

# 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 21, 2016

**TO:** BCDC Enforcement Committee

**FROM:** Larry Goldzband, Executive Director (415/352-3653 [larry.goldzband@bcdc.ca.gov](mailto:larry.goldzband@bcdc.ca.gov))  
Maggie Weber, Enforcement Analyst (415/352-3668 [maggie.weber@bcdc.ca.gov](mailto:maggie.weber@bcdc.ca.gov))  
Marc Zeppetello, Chief Counsel (415/352-3655 [marc.zeppetello@bcdc.ca.gov](mailto:marc.zeppetello@bcdc.ca.gov))

**SUBJECT: Staff Recommended Enforcement Decision Regarding Proposed Commission Cease and Desist and Civil Penalty Order No. CCD 2016.01; Trux Airline Cargo Services and City of South San Francisco**  
(For BCDC Enforcement Committee consideration on July 1, 2016)

## Summary and Recommendation

This matter arises out of an enforcement action commenced by BCDC staff on November 16, 2001, which was never resolved, and recommenced on July 30, 2015, against Trux and the City concerning compliance issues with BCDC Permit No. 1998.011.02 (“Permit”) authorizing a long term parking structure in the shoreline band in the City of South San Francisco.

The Order requires Trux and the City to: (i) comply with the Permit; (ii) resolve all outstanding Permit violations within 60 days of issuance; and (iii) and pay a \$255,000 civil penalty into the Bay Fill Cleanup and Abatement Fund within 31 days of issuance, with a \$30,000 suspension for timely compliance with the terms of the Order. The BCDC staff has determined that the proposed Order is a fair resolution of the alleged violations.

Attached to this memorandum are the following documents: (1) a Recommended Enforcement Decision by the Enforcement Committee (Attachment One); (2) a proposed Order (Attachment Two); (3) a Violation Report (Attachment Three); (4) BCDC Permit No. 1998.011.04, issued on May 10, 2016 (Attachment Four); and (5) Trux Legal Argument in Support of Defense (Attachment 5.1), Trux Statement of Defense (Attachment 5.2), and City Statement of Defense (Attachment 5.3).

# 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

## (Attachment One)

June 21, 2016

**TO:** BCDC Enforcement Committee

**FROM:** Larry Goldzband, Executive Director (415/352-3653 [larry.goldzband@bcdc.ca.gov](mailto:larry.goldzband@bcdc.ca.gov))  
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**SUBJECT: Staff Recommended Enforcement Decision Regarding Proposed Commission Cease and Desist and Civil Penalty Order No. CCD 2016.01; Trux Airline Cargo Services and City of South San Francisco**  
(For BCDC Enforcement Committee consideration on July 1, 2016)

### Summary and Recommendation

The BCDC staff recommends that the Enforcement Committee adopt the Recommended Enforcement Decision on the proposed Commission Cease and Desist and Civil Penalty Order No. CCD 2016.01 (“Order”) to Trux Airline Cargo Services (“Trux”) and the City of South San Francisco (“City”), for the reasons stated below.

This matter arises out of an enforcement action commenced by BCDC staff on November 16, 2001, which was never resolved, and recommenced on July 30, 2015, against Trux and the City concerning compliance issues with BCDC Permit No. 1998.011.02 (“Permit”) authorizing a long term parking structure in the shoreline band in the City of South San Francisco.

The Executive Director has not issued a Cease and Desist Order; the proposed Order will be the first Cease and Desist Order issued pertaining to this Enforcement Investigation.

The Order requires Trux and the City to: (i) comply with the Permit; (ii) resolve all outstanding Permit violations within 60 days of issuance; and (iii) and pay a \$255,000 civil penalty into the Bay Fill Cleanup and Abatement Fund within 31 days of issuance, with a \$30,000 suspension for timely compliance with the terms of the Order. The BCDC staff has determined that the proposed Order is a fair resolution of the alleged violations.

## Staff Report

### I. Permit History

On September 23, 1998, the Commission issued BCDC Permit No. 1998.011.00 to Trux Airline Cargo Services and the City to construct, use, maintain a six-story airport parking structure known as Park SFO along with paved surface parking on three “fingers” of land, and provide public access amenities as follows:

- A. A 67,350-square-foot public access “finger” park that includes landscaping, pathways, access sidewalks and bike lanes leading from North Access Road and an overlook area (Special Condition II.B.4.a);
- B. A minimum of eight signed, public parking spaces (Special Condition II.B.4.b);
- C. Sidewalks and Class II bike lanes along North Access Road from its intersection with South Airport Boulevard, east to the southern end of the North Access Road Bridge over San Bruno Channel (Special Condition II.B.4.c). Exhibit C of the Permit requires 4’6” wide sidewalks and 8’ wide bike paths on both sides of North Access Road, and 4’ wide sidewalks and 4’ wide bike paths on both sides of North Access Road Bridge<sup>1</sup> over San Bruno Channel;
- D. A sidewalk and Class II bike lanes along the north side of North Access Road, from the southern end of the North Access Road Bridge over San Bruno Channel to the existing tidegate bridge over San Bruno Channel, and a new sidewalk and Class II bike lane from North Access Road at the existing tidegate bridge<sup>2</sup> to the new “finger” park, including crosswalks where necessary (Special Condition II.B.4.d). Exhibit C of the Permit requires 4’ wide sidewalks and 4’ bike paths on both sides of North Access Road South of San Bruno Channel;
- E. New road and trail signs that promote pedestrian use of North Access Road sidewalk and the “finger” park (Special Condition II.B.4.e);
- F. Site furnishings, including a minimum of four benches and two garbage containers, and appropriate lighting (Special Condition II.B.4.f); and
- G. Landscaping of the south and east side of the parking structure, including tall trees, designed to screen the parking structure and reduce its visual impacts (Special Condition II.B.4.g).

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<sup>1</sup> North Access Road Bridge is referred to “San Bruno Channel Bridge East” in Permit Exhibit C, however this the violation report refers to this roadway, which crosses over San Bruno Channel just west of the parking structure, exclusively as North Access Road Bridge (See Exhibit #2).

<sup>2</sup> The tide gate bridge is located on the east side of the parking structure, crossing over San Bruno Channel (See Exhibit #2).

Trux and the City failed to comply with several special conditions required by the Permit and made little effort to bring the Permit into compliance until January 12, 2016 when BCDC staff notified the permittees that resolution of the Permit violations would be pursued through a formal enforcement proceeding. For more details please refer to Findings provided in the Order.

**II. Allegations for Consideration under Commission Cease and Desist Order** (Defenses raised by Respondents; Staff Rebuttal; Unresolved Issues)<sup>3</sup>

**A. Failure to permanently guarantee all public access areas, in violation of Special Condition II.B.2 (Public Access Guarantee) of the Permit**

**1. Trux's Defense**

- a. Admit not all public access areas were guaranteed as required by the permit, but deny that this constitutes a violation

(1) **Staff Rebuttal:** *There is no legal or factual basis to support this denial. Special Condition II.B.2 of the Permit requires all public access areas to be permanently dedicated and Trux admits this has not occurred; therefore this is a violation of the Permit.*

- b. Trux does not own the roadway for the bike lanes nor the sidewalks, and the engineering matters were handled by the City. Trux lacked the authority to complete the Public Access Guarantee because it included property that Trux does not own.

(1) **Staff Rebuttal:** *This defense is irrelevant because staff has informed Trux that Trux is only responsible for dedicating the public access areas located on Trux's property. In the September 29, 2015 letter from staff to Trux and the City, staff informed you "that although the Permit requires one distinct public access area to be recorded and guaranteed to the public, because both [Trux] and the City are co-permittees with separate and distinct property ownership interests, two separate legal instruments and exhibits must be recorded to satisfy this requirement." Additionally, the September 29<sup>th</sup> letter directed Trux that the public access area owned by Trux was not affected by the forthcoming amendment and once staff counsel approved a document it could be recorded prior to issuance of the amendment (See Violation Report Exhibit #35).*

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<sup>3</sup> The letters for each alleged violation correspond with the letters assigned to each alleged violation in Section II of the Violation Report.

