

# San Francisco Bay Conservation and Development Commission

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**TO:** Commissioners and Alternates

**FROM:** Larry Goldzband, Executive Director, (415/352-3653; larry.goldzband@bcdc.ca.gov)  
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**SUBJECT: Enforcement Committee’s Recommendation to Grant Scott’s Jack London Seafood, Inc.’s Appeal of the Executive Director’s Determination that Scott’s Is Not Entitled to a Waiver of 15% of the Total Penalty Amount under Cease and Desist and Civil Penalty Order No. CDO 2017.01**  
(For Commission consideration on May 17, 2018)

## Staff Report

This memorandum summarizes the substantive and procedural background of the Enforcement Committee’s recommendation to grant the appeal of Scott’s Jack London Seafood, Inc. (“Scott’s”) of the Executive Director’s determination that Scott’s is not entitled to a waiver of 15% of the total penalty amount under Cease and Desist and Civil Penalty Order No. CDO 2017.01 (“Order”). In summary, following a public hearing on January 18, 2018, the Enforcement Committee adopted a motion to recommend that the Commission grant Scott’s appeal and grant Scott’s a waiver of 15% of the total penalty amount under the Order.

The Commission issued the Order to Scott’s on April 7, 2017. The Order requires Scott’s to cease and desist from all activity in violation of BCDC Permit No. 1985.019.09B (“Permit”), which regulates its use of the public pavilion in a portion of the Franklin Street plaza at Jack London Square. Among other provisions, the Order requires Scott’s to: (1) submit an application to amend the Permit to (a) request after-the-fact authorization for certain structural components of the pavilion that Scott’s had constructed without authorization, and (b) request authorization for a new entrance door to the pavilion; (2) provide public access improvements required by the Permit; (3) record a legal instrument (public access guarantee); and (4) submit monthly statements of events held at the pavilion.

The Order imposes an administrative civil penalty in the amount of \$395,360 and requires Scott’s to pay the penalty in three equal installments of \$131,786.67 each, over a three-year period, but provides that Scott’s shall be entitled to a waiver of 15% of the total penalty amount if the Executive Director determines, in accordance with Paragraph IV.L, that Scott’s has complied with the Order and the Permit.



Paragraph IV.L of the Order states as follows:

Scott's shall be entitled to a waiver of 15% of the total penalty amount if the Executive Director determines that Scott's has complied fully and in a timely manner with each and every requirement of Paragraphs III.A, III.B, III.C, III.D, III.E, III.F, III.G, and III.I of this Order and has maintained full compliance with this Order and the Permit through September 1, 2017. By no later than September 15, 2017, the Executive Director shall notify Scott's in writing of his determination as to whether or not Scott's has complied with the referenced requirements of this Order and has maintained compliance with this Order and the Permit through September 1, 2017, and, therefore, whether or not Scott's shall be entitled to a waiver of 15% of the total penalty amount.

By letter dated September 15, 2017, the Executive Director determined that Scott's: (1) had not fully complied in a timely manner with all applicable requirements of the Order and had not maintained full compliance with the Order and the Permit through September 1, 2017, and, therefore, (2) is not entitled to receive the 15% waiver of the total penalty amount.

By letter dated September 27, 2017, Scott's, through its counsel, objected to the Executive Director's determination, sought to appeal it, and, absence reversal of the determination, requested a hearing before the Commission to determine Scott's compliance with the Order.

By letter dated October 16, 2017, Scott's, through its counsel, objected to certain conditions in the staff's recommendation on the Commission's consideration of the application to amend the Permit that Scott's had submitted pursuant to the Order. In that letter, among other issues, Scott's noted that it had previously objected to and sought to appeal the Executive Director's determination that it is not entitled to a waiver of 15% of the total penalty under the Order, and Scott's attached a copy of its counsel's September 27th letter.

By letter dated October 18, 2017, the Executive Director reaffirmed his determination that Scott's had not complied fully and in a timely manner with all requirements of the Order, and, therefore, is not entitled to a waiver of 15% of the total penalty amount. On reconsideration, the Executive Director determined that Scott's repeated failures to comply with the monthly event reporting requirement established by Paragraph III.I of the Order — which provides that "Scott's shall submit to BCDC by no later than the 15th of each month a statement for the prior month listing all events held at the pavilion" — are material violations of the Order.

At the Commission meeting on October 19, 2017, representatives of Scott's requested during the public comment period that the Commission review the Executive Director's determination that Scott's had not complied fully and in a timely manner with each and every requirement of the Order, and, therefore, is not entitled to a waiver of 15% of the total penalty amount. In response, Chair Wasserman asked that the matter be scheduled for discussion at a later date. Chair Wasserman subsequently directed that the matter be referred to the Enforcement Committee for consideration and a recommendation to the full Commission.

By letter dated November 7, 2017, Scott's counsel re-argued Scott's position on this matter and once again requested that the Executive Director reverse his decision.

On January 18, 2018, the Enforcement Committee held a public hearing on Scott's appeal. After considering the evidence and the arguments of counsel for BCDC and Scott's, the Committee found that there was no dispute that Scott had in fact violated the monthly event reporting requirement established by Paragraph III.I of the Order by failing to submit a number of the required reports for the months from April to August 2017. The Committee further found that the Executive Director did a reasonable and appropriate job in interpreting the requirements of the Order and in finding that Scott's was not entitled to a waiver of 15% of the total penalty amount. However, the Committee also determined that there is some subjectivity involved in determining what constitutes "full compliance" with the terms of the Order and further determined, in considering the full context, that Scott's violations of Paragraph III.I of the Order were not material violations, there had been overall good faith intent by Scott's to comply, and Scott's had substantially complied, or fully complied, to meet the requirement of the Order.

Based on the foregoing considerations, the Enforcement Committee unanimously adopted a motion (by a vote of 4 in favor and none opposed) to recommend that the Commission grant Scott's appeal and grant Scott's a waiver of 15% of the total penalty amount under the Order as authorized by Paragraph IV.L of the Order.