executive with the Santa Clara Valley Water District. Following that, I became the San Jose Director.

My background is in environment and civil environmental engineering. I have a Masters in civil engineering and I have worked in infrastructure organizations which were PG&E and the Water District. I am very excited about the work that BCDC does and I look forward to meeting all of you.

b. I would like to welcome Eddie Ahn, who has been appointed to the Commission by the Speaker of the Assembly and I will let you introduce yourself and tell us anything you would like to tell us.

Commissioner Ahn addressed the Commission: I am Eddie Ahn a recent Speaker's Appointee to this Commission. I run a public policy, non-profit in San Francisco dedicated to environmental issues and workforce issues particularly with grass-roots communities like Bayview Hunter's Point and the Mission District et cetera. I am also currently serving on the San Francisco Commission on the Environment. We do a lot of policymaking on environmental issues affecting the City and County. I am happy to be here and I am looking forward to working with you all.

c. I would also like to thank Commissioner Geoff Gibbs for his many years of service on the Commission. He will be missed unless we can get him back as an alternate.

d. **Next BCDC Meeting.** Our next BCDC meeting may be on June 7th, if we do have one we will:

Hold a public hearing and vote on legislative matters.

Hear a staff briefing on our Workplan for our Strategic Plan.

Hear a briefing by the San Francisco Estuary Institute on their analysis of the Bay shoreline for adapting to rising sea level.

Hear a staff briefing on a new online rising sea level viewer. I think this is going to help our work a lot.

The presentation for Resiliency by Design is reaching its culmination today and tomorrow. You can watch it live streaming this morning. There will be a party tomorrow at the Alameda Naval Air Station talking about the winners in the future.

The relationship between BCDC and Resiliency by Design is close but informal. We will watch carefully over the next weeks and months to see how that develops because one of the challenges is that it is not clear after Friday who really owns or will be champion for the various projects. That topic is one that is very important to our efforts in addressing rising sea level in the Bay.

We know that one of the issues that you will be hearing about related to that from our Financing the Future Working Group is how some of those projects could be financed.

The news has been relatively quiet about rising sea level in the last four weeks or so. The sea is still rising and as you will hear from the Financing the Future Group that problems may occur if we don't figure out the solutions.

e. **Ex-Parte Communications.** If any of you have had ex-parte communications on adjudicatory matters like the enforcement matters on our agenda and have not put them in writing you should state them now. You do need to put them in writing. Is there anyone who would like to put an ex-parte communication on the record? (No comments were voiced)

6. Report of the Executive Director. Executive Director Goldzband reported:

It's good to be back with you. Spring is almost over. The hay fever season is upon us, students, like our son, are starting finals and summer is almost here. While you can the Executive Director out of San Diego, you cannot take the San Diegan out of the Executive Director. Even with the Padres in last place I am looking forward to going barefoot far more often.

a. **Budget and Staffing.** I am thrilled to let you know that Jessica Fain, of Brooklyn, New York, has accepted our offer to become BCDC's new Director of Policy and Planning. Jessica cut her coastal teeth as a Senior Planner of Waterfront and Open Space in New York City's Department of City Planning and successfully led the city's process to update its coastal zone management program. Currently, she is Program Director of the Science and Resilience Institute at Jamaica Bay and is a part-time faculty member at The New School. Jessica earned her undergraduate degree at the University of Pennsylvania, which makes her a Quaker, and her graduate degree in city planning at MIT, although she is not an Engineer. Her first day will be on October 1st; she delivered her second child two months after visiting us in San Francisco and she and her family will be moving out here in August or September. Her mother-in-law, who lives in the East Bay, is looking forward to seeing her grandchildren far more often.

We are very fortunate that Myles Saron, who has been an outstanding legal intern for us for several months, has accepted a six-month position as a staff attorney. Among other duties, Myles is working with Marc and John on enforcement matters and the case against the Army Corps of Engineers. He is responding to Public Records Act requests and preparing documentation that will be needed to support the rulemaking process to amend the permit application fees. In other words, he's doing all that scut work that new attorneys do and he hasn't complained yet.

I am also happy that Rebecca Coates-Maldoon of our staff has accepted our offer to fill the vacant Principal Regulatory and Permit Analyst position which you may remember was held by Jaime Michaels and Bob Batha before her. Rebecca will be replacing Ethan Lavine, who became Chief of Bay Resources and Permits. Rebecca has worked as a Permit Analyst since last year and previously she worked in our Planning Unit. She's a Banana Slug from UC Santa Cruz and a Golden Bear from Cal. You will see her next month when Caltrans presents its proposal to retain various piers of the old east span of the Bay Bridge.

We need backfill for Rebecca. We are going to hire Morgan Chow. Morgan earned her undergraduate degree from U.C. Davis and a Master's degree in Marine Resource Management from Oregon State University, so she is an Aggie Beaver. Morgan is finishing her two-year NOAA Digital Coast Fellowship with The Nature Conservancy and previously worked as a researcher for the Aquafish Innovation Lab at Oregon State University. Prior to that she was a Coastal Resource Management Extension Worker for the U.S. Peace Corps in the Philippines. We believe Morgan's background in coastal management will provide new insights and expertise for our program.

And, finally, replacing Elena Perez (now in the Galapagos as a Fulbright Fellow) will be Sam Stewart. Sam comes to us from the United Kingdom. Prior to relocating to the Bay Area, Sam worked for six years as a Marine Lead Advisor for Natural England, the British government's advisor in protecting nature and landscapes and also worked in a number of capacities as an ecologist and advisor on conservation to governmental agencies in the UK and Croatia. Sam holds a Master of Science in Conservation from University College in London. So he is an advocate for Phineas Maclino. He holds professional certifications as a Chartered Scientist from the UK Science Council and a Chartered Marine Scientist with the Institute of Marine Engineering, Science, and Technology. Please let me know if you have any questions or concerns about these appointments.

With regard to budget, we have finally been able to use our Greenhouse Gas Reduction Funding allocation and we're starting planning for next fiscal year and for our next round of requests from the Department of Finance. I'll update you on the budget after the beginning of the fiscal year.

In addition, we shall sign a small contract – under \$5,000 – with Jim Gladfelter, a well-recognized budget and accounting professional whose expertise is to create budgeting systems for nonprofit organizations. Within a couple of months we should have a re-created budget preparation, forecasting and tracking system that will help us manage our funding more accurately.

The final piece of information about our budget that you should know is that I testified before the Assembly Budget Subcommittee two weeks ago to defend our request for two new positions on the Enforcement team – an attorney and a manager-level supervisor – to be funded through the Bay Fill and Abatement Fund. Assembly Member Mullin of San Mateo County, a member of the Budget Committee, decided to hold our budget request in abeyance at that time and asked us to meet with him, Senator Jerry Hill, and various staff to discuss BCDC's new enforcement strategy. Last week, Steve Goldbeck, Brad McCrea, and I met with them for over an hour in San Mateo. They have received concerns about BCDC's newly active enforcement program and we discussed the need for our program to be consistent, visible, and ultimately, compliance-driven. We believe we have satisfied Mr. Mullin's and Mr. Hill's concerns and we expect that our two new positions will be funded during the upcoming fiscal year.

b. **Policy.** You have in your packet a letter from a former Caltrans employee who has written to BCDC about alleged issues regarding a public access path. Our Chief Counsel is evaluating the allegations in the letter and we'll keep you updated should events warrant it.

While we have a packed agenda today, I want to let you know that the Design Review Board has an even busier schedule. A slew of interesting projects is coming before your distinguished design review experts volunteer board before the end of the year, including the San Francisco firehouse on Pier 22.5; a hotel in Jack London Square; the Encinal Terminal in Alameda and Alameda Landing; a briefing on the Hunters Point Master Plan; a tech center in Brisbane, Monarch Bay in San Leandro; an expansion of Montezuma Wetlands; and, perhaps, a Lake Merritt bicycle and pedestrian bridge. Be on the lookout for these projects!

And, now, for something completely different that we think you will enjoy: I want two of our planning staff – Eliza Berry and Todd Hallenbeck – to spend ten minutes giving you a preview of something that Chair Wasserman said we might do next week but probably are not. And that is a new product that BCDC and the San Francisco Estuary Institute are creating. We hope that it will enable all local planners to use one set of data as we move forward with adaptation projects. – it's a Bay Area Rising Sea Level viewer that will enable all local planners to use one set of data as we move forward with adaptation projects.