- c. Trux has been providing the documents for the Public Access guarantee since 2002

(1) **Staff Rebuttal:** *On November 19, 2001, Trux first submitted a draft public access permanent guarantee to staff; on November 29, 2001, staff provided comments for necessary revisions. On July 31, 2002, Trux submitted a revised draft public access guarantee to staff; on August 29, 2002, staff provided comments for further necessary revisions. On March 3, 2003, Trux provided staff with a third revised draft of the public access permanent guarantee and requested staff not review the submittal until staff received the City's public access guarantee; staff received the City's draft public access guarantee on December 17, 2015. In the September 29, 2015 letter cited above in Section II.A.1.b.1 of this staff report, staff agreed that the co-permittees may submit two separate permanent guarantees for the public access areas based on their distinct and separate property interests. On November 10, 2015, staff responded to the permanent guarantee submitted by Trux in 2003 and informed Trux that the document required revisions; staff requested electronic copies of the documents so staff could electronically make the necessary revisions, which would be easier for Trux to accept and resubmit. On December 21, 2015, staff attempted to reach Mr. Simms of Trux by telephone to discuss the permanent guarantee and ultimately sent an email requesting he revise the submittals and set up a time to talk with staff. On January 22, 2016, staff emailed Mr. Simms of Trux to provide detailed instructions for preparing an updated version of the draft permanent guarantee in electronic format (See Violation Report and Exhibits). Ultimately, staff has provided comments and instructions for how Trux can comply with this condition of the Permit, however Trux took no further action prior to issuance of either the Violation Report but took some actions after the violation report was issued, discussed below in summary of unresolved issues.*

*Although Trux has provided staff with three drafts of the public access permanent guarantee, none of them meet the standard for recordation and this violation will not be cured until all public access areas permanent guarantees are recorded with San Mateo County. Therefore, this defense has no factual or legal basis.*

- d. The fact that legal descriptions provided by Simms' surveyors may not have been accurate was beyond the control of Simms

(1) **Staff Rebuttal:** *As the permittee, Trux is responsible for the activities of all of its agents including surveyors and this defense has no legal basis.*

- e. Simms lacked the authority to make a guarantee that covered property owned by the City of South San Francisco

(1) **Staff Rebuttal:** *This defense is irrelevant for the same reasons identified in Section II.A.1.b.1 of this report. Staff is requesting permanent guarantees from both Trux and the City, and neither of these requests has been satisfied.*

## 2. City's Defense

- a. The alleged violation is not the failure to construct the public access area, but the failure to first amend the Permit to reflect the "as-built public access area" before the City could permanently guarantee it.

(1) **Staff Rebuttal:** *Permittees have an obligation to comply with their permit. When the City determined that it could not build the required public access area consistent with what is required by Special Condition II.B.4 of the Permit, the City should have requested to amend the Permit to authorize modifications to how the public access area could be built. Instead, the City knew there was an issue and chose not to amend the Permit making it impossible to resolve this Permit violation.*

## 3. Summary and Analysis of Unresolved Issues

- a. *Following issuance of the violation report on March 23, 2016, on March 29, 2016, Trux resubmitted an identical, unmodified copy of a prior submission of the public access guarantee to which staff responded to on April 4, 2016. On April 6, 2016, staff advised Trux that it should "retain a surveyor to review the legal descriptions and associated plats, make necessary revisions, and confirm that all exhibits are correct and comply with the instructions on our website." On April 15, 2016, the City submitted to staff a draft public access permanent guarantee; staff provided comments for revision on May 4, 2016. On April 21, 2016, staff exchanged correspondence and had a telephone conversation with Trux's surveyor, Gary Posekian, to explain the necessary revisions for staff to approve the exhibits. On April 25, 2016, staff followed up with Trux's surveyor regarding the comments provided on April 4<sup>th</sup>. On May 10, 2016, staff issued Amendment 4 to the Permit, which includes a description of the City's public access areas consistent with the as built conditions. On May 18, 2016, the City submitted a revised legal description and survey to staff; staff responded on June 8, 2016,*

*informing the City that the legal description is not consistent with the recently issued Amendment 4, and thus, must be revised to be consistent with the Permit. As of the date of this staff report, neither Trux nor the City has submitted revised public access permanent guarantees consistent with the most recent comments provided by staff, respectively. This violation will remain unresolved until two permanent guarantees are recorded with San Mateo County for all public access areas required to be dedicated.*

**B. Failure to permanently guarantee the open space area for wildlife habitat, in violation of Special Condition II.J.1 (Wildlife Refuge Area) of the Permit**

**1. Trux's Defense**

- a. Admit that the open space area for wildlife habitat was not guaranteed as required by the permit, but deny that this constitutes a violation

(1) **Staff Rebuttal:** *There is no legal or factual basis to support this denial. Special Condition II.H.1<sup>4</sup> of the Permit requires that at least 180 days prior to the use of any parking facilities, the permittees shall submit a draft instrument that creates an open space restriction adjacent to the "finger parking" for the life of parking on the "fingers" and Trux admits this has not occurred; therefore, this is a violation of the Permit.*

- b. Trux lacks the authority or ability to submit a guarantee for the wildlife habitat that covers property that it does not own

(1) **Staff Rebuttal:** *This defense is not based in fact; Trux holds a grant deed to all of the property subject to the required open space instrument (See Violation Report Exhibit #3<sup>5</sup>).*

- c. Trux has, to the best of its knowledge, provided all information in its possession or control so that the exhibits to the guarantees properly designate ownership of the respective properties; open space documents and exhibits were presented to Ellen Sampson, former staff counsel, in August 2002.

(1) **Staff Rebuttal:** *On November 19, 2001, Trux submitted a draft open space permanent guarantee to staff; staff provided comments for necessary revisions on November 29, 2001. On July 21, 2002, Trux submitted a revised draft of the open space permanent guarantee to staff; staff provided additional comments for necessary revisions on August 29, 2002. On March 3, 2003 Trux provided staff with a third revised draft of the open space*

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<sup>4</sup> Prior to the issuance of Amendment 4 to the Permit, this Special Condition was II.J.1.

<sup>5</sup> The Open Space area is entirely located in the green-shaded parcel owned by Trux.

*permanent guarantee. On March 29, 2016, Trux resubmitted a revised draft of the open space permanent guarantee in electronic form. Neither Trux nor its agents have communicated with staff since April 21, 2016.*

*Ultimately, staff has provided comments and instructions for how Trux can comply with this condition of the Permit, however Trux has taken no further action to finalize its draft submittal pursuant to staff's instructions.*

*Although Trux has provided staff with three drafts of the open space permanent guarantee, none of the submittals meet the standard for recordation and this violation is not cured until the open space instrument is recorded with San Mateo County. Therefore, this defense has no factual or legal basis.*

- d. The fact that legal descriptions provided by Simms' surveyors may not have been accurate was beyond the control of Simms
    - (1) **Staff Rebuttal:** *As the permittee, Trux is responsible for the activities of all of its agents including surveyors and this defense has no legal basis.*
- 2. City's Defense**
- a. Co-permittees have demonstrated a good faith effort to comply with this special condition; Trux has received BCDC's comments to the draft recording documents and is in the process of finalizing the documents for approval
    - (1) **Staff Rebuttal:** *Although the open space area to be guaranteed is located entirely on Trux's property, as a co-permittee, the City is jointly and severally liable to comply with all Permit conditions. This violation will not be resolved until the instrument is recorded with San Mateo County.*
- 3. Summary and Analysis of Unresolved Issues**
- a. *Since the Violation Report was issued on March 23, 2016, staff has provided comments for revision on April 6, 2016, and recommended retaining a surveyor to resolve the issues with the legal description and exhibits. As of the date of this staff report, Trux has not submitted a revised open space permanent guarantee consistent with staff's April 6<sup>th</sup> comments. This violation will remain unresolved until the permanent guarantee is recorded with San Mateo County for the open space area.*

**C. Failure to post one Bay Trail Sign, one “Public Shore” sign, and three public shore parking signs in conformance with the staff-approved public access signage plan entitled “Preliminary Signage Program for BCDC,” prepared by Molly Duff, dated November 24, 1998, and approved by BCDC staff on August 20, 2001, in violation of Special Condition II.A.3 (Plan Approval) of the Permit, which requires conformance with the final approved signage plan**

1. *Staff acknowledges that this violation has been resolved and, therefore, it has been removed for consideration under the Cease and Desist Order; Trux’s and the City’s defenses to this alleged violation will be raised in Section III.C of this Staff Report (Administrative Civil Penalty).*

**2. Staff Summary**

a. *Since the Violation Report was issued on March 23, 2016, on April 6, 2016, Trux submitted photographs to staff indicating that the missing Bay Trail, Public Shore, and Public Shore Parking signs had been installed consistent with the staff-approved plan. Trux also submitted photographs showing that the hedge formerly obstructing the public shore parking sign on the north side of the parking area was trimmed and the fallen public shore parking sign on the south side of the parking area was replaced. This violation was resolved by the submittal of the aforementioned photographs, demonstrating that the permittees are in compliance with the final approved signage plan.*

**D. Failure to provide and maintain adequate signage for eight public parking spaces, in violation of Special Condition II.B.4.b (Improvements Within the Total Public Access Area) of the Permit**

1. *Staff acknowledges that this violation has been resolved and, therefore, it has been removed for consideration under the Cease and Desist Order; Trux’s and the City’s defenses to this alleged violation will be raised in Section III.D of this Staff Report (Administrative Civil Penalty).*

**2. Staff Summary**

a. *Since the Violation Report was issued on March 23, 2016, on April 6, 2016, Trux submitted photographs to staff indicating that the hedge formerly obstructing the public shore parking sign on the north side of the parking area had been trimmed and the fallen public shore parking sign on the south side of the parking area had been replaced. This violation was resolved by the submittal of the aforementioned photographs, showing that the permittees are in compliance with Special Condition II.B.4.b of the Permit, which requires the permittees to provide and maintain adequate signage for eight public parking spaces.*

**E. Failure to provide signage that clearly promotes the required public access amenities, in violation of Special Condition II.B.4.e (Improvements Within the Total Public Access Area) of the Permit**

