

SAN FRANCISCO BAY CONSERVATION
AND DEVELOPMENT COMMISSION

ENFORCEMENT COMMITTEE MEETING

MILTON MARKS CONFERENCE CENTER
455 GOLDEN GATE AVENUE
SAN DIEGO ROOM, BASEMENT LEVEL
SAN FRANCISCO, CALIFORNIA

THURSDAY, NOVEMBER 16, 2017

9:30 A.M.

Reported by:
Ramona Cota

A P P E A R A N C E SEnforcement Committee

Greg Scharff, Chair

Mark Addiego

Geoffrey Gibbs

Marie Gilmore

Jill Techel

Counsel to the Committee

David Alderson, Deputy Attorney General
Office of the Attorney General

BCDC Staff and Consultants

Adrienne Klein, Chief of Enforcement

Brad McCrea, Regulatory Director

Marc Zeppetello, Chief Counsel

Tara Mueller, Deputy Attorney General
Office of the Attorney General

Respondent/Permittee

Kevin Sadler, Attorney at Law
Chris Carr, Attorney at Law
Kevin Vickers, Attorney at Law
Baker Botts LLP

Mark Sanders
Westpoint Harbor, LLC

A P P E A R A N C E SPublic Speakers

Maureen O'Connor Sanders

David C. Smith

John Sanders

Ben Eichenberg, San Francisco Baykeeper

Betty Kwan, Bay Planning Coalition

Mitchell Oster, Save the Bay

Steve Meckfessel

Lisa Belenky, Center for Biological Diversity

Cort Larned, 101 Surf Sports

David Wells, 101 Surf Sports

Doug Furman, Westpoint Harbor

Peter Leib, Westpoint Harbor

John R. Bradley, Citizens Committee to Complete the Refuge

Arthur Feinstein, Citizens Committee to Complete the Refuge

Gail Raabe, Citizens Committee to Complete the Refuge

Leslie Flint, Sequoia Audubon Society

G. Nelson Wolfe, Westpoint Harbor

Therese "Terey" Quinlan

Kevin Dew

Paul Kaplan

Helen Wolter, Committee for Green Foothills

James "Jay" Farwell

Przemyslaw Karwasiecki

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P R O C E E D I N G S

10:06 a.m.

1
2
3 COMMITTEE CHAIR SCHARFF: We will call this meeting to
4 order then of the Enforcement Committee. All Commissioners
5 are present. Do you want to call the roll? Someone calls
6 the roll. Adrienne calls the roll.

7 MS. KLEIN: Good morning. Welcome Committee Members.
8 Chair Scharff?

9 COMMITTEE CHAIR SCHARFF: You want to call the roll?

10 Ms. Klein: Yes.

11 COMMITTEE CHAIR SCHARFF: Oh, I'm here, yes.

12 MS. KLEIN: No, no, I'm sorry.

13 COMMITTEE CHAIR SCHARFF: Yes.

14 Ms. Klein: Member Addiego?

15 COMMITTEE MEMBER ADDIEGO: Here.

16 MS. KLEIN: Member Techel?

17 COMMITTEE MEMBER TECHEL: Present.

18 MS. KLEIN: Member Gilmore?

19 COMMITTEE MEMBER GILMORE: Here.

20 MS. KLEIN: Member Gibbs?

21 COMMITTEE MEMBER GIBBS: Here.

22 MS. KLEIN: And Chair Scharff?

23 COMMITTEE CHAIR SCHARFF: Here, present.

24 MS. KLEIN: We have a quorum.

25 COMMITTEE CHAIR SCHARFF: Well thank you. So the way

1 we are going to do this is we are going to -- first of all I
2 think we have some objections and some preliminary matters,
3 if counsel want to come up and address those issues.

4 COMMITTEE MEMBER TECHEL: Let's do the minutes.

5 COMMITTEE CHAIR SCHARFF: Oh, the minutes, roll call
6 and public comment not on the agenda. Okay, I didn't think
7 we had any.

8 Approval of the draft minutes. Do I have a motion for
9 that?

10 COMMITTEE MEMBER GILMORE: So moved.

11 COMMITTEE MEMBER TECHEL: Second.

12 COMMITTEE CHAIR SCHARFF: All in favor?

13 (Ayes.)

14 COMMITTEE CHAIR SCHARFF: It passes unanimously. And
15 now we are here at Item 5, which I am not going to read,
16 which is a public hearing and possible vote on a recommended
17 enforcement decision involving Proposed Cease and Desist and
18 Civil Penalty Order No. CDO 2017.04; Mark Sanders and
19 Westpoint Harbor, LLC.