Planner Eliza Berry addressed the Commission: Todd and I are excited to be here today to provide a briefing on the Bay Area Flood Explorer a website hosting the sea level rise and flood maps that were finalized by the ART team last year.

This is a website we are developing with our partners at the San Francisco Estuary Institute (SFEI) through the GIS and graphic contract that the Commission approved last year.

This is an opportunity to provide you an overview of the project and outline opportunities for you to review our draft or “beta” site in more depth in the coming weeks.

Before Todd provides us an overview of the website I would like to begin by answering the question; why create this flood explorer?

We are creating this to provide our partners and our broad-user group easy, convenient access to Bay-Area specific sea level rise and flood maps so they can zoom in and out, conduct their own investigation of the shoreline, move away from the cumbersome, stagnant pdf maps that we have been producing over the last few years and move to something modern with an interactive web.

We are especially excited that the site will feature our new ART sea level rise and flood maps because they are uniquely suited to support adaptation planning in the Bay Area specifically.

There are three primary reasons that these maps are so powerful to support planning in our region. First of all, they have been stakeholder reviewed right in our region. We were able to go out and talk to congestion-management agencies, flood managers, land trusts and other folks that are experts on our shoreline. They were able to help us identify details of the shoreline topography, flood-control structures; specific details that are really hard to identify but critical to understanding the movement of water. This was possible because of our focus on the Bay Area.

The next reason that the ART maps are so unique is because we follow our one-map, many-features approach that enables us to consider the impacts of temporary flooding from storm surges as well as permanent inundation from sea level rise at the same time.

This is really powerful for planning because it enables us to start thinking about some temporary fixes for temporary floods while we simultaneously begin planning for solutions to permanent inundation into the future.

Finally, the ART maps are unique because they include our shoreline overtopping assessment. This assessment tells us where water will overtop the shoreline, where are the low points that will allow water to flow inland and that enables us to figure out where we should be targeting solutions.

With getting this data online we have a broad and diverse set of audiences in mind. First of all, we want this to be available to our Commission, to our staff at BCDC, our planning partners, public agencies, elected officials and their staff and the general public; high school students, any community members that are interested in exploring sea level rise issues.

We want folks to be able to explore and interact with the maps but we also appreciate that some education is needed to support this. We need to help people understand some of the key concepts in sea level rise and storm surges.

We are going to be clear about the intended uses for the maps and what their limitations are. We are providing data download for technical users. We are connecting the public to existing adaptation efforts around the region because we appreciate the fact that some of the flooding shown on these maps is pretty intimidating and represents what could happen in the region without any action.

However, the reality of the situation is that there is a lot of action happening. There are a lot of exciting efforts going on to work towards a more resilient region and we want to connect folks to those efforts and motivate them to get involved.

With that I would like to hand it over to Todd to walk us through the website.

GIS Specialist Todd Hallenbeck addressed the Commission: Thanks Eliza. My name is Todd Hallenbeck and I am the GIS specialist at BCDC and I'm going to walk you through some of the major functions of the site.

This will not be a live demo but a teaser to hopefully entice you or your staff to help provide more in-depth review later this month.

One of the guiding principles for the site has been to put this technical information in a context that people can understand and relate to. That is why we are calling the site the Bay Area Flood Explorer, since people know what flooding is and they can relate to it.

This is the home page. It is really designed to get people to navigate to the area of the site that they are more interested in, whether it is a new user looking to learn about flooding concepts or explore the map or more technical users that need to download the GIS data.

When users go into the learning module they are going to see a rich, immersive media experience.

We are going to use graphics, photos, videos and simple concise text to help explain the terms and concepts they need to know to understand the maps.

From here they will probably jump into the maps, which is my favorite part.

But before they do they are going to see this disclaimer. We can thank the lawyers for this. But in all seriousness, it is really important for us to emphasize the intended uses for the maps and what the limitations of the data are and so this helps do that.

Once they click through there they can start interacting with the maps. This is the Explorer module where we are really encouraging interaction and exploration around the region to understand local flood risk without future planning.

So this is where users will start to control what they want to see on the map and that starts with the slider on the left.

This is an easy and intuitive way for users to select the amount of flooding they see on the map. You slide up and water goes up.

Because it is very easy it also allows for a very intuitive approach to identify where thresholds of flooding are for a particular part of the shoreline.

As the user is controlling the water level the flooding scenarios window in the top right hand side changes dynamically to reflect the different combinations of sea level rise and storm surge that can cause that total water level.

So again, reemphasizing the One Map, Many Futures approach and helping users understand both the temporary and permanent flooding impacts.

We want to make it very easy for users to control what they see on the map so they can customize it for their own needs.

In the Layer and Legend window they are able to turn on and off map layers as well as adjust things like transparency.

Here we are showing the depth and extent of inundation in blue and also the shoreline overtopping as these multicolored lines so they can identify low points in the shoreline.

The map also allows for a lot more interaction. You can click anywhere on the map to get more detailed information or also be connected to additional resources.

One of the other really cool features of this map is that the user can add their own data to it so that they can explore flood risk for assets they might manage or create a map to share with some of their partners. Here we have added the BART alignment in pink.

This is a sneak peak of some of the cool features of the Explorer. There is a lot more to share later this month.

I want to spend a quick minute to talk about the timeline and rollout.

First it is important to recognize that we spent a good deal of time earlier this year when we got started with this project to work with some of our state, local, county and regional partners to understand what their needs were for this type of site as well as the best way to communicate the information inside of it.

So SFEI since January has been really wonderfully incorporating that feedback into this beta version of the site. This is a live website but not available to the public.

The beta site allows for interaction with it, playing with the site, so that we can really do a thorough testing to improve the look, feel and function of how it can support our needs.

This is a really important time right now for us to circle back with our partners as well as invite other colleagues to review the site for this purpose so that we can make it the best possible tool.

If all goes well we are hoping that this is something that we can launch to the public in July.

We really want your help to make this tool better and more useful to yourself and people that you work with.

Whether it is planning staff or directors we are hoping you can let us know who you think we should reach out in order to provide a more in-depth demonstration, a live demonstration and give them access to the tool so that they can provide feedback to us.

If you have the opportunity to provide some of those contacts on the cards in your packet we will collect them from you after the meeting and reach out to those folks.

Thank you very much for your time.

Executive Director Goldzband added: In your packets in front of you there is both a two-page and attached to that is this card. If you look on the back of this card it says, adapting to rising tides, Bay Area Flood Explorer, beta site reviewer feedback. We would like you to take a couple of minutes to put your name there and if you have colleagues or staff you want us to contact please write down their names.

Whoever you think should see this who you work with please write down their names and their contact information. If you don't have their contact information Todd and Eliza will get back to you to request it.

This is a real-time way for us for you to get to us the names of people you would like to actually see this.

Chair Wasserman commented: This is a very important tool for us to understand what is going on and for our technical and elected partners. From my perspective, one of the most important pieces of it is that it is going to make it easy for the general public, for high schoolers and for middle schoolers to get in and play and get a much better understanding of what we are all facing.

Commissioner Zwissler asked: Are there resources to keep this website updated? There is. Okay, great.

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Commissioner McGrath commented: I have been asked these questions before and the two sources that I gave people which are available now online are NOAA has a visualization tool that is live. It allows you to toggle six feet of sea level rise. And the other source I have given them is the FEMA flood maps.

They both have limitations in terms of wave run up and things like that. I assume that you have been working with NOAA as one of the stakeholders. What are the advantages that this offers or what are the differences between this and the existing NOAA tool?

Ms. Berry replied: In terms of the methodology for producing the maps displayed on the tool, there are a lot of similarities to NOAA. However, the NOAA maps did not go through the stakeholder review process that we did to produce these maps. We have been talking to NOAA about how they can incorporate some of the corrections we have made into their maps.

Commissioner McGrath interjected: So let me stop you there. So, for example, you have been talking to flood control and county public works to see what the actual drainage facilities there that might actually determine what the relevant water levels are.