1. *Staff acknowledges that this violation has been resolved and, therefore, it has been removed for consideration under the Cease and Desist Order; Trux's and the City's defenses to this alleged violation will be raised in Section III.E of this Staff Report (Administrative Civil Penalty).*
2. **Staff Summary**
  - a. *Since the Violation Report was issued on March 23, 2016, on April 6, 2016, Trux submitted photographs to staff showing that it had installed signage that clearly promotes the required public access amenities, thereby resolving the violation of Special Condition II.B.4.e of the Permit.*

**F. Failure to screen the parking structure by not placing landscaping on its south and east sides to reduce visual impacts of the structure from the BCDC-required public access areas, in violation of Special Condition II.B.4.f<sup>6</sup> (Improvements Within the Total Public Access Area) of the Permit**

1. *Staff acknowledges that this violation has been resolved and, therefore, it has been removed for consideration under the Cease and Desist Order; Trux and the City's defenses to this alleged violation will be raised in Section III.F of this Staff Report (Administrative Civil Penalty).*
2. **Staff Summary**
  - a. *Since the violation report was issued on March 23, 2016, staff approved the Planting Plan on April 4, 2016, which includes vegetation to be planted adjacent to the east and south walls of the parking structure to resolve this violation. On May 17, 2016, Trux informed staff that the concrete planters for the visual screening have been ordered and will be installed in four weeks. On June 20, 2016, staff conducted a site visit and observed that six planters with irrigation, each containing one *Garrya elliptica* 'James Roof' and four *Erigeron karvanskianus* have been installed on the east side of the parking structure as shown on the Planting Plan. However, staff observed that most of the *Erigeron karvanskianus* are dying and some are dead. Therefore, although this violation is resolved, the dead and dying *Erigeron karvanskianus* must be replaced prior to resolving the maintenance violation.*

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<sup>6</sup> Prior to the issuance of Amendment 4 to the Permit, this Special Condition was II.B.4.g.

**G. Failure to maintain BCDC-required public access improvements and areas, such as landscaping, seating, path surfaces and signage, in violation of Special Condition II.B.5<sup>7</sup> (Maintenance) of the Permit**

**1. Trux's Defense**

- a. The public access area of the park has been consistently maintained for over 14 years. Trux promptly retained a landscape professional, and a gardener who cleans the park and trims the foliage regularly

(1) **Staff Rebuttal:** *While this may be the case, on site visits conducted by staff on June 19, 2015, and January 19, 2016, staff observed that the "finger" park was not maintained consistent with the standards outlined in the Permit. Special Condition II.B.5 requires the maintenance of all public access areas including landscaping, seating, path surfaces, adequate lighting, and signage. On the aforementioned site visits, staff observed uneven path surfaces, overgrown and dead/dying vegetation, burnt and weathered required seating, damaged lighting, and significant trash (See Violation Report Exhibit #7).*

- b. Homeless drug addicts frequent the park at night leaving empty liquor bottles and syringes, etc.

(1) **Staff Rebuttal:** *While this may be the case, Trux, as the permittee is responsible for complying with all Permit conditions. If use demands prevented Trux from complying with the Permit, Trux should have worked with staff to amend the Permit or plans to address the issues and challenges it faced.*

- c. SFO's maintenance company has been instructed to clean the property twice a week.

(1) **Staff Rebuttal:** *While this may be the case, on June 19, 2015, and January 19, 2016, staff observed trash at the public access areas. Therefore, twice weekly trash clean up may be insufficient at this location.*

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<sup>7</sup> Prior to the issuance of Amendment 4 to the Permit, this Special Condition was II.B.6.

- d. The plant maintenance is complicated by the ongoing drought, even though drought resistant vegetation has been planted.

(1) **Staff Rebuttal:** *While this may be the case, Trux, as the permittee is responsible for complying with all Permit conditions. If conditions prevented Trux from complying with the Permit, Trux should have worked with staff to amend the Permit or plans to address this issue.*

- e. Because of the proximity to the Bay water, the use of chemicals for weed control must be restricted to avoid ecological harm.

(1) **Staff Rebuttal:** *This defense is irrelevant because weed control is not one of the maintenance issues.<sup>8</sup>*

- f. Robert Simms, CEO of Trux, retains and pays for landscape maintenance of the park and other landscaped areas since 2000; the park and landscape area was cleaned and trimmed two times per week since 2000; Simms claims to have kept a constant maintenance program since approximately when the permit was issued, including the retention of maintenance personnel and landscapers

(1) **Staff Rebuttal:** *While this may be the case, on June 19, 2015, and January 19, 2016, staff observed maintenance issues at the required public access areas (See Violation Report Exhibit #7).*

## 2. City's Defense

- a. The co-permittees contend that the public access areas of the park have been consistently maintained. Trux has retained a landscape professional and gardener who regularly cleans and maintains the area. The co-permittees contend that there is no evidence in the record to support otherwise. Accordingly, the City respectfully request that BCDC eliminate entirely the administrative civil penalty for this alleged violation

(1) **Staff Rebuttal:** *While this may be the case, on June 19, 2015 and January 19, 2016, staff observed maintenance issues at the required public access areas (See Violation Report Exhibit #7).*

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<sup>8</sup> However, during its site visit on June 20<sup>th</sup>, staff observed weeds growing around newly planted shrubs and existing trees, which should be addressed by increased weeding and the installation of a thicker layer of wood chips.

### 3. Summary and Analysis of Unresolved Issues

- a. *Since the violation report was issued on March 23, 2016, staff approved the Planting Plan on April 4, 2016. The submittal and subsequent approval of the Planting Plan was how Trux determined to resolve the landscaping maintenance issues at the "finger" park. On May 17, 2016, Mr. Simms of Trux submitted to staff photographs of the implemented Planting Plan at the "finger park". On May 20, 2016, staff responded to Trux and the City that the signage maintenance has been resolved and the "finger" park looks improved, however several actions must be taken prior to resolution of the maintenance violation. These actions include: (1) properly staking the Peppermint Willows; (2) adding Coyote Brush to the "look out point"; (3) refinishing and/or replacing the weathered seating located at the "finger" park; and (4) repairing path surfaces with cracks and bumps greater than ¼ inch. On June 16, 2016, Trux submitted photographs to BCDC staff that showed the concrete planters east of the parking structure were installed and planted with vegetation consistent with the 2016 staff-approved Planting Plan. On June 20, 2016, BCDC staff conducted a site visit to follow up on the photographs submitted by Trux on May 17, 2016 and June 16, 2016, to determine whether the ongoing maintenance issues had, in fact, been fully resolved. Staff observed the site to be in better condition than the prior site visit conducted on January 19, 2016. However, staff determined that there are old and new maintenance issues that need to be addressed, including but not necessarily limited to: (1) The approved Planting Plan does not match the onsite conditions and must be revised to show all existing plants and to propose planting in areas that were discovered to be barren of landscaping; (2) Trux and the City have not installed all of the landscaping shown on the Planting Plan and must install the missing landscaping; (3) There are dead and dying plants that must be replaced; (4) Header board in the southwest corner of the "Finger" Park is broken and must be replaced; (5) The two required trash cans need new square vs. round liners that fit the square containers and provide lids to prevent the wind from dispersing their contents; (6) Trash and disposed items need to be removed from the public access areas and the adjacent slopes and marsh areas on either side of the "Finger" Park; (7) Weeds need to be removed from the "Finger" Park; (8) All of the lighting has loose wiring and may not be providing proper night lighting; (9) The concrete wall at the east end of the "Finger" Park is broken is needs repair; (10) Retaining wall/fence at the east end of the "Finger" Park is broken and needs repair; and (11) Fence at crosswalk needs to be repaired. This violation will be resolved upon compliance with Section II.C of the Order.*

**H. Failure to submit two, past-due monitoring reports for the wildlife habitat surrounding the “finger” parking areas, in violation of Special Condition II.I<sup>9</sup> (“Finger” Parking Monitoring Reports) of the Permit**

1. *Staff acknowledges that this violation has been resolved and, therefore, it has been removed from consideration under the Cease and Desist Order; Trux’s and the City’s defenses will be raised in Section III.H of this Staff Report (Administrative Civil Penalty).*

**2. Staff Summary**

a. *This violation was resolved on February 9, 2016 prior to the mailing of the violation report (see Finding VI.LLL of the Violation Report).*

**I. Failure to authorize by an amendment to Special Condition II.B.4.c and .d of the Permit, the as-built and desired re-alignment of a section of the public access pathway and changes to the width and location of sidewalks and bike lanes located on the segment of the Bay Trail**

1. *Staff acknowledges that this violation has been resolved and, therefore, it has been removed for consideration under the Cease and Desist Order; Trux’s and the City’s defenses will be raised in Section III.I of this Staff Report (Administrative Civil Penalty).*

**2. Staff Summary**

a. *On May 10, 2016, staff issued Permit No. 1998.011.04 (i.e. Amendment 4) to provide after-the-fact authorization for the as-built public access walkway and changes to the width and location of sidewalks and bike lanes.*

**J. Construction of two 5-foot-wide bike lanes versus two 8-foot-wide bike lanes on both sides of North Access Road as required by plans entitled, “North Access Road Public Access Project”, dated April 12, 2006 and November 21, 2006 (“Public Access Plan”), approved by Brad McCrea, Bay Design Analyst, on April 12, 2007**

1. *Staff acknowledges that this violation has been resolved and, therefore, it has been removed for consideration under the Cease and Desist Order; Trux’s and the City’s defenses will be raised in Section III.J of this Staff Report (Administrative Civil Penalty).*

**2. Staff Summary**

a. *On May 10, 2016, staff issued Permit No. 1998.011.04 (i.e. Amendment 4) to provide after-the-fact authorization for the as-built public access bike lanes.*

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<sup>9</sup> Prior to the issuance of Amendment 4 to the Permit, this Special Condition was II.K.