20 Do counsel want to come up? Marc?

21 MR. ZEPPETELLO: I can do it from the chair?

22 COMMITTEE CHAIR SCHARFF: You can.

23 MR. ZEPPETELLO: Good morning, Commissioners.

24 Yesterday we received four pleadings from the Respondents
25 totaling approximately 69 pages of objections. We have

1 barely had time to review them. The Committee, the
2 Commissioners have not had time to review them. We object
3 to them under Regulation 11328 on the grounds of prejudice
4 that we haven't had a chance to respond and we would ask
5 that those objections not be included as part of the record.

6 COMMITTEE CHAIR SCHARFF: Okay.

7 Counsel for Westpoint. What was your name, sir?

8 MR. SADLER: I was just going to get to that because we
9 hadn't had that opportunity so good morning to all of you.
10 I'm Kevin Sadler from the Baker Botts law firm. With me
11 this morning is Mr. Kevin Vickers to my left, Mr. Chris Carr
12 the third down; and if I could just ask him to stand,
13 Commissioners, this is Mr. Mark Sanders who is here with his
14 wife Maureen who is seated in the very first row.

15 COMMITTEE CHAIR SCHARFF: Welcome.

16 MR. SADLER: And now with that if I may just address --

17 So ten days ago we received three things, the
18 recommended Decision along with the proposed Cease and
19 Desist Order, but at the same time we received a declaration
20 from a gentleman by the name of Mr. Leddy, L-E-D-D-Y, we
21 also received for the first time a copy of a letter which I
22 will refer to as the CCCR letter. So those all came to us
23 for the very first time ten days ago, so that was first --
24 it's pretty obvious that was the first time we had an
25 opportunity to look at them, react to them and decide

1 whether any objections were appropriate.

2 We have lodged objections to the Leddy declaration and
3 to the CCCR letter for basically the same reason and that is
4 the following: These were not declarations -- and they have
5 documents attached to them. These were not items that were
6 attached to the Violation Report and Complaint that was
7 filed many, many weeks ago and so having our first
8 opportunity to see them we object that they are untimely.

9 Both the Leddy declaration and the CCCR letter contain
10 a number of what I would submit are testimonial statements
11 testifying to facts, testifying to matters of opinion, which
12 would be objectionable even if they came in here today
13 because they are not experts and there is nothing in the
14 materials submitted with them that would qualify them to
15 give opinions on that regard. I am obviously summarizing
16 but we have very detailed objections, including hearsay
17 objections, to a number of the statements made in these two
18 pieces of information, again, which we saw for the very
19 first time only ten days ago.

20 I would submit that the Commission, the Committee, is
21 free to consider both of those things as public comment. We
22 have had letters and emails and so forth come in from a
23 large number of people and I don't think there would be
24 anything inappropriate about the Committee considering the
25 Leddy declaration and the CCCR letter as just nothing more

1 than public comment. The objection we have is that it is
2 not appropriate, in our view, that those two items be
3 considered as evidence that would support any finding that
4 this Committee would seek to make. And I think that is our
5 core objection, consider them as comments, if you will, like
6 all the other letters and emails that have been submitted,
7 including two letters we just got handed about ten minutes
8 ago. Consider them as comments; but comments are not
9 evidence and that is our basic objection. We saw these for
10 the first time ten days ago, this was our first opportunity
11 to lodge that objection and we don't think it is proper
12 evidence for this Committee to consider.

13 COMMITTEE CHAIR SCHARFF: Mr. Zeppetello, your
14 response?

15 MR. ZEPPETELLO: Just would respond again that these
16 objections, if they had been submitted two or three days ago
17 where we would have had a chance to read them and prepare a
18 response and the Commissioners would have had a chance to
19 read them, that would be one thing.

20 Public comment letters you accept and consider all the
21 time in public hearings, you give them whatever weight you
22 deem appropriate. There is no rule against the
23 consideration of hearsay evidence; in fact, the rule
24 expressly provides that you may consider evidence even if it
25 would be objectionable in a judicial proceeding.

1 So we reaffirm our objection, it is just we haven't had
2 time to prepare a response and I'll leave it there.

3 COMMITTEE CHAIR SCHARFF: So just so I summarize to
4 make sure I understand. So you have an objection to two
5 declarations?

6 MR. SADLER: The letter and the declaration, yes.

7 COMMITTEE CHAIR SCHARFF: The letter and the
8 declaration, that's the sum of your objections.

9 MR. SADLER: No.

10 COMMITTEE CHAIR SCHARFF: No?

11 MR. SADLER: There is one other item that is kind of in
12 a different category that Mr. Zeppetello hasn't gotten to
13 yet.