Ms. Berry explained: We have been able to capture some levees and flood-control structures that aren't captured in the NOAA data.

There is something very unique about the fact that this is Bay-Area specific; that we were able to get all those details into the maps produced here. Another unique feature of the Explorer that we are producing is the fact that the shoreline overtopping data that helps you identify those low points on the shoreline to begin targeting your adaptation actions will be included in our Flood Explorer and that is not available in the NOAA data.

Commissioner Alvarado had a question: How do you convey current flood risks from high tides or things like that versus future impacts and expectations around sea level rise?

Ms. Berry asked: Are you asking visually how do we show that or in terms of talking to the public about it?

Commissioner Alvarado replied: Both.

Ms. Berry continued: It is probably a little hard to see here but what we are showing on this flood map that we are using an example here is that if we experience 24 inches of water above today's high tide line that would be the same as a five-year storm today or it could be 24 inches of sea level rise. We are trying to make the connection between showing that this amount of flooding could be experienced either today through a storm or in the future due to sea level rise.

Executive Director Goldzband commented: We have two new Commissioners here who have not experienced the lectures that you all have experienced about One Map, Many Futures. The way BCDC tries to explain this is that it is like a layer cake. Certain things happen which cause water to flood, which causes things to flood. One can be rising sea level. Another one could be storm surge. One could be a very high tide like a king tide.

What we do is we say, you need to be able to distinguish between what can cause those things and they are also additive.

As you work through this you will see that flooding scenarios legend on the top right be able to reflect that kind of information.

Commissioner Alvarado continued: And that is exactly why I asked the question because I am familiar with all the criteria. However, the public will not have you to be able to explain it which is why I am curious to know how it is conveyed to a lay person.

Mr. Hallenbeck added: That is part of the way or why we have focused also on including this sort of educational component to the overall site. The learning module walks through each of those sources of flooding and provides more detail about what those causes are, what the impacts might be and starts to build the story about what you see in that map.

As opposed to switching to total water level you can also control the different combinations that you see.

Executive Director Goldzband continued his report: So, three more pieces of good news. First, I believe we may be seeing a light at the end of the tunnel regarding BCDC's proposed move to this building. Steve Goldbeck and I spent yesterday in Sacramento and I testified before the Assembly Budget Subcommittee and Steve testified before the Senate Budget Subcommittees in favor of the Governor's May Revise which includes half the cost of the tenant improvements that are now in place on the 5th floor totaling about 2.64 million dollars plus dollars for BCDC to actually get up and move. The Senate Budget Subcommittee, this afternoon, is scheduled to vote on that proposal and we expect it to pass. At this point we don't know when the Assembly will do so. We shall await the outcome but assuming that an augmentation of some amount is approved the Bay Area Headquarters Authority Board will then decide whether to approve that this summer and then allow us to move into the building. If approved, BCDC and the state can sign a 10-year lease for the space. We hope to have good news for you next month.

The other half of these funds are not in anybody's disposal with regard to the state. The state has said, we will pay you for half of the tenant improvements.

It is essentially a take-it-or-leave-it budget augmentation from the state. And if the Bay Area Headquarters Authority says, no; the 2.64 million dollars goes back to the General Fund.

Chair Wasserman added: They are exploring their options but it may be appropriate to call your BAHA and MTC representative.

Executive Director Goldzband continued: Second, just about all of BCDC staff will be in the Suisun Marsh tomorrow for a staff retreat hosted by the Suisun Resource Conservation District and other stakeholders. We are pleased that Supervisor Vasquez will be joining us for part of the morning.

And, finally, I am very pleased to let you know that BCDC's crack bocce team – whose name is "The Mean High Tides" – had both the best record in its regular season division and won the division title at the playoffs this past week. Tomorrow is the Tournament of Champions and many of our staff will be there – likely in shorts and boots and muddy from the Suisun Marsh and looking very threatening!

That concludes my report, Chair Wasserman and I'm happy to answer any questions you may have.

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

Executive Director Goldzband gave further instructions: When you have completed the card please pass it to the left so we can pick them up.

7. Consideration of Administrative Matters. Chair Wasserman stated: That brings us to Consideration of Administrative Matters. Shannon Fiala is here if anyone has any questions. (No questions were voiced)

8. Public Hearing and Possible Vote on the Enforcement Committee's Recommendation to Grant Scott's Jack London Seafood, Inc.'s Appeal of the Executive Director's Determination Regarding Scott's Failure to Comply with Cease and Desist and Civil Penalty Order No. CDO 2017.01 ("Order"). Chair Wasserman announced: Item 8 is consideration of the Enforcement Committee's recommendation that the Commission grant Scott's Jack London Seafood's appeal of the Executive Director's determination regarding compliance with Cease and Desist and Civil Penalty Order No. CDO 2017.01. This is a public hearing and possible vote on this matter to determine whether Scott's had substantially complied with requirements of the Order in order to receive a waiver of 15 percent of the total penalty amount under the Order.

Enforcement Chair Gregg Scharff will introduce the matter and provide the Enforcement Committee's recommendation.

Commissioner Scharff addressed the Commission: As you may recall we imposed on Scott's Seafood a penalty of \$395,360.00 of which they could get a 15 percent waiver at the Executive Director's discretion if he determined that they had complied with the Order and the permit.

The Executive Director correctly decided that they had not complied. The monthly event reporting requirement was established by the Order. However, by failing to submit that information it was done inadvertently and it was not really material that they had not done it.

It was an internal mistake that they sent it to the property management company who did not forward the reports on. There was no adverse effect and it was really a technical violation.

What we found is that the Executive Director was correct in his decision but that we would use our discretion to say that this was really a very technical violation and they had substantially complied with the Order and they had substantially complied in good faith.

And given the good faith and the substantial compliance we felt that they should get the 15 percent reduction.

Commissioner McGrath had a question: It didn't mean that there were any unapproved events outside of the time and you believe that the process for notifying BCDC properly has been rectified?

Commissioner Scharff answered: That is correct.

Chair Wasserman announced: We will now have a presentation by Marc Zeppetello regarding staff's position and then Scott's representative to present the appellant's position.

Chief Counsel Zeppetello addressed the Commission: As Commissioner Scharff noted the Enforcement Committee found that the Executive Director did a reasonable job and an appropriate job in interpreting the requirements of the Order.

The Committee found some subjectivity was required in interpreting the Order and came to a different conclusion. The staff does not oppose the Enforcement Committee's recommendation.

Scott's counsel Lawrence Goldberg addressed the Commission: I am one of the attorneys for Scott's and I have appeared before you previously. I have nothing to say unless you have questions. I would be happy to respond to anything that goes against the recommendation of the Enforcement Committee but Scott's wholeheartedly supports it.

Those are words that a year ago would have been foreign to my list. But right now we support this recommendation. Thank you so much.

Chair Wasserman announced: We will now open the public hearing. We have three cards from public speakers not including Mr. Goldberg.

Mr. Sandré Swanson spoke: Thank you, Chairman Wasserman. I support the recommendation. My name is Sandre Swanson and I am a former member of the State Assembly. I want to remind the Board that this provision was motivated by the Board itself to show some consideration and mediation in this process because this is real money and Scott's is running a business and is providing access to the waterfront by way of these decisions. We support the recommendation and encourage your favorable approval. Thank you.

Mr. Ignacio De La Fuente addressed the Commission: We are here in support of the recommendation of the Enforcement Committee and hopefully we can put this thing to rest for now. I believe that the Commission and the staff has spent a lot of time for the last several years working with us and trying to do the right thing and letting this business continue. Thank you very much.

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

MOTION: Commissioner McGrath moved to close the public hearing, seconded by Commissioner Peskin. The motion carried by a voice vote with no abstentions or objections.

Commissioner Butt spoke: If I remember correctly one of the issues that came up was that a lot of the unauthorized improvements were done under permits from the city of Oakland. I believe we asked staff to come up with some way of communicating with cities and counties to make sure they understood that they should not be issuing permits for items under BCDC jurisdiction without BCDC's approval.

I don't want that to get lost. I am still interested in it.

Executive Director Goldzband responded: It won't get lost. One of the things that you will hear when we show you the work plan under the Strategic Plan is that the enforcement strategy is a priority A item and that will certainly include outreach and compliance and the like.