**K. Construction of an unauthorized gate and fence in the shoreline band**

1. *Staff acknowledges that this violation has been resolved and therefore, it has been removed for consideration under the Cease and Desist Order; Trux's and the City's defenses will be raised in Section III.K of this Staff Report (Administrative Civil Penalty).*

**2. Staff Summary**

a. *On May 10, 2016, staff issued Permit No. 1998.011.04 (i.e. Amendment 4) to provide after-the-fact authorization for the unauthorized gate and fence in the shoreline band*

**III. ADMINISTRATIVE CIVIL PENALTY (DEFENSES AND MITIGATING FACTORS RAISED BY RESPONDENTS; STAFF SUMMARY, ANALYSIS, RESPONSE, AND RECOMMENDATION).**

**1. Permittees are not subject to Standardized Fines because staff failed to follow its procedural requirements outlined in its own regulations.**

**Defenses:**

- Denies that an administrative penalty clock for “standardized fines” commenced when Ms. Bennett of BCDC staff wrote a November 15, 2001, violation letter or any other time prior to 35 days after service of the Violation Report dated March 23, 2016 (Trux).
- California Code of Regulations, Title 14, section 11386(b) states the contents of notice that must be given to one who has allegedly committed a violation, including, but not limited to, the nature of the alleged violation, each and every action that must be taken to correct the violation, and that if the violation is corrected within 35 days of the mailing of the notice the Commission shall not impose a civil penalty. No prior letters from BCDC met these requirements. Within 35 days of the notice dated March 23, 2016, the alleged violations by Trux, such as a fallen sign and insufficient vegetation, had been remediated, except for some recently revised planting requirements, which await the arrival of plants that have been ordered (Trux).
- California Code of Regulations, Title 14, Section 11386(a) provides that a consideration is whether the alleged violation has not resulted in significant harm to the resources or to existing or future public access; and whether the alleged violation can be corrected in a manner consistent with the Commission's laws and policies. Here there is no showing of any harm to resources or past or future public access. All of the alleged violations are being remediated in accordance with BCDC's requirements (Trux).

- **Staff Response:** *Trux has demonstrated an incorrect interpretation of California Code of Regulations, Title 14, Section 11386 on three points: (a) an administrative penalty clock commenced on November 15, 2001 (for Violation Report Violations A and B) and on July 30, 2015 (for Violation Report Violations C through K); (b) the correspondence dated March 23, 2016, is a violation report issued under California Code of Regulations, Title 14, Section 11321; and (c) the issuance of the violation report under Section 11321 is the Executive Director's method of commencing formal enforcement proceedings and terminated the opportunity for settlement under the standardized fines model and effectively switched gears to resolution through other administrative civil penalties, consistent with California Code of Regulations, Title 14, Section 11386(h).*

*(a) Section 11386(b) requires the Executive Director to mail written notice to the person(s) believed to be responsible for the alleged violation that includes: (1) the nature of the alleged violation and each and every action that must be taken to correct the violation; (2) the fact that if the alleged violation is fully corrected within 35 days of the mailing of the notice, the Commission will not impose any civil penalty; and (3) the fact that if the alleged violation is not fully corrected within 35 days of mailing the notice, the person believed to be responsible for the alleged violation may be subject to the payment of a civil penalty.*

*The letters staff wrote to Trux on November 15, 2001 (pertaining to Violations A and B), and to Trux and City on July 30, 2015 (pertaining to Violations C through K), meet the written notice requirements provided by Section 11386(b) and, therefore, standardized fines commenced on November 15, 2001 for Violations A and B, and July 30, 2015, for Violations C through K (See Violation Report Exhibits #13 and #32).*

*(b) Section 11321 provides that the Executive Director shall commence formal Commission enforcement proceedings by issuing, at least 45 days prior to holding an enforcement hearing, a violation report that complies with Appendix H, a complaint for civil penalties that complies with Appendix H, and a statement of defense form that complies with the format in Appendix I. The March 23, 2016, correspondence is a violation report consistent with the requirements of Section 11321 (See Violation Report).*

*(c) Section 11386(h) provides that if the person responsible for the alleged violation does not complete all of the required corrective actions and pay the appropriate standardized civil penalty within 125 days of receiving notice under 11386(b), the Executive Director may commence enforcement proceedings in accordance with*

*Sections 11300 through 11385. The Violation Report was issued more than 125 days after notice was provided on July 30, 2015 and therefore, standardized fines are no longer available.*

*The Executive Director issued the violation report on March 23, 2016 and within the report provided notice that the standardize fines process will no longer be available (See pages 1, 2, and 17 of the Violation Report).*

**2. Staff has misapplied Government Code Section 66641.9(a), Factors to Consider in Determining the Amount of Administrative Civil Fines, by Assessing Multiple Penalties for the Same Violation and Assessing the Same Penalty for Violations with Different Impacts**

**Defenses**

- Minor, and incidental alleged violations are treated the same as more substantial violations such as a lack of guarantee for the habitat and the public access (Trux).
- Government code section 66641.9(a) provides that in determining the amount for administrative civil liability the Commission shall consider the nature, circumstances, extent and gravity of the violations, whether the violation is susceptible to removal or resolution and the gravity of the violations (Trux).
- Under BCDC's apparent theory of strict liability, BCDC has sliced alleged violations such as the guarantees into two violations when that is one issue; the signage issue has been sliced into several alleged violations; matters such as the failure to screen and plant have been subject to the approval of third parties such as Shell Oil and the Airport (Trux).
- BCDC's proposed penalties of \$30,000 per violation are unconstitutional because what is basically one alleged violation, noncompliance with the provisions of the Permit, are sliced into numerous violations (Trux).
- A penalty, which simply seeks the maximum amount for each violation without consideration of the gravity is unconstitutional as a taking of private property for public use (Trux).
- BCDC's commencement of formal enforcement proceedings was unnecessary and the imposition of the maximum administrative civil penalty of \$30,000 for 10 of the 11 alleged violations, and \$15,000 administrative civil penalty for the 11<sup>th</sup> alleged violation noticed on January 19, 2016 is unreasonably high (City).
- The legislature directed BCDC under the McAteer-Petris Act to consider the nature, circumstance, extent, gravity of the violations, whether the violation is susceptible to removal or resolution, the cost to the state in pursuing the enforcement action,

the voluntary removal or resolution efforts undertaken, prior history of violations, and other matters as justice may require, based on this and the following mitigating factors (City).

- Prior BCDC enforcement actions impose much smaller civil penalties for BCDC violations that actually damaged, or had the very real possibility to significantly damage, the Bay's natural resources (City).
- San Pedro Cove HOA (2007), similar to the facts of this case, the alleged violations extended back almost 15 years and the potential administrative civil penalties totaled approximately \$180,000; BCDC agreed in that case to stay the civil penalties in exchange for the HOA's commitment to remedy the alleged violations; Accordingly, the imposition of a civil penalty was used only to "provide an incentive to achieve compliance"; In contrast to this case, imposing maximum administrative civil penalties for cured violations is punitive in nature (City).
- **Staff Response:** *Section 66641.9(a) of the McAteer-Petris Act states that in determining the amount of administrative civil liability, the Commission shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the violation is susceptible to removal or resolution, the cost to the state in pursuing the enforcement action, and with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary removal or resolution efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require.*

*In determining the appropriate amount of civil penalties, staff considered each violation separately, and assigned unique daily penalties for each violation that it determined based on the factors provided for in Section 66641.9(a). Each violation was assigned an appropriate daily penalty based on the seriousness of the violation in the context of the Section 66641.9(a) factors. The reason it may appear that all violations have been treated the same regardless of the apparent seriousness is because the majority of the penalties reached the statutory maximum of \$30,000 due to the permittees' delay in resolving the violations; pursuant to Section 66641.5(e) of the McAteer-Petris Act, civil penalties accrue for each day in which the violation occurs or persists.*

*Staff assessed fines based on the factors established by Section 66641.9(a). Staff has not sliced violations such as the guarantees into two violations and the signage issues into three violations; the guarantees and signage violations were required by different conditions of the Permit. Section 66641.5(e) states that civil penalties may be administratively imposed for a violation of any term or condition of a Permit.*

*Therefore, violations were calculated based on each violation of each term and condition, of which there are two pertaining to the permanent guarantees and three pertaining to signage.*