14 COMMITTEE CHAIR SCHARFF: Okay. So right now we have
15 those two objections.

16 MR. SADLER: Correct.

17 COMMITTEE CHAIR SCHARFF: And your response to that is?
18 First of all I want to ask, does this proposed Cease and
19 Desist Order rely on, for its findings, these two
20 declarations, or not?

21 MR. ZEPPETELLO: I would say it does not rely on them
22 for the findings. There is a paragraph in the proposed
23 Cease and Desist Order that references photographs that were
24 submitted; and in fact, the Respondents objected to the
25 photographs as part of the Violation Report. And the reason

1 Mr. Leddy, I believe, submitted a declaration is to respond
2 to the objections that the photographs were hearsay.

3 So again, I haven't had a chance to read what their
4 latest reason for objecting to his declaration
5 authenticating his pictures is, but they submitted the
6 declaration in response to objections that he was submitting
7 hearsay in the first place.

8 The other --

9 COMMITTEE CHAIR SCHARFF: We allow hearsay.

10 MR. ALDERSON: But not to support a finding of fact.

11 MR. SADLER: Understood, and that's what we want to be
12 very clear about. In reading the rules, it isn't a blanket
13 exception to hearsay and we have laid that out very clearly.
14 I think what Mr. Zeppetello just highlighted for you is that
15 those materials related to the photographs could have been
16 submitted, the declaration could have been submitted weeks
17 and weeks ago when the Violation Report was first submitted.
18 It wasn't. This was our first opportunity to object to it.
19 There is nothing in the rules that required us to object
20 within 24 hours or 48 hours or 36 hours. Obviously there's
21 a lot of materials here, we have been very busy working on
22 that. And so we raised the objection in a reasonable amount
23 of time prior to the hearing and we stand on our objections.

24 MR. ZEPPETELLO: I'd like to make just one other
25 comment. This actually raises an issue of what are the

1 material issues that this Commission needs to decide.

2 The permit requires the installation of buoys.

3 Mr. Sanders doesn't dispute that he did not install buoys,
4 he installed signs instead and now we are into a big dispute
5 about whether there were signs or not signs. But the Cease
6 and Desist Order would require him to install buoys as
7 required by the permit. So in effect we are off on a
8 tangent on a issue that really isn't material to the
9 Commission's determination.

10 COMMITTEE CHAIR SCHARFF: That's why I was asking if
11 you relied on any of these disputed or objected-to
12 declarations for the findings of fact; and you said you
13 don't but there was some narrative response.

14 MR. ZEPPETELLO: Right, that staff received photographs
15 and this is what the photographs purported to show.

16 COMMITTEE CHAIR SCHARFF: Right. So they are not
17 relying on hearsay for the findings of fact, they are not
18 relying on the declarations for the findings of fact. Is
19 that clear?

20 MR. SADLER: That is what I hear Mr. Zeppetello saying
21 and if that's true then I think that folds right into what I
22 began with, these are really no different than public
23 comments that have been submitted, including comments that
24 we just got this morning.

25 COMMITTEE CHAIR SCHARFF: Commissioner, you wanted to?

1 COMMITTEE MEMBER GILMORE: No. No, it's been cleared
2 up, thanks.

3 COMMITTEE CHAIR SCHARFF: Okay.

4 MR. ZEPPETELLO: I guess the other thing to mention is
5 the other category of objections is objections to various
6 statements in the recommended Decision. And again we
7 haven't had time to review and respond to those but that's
8 another category of pleading that was submitted yesterday
9 afternoon.

10 COMMITTEE CHAIR SCHARFF: Well I think you are each
11 going to get to do your presentations and I think that would
12 be the appropriate time to raise your concerns with the
13 weight of the evidence. Unless you have something that you
14 say, this finding relies on this hearsay fact and you want
15 to hone in on that, I'm totally fine with taking that, but
16 at the moment I'm going to allow the declarations in with
17 the understanding that, you know, that we have those hearsay
18 issues that we are going to have to deal with.

19 MR. SADLER: Understood. And with respect to the
20 objections we filed to the Recommended Decision, that is
21 going to be, obviously, part of our presentation.

22 COMMITTEE CHAIR SCHARFF: That's what I was thinking.

23 MR. SADLER: Much of that, as you can imagine, is in
24 the nature of argument, it is not evidence, and you will
25 hear both sides of that in a minute.