Commissioner McGrath commented: As one of the people that was concerned about this; I am quite happy to see the resolution. I have been to Jack London Square and have seen the improvements. I am glad to see this resolved.

Chair Wasserman announced: I would now entertain a motion on the recommendation of the Enforcement Committee.

MOTION: Commissioner Zwissler moved approval of the Enforcement Committee's recommendation, seconded by Vice Chair Chappell.

VOTE: The motion carried with a vote of 16-0-2 with Commissioners Addiego, Ahn, Alvarado, Butt, Scharff, McElhinney, Pemberton, McGrath, Peskin, Pine, Sears, Showalter, Wagenknecht, Zwissler, Vice Chair Chappell and Chair Wasserman voting, "YES", no "NO", votes and Commissioners Galacatos and Brush abstaining. Commissioner Gilmore recused herself from the item.

9. Closed Session on Pending Litigation: San Francisco Bay Conservation and Development Commission v. United States Army Corps of Engineers, United States District Court for the Northern District of California, Case No. C 3:16-CV 05420-RS. Chair Wasserman announced: Item 9 is a closed session on pending litigation with the U.S. Army Corps of Engineers. I have to ask everybody to clear the room other than Commissioners and staff. (Unauthorized attendees vacated the room)

The Commission went into closed session.

Upon conclusion of the closed session Chair Wasserman announced: We are back in open session. No reportable action was taken in closed session.

10. Public Hearing and Possible Vote on the U.S. Army Corps of Engineers, San Francisco District's Operations and Maintenance Dredging Program for 2018 and 2019; BCDC Consistency Determination No. C2018.003.00. Chair Wasserman announced: Item 10 is a public hearing and possible vote on the U.S. Army Corps of Engineers' consistency determination for their maintenance dredging of San Francisco Bay channels. Brenda Goeden will introduce the project.

Sediment Program Manager Brenda Goeden addressed the Commission: Today we will present to you the U.S. Army Corps of Engineers proposed Operations and Maintenance dredging Program for San Francisco Bay for calendar years 2018 and 2019. The program consists of maintenance dredging of eight federal navigation channels both deep and shallow draft and its associated disposal and beneficiaries for the sediment.

The federal channels proposed for dredging include: Oakland Harbor Inner, Outer and Entrance Channels, Richmond Inner and Richmond Outer Harbor Channels, Pinole Shoal Channel, Suisun Bay Channel, Redwood City Harbor Channel, the Petaluma River Channel and Petaluma River across the Flats Channel.

Most of these channels are annually dredged deep-water channels. However, the Petaluma River Channel and the Petaluma River across the Flats are shallow-draft channels and they are dredged less frequently. The last time the Petaluma Channel was dredged was 2003.

In this two-year period the U.S. Army Corps of Engineers proposed to dredge 5.3 million cubic yards of sediment, a maximum of 2.375 million cubic yards in 2018 and a maximum of 2.975 million cubic yards in 2019. In 2018 the Army Corps of Engineers proposes to dispose of 1.075 million cubic yards of sediment in Bay which is approximately 45 percent of the total proposed dredging, 30 percent at the deep ocean disposal site, and beneficially reuse 25 percent of the dredged sediment. In 2019 the U.S. Army Corps of Engineers proposed to dispose of approximately 1.325 million cubic yards, 45 percent of their dredged sediment in San Francisco Bay disposal sites, and 55 percent at the deep-ocean disposal site with no beneficial reuse. In addition, during this time it is possible that the Army Corps of Engineers may need to do advanced maintenance dredging at Bulls Head Reach in Suisun Channel to prevent a navigation hazard.

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It is important to note that in 2018 dredging of Pinole Shoal Channel will be deferred rather than being dredged with a mechanical dredge. Similarly in 2019 dredging of the Richmond Outer Harbor will also be deferred as it was in 2017. Due to the deferral of dredging in 2017 Richmond Outer Harbor is currently experiencing navigation issues including the light loading of ships going into the Chevron Terminal.

In your packet I included an errata sheet noting some of the items in the summary that were corrected in the staff recommendation; primarily small errors in spellings and a correction to a channel reference. Also in the errata sheet there is clarification of the language immediately prior to the Special Conditions section of the recommendation and inclusion of two new definitions. We would also like to correct a typo on page 2 of the staff recommendation that was not included in the errata sheet where I misrepresented the total volume dredged in 2019 as 2.375 rather 2.975 million cubic yards of material. That is my introduction to the project and I'd like to welcome Lieutenant Colonel Travis Rayfield and Mr. Jay Kinberger from the Army Corps of Engineers who are here to present the program to you today.

Lieutenant Colonel Rayfield presented the following: I am the Commander for the San Francisco District and I appreciate the time to talk about our 2018/2019 Operations and Maintenance Dredging Program for the San Francisco Bay Area. We recommend the Commission approve the staff recommendation with the understanding that we are currently in litigation with the Commission on a few specific conditions. That litigation may affect how we respond to some of your questions here today in terms of how we give an entirety of our response.

The maintenance of a reliable federal navigation system is essential to our economic well-being and other areas such as the national defense of our country. To that purpose our primary mission is to maintain safe navigation channels which are critical to ensuring efficient, maritime commerce, military navigation, recreation and other public purposes in the San Francisco Bay.

I brought several members of my staff who represent over 50 years of experience. Jay Kinberger is our Navigation Program Manager and he will go through the majority of the brief. Tessa Beach is our Chief of Environmental Planning. Chris Eng is our Environmental Lead, and Jessie Anderson is from our District Counsel. Jay is going to go through four points and then we will open it up for questions.

Mr. Jay Kinberger addressed the Commission: I want to walk through our agenda. We are going to talk about our navigation mission and the Maritime Highway; our authorities in the federal budget cycle; we are going to talk about our maintenance dredging program for 2018 through 2019; and then the overall USACE recommendation.

The USACE's navigation mission is to maintain safe, efficient and effective navigation transportation systems.

The channels shown here are the deep-draft channels in San Francisco Bay five of which are maintained annually and included in our consistency determination for maintenance dredging for 2018/2019. The USACE's navigation mission in San Francisco Bay is to maintain a safe, efficient, effective transportation system through dredging the 11 federally-authorized projects. These navigation projects were individually authorized by Congress to serve federal navigation interests. The San Francisco District has been maintaining navigation channels in San Francisco Bay for over 100 years and it is a mission that we will continue to perform subject to Congress de-authorizing the project. This slide depicts the Maritime Highway and the major ports and channels that we maintain and creates the connection for the Maritime Highway in the Bay. These projects form the backbone of the deep-draft, maritime, transportation network in San Francisco Bay and are budgeted for annual maintenance. These federal channels join all of the deep-draft ports in San Francisco Bay and into the Delta.

There are 4,000 to 5,000 deep-draft ships that arrive in the Bay each year. Our channels are critical for the overall economy. San Francisco Bay is a dynamic system and maintaining safe navigation is critical to the economic and environmental health of the region. To keep navigation safe and reliable we must remove the shoals that impede or obstruct safe navigation. Without that annual maintenance the shoals in the channel present a risk to shipping in the form of collisions or groundings that could result in an environmentally damaging accident. Ensuring economic efficiency and preventing potential accidents are a crucial outcome of the Channel Maintenance Program.

I would like to speak to you about the provision of how it is that we are providing for that dredging. This has to do with the idea of authority and appropriation. The Corps needs two things in order to proceed with work. The first thing is the idea of the authority, and that is Congress telling us to go ahead and do a job. All of our projects initially started with a project authority, they then received appropriation to construct it and then they have moved into the annual maintenance cycle.

In order to execute that annual maintenance cycle we need an appropriation to do that work. The key here is that when we start to maintain those channels, we have to conduct that maintenance complying with all federal laws. We look to complying with environmental laws and regulations, federal fiscal laws and regulations and procurement laws and regulations. The lens through which we look at our budget cycle in trying to procure or represent appropriations for the series of projects is that in any given year we are doing three things at the same time. We are executing our current program, we are defending the subsequent year's program and we are building the program two years out. Right now we have essentially a passed-2018 budget and we are executing that budget and getting ready to do that work.