*The present enforcement case is distinct from the past enforcement case, San Pedro Cove, because that case was resolved through a negotiated resolution. Each case is decided on its merits and San Pedro Cove was resolved 10 years ago through settlement and no violation report was issued. The facts of San Pedro Cove differ from this present case and are not relevant to this proceeding.*

### **3. Joint/Several Liability is Inappropriate Given the Distinct Property Interests and Responsibilities of Each Party**

#### **Defenses**

- On March 27, 2002, the City agreed to be responsible for project administration, coordination with permitting agencies, completion of project survey, construction management and debris removal; Simms was delegated responsibility for all other tasks (Trux).
- Trux is facing potential penalties for allegations that it did not commit and for a breakdown in communications between BCDC and the City of which Trux was not apprised (Trux).
- **Staff Response:** *Co-permittees are jointly and severally liable to comply with all conditions of the Permit. It is the responsibility of both co-permittees to communicate with one another to ensure they are in compliance with their Permit. Trux was in no way prevented from checking in with the City and should have known that the Permit was not in compliance because Trux would have had to sign off on any requests to amend the Permit to authorize the as-built public access.*

#### **TRUX'S DEFENSES THAT SHALL BE APPLIED TO ADMINISTRATIVE CIVIL PENALTY, GENERALLY:**

- BCDC appears to assert that non-compliance with a condition amounts to a violation.
  - **Staff Response:** *Yes; Section 66641.5 of the McAteer-Petris Act states that civil liability may be imposed for any violation of any term or condition of a permit issued by the Commission.*

**CITY'S DEFENSES THAT SHALL BE APPLIED TO ADMINISTRATIVE CIVIL PENALTY, GENERALLY:**

- There is no evidence that any of the alleged violations actually damaged – or even had the potential to damage - the Bay natural resources.
  - **Staff Response:** *Harm to the Bay is not a threshold requirement for an action, or failure to act, to constitute a violation, however failure to comply with the Permit, which is the case here, constitutes a violation. Additionally, staff cannot conclude that no harm to the Bay occurred in part because the permittees failed to timely submit the monitoring reports to assess the affect of the parking structure on the wildlife habitat surrounding the “finger” parking areas, in violation of Special Condition II.I of the Permit (See Violation H). Further, staff has not made the allegation that the permittees have caused certain harm to the Bay.*
- Five of the Eleven alleged violations were remedied prior to receiving the March 23, 2016 report
  - **Staff Response:** *This defense is not factually accurate: one violation, Violation H (Monitoring Reports) was resolved on February 9, 2016 prior to the mailing of the violation report (see Finding VI.LLL of the Violation Report). Staff will acknowledge that the rate of progress in resolving the violations increased significantly after staff provided notice to the permittees on January 12, 2016, that a violation report would be issued. Curing a violation does not absolve the permittees from liability for civil penalties for the time period during which the violation remained unresolved, as Section 66641.5(e) of the McAteer-Petris Act states that civil liability may be imposed for each day in which the violation occurs or persists.*
- As of the date of this Statement (of Defense), eight of the eleven have been resolved and the remaining three will be remedied upon approval of the final documentation.
  - **Staff Response:** *This defense is not factually accurate. As of the date of the statement of defense submittal (and issuance of this recommended enforcement decision), seven – rather than eight - of the eleven violations have been resolved.<sup>10</sup> Curing a violation does not absolve the permittees from*

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<sup>10</sup> Violation C (Signage Plan) was resolved on April 6, 2016; Violation D (Parking Signage) was resolved on April 6, 2016; Violation E (Signage that clearly promotes Public Access) was resolved on April 6, 2016; Violation H (Monitoring Reports) was resolved on February 9, 2016; Violation I (Failure to authorize as-built public access as required by Special Conditions II.B.4.c and d of the Permit) was resolved on May 10, 2016; Violation J (Failure to authorize 5-foot-wide Public Access bike lanes on North Access Road) was resolved on May 10, 2016; and Violation K (Unauthorized Gate/Fence) was resolved on May 10, 2016.

*liability for civil penalties as Section 66641.5(e) of the McAteer-Petris Act states that civil liability may be imposed for each day in which the violation occurs or persists. The eighth violation, Violation F (Screening Parking Structure), was resolved on June 16, 2016. The remaining unresolved violations are: Violation A (Permanent Guarantee for Public Access Area); Violation B (Permanent Guarantee for Open Space Area); and Violation G (Maintenance).*

- The record reflects the City's ongoing good faith effort to respond to BCDC's concerns to comply with the Permit's special conditions; the City acknowledges that the process has been drawn out, but since re-engaged after a seven year lull, the City has made a substantial good faith effort to address BCDC's concerns and comply with all Permit requirements
  - **Staff Response:** *Violations to the Permit existed prior to staff contacting the Permittees about the violations. The permittees took no initiative to comply with the Permit prior to staff commencing the second standardized fine clock on July 30, 2015. Additionally, none of the violations were resolved until after January 12, 2016, when staff provided notice to the permittees that it was time to switch gears and pursue resolution of the violations through a formal enforcement proceeding (See Finding VI.CCC of the Violation Report).*

## **DEFENSES TO SPECIFIC ALLEGATIONS**

### **A. Failure to permanently guarantee all public access areas, in violation of Special Condition II.B.2 (Public Access Guarantee) of the Permit**

#### **1. City's Defense**

- a. The City contends this alleged procedural error does not warrant the maximum \$30,000 administrative civil penalty given the below history reflecting the City and Trux's good faith effort to comply.
  - (1) **Staff Response:** *The recommended \$30,000 administrative civil penalty was derived based on assigning a daily penalty of \$1200 that was reached by applying the factors required by Section 66641.9(a) of the McAteer-Petris Act. The recommended penalty is \$30,000 because the daily penalty maxed out on X due to the longevity of the violation.*
- b. There is no evidence in the record establishing that the public was ever prevented from accessing public access areas within the City's jurisdiction.

(1) **Staff Response:** *This defense is not relevant to the permittees' failure to comply with Special Condition II.B.2 of the Permit. Additionally, staff never alleged this statement.*

- c. The protracted permit process was not entirely the responsibility of the co-permittees, as there was 7-year gap in communication regarding the outstanding Permit requirements between the parties from 2008 through 2015

(1) **Staff Response:** *Permittees are responsible for complying with the requirements of their Permit. Regardless, the administrative civil penalties would be maxed out at \$30,000 even if the violation had occurred in 2015. In other words, at \$500/day, the maximum fine is reached in 60 days.*

2. **Staff Recommendation:** *As of the mailing date of this report, this violation is ongoing, unresolved, and continues to cost the state many staff hours in pursuing its resolution. Therefore, staff recommends the \$30,000 administrative civil penalty proposed in the Violation Report.*

**B. Failure to permanently guarantee the open space area for wildlife habitat, in violation of Special Condition II.J.1 (Wildlife Refuge Area) of the Permit**

**1. City's Defense**

- a. The protracted permit process was not entirely the responsibility of the co-permittees, as there was 7-year gap in communication regarding the outstanding Permit requirements between the parties from 2008 through 2015;

(1) **Staff Response:** *Even though Trux is the only permittee with a property interest subject to the open space permanent guarantee, it is the responsibility of co-permittees to comply with all requirements of the Permit.*

2. **Staff Recommendation:** *As of the mailing date of this report, this violation is ongoing, unresolved, and continues to cost the state many staff hours in pursuing resolution of the violation. Therefore, staff recommends the \$30,000 administrative civil penalty proposed in the Violation Report.*

**C. Failure to post one Bay Trail Sign, one “Public Shore” sign, and three public shore parking signs in conformance with the staff-approved public access signage plan entitled “Preliminary Signage Program for BCDC,” prepared by Molly Duff, dated November 24, 1998, and approved by BCDC staff on August 20, 2001, in violation of Special Condition II.A.3 (Plan Approval) of the Permit, which requires conformance with the final approved signage plan**

**1. Trux’s Defense**

a. The allegations of signage violations should be one alleged violation.

(1) **Staff Response:** *Section 66641.5(e) of the McAteer-Petris Act states that civil liability may be imposed for any violation of any term or condition of a Permit. The signage violations constitute violations to three separate conditions to the Permit: Special Conditions II.A.3 (Plan Approval); II.B.4.b (Improvements within the total Public Access Area, Public Shore Parking); and II.B.4.e (Improvements within the total Public Access Area, Clearly Promotes Public Access Amenities). Therefore, staff finds this defense not based in law.*

b. Signs designated for North Access Road were installed by the City, which owns North Access Road.

(1) **Staff Response:** *On April 6, 2016, staff received photographic evidence from Mr. Simms of Trux that the signs on North Access Road had been installed. Pursuant to Special Condition II.B.4 (Improvements within the total Public Access Area), signage was required to be installed prior to the use of any of the parking facilities, which was in 2001. The resolution of a violation does not absolve civil liability, as stated in Section 66641.5(e) of the McAteer-Petris Act.*

c. The public shore and bay trail signs are new signs that were not in the original sign plan.