1 COMMITTEE CHAIR SCHARFF: Have we dealt with the
2 objections, your preliminary ones, enough to proceed?

3 MR. ZEPPETELLO: I guess just one more to raise and
4 maybe we don't have to take the time with this but just to
5 highlight it is that the Respondents had requested to cross-
6 examine 16 witnesses, most of whom are not here today, and
7 they renewed their request yesterday in a letter. We object
8 to that request on the grounds that under the rules
9 Regulation 11327(f), the presentations today shall be
10 focused on evidence already made part of the record or the
11 policy implications and the Commission shall not allow oral
12 testimony unless the Committee or the Commission believes
13 such testimony is essential to resolving material issues.
14 So if at some point the Commissioners decide there is
15 something material they would like to have live testimony
16 on, but otherwise we object to that request as well.

17 COMMITTEE CHAIR SCHARFF: That's my view, that we have
18 a record and that if for some reason the Commissioners
19 themselves have some concerns then we would need to have the
20 person come and testify.

21 MR. SADLER: Exactly. We raised that issue, again,
22 very much related to what we just talked about, which is, if
23 there are statements by these 16 people, none of whom have
24 submitted declarations, none of whom are here prepared to be
25 cross-examined, we don't consider that proper evidence for

1 the Committee to make a finding of fact on. I think it
2 sounds like what Mr. Zeppetello is saying is that he is not
3 relying on these statements by these people who have not
4 submitted declarations and who are not present for cross-
5 examination; and if that's the case then I don't think we
6 have to worry about it anymore.

7 COMMITTEE CHAIR SCHARFF: Now there were some time
8 issues.

9 MR. ZEPPELLO: That's the last issue, yes.

10 COMMITTEE CHAIR SCHARFF: The last issue.

11 MR. ZEPPELLO: We may have resolved that, I'm not
12 sure. The Respondents yesterday suggested that each side
13 have an hour to present their case followed by public
14 comment. I pointed out this morning in a conversation that
15 didn't allow time for questions and deliberations so I
16 propose that we each have 30 minutes to present our side and
17 then followed by questions and/or public hearing. I'm not
18 sure if that's acceptable but I think maybe it is.

19 MR. SADLER: As I mentioned to Mr. Zeppetello, my
20 proposal for an hour assumed that some goodly portion of
21 that hour would be consumed with questions coming from the
22 Committee Members. I would not burden you with listening to
23 me uninterrupted for an hour, that would be unfair. So I
24 don't think we're too far apart and obviously we invite
25 questions from the Committee Members.

1 COMMITTEE CHAIR SCHARFF: So let's do 30 minutes and we
2 then basically will ask questions and deliberate afterwards.
3 That itself usually takes an hour.

4 MR. SADLER: Understood. And then with respect to the
5 public comment. We had suggested a minimum of three minutes
6 for the citizens. I do not know how many have shown up.

7 COMMITTEE CHAIR SCHARFF: I'm going to count them
8 quickly.

9 MR. SADLER: Okay, all right, thank you.

10 COMMITTEE CHAIR SCHARFF: We have 20 public speakers.

11 COMMITTEE MEMBER ADDIEGO: Three minutes is an hour.

12 COMMITTEE CHAIR SCHARFF: Yes, three minutes would be
13 an hour so we're not going to do three minutes. We are
14 actually going to do -- what does a minute and a half total?

15 THE REPORTER: Thirty minutes.

16 COMMITTEE CHAIR SCHARFF: Thirty minutes, right. So
17 we'll do a minute and a half.

18 Proceed.

19 MR. ZEPPETELLO: Thank you, Commissioners.

20 As you know, Mark Sanders is the Permittee for the
21 Westpoint Harbor Marina in Redwood City. The Executive
22 Director and staff acknowledge that Mr. Sanders is a
23 responsible marina operator and that Westpoint Harbor is
24 operated in an environmentally sound manner and that he
25 promotes clean boating.

1 However, this matter has very little to do with the
2 actual operation of the marina. The reason that we are here
3 today is that in numerous ways, both large and small,
4 Mr. Sanders has refused to accept that he entered into a
5 contract with the Commission 14 years ago when he signed his
6 permit for this project and he is bound by the terms of that
7 permit, including the conditions that he finds inconvenient
8 or doesn't agree with.

9 Staff has attempted to work with Mr. Sanders over the
10 past six years to resolve the violations, including
11 preparing five different versions of a proposed permit
12 amendment in response to his requests, which would have
13 resolved at least some of the violations and each of which
14 he refused to sign that has resulted in a continuing