For 2019, we have the President's Budget that was released in February. That President's Budget was for 2019 and was released in February lays out a kind of administration blueprint for the work that we intend to conduct in FY19. And lastly, when we look at building our 2020 budget, we are also doing that this year. What we do is look out into the future and try to assess our needs and how it is that we are portraying the work that we are going to do and then we are proposing for the 2020 budget. And that 2020 budget would end up being released in February of 2019. The thing to keep in mind here is that in any given year we are doing these three activities at the same time.

This is a very busy slide and it represents the complexity of how we view our federal budgeting process. The easiest way to convey the major intent here is to assume we are in 2018 and we are building the 2020 budget. This slide talks about building the 2020 budget. In the upper left-hand corner you see that there is guidance that is being provided. That means that the Headquarters and OMB [the office of Operations Management and Budget] are laying out the parameters and constraints of what we are going to propose in our budget. They give us that document with the framework that use to assess our needs, and deliver our needs.

We look at all the jobs in our area and what we think it takes to complete that job and reconcile it with the budget guidance that we have been given. Through that process we are creating this budget at the field level and then delivering our new budget based on all of these constraints and requirements. The whole Corps is doing that and they are rolling those up. Then the next phase is that you start to walk through this review process.

In that review process you are having an entire Corps budget from all the field offices rolled up, and essentially then Headquarters goes back and looks at the original guidance that was proposed, reconcile it against how the field is interpreting it, and then you have a review process to say, yes, these projects are consistent with the guidelines. That review process continues through Headquarters, then moves to the Assistant Secretary of the Army. At each point people are looking at it and making sure it representative of the guidance that we were originally given. Then lastly, it goes to OMB. This is the place where the rubber hits the road. OMB is the Administration creating and delivering its priorities. It gets the entire budget from these different entities, and this is the point where the Administration can really focus in on their priorities, reconcile against the guidance, and then forward what they believe are the most important items that represent their budget priorities. That budget then goes to Congress.

As it winds its way through this clock and pops out at the bottom with the President's proposed budget that goes to Congress, and ideally is released in February of FY 19. What that does, is allows the public and Congress to be able to look at the Administration's priorities for the 2020 year.

The most important thing to remember is that Congress now has a template and a blueprint, but Congress is ultimately the authority that would add or subtract to that budget, and then forwards that for a vote and the President's signature.

In light the budget process our 2018 through 2019 Maintenance Dredging Program is informed by that process. What we have is our 2018 budget with the projects proposed that are actually in the 2018 Budget, and we have the 2019 budget, which was released in February, giving an initial look at the Administration's priorities for dredging in 2019. Those two things form the basis of what we believe our program is, what we are proposing here, and is how we are interpreting the budgets. These are the projects that are on our plate. These dredged volumes are really an estimate of the high-end the work that we would do. At this point, some of the key elements to remember are that the projects included in our consistency determination for 2018/2019 are those that we reasonably expect to dredge over the next two years. The project described in the consistency determination represents a maximum.

In other words, it is a conservative estimate of what the maintenance dredging need will be through 2019. Ultimately, the volume of material that would be removed from each channel will be determined by two major things. One is the amount of material that shows up through shoaling and, two, is the amount of funding that we have been given. Those two things combined informs the ultimate outcome of the dredging program.

Fiscal law does prohibit us from spending more money to dredge that we have received which is also an important item to understand. With that, this concludes the overall presentation. I would like to thank the staff for the time and effort that they put into working with us to develop the staff recommendation. At this point we are recommending a vote for the staff recommendation with the understanding that we are currently in litigation on a few specific conditions. I would be happy to take any questions you might have.

Commissioner Zwissler had a question: How do you come up the formula for your allocations of beneficial reuse? Mr. Kinberger replied: Our initial push for developing our dredge disposal plan is using the federal standard. The federal standard is linked to our project authorizations. We are looking to be consistent with the federal standard and then we are trying to reconcile that with the LTMS step down goals.

Commissioner Pine inquired: With respect to Richmond Outer Harbor and the Pinole Shoal Channel since you propose to do it every other year in 2018/19; are you doing twice the amount in a single year since there is a deferred year? Mr. Kinberger explained: The volumes have gone up. In general you could logically conclude that, but we don't necessarily know what the overall shoaling rates are. It is two years of accumulation that we would be dredging.

Commissioner McElhinney asked: When we are talking about a history of more than 100 years dredging and certainly over the last 20 years with shipping size changing and goods moving now in one our best economies in a long time and you know the dredging needs; a couple of questions. Because of the change in not doing these main channels each year; has the Corps reduced the dredging impacting the goods movement? We hear about requirements for lighter shipping loads by some of the companies. And if so, when at some point will the Corps resolve that backlog of dredging on these channels to meet the goods' movement needs? Mr. Kinberger responded: The fact that we are dredging in alternating years does have an impact on commerce. There will be some level of light loading and a constraint in the amount of material and goods that are transited. Right now we intend to continue alternating dredging Richmond Outer and Pinole Shoals with the hopper dredge. Lieutenant Colonel Rayfield added: To your question with timing that relates to some other things so I won't address the timing question because that is outside of the USACE's control.

Commissioner McElhinney asked about the budgeting process: Is there a backlog of dredging that needs to be dealt with in the budget process? Mr. Kinberger replied: We do propose our capability for what we think is necessary to be done. And then that is consistent with the budget process that I proposed. As we look into the future, we do understand that there is an increased level of quantities for when we dredge and so we try to state the capability that is necessary to do the job. Commissioner McElhinney clarified his concern: But lightening shipping means we are not keeping up with the dredging to some level. That is the concern. That is an economic impact. Mr. Kinberger answered: I understand.

Commissioner Butt had questions: Can you be more specific about what the impact will be on the Richmond Channels? Is it going to be petroleum products from Chevron? Is it going to be car imports? Those are the two main products coming in and out of Richmond. Mr. Kinberger responded: I don't have exact data on that but I think the answer is that as you limit the draft, you do have to take corrective actions; either light loading or riding the tides. So you do have an effect on commerce. Ms. Goeden commented: I would just add to that. One of the differences at the Richmond Outer Channel has a navigation depth of 45 feet and Richmond Inner Channel has a navigation depth of 38 feet. So the Inner Channel potentially would have less impact associated with not dredging the Outer Channel but eventually it would get to that.

Commissioner McGrath listed a number of concerns: I think my comment is probably appropriate before the staff recommendation is presented to us because there are some concerns that should be alleviated. To the Lieutenant Colonel and the Corps staff; none of this is personal. I hope you understand.

I have chosen to be the bad cop today. I am particularly qualified for that. I spent 16 years running the environmental department of the Port of Oakland. At that time I did Sonoma Baylands which was a struggle against the Division. Sonoma Baylands is now completed. I did Middle Harbor, Hamilton and Montezuma. I clearly have an interest in maintaining channels and in finding ways to make beneficial reuse of dredged material feasible. I have fundamental problems with this approach. First, the end-users, the shippers pay into the Harbor Maintenance Tax Fund. There is a large surplus in that fund. Only about 50 percent of it is appropriated each year. Those users have a credible claim that the money that they pay to maintain the federal channels should be used for that purpose and not for somehow – maybe, next year. That is one of the factors that this Commission is entitled to weigh in our consideration of the term, “feasibility” which is the term of art under the CZMA.

Second, the federal standard was a regulation that the Corps adopted prior to the enactment of the Coastal Zone Management Act. The Corps has not re-adopted the regulation in a manner that tries to incorporate the Coastal Zone Management direction. In arguing, as you’ve done here, that the federal responsibility is only to comply with federal laws; you are essentially arguing federal pre-emption. That argument may have been tenable prior to the passage of the CZMA but that act without a doubt made states with Coastal Programs that had been certified players in the federal process. It was without a doubt, a partial waiver of federal supremacy and importantly, it involved the establishment of process by which that set of negotiations would play out.

Thirdly, in the substantive issue behind this; I cannot accept for one minute that the Corps can conclude that ignoring state endangered species can be justified under the Corps’ own regulatory standard of environmentally acceptable methods. I am not at all comfortable with 500,000 cubic yards of hopper dredging. The evidence that we have seen before us, and it is in the record, is that every single hydraulic dredge kills smelt whether they are federally-endangered or state-endangered. I don’t believe that is environmentally acceptable.