(1) **Staff Response:** *This defense is not based on fact. The Public Shore and Bay Trail signs appear in the signage plan entitled “Preliminary Signage Program for BCDC”, prepared by Molly Duff, and dated November 24, 1998 and approved August 20, 2001 (See Finding VI.F of the Violation Report). Furthermore, while permits often specify the minimum number of public shore and public shore parking signs and other signs to be posted, the Permit requires sufficient signage to clearly identify the public access areas as public and, it is through the plans - there can be more than one set and as many revisions as necessary to satisfy both parties - that the number, type, orientation and location of the signs is determined. Site conditions and needs*

*may change over time and signage changes can be requested and implemented by the permittees pursuant to the submittal of updated plans to staff and staff's subsequent approval thereof.*

**1. City's Defense**

- a. The City respectfully requests that BCDC reconsider imposing any administrative civil penalty for these signage violations, let alone the maximum possible, where all parties are in agreement that the violations have been remedied. BCDC has stayed the penalty portion in other similar enforcement actions as an incentive for permittees to cure alleged violations (San Pedro Cove HOA).
  - (1) **Staff Response:** *Staff agrees that the violation has been resolved, however the resolution of a violation does not absolve civil liability, as stated in Section 66641.5(e) of the McAteer-Petris Act. The civil penalty is based on time period the violation persisted, which was approximately 15 years. The absence of signage over such an extended period of time has an adverse affect on the public's ability to know about and make use of a public benefit.*
- b. The co-permittees proactively remedied these alleged violations.
  - (1) **Staff Response:** *The co-permittees were not proactive in resolving these violations until after January 12, 2016, when staff provided notice to the permittees that it was time to switch gears and pursue resolution of the violations through a formal enforcement proceeding (See Finding VI.CCC of the Violation Report). It is the responsibility of permittees to comply with their Permit and the violation persisted for approximately 15 years.*
- c. Any administrative civil penalty would serve no benefit other than to punish the co-permittees. This appears unreasonable and inconsistent given prior BCDC enforcement actions. Punitive penalties after a permittee remedies an alleged violation leads to the conclusion that a permittee should not cure any alleged violation without first negotiating a stay of potential penalties from BCDC. The co-permittees' genuine efforts to remedy the violation should not be punished more harshly than a permittee who complies only after BCDC stays penalties.
  - (1) **Staff Response:** *The administrative civil penalties were applied consistent with Section 66641.9(a) of the McAteer-Petris Act.*

- d. The alleged failure to post proper signage is a single failure to act, and should not result in three separate penalties.
    - (1) **Staff Response:** *Section 66641.5(e) of the McAteer-Petris Act states that civil liability may be imposed for any violation of any term or condition of a Permit. The signage violations constitute violations to three separate conditions to the Permit: Special Conditions II.A.3 (Plan Approval); II.B.4.b (Improvements within the total Public Access Area, Public Shore Parking); and II.B.4.e (Improvements within the total Public Access Area, Clearly Promote Public Access Amenities). Therefore, staff finds this defense not based in law.*
  - e. A \$90,000 fine for failure to post proper signage unfairly burdens the City, and correspondingly the tax payers for which the signage was meant to benefit.
    - (1) **Staff Response:** *The co-permittees are responsible for determining who pays what portion of the civil penalties. Staff has never stated that the tax payers are responsible for paying the accrued civil penalties. Further, the City is a lessor and is receiving an economic benefit from leasing its property to Trux.*
  - f. There is no evidence in the record establishing that the public was ever prevented from accessing public access areas within the City's jurisdiction.
    - (1) **Staff Response:** *This defense is not relevant to the permittees' failure to comply with the Permit. Additionally, staff never alleged this statement.*
2. **Staff Recommendation:** *The signage violations cited as C, D, and E in the Violation Report were all resolved on April 6, 2016. Although staff maintains that a violation to each term of the Permit constitutes a violation, because the violations have been resolved, staff recommends that the civil penalty liability for each signage violation shall be: \$0<sup>11</sup>, reduced from \$30,000 for Violation C; \$10,000, reduced from \$30,000 for Violation D; and \$20,000, reduced from \$30,000 for Violation E for a total of \$30,000.*
- D. Failure to provide and maintain adequate signage for eight public parking spaces, in violation of Special Condition II.B.4.b (Improvements Within the Total Public Access Area) of the Permit**
1. **Staff Recommendation:** *Please refer to the defenses, staff responses and recommendation in Section III.C, above.*

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<sup>11</sup> Staff withdraws the allegations pertaining to Violation C because the violation has been resolved and the permittees' defense has merit.

**E. Failure to provide signage that clearly promotes the required public access amenities, in violation of Special Condition II.B.4.e (Improvements Within the Total Public Access Area) of the Permit**

1. **Staff Recommendation:** *Please refer to the defenses, staff responses and recommendation in Section III.C, above.*

**F. Failure to screen the parking structure by not placing landscaping on its south and east sides to reduce visual impacts of the structure from the BCDC-required public access areas, in violation of Special Condition II.B.4.g (Improvements Within the Total Public Access Area) of the Permit**

**1. Trux's Defense**

- a. Admit that the landscaping was not placed on the east side of the building because it was a driveway for vehicles, including emergency vehicles and shuttle buses
  - (1) **Staff Rebuttal:** *This is not a defense for the permittees' failure to comply with the Permit requirement to screen the east side of the parking structure. Special Condition II.B.4.f of the Permit requires, "new landscaping on the south and east sides of the parking structure designed to screen the parking structure and reduce its visual impacts from the public access areas required herein." Trux has an obligation to comply with the conditions of the Permit; if the permittees cannot comply with the Permit, it is the responsibility of the permittees to request an amendment to the Permit. Regardless of this, landscaping directly adjacent to the east side of the parking structure would not impact the driveway.*
- b. The land on the south side of the parking structure is owned by the San Francisco International Airport
  - (1) **Staff Rebuttal:** *This is not a legal defense because San Francisco International Airport (SFIA) issued Use Permit No. 3950 on May 30, 2007 to Trux and the City (See Violation Report Exhibit #27). Therefore, Trux has a legal interest to use the property owned by SFIA.*
- c. Airport and Shell Oil have restricted the planting of shrubs or trees over the pipelines
  - (1) **Staff Rebuttal:** *This defense is irrelevant. In a February 8, 2002 letter from SFIA to BCDC, SFIA declared that, "ground cover is SFO's preferred type of landscaping" to screen the parking structure. Additionally, a February 7, 2001 letter from Shell Oil to Trux declares that, "if you must landscape this*

*property, please plan to use shallow root plant that minimizes the above ground coverage area” (See Violation Report Exhibit #35). Finally, Special Condition II.B.4.f requires “new landscaping”, and does not specify that this new landscaping must be shrubs or trees. Therefore, neither the Airport nor Shell Oil have obstructed Trux from complying with this Permit condition.*

- d. The east side of the parking structure is cement and planters have been placed on that surface
- (1) **Staff Rebuttal:** *This defense is not supported by the facts. On May 17, 2016, Mr. Simms of Trux emailed staff and stated that, “concrete planters have been ordered and will be installed in four weeks”. The violation will be resolved upon Trux submitting photographs that show the visual screening approved in “Park SFO Airport Parking Expansion: Renovation Planting Plan,” prepared by Jeanne Lau, last revised, April 4, 2016, approved by staff on April 4, 2016 (“Planting Plan”) has been implemented consistent with the approved Planting Plan (See May 17 email from Simms to Weber), which appears to have occurred on Friday, June 17<sup>th</sup>, as confirmed by a staff site visit on June 20<sup>th</sup>, though maintenance of some of the new landscaping is already an issue, as discussed below.*
- e. Ivy on the side of the parking facility is not feasible because it would damage the surface. This information is confirmed by John Fugle, landscape architect
- (1) **Staff Rebuttal:** *This defense is irrelevant because staff never required ivy and because has approved the Planting Plan, which does not utilize Ivy to achieve visual screening of the parking structure. Upon implementation of the approved Planting Plan, this violation will be resolved.*
- f. Tall shrubs are being planted on the south side and in planters on the east side of the building. Shrubs on the south side are replacements from plantings under the original plan, which were damaged by the drought and homeless people. The shrubs and planters on the east side were not required in the original plan.
- (1) **Staff Rebuttal:** *Staff acknowledges that on June 20<sup>th</sup>, staff confirmed that Trux has installed shrubs and plants on the south and east sides of the parking structure generally pursuant to the Planting Plan. This defense is irrelevant because the “original plan” was never approved and its scope encompassed only the “finger” park. During the September 8, 2015 meeting, which was memorialized in the September 29, 2015 letter, staff, Trux, and the City discussed that staff never approved the “original plan” prepared by Molly Duff, dated November 24, 1998 (See Violation Report Exhibit #35).*

- g. Simms lacked permission needed from the Airport with respect to any use of its property or tree planting that would interfere with underground pipelines needed to be resolved.
  - (1) **Staff Rebuttal:** *This defense is irrelevant. In a February 8, 2002, letter from SFIA to BCDC, SFIA declared that “ground cover is SFO’s preferred type of landscaping” to screen the parking structure. Special Condition II.B.4.f of the Permit has been amended to exclude trees from the required landscaping.*