Fourth, and this goes to the procedural question in to what I want to see in the staff recommendation; there is no record before us to conclude that reuse of dredged material, at least to some degree, is neither consistent to the maximum extent practical (and that is the Coastal Zone Management Act standard) or infeasible (and that is the standard under the LTMS policies that we all work cooperatively under). And this is incorporated into the Bay Plan. It may well be that the Corps could have asked for money and Congress could have turned it down. It may well have been that the Harbor Maintenance Tax Fund could have no money left in it or only enough money for a small amount of beneficial reuse. With a record like that this Commission would have to weigh that record of feasibility and practicability in making a decision. But with no record before us there is no way to conclude that it is not either practicable or feasible.

So with that background I want to make sure that the recommendation includes some manner of ensuring that a process occurs to determine whether or not there is sufficient funding. We did have a condition before. I would ask the staff to look at re-inserting that condition. That is not to say that I would automatically agree with the staff.

There is a substantive and a procedural question here as to whether or not it is feasible. But you have provided no information. So we conclude that it is not. With that I am going to try to encourage that the staff recommendation include such a provision and make clear for the record because I know this is likely to end up in court; my own view with some expertise – is the fact that the federal standard certainly does not extend as far as you think it does. Thank you.

Chair Wasserman asked: Any others before we open the public hearing? (No other Commissioners commented) The public hearing is opened. We have one public speaker. Nicole Sasaki of San Francisco Baykeeper commented: My name is Nicole Sasaki and I am here on behalf of San Francisco Baykeeper. Baykeeper supports the staff recommendation that the Commission conditionally concur with the consistency determination for the Corps' proposed maintenance dredging in San Francisco Bay for the years 2018 and 2019. The special conditions in Section II of the staff recommendation were properly identified by staff and are critical to ensuring that the Corps' dredging is consistent to the maximum extent practicable with the enforceable policies of the Commission's Bay Plan in accordance with the Commission's authority under the Federal Coastal Zone Management Act. Specifically, Special Condition 2B requires the Corps to decrease in-Bay disposal and increase beneficial reuse of dredged materials. As the largest dredger in San Francisco Bay the success of the LTMS and local efforts to adapt to sea level rise in the Bay Area depend on the Corps' commitment to beneficial reuse.

Special Conditions 2I, 2A and 2B require the Corps to reduce the use of hydraulic dredges and narrow the work windows for hydraulic dredging in order to protect fish species on the brink of extinction. The Corps' own entrainment surveys indicate that these conditions are necessary. Three times more of longfin smelt were entrained during the dredging operations in 2017 than in the previous year. The Corps' pushback against these same conditions, the conditions the Commission imposed on the Corps' last round of maintenance dredging operations from 2015 to 2017, despite the Corps' protestations; the conditions identified in the staff recommendation are feasible for the Corps to implement.

Baykeeper encourages the Commission to use its authority to ensure compliance with the Bay Plan even in the face of the Corps' resistance. In closing, Baykeeper agrees with the staff recommendation that the consistency determination for the Corps' maintenance dredging operations in 2018 and 2019 must be conditioned by the Commission in order to comply with the enforceable policies of the Bay Plan and thus the Federal Coastal Zone Management Act. We ask the Commissioners to vote in support of conditionally concurring

with the consistency determination and applying all of the conditions identified in the staff recommendation. Thank you.

Chair Wasserman continued: There are no other public speakers. I would entertain a motion to close the public hearing.

MOTION: Commissioner Pine moved to close the public hearing, seconded by Commissioner Showalter. The motion carried by a voice vote with no abstentions or objections.

Chair Wasserman stated: We have had a round of questions. Shall we have the staff report?

Ms. Goeden presented the staff recommendation: In response to Commissioner McGrath's request we have drafted a potential condition which we would call; "Condition J" and it would be proposed right before the current Condition J, which is management and monitoring of in-Bay disposal and dredged material. The title of it would be, "Funding Requests" and it would say something along the lines of: The U.S. Army Corps of Engineers shall request funding in 2018 and 2019 to, (1) use a mechanical dredge in the deferred channels to maintain safe navigation and to protect listed species as described in Special Condition 2-I.2B and, (2) to beneficially reuse a minimum of 40 percent of the dredged material each year or over the two-year period as required in Special Condition 2D, and (3) to report back to the Commission regarding the outcome of that request at the appropriate time in the budget cycle. What do you think?

Commissioner McGrath responded: I certainly think it does the trick. It distinguishes between the protection of the endangered species and beneficial reuse because they are two separate policy questions. The remaining question would be procedural. I would certainly make that as a motion and defer to the staff if they are willing to include it in their recommendation and in the Executive Director's determination of which is the more appropriate way to proceed.

Chair Wasserman added: Staff is willing.

Ms. Goeden echoed his comment: Staff is willing.

Commissioner McGrath continued: Then it is appropriate to have the Corps address the question.

Ms. Goeden continued: So with that additional condition the staff recommends that you concur, as conditioned, to the U.S. Army Corps of Engineers' 2018 and 2019 Operations and Maintenance Dredging Program is consistent to the maximum extent practical.

Chair Wasserman asked: Any questions on the staff recommendation? (No Commissioners voiced additional questions) Does the applicant's representative wish to comment?

Lieutenant Colonel Rayfield commented: Based on that we would need time to process what that means for us. We initially came in with a recommendation to approve but that is a change so it will take maybe 20 minutes to look at that.

Chair Wasserman continued: So I can go so far as to put words in your mouth. You have previously indicated that you agreed with the staff report. That stands. You are not prepared to take a position at the moment because it would have to have review on this amendment. Is that a fair statement?

Lieutenant Colonel Rayfield replied: My initial statement was, is that we approve the staff recommendation with the understanding that we are currently in litigation on a few specific conditions. The conditions have changed, so I would ask for a few minutes to collaborate with my team.

Chair Wasserman was amenable to this request: Certainly.

Commissioner McGrath chimed in: May I offer a comment? To the Colonel, I think the thrust of this is to make sure that there is a consistent posture in potential litigation for both the previous action and this action. It does revolve around the question of, what is the responsibility to the Corps to meet the standard of the maximum extent practicable. It is very similar to a condition that was in the last one which is, of course, under litigation and we do have different views on.

(A 10-minute off-the-record recess was taken for Corps representatives to confer)

Chair Wasserman announced: We are back in session. The Army Corps has the floor. I want to be clear that your correction of my comment was absolutely right. You made very clear and aptly and appropriately that we are in litigation and so whatever you accept or don't is subject to that and may be modified because of that.

Lieutenant Colonel Rayfield addressed the Commission: And so that is exactly why I came back up to the microphone, because in that measure there are a couple of elements that will be subject to the current litigation, and as such I don't think in a public forum I can agree to implement all of them while that litigation is pending. As such we would sign the letter of agreement and note those elements in writing. That is what I can say in a public forum at this time. Thank you for allowing us to come back up and clarify that.

Chair Wasserman added: Well stated, thank you. I now need a motion and a second for the staff recommendation as modified by Commissioner McGrath. And federal representatives cannot vote on this.

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

VOTE: The motion carried with a vote of 17-0-0 with Commissioners Addiego, Ahn, Alvarado, Butt, Gilmore, Scharff, McElhinney, Pemberton, McGrath, Peskin, Pine, Sears, Showalter, Wagenknecht, Zwissler, Vice Chair Chappell and Chair Wasserman voting, "YES", no "NO", votes and no abstentions.

11. Public Hearing and Possible Vote on the Enforcement Committee's Recommended Enforcement Decision Involving Proposed Cease and Desist Civil Penalty Order CDO No. 2018.02. Chair Wasserman moved to Item 11: Item 11 is a public hearing and possible vote on the Enforcement Committee's recommended decision regarding Proposed Cease and Desist civil Penalty Order CDO No. 2018.02 to the North Coast Rail Authority.

This matter concerns the alleged violation by the North Coast Rail Authority and the Enforcement Committee chair Gregg Scharff will introduce the matter and present the Committee's recommendation.

Matthew Trujillo and Marc Zeppetello will provide staff's recommendation on the recommended enforcement decision.

Representatives of the North Coast Rail Authority will then have the opportunity to comment on the recommended decision.

Executive Committee Chair Scharff addressed the Commission: The North Coast Rail Authority representative came before us and said that they agree with all of the conditions except for the issue of the fine.

They said they had no money and they went through a lengthy recitation of why they had no money and all of that.

What we said is that if they provide that information to the Executive Director, the Executive Director may waive the penalty, because that is one of the criteria we use is the ability to pay.

My understanding is that they sent the information in and that the Executive Director did waive the penalty. So we would ask that you go ahead and accept the recommendation that we made and move forward.

Chief Counsel Marc Zeppetello added: I would clarify Commissioner Scharff that they did provide the information. It was that they would have an opportunity to waive the penalty provided they comply with the conditions.

Commissioner Scharff agreed: That is correct, I misspoke. They need to clean up the fill and do all of that.

Enforcement Analyst Matthew Trujillo addressed the Commission: Thank you, Commissioner Scharff. Good afternoon, Commissioners. Today you are being asked to adopt proposed Cease and Desist and Civil Penalty Order No. CDO 2018.02 issued to the North Coast Railroad Authority, as recommended by the Enforcement Committee.

To aid you in your decision I will present a summary of the facts of this case and a summary of the recommended enforcement actions 1 through 8.

The North Coast Railroad Authority (NCRA) conducted unauthorized work in the Commission's Bay jurisdiction in or around March 2016, resulting in approximately 4 cubic yards of dirt and gravel and two large timbers weighing approximately 444 pounds each.

Staff was unable to resolve the alleged violation with NCRA using the standardized administrative fines process from May 2016 until September 2017, at which time the Executive Director issued a Violation Report/Complaint for the Imposition of Administrative Civil Penalties.

If adopted, the Order would require NCRA to:

Cease and desist from all activity in violation of the McAteer-Petris Act.

Submit a comprehensive site remediation plan to the Executive Director for review and approval within 60 days of the adoption of the Order by the Commission.

Implement the approved remediation plan.

Pay a civil penalty of \$30,000, 100% of which may be waived upon determination by the Executive Director that NCRA has substantially complied with the terms of the Order.

Pursuant to BCDC Regulation Section 10121, the Commission's San Francisco Bay jurisdiction in the vicinity of the alleged violation includes sloughs and tidal marshland up to five feet above mean sea level along the portion of the Petaluma River located bayward of the Highway 37 bridge. As depicted in this image, the Bay jurisdiction extends beyond the banks of the Petaluma River.

The next image zooms into the site of the alleged violation depicted by the red dot.

This case centers around a private residential road located in the City of Novato, in the County Marin, known as Hunters Club Road. The road crosses through Beattie Marsh over an unnamed slough that provides a tidal connection to the Petaluma River. Staff believes Hunters Club Road predates the enactment of the Commission's jurisdiction over this site.

Presumably, at the time of the road's construction a culvert was placed under the road to enable the natural tidal flows to continue despite the presence of the road.

Thus, the road and culvert do not require a BCDC permit to be located in the marsh; however, any maintenance to the road or the culvert would require a BCDC permit.

As seen in this image, Beattie Marsh and its unnamed slough are adjacent to the Lombard Segment of the Northwestern Pacific Railroad line. For many years Hunters Club Road was used to access the Black Point Swing Bridge operator's house which is located across the railroad tracks from the marsh. However, the Black Point Swing Bridge was automated a few years ago making it unnecessary to house an operator on-site. As of the initiation of this case in 2016, the house was unoccupied, and there are no plans to continue to use or maintain the road.

The site of the violation is owned by the Sonoma-Marine Area Rail Transit Authority (a.k.a, SMART), but NCRA holds a freight operating and maintenance easement over the Lombard Segment which includes, by contract, maintenance of the tracks, the access road, and the culvert.

It is important to note that SMART was initially a co-respondent to this case from May 2016 until October 2017. However, SMART was dismissed in 2017 based on the presentation of the operating and maintenance agreement it holds with NCRA, which demonstrated that NCRA is solely responsible for the violation.

In the winter of 2015/2016 or the spring of 2016, Hunters Club Road was flooded. Road-top materials and retaining wall timbers washed out into the marsh and the slough. This is an image of the flooding which was taken by a local resident. You can see how the waters have inundated the road.

Subsequently, in or around March 2016, the damage to the road and retaining wall was repaired by NCRA's contractor, the Northwestern Pacific Railroad Company. As shown in this photograph taken and annotated by the contractor, there are approximately four cubic yards of new dirt, and gravel fill was placed on the top of the road, and two timbers were replaced on the northeastern retaining wall.

This work was done without a permit in violation of Section 66632 of the McAteer-Petris Act.

On March 29, 2016, BCDC enforcement staff received a report from a member of the public that fill had been placed in the slough and it was blocking the flow of tidal water through the marsh, creating a risk of flooding in the area.

Enforcement staff sent a letter notifying NCRA of the alleged violation on May 23, 2016. Standardized administrative fines began to accrue on June 27, 2016, thirty-five days after the date of the notification letter.

This photo shows the repaired access road and retaining wall. Also visible is road debris from prior wash-outs, and that road debris was not corrected or remediated when this work was done.

In the winter of 2016/2017 a mixture of storms and king tides caused flooding of creeks and sloughs in Novato, which included the site of the violation.

During this flooding event the retaining wall timbers were carried into the western extent of the marsh. As the floodwaters receded, the road washed out again and redistributed a lot of that unauthorized fill into the slough.

All of a sudden, what began as a relatively benign matter of unauthorized road work had become a more serious situation requiring marsh restoration and mitigation to fully correct.

In the photograph on the left, staff found evidence of debris extending at least 100-foot bayward from the access road. In the middle photo, staff observed scouring of along the banks of the slough that may have been caused or exacerbated by gravel from the road-top which can be seen in the lower left corner of the photograph.

Between May 2016 and September 2017, staff engaged with NCRA via numerous letters, e-mails, and phone calls repeatedly asking NCRA to submit an application for an administrative permit to approve the unauthorized work and remediate the damage to the marsh. However, NCRA failed to submit a permit application to authorize the work after-the-fact, and failed to work with staff to sufficiently remediate the site.

In October 2017, staff met with NCRA to discuss the Violation Report/Complaint for Administrative Penalties and the steps that needed to be taken to resolve the violation, wherein NCRA agreed to develop a remediation plan for the site. Then, in November 2017, NCRA submitted a one-page remediation plan in which it proposed to excavate ten-to-fifteen cubic yards of material from the slough in the immediate vicinity of the culvert.

Upon review of this plan, staff concluded that it was insufficient in scope and detail. It did not indicate who prepared the plan. It did not provide a description of the methodology of the site assessment. There was no description of the data used to prepare the plan; no analysis of why the proposed work plan was the most effective means of remediating the site; and there was no consideration given to securing the road against future wash-outs.

On January 10, 2018, staff informed NCRA that it would not accept its proposed remediation plan, and asked NCRA to commit to work with staff to prepare a stipulated order to present to the Enforcement Committee. NCRA responded to staff on January 22, 2018, stating that it welcomed the opportunity to work together on a stipulated order.

Between March 13, 2018 and April 2, 2018, staff attempted to negotiate a stipulated order with NCRA, but no agreement could be reached on the terms of the Order or the penalty amount. At that time staff chose to move forward with the proposed Order.

BCDC MINUTES
May 17, 2018

On April 19, 2018, the Enforcement Committee held a publicly noticed hearing on this matter. Based on the information presented by staff and NCRA, the Committee voted to adopt the Executive Director's Recommended Enforcement Decision and proposed Order with one change to the penalty portion of the Order.

Instead of adopting the recommended waiver of 50% of the total \$30,000 penalty, the Committee agreed to waive 100% of the penalty if NCRA substantially complies with the terms of the Order, and presented documentation of evidence of its inability to pay the penalty by April 30, 2018.

NCRA presented its financial documentation for staff's review on April 23rd, which was subsequently determined by the Executive Director to be sufficient to demonstrate NCRA's inability to pay on April 25th.

In the next two slides, I will summarize the terms of the proposed Order.