## 2. City’s Defense

- a. Co-permittee Trux had sole responsibility.
  - (1) **Staff Rebuttal:** *As a co-permittee, the City is jointly and severally liable to comply with all Permit conditions even though the area of the site at issue is located on property owned by Trux, SFIA, and Shell Oil.*
- b. Nevertheless, the record shows that the restrictions by Shell Oil and the Airport to plant shrubs or trees over existing pipelines initially complicated efforts to satisfy this Special Condition.
  - (1) **Staff Rebuttal:** *This defense is irrelevant. In a February 8, 2002, letter from SFIA to BCDC, SFIA declared that, “ground cover is SFO’s preferred type of landscaping” to screen the parking structure. Additionally, a February 7, 2001, letter from Shell Oil to Trux declares that, “if you must landscape this property, please plan to use shallow root plant that minimizes the above ground coverage area” (See Violation Report Exhibit #35). Special Condition II.B.4.f requires landscaping to “screen the parking structure and reduce its visual impacts” and does not exclusively require the planting of shrubs or trees to satisfy this Permit requirement.*
- c. BCDC acknowledges in its April 4, 2016, communication that this violation is resolved.
  - (1) **Staff Rebuttal:** *This defense is not supported by the facts. On April 4, 2016, staff emailed Trux and the City to inform the permittees that the Planting Plan had been approved. The email states that the violation to Special Condition II.B.4.f will be resolved once the approved plan is implemented and photographs are submitted or a site visit occurs, however, the visual screening component of the Planting Plan was only evidenced as having been, for the most part, implemented on June 17<sup>th</sup> and confirmed by staff on June 20<sup>th</sup>. On May 17, 2016, Mr. Simms of Trux emailed staff and stated that, “concrete planters have been ordered and will be installed in four weeks” (See emails dated April 4, 2016 and May 17, 2016).*

- d. There is no evidence in the record to suggest the co-permittees willfully violated the permit conditions, nor any evidence that significant harm occurred as a result.

(1) **Staff Rebuttal:** *Although the area of the site at issue is located entirely on Trux's property, as a co-permittee, the City is jointly and severally liable to comply with all Permit conditions. The evidence of the violation is clear from photographs taken in 2015 and 2016 that show no visual screening of the parking structure and the absence of an approved landscaping plan until April 4, 2016.*

- e. The City contends that a maximum civil administrative penalty for failing to screen a parking structure is unreasonable and also inconsistent with prior BCDC enforcement actions.

(1) **Staff Response:** *The recommended \$30,000 administrative civil penalty was derived based on assigning a daily penalty of \$1100 for 377 days that was reached by applying the factors required by Section 66641.9(a) of the McAteer-Petris Act. The recommended penalty is \$30,000 because the daily penalty maxed out on X due to the longevity of the violation.*

3. **Staff Recommendation:** *On June 16, 2016, Trux and the City submitted photographs showing that the visual screening was installed. Staff recommends the \$30,000 administrative civil penalty proposed in the Violation Report.*

**G. Failure to maintain BCDC-required public access improvements and areas, such as landscaping, seating, path surfaces and signage, in violation of Special Condition II.B.6 (Maintenance) of the Permit**

**1. City's Defense**

- a. There is no evidence in the record establishing that the public was ever prevented from accessing public access areas within the City's jurisdiction

(1) **Staff Response:** *This defense is not relevant to the permittees' failure to comply with Special Condition II.B.6 of the Permit. Additionally, staff never alleged this statement; however, the importance of signage at a private development is critical to the maximum promotion and use of all BCDC required public access.*

- b. **Staff Recommendation:** *On April 4, 2016, staff approved the Planting Plan, which includes vegetation to be planted adjacent to the east and south walls of the parking structure to resolve this violation. On May 17, 2016 Trux submitted photographs of the implemented planting plan at the "finger" park. On May 20, 2016, staff*

*responded to Trux and City that there is still work that must be completed prior to resolving the maintenance violation (See Section II.G.3.a of this staff report). On June 16, 2016, Trux submitted photographs to BCDC staff that showed the concrete planters east of the parking structure were installed and planted with vegetation consistent with the 2016 staff-approved Planting Plan. On June 20, 2016, BCDC staff conducted a site visit to follow up on the photographs submitted by Trux on May 17, 2016 and June 16, 2016, to determine whether the ongoing maintenance issues had, in fact, been fully resolved. Staff observed the site to be in better condition than the prior site visit conducted on January 19, 2016. However, staff determined that there are old and new maintenance issues that need to be addressed, including but not necessarily limited to: (1) The approved Planting Plan does not match the onsite conditions and must be revised to show all existing plants and to propose planting in areas that were discovered to be barren of landscaping; (2) Trux and the City have not installed all of the landscaping shown on the Planting Plan and must install the missing landscaping; (3) There are dead and dying plants that must be replaced; (4) Header board in the southwest corner of the "Finger" Park is broken and must be replaced; (5) The two required trash cans need new square vs. round liners that fit the square containers and provide lids to prevent the wind from dispersing their contents; (6) Trash and disposed items need to be removed from the public access areas and the adjacent slopes and marsh areas on either side of the "Finger" Park; (7) Weeds need to be removed from the "Finger" Park; (8) All of the lighting has loose wiring and may not be providing proper night lighting; (9) The concrete wall at the east end of the "Finger" Park is broken and needs repair; (10) Retaining wall/fence at the east end of the "Finger" Park is broken and needs repair; and (11) Fence at crosswalk needs to be repaired. As of the mailing date of this report, this violation is ongoing, unresolved, and continues to cost the state staff hours in pursuing resolution of the violation. Therefore, staff recommends the \$30,000 administrative civil penalty proposed in the Violation Report.*

**H. Failure to submit two, past-due monitoring reports for the wildlife habitat surrounding the "finger" parking areas, in violation of Special Condition II.I ("Finger" Parking Monitoring Reports) of the Permit**

**1. Trux's Defense**

- a. Admit that wildlife habitat reports were late, but deny that this constitutes a violation.

(1) **Staff Response:** *There is no legal or factual basis to support this denial. Special Condition II.I of the Permit requires the permittees to monitor the wildlife habitat surrounding the project site for ten years after the use of the*

*parking facility begins and the submittal of two reports, one at five years (September 1, 2006) and one at ten years (September 1, 2011). Trux admits this did not occur, therefore, staff is affirmed in its assertion that there is a violation of the Permit.*

- b. The substance of this allegation has been resolved by substantial compliance; see letter from Maggie Weber, dated September 29, 2015, showing that the violation would be resolved upon submittal and approval of two reports conforming to the Permit's requirements.

(1) **Staff Response:** *It is true that the violation has been resolved by the submittal of the single report dated February 9, 2016, however this is irrelevant because under Section 66641.5(e) of the McAteer-Petris Act, curing the violation does not absolve the civil penalties that accrued prior to resolution.*

## 2. City's Defense

- a. This violation has been fully resolved. In a September 29, 2015, letter from Maggie Weber, she indicates that this violation would be resolved upon submittal and approval of two reports conforming to the Permit's requirements. Simms submitted the first report to Maggie Weber on February 9, 2016; on February 10, Weber approved the report.

(1) **Staff Response:** *It is true that the violation has been resolved by the submittal of the Report dated February 9, 2016, however, this is irrelevant because under Section 66641.5(e) of the McAteer-Petris Act, curing the violation does not absolve the civil penalties that accrued prior to resolution.*

- b. Accordingly, the City contends that this alleged violation has been resolved. A maximum civil penalty of \$30,000 is, therefore, unreasonable given the nature of the alleged violation and the fact that it has been remedied to BCDC satisfaction.

(1) **Staff Response:** *The recommended \$30,000 administrative civil penalty was derived based on assigning a daily penalty of \$1400 that was reached by applying the factors required by Section 66641.9(a) of the McAteer-Petris Act. The recommended penalty is \$30,000 because the daily penalty maxed out after 22 days due to the longevity of the violation.*

3. **Staff Recommendation:** *The permittees resolved this violation on February 9, 2016, by submitting a monitoring report, prior to the issuance of the Violation Report. However, the permittees are responsible for complying with the Permit and were almost 10 years late with their submittal. The permittees failure to monitor the wildlife habitat surrounding the project site for the first ten years of operating the*

*parking structure leaves staff without vital information to determine whether this project has harmed to the Bay; this data would have been useful in analyzing the permittees' proposed expansion of the current parking structure and, as a result of this violation, this data is impossible to obtain. Therefore, staff recommends the \$30,000 administrative civil penalty (\$1400/day for 3447 days<sup>12</sup>) proposed in the Violation Report.*

**I. Failure to authorize by an amendment to Special Condition II.B.4.c and .d of the Permit, the as-built and desired re-alignment of a section of the public access walkway and changes to the width and location of sidewalks and bike lanes located on the segment of the Bay Trail**

**1. Trux's Defense**

- a. The sidewalks and bike lanes are owned by the City; Trux lacks the authority to obtain an amendment concerning property that it does not own.