If the proposed Order is adopted, then, in lieu of a Commission permit, NCRA will be required to present a comprehensive site assessment and remediation plan within 60 days for review and approval by the Executive Director, and implement the remediation plan promptly after approval.

The plan will have to be prepared by a qualified professional or professionals who is/are able to conduct and/or lead the assessment and identify the most effective activities needed to remediate and secure the site. The site assessment must take into account, at minimum:

The tidal cycle and storm effects in the area, and the continued risk of road flooding and culvert congestion from these influences.

The full extent, volume, and nature of the debris originating from the road and deposited in the culvert, slough, and marsh.

All impacts that the debris has had on the habitat.

The remediation component of the plan must include the following provisions based on the results of the site assessment:

The removal of all road debris from the slough, culvert, and marsh that occurred since the winter of 2016/2017, as well as any road debris that has been deposited in these areas during subsequent flooding events, if applicable.

A plan to secure the road against future wash-outs.

Mitigation of the assessed damage to the slough and marsh.

Monitoring of the site for two years after the completion of the remediation work.

If the proposed Order is adopted NCRA shall be liable for a penalty totaling \$30,000. The amount of the penalty is reasonable and appropriate given the nature, extent, and gravity of the violation, and the cost to the state to pursue the enforcement action from May 23, 2016 to date.

In light of NCRA's demonstrated inability to pay an administrative civil penalty, 100% of the penalty will be waived if the Executive Director determines that NCRA has substantially complied with the terms of the Order. To secure the penalty waiver NCRA will have to demonstrate that it has complied with Conditions III.A through III.E of the Order. That is to say, all conditions up to and including the submission of a written statement declaring that the remediation work has been completed in accordance with the approved plan, as required by Condition III.E.

At this time NCRA would like to make a statement before any questions. Thank you.

Dave Anderson, NCRA Engineer, addressed the Commission: I am Dave Anderson and I serve as NCRA's engineer. I am pleased to hear that the Commission is waiving the \$30,000 penalty. I am here also to state that we are in complete agreement with the Order.

These photos show what we have started to do already, even though we haven't had an official plan approved. One element that we agreed to was to do an aerial survey.

The stakeholders involved here include SMART, who is the fee owner of the property, NCRA, which is a public agency and holder of the perpetual lease for freight operations, NW Pico Company is the private operator that did the repair, and I am a consultant from ARE and serve as their engineer.

All of this property is owned by SMART. SB 1029 is likely to pass. If it does NCRA will be dissolved and SMART will be the owner. And, as the owner, SMART will be responsible for this property.

In talking to SMART and to staff it is agreed that the real solution here is to remove this driveway to the operator house, which is abandoned.

The problem that we had is we put too much material in this area shown on the slide; so when the high tide would come around it would not go through the same path, and we diverted around the slough crossing.

We found with some of our aerial photography that some of the waters and erosion came through this area seen on the slide. This photo is after the spring of 2017 when it washed out again.

This fence seen in the slide is a recent addition. We are finding that the fence posts are causing some erosion of this bank.

We have all the detail we need to start assessing. Thank you and I can answer any questions you might have.

Commissioner McElhinney had a question for staff: I was a little concerned with the licensed contractor and the licensed engineer not understanding that we always have to get our permits and a quality design.

Wasn't there a previous culvert there Mr. Trujillo?

Mr. Anderson answered: That roadway was placed about 100 years ago and, yes, there is a culvert there. Over the 100 years this event has been happening. That is part of the issue of us trying to determine the extent of the material to remove.

It was also determined immediately upon the complaint that there was no blockage of the culvert. Hydraulically there were no impacts at that point.

Commissioner McElhinney asked: So when we saw the earlier repair of the roadway, were you the engineer at that time, or did you come in after the fact?

Mr. Anderson replied: It was after the fact. I did not know that it was happening. I was notified after the fact. I tried to figure out exactly what did happen. I was able to get the photograph of the fill being placed.

Over the last couple of years we have completed a survey of this area so we could determine if they put too much material there, so we were about to get approval to remove and get our permit to go back and repair this area.

Commissioner McElhinney replied: I am glad to hear we are planning to remove it. That is a great solution.

Mr. Anderson stated: We were planning to remove the excess that they placed.

Commissioner McElhinney added: You are also going to remove the roadway at some point.

Mr. Anderson explained: That is not our roadway to remove. That belongs to SMART.

Chair Wasserman had a question for staff: Given the information provided that this entity has a significant chance of being dissolved in the near future, is the documentation such that SMART is clearly responsible for caring out the repairs? Because certainly a two-year monitoring plan will be likely beyond the length of the authority if the measure passes.

Mr. Anderson replied: That is correct.

Mr. Zeppetello commented: I had reviewed the legislation, the Senate bill that Dave referred to, and as I read it the obligation to comply with this order may devolve upon SMART if they end up taking over the assets of NCRA at this particular segment of track.

Chair Wasserman commented: You got two qualifiers in there. I understand the, "if it passes". I don't understand if it passes it, "may" transfer to SMART.

Mr. Zeppetello explained: As I read the bill in its form a few weeks ago that was how I read it.

Chair Wasserman pressed for clarification: That it, "will" transfer to SMART or that it "may"? For the record, "may" does not work.

I think I can make this simpler. Whoever makes the motion: I would like to include a provision that it apply to the successor in interest to the Authority.

Commissioner Peskin had a question: Can someone explain to this non-lawyer what the import of the Neary and O'Brien letter of May 14, 2018, is wherein they advise us that on behalf of their client NCRA that none of this is acceptable which is entirely contrary to what the representative from NCRA just said.

Chair Wasserman replied: I have an answer, but I will let the engineer answer.

Mr. Anderson stated: Mr. Neary got very confused with some of the announcements. Even though I had reported back after it went to the Enforcement Committee that if, in fact, we could demonstrate that we could not pay the fine; as you go through the documentation it is clearly stated. But he did not see that. He was quite upset over that and thinking that the Commission was going to reverse what I had told him was going to happen.

Through the correspondence with him over the last couple of days he now understands. I don't think there is a problem there. The letter is there and I am not sure what to do with it.

Mr. Mitch Stogner, Executive Director of NCRA addressed the Commission: My name is Mitch Stogner I am the Executive Director of the North Coast Railroad Authority. I want to confirm that NCRA and on behalf of NCRA that we want to work with the staff. We want to resolve this and we very much appreciate the accommodation that has been made.

We believe that Mr. Neary is not correct in his assumptions here. We will so notify him based on what the Commission decides.

Chair Wasserman continued: Thank you. And my comment is, that is a good question. The actions of the client prevail over the statements of the lawyer every day of the week. (Laughter) I still need a motion and a second.

Mr. Zeppetello stated: We have just been discussing that given the regulations that we are operating under, the Commission is not allowed to change the Enforcement Committee's recommendation; so adding that provision would be a change. On the other hand, we think it may not be necessary, because it was made clear to SMART that, as the land owner, if this issue was not resolved we reserve our rights to require SMART to address the issue.

Chair Wasserman stated: I will accept that, absolutely. What I would request is that if there is any question about SMART's liability that staff take the appropriate actions, which might be bringing it back to the Enforcement Committee.

We will vote for this today. I do not want to hear that there was a loophole and that this slipped.

As the maker and the seconder of the amendment I will withdraw my inappropriate suggestion for this motion. So we will be voting on the staff recommendation as it stands.

MOTION: Commissioner Pemberton moved approval of the Enforcement Committee recommendation, seconded by Commissioner Scharff.

VOTE: The motion carried with a vote of 15-0-2, with Commissioners Addiego, Ahn, Alvarado, Butt, Gilmore, Scharff, McElhinney, Pemberton, McGrath, Peskin, Pine, Sears, Showalter, Wagenknecht, Zwissler, Vice Chair Chappell and Chair Wasserman voting "YES", no "NO" votes, and Commissioners Galacatos and Brush abstaining.

12. **Adjournment.** Upon motion by Commissioner Showalter, seconded by Commissioner Gilmore, the Commission meeting was adjourned at 4:02 p.m.

Respectfully submitted,

LAWRENCE J. GOLDZBAND
Executive Director

Approved, with no corrections, at the
San Francisco Bay Conservation and
Development Commission Meeting
of June 21, 2018

R. ZACHARY WASSERMAN, Chair