(1) **Staff Response:** *Even though this portion of public access is located on property owned by the City, it is the responsibility of co-permittees to comply with all requirements of the Permit and a single permittee cannot apply alone for a permit amendment.*

- b. City assumed responsibility for this Amendment. Simms did not know that BCDC and City ceased their efforts to resolve the public access issue and other issues, which had been assumed by the City; BCDC's failure to notify Simms that negotiations had broken off combined with a severely excessive delay in enforcement amounts to a bar under the doctrine of equitable estoppel.

(1) **Staff Response:** *Even though the City assumed responsibility for this amendment, it is the responsibility of co-permittees to comply with all requirements of the Permit. Trux should have known that the Amendment had not been issued because Trux would have had to sign a request for the amendment prior to its issuance and a copy of the amended permit after its issuance, neither of which the City or BCDC ever submitted to Trux between 2007 and 2015/6.*

**2. City's Defense**

- a. The City has substantially complied with the requirement under the Permit to build public access walkways, sidewalks, and bike lanes. Due to operational concerns, the location of the public access walkways, sidewalks and the width of the bike lanes differ from the previously submitted plans. The City has been

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<sup>12</sup> Even though the \$1400 daily penalty maxes out after 22 days.

actively engaged in a good faith effort with BCDC to amend the Permit to comport with the as-built environment. Consequently, the City substantially complied with the Permit and furthered the intent of the Permit by constructing public amenities and ensuring that the public had access to the Bay. The City contends that a maximum administrative penalty of \$30,000 for what amounts to an administrative condition that has since been remedied is unreasonable and requests that it be waived, or at the very least, significantly reduced.

(1) **Staff Response:** *Permittees are responsible for complying with the Permit and should have taken the initiative to amend the Permit when “operational concerns” were discovered. The Permit requires both constructing the improvements and recording the guarantee. Simply constructing the improvements is not equal to substantial compliance. The City only engaged in “a good faith effort” with BCDC to amend the Permit only after staff provided notice of standardized fines on July 30, 2015. Even though the violation was remedied when Amendment 4 to the Permit was issued on May 10, 2016, Section 66641.5(e) of the McAteer-Petris Act states that curing the violation does not absolve the civil penalties that accrued prior to resolution. The recommended \$30,000 administrative civil penalty was derived based on assigning a daily penalty of \$1400 that was reached by applying the factors required by Section 66641.9(a) of the McAteer-Petris Act. The recommended penalty is \$30,000 because the daily penalty maxed out after 22 days due to the longevity of the violation.*

b. There is no evidence in the record establishing that the public was ever prevented from accessing public access areas within the City’s jurisdiction

(1) **Staff Response:** *This defense is not relevant to the permittees’ failure to comply with Special Condition II.B.6 of the Permit. Additionally, staff never alleged this statement.*

c. The protracted permit process was not entirely the responsibility of the co-permittees, as there was 7-year gap in communication regarding the outstanding Permit requirements between the parties from 2008 through 2015

(1) **Staff Response:** *The permittees are responsible for complying with the Permit.*

3. **Staff Recommendation:** *On May 10, 2016 staff issued Amendment 4 to the Permit, which authorized the as-built public access. Resolving this violation took many years at a significant cost to the state. Additionally, the violation prevented the permittees from recording the public access permanent guarantee (Violation A) because the as-*

*built public access conditions were not consistent with the Permit. Therefore, staff recommends the \$30,000 administrative civil penalty proposed in the Violation Report.*

**J. Construction of two 5-foot-wide bike lanes verses two 8-foot-wide bike lanes on both sides of North Access Road as required by plans entitled, “North Access Road Public Access Project”, dated April 12, 2006 and November 21, 2006 (“Public Access Plan”), approved by Brad McCrea, Bay Design Analyst, on April 12, 2007**

**1. Trux’s Defense**

- a. Admits that the bike lanes were not constructed according to the permit, however, deny that this constitutes a violation.

(1) **Staff Response:** *There is no legal or factual basis to support this denial. Staff approval of the North Access Road Public Access Project Plan authorized two 8-foot-wide bike lanes and not the as-built 5-foot-wide bike lanes. Trux admits that the bike lanes were not constructed consistent with the approved Plan; therefore, staff’s allegation that there is a violation of the Permit is correct.*

- b. The sidewalks and bike lanes are owned by the City; Trux lacks the authority to obtain an amendment concerning property that it does not own

(1) **Staff Response:** *Even though this portion of public access is owned by the City, it is the responsibility of co-permittees to comply with all requirements of the Permit.*

**2. City’s Defense**

- a. Defense outlined in Section III.I.2.a, above, also applies to this violation.

(1) **Staff Response:** *See Section III.I.2.a.1.*

- b. There is no evidence in the record establishing that the public was ever prevented from accessing public access areas within the City’s jurisdiction

(1) **Staff Response:** *This defense is not relevant to the permittees’ failure to comply with approved Public Access Plan. Additionally, staff never alleged this statement.*

3. **Staff Recommendation:** *On May 10, 2016 staff issued Amendment 4 to the Permit, which authorized the as-built bike lanes. Resolving this violation took many years at a significant cost to the state and the violation prevented the permittees from recording the public access permanent guarantee (Violation A) because the as-built*

*bike lanes were not consistent with the Permit. Therefore, staff recommends the \$30,000 administrative civil penalty proposed in the Violation Report (\$1450/day for 3055 days<sup>13</sup>).*

**K. Construction of an unauthorized gate and fence in the shoreline band**

**1. Trux's Defense**

- a. Admits to construction of the fence without prior authorization and states it was required for maintenance to prevent homeless people from trespassing upon the driveway and denies this is a violation. The gate and fence was placed there as part of the ongoing maintenance after the bridge was installed to prevent trespassers from entering the driveway, and to eliminate safety and security hazards

(1) **Staff Response:** *This is not a defense; as a permittee, Trux knew that any placement of fill in the shoreline band requires authorization in the form of a Permit amendment. Trux admits the fence was constructed without authorization; therefore, this constitutes a violation. New construction does not constitute maintenance.*

- b. On January 19, 2016, Maggie Weber stated that the unauthorized gate and fence could be authorized by an amendment request letter; such a request letter was submitted.

(1) **Staff Response:** *Corrective action was only taken after staff informed the permittees of the violation.*

**2. City's Defense**

- a. City was not properly noticed under BCDC's own regulations (brought to the City's attention by email).

(1) **Staff Response:** *Staff discovered the violation during the January 19, 2016, site visit, where both the City and Trux were present, and provided notice by email to Trux and the City later that day. After receiving notice, Trux and the City took steps to resolve this violation by applying for after-the-fact authorization in their request for Amendment 4 to the Permit, which was issued on May 10, 2016.*

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<sup>13</sup> Even though the penalty maxes out after 21 days.

- b. The record demonstrates that the City began working to remedy this alleged violation within three days of being notified by email; the City respectfully requests that BCDC consider the City's efforts and reduce or eliminate entirely the administrative civil penalty for this alleged violation.
  - (1) **Staff Response:** *This defense is irrelevant to the fact that the permittees made no effort to authorize the gate/fence until staff notified them of the violation. As permittees, Trux and the City should have known that this item of fill needed authorization.*
- c. BCDC indicated in the January 19, 2016, notice email that the unauthorized gate/fence can be authorized in the current amendment proposal before BCDC, thereby implying this alleged violation was simply a procedural error.
  - (1) **Staff Response:** *By referring to the failure to obtain authorization to install a long section of fence at the boundary between the public and private use areas as "a procedural error" the permittees seem to be suggesting that it constitutes a minor infraction. However, it is through the application process, that staff (or the Commission) analyzes a project's potential impacts on existing or future possible public access. This procedure of obtaining approval is intended to occur in advance of construction. As permittees, Trux and the City should have known that this item of fill requires authorization.*
3. **Staff Recommendation:** *Trux has acknowledged that the gate/fence was installed several years ago when the Airport completed their Bay Trail connection to the "finger" park. Staff provided notice to the permittees on January 19, 2016, of the violation, which was resolved upon issuance of Amendment 4 to the Permit on May 10, 2016. In the Violation Report, staff proposed \$15,000 in administrative penalties for this violation; this amount was determined by assigning a daily penalty of \$133 based on the factors provided for in Section 66641.9(a) of the McAteer-Petris Act for 113 days. Based on the circumstances and degree of culpability, that the permittees should have known this placement of fill in the shoreline band needed authorization, staff recommends the \$15,000 administrative civil penalty proposed in the Violation Report.*

#### **IV. RECOMMENDED COMMISSION ACTION**

- A. *After consideration of the defenses described above and the staff's responses thereto, staff is recommending the Enforcement Committee recommend to the Commission that it issue a Cease and Desist and Civil Penalty Order to Trux and the City that will:*
1. *Require compliance with Special Condition II.B.2 (Public Access Permanent Guarantee) of the Permit, which will resolve Violation A;*
  2. *Require compliance with Special Condition II.H.1 (Open Space Permanent Guarantee) of the Permit, which will resolve Violation B;*
  3. *Require compliance with Special Condition II.B.6 (Public Access Maintenance) of the Permit, which will resolve Violation G; and*
  4. *Require Trux and the City to pay a civil penalty of \$255,000 to resolve their civil liability for violating the law and the Permit, \$30,000 of which will be suspended if Trux and the City fully comply with the Order.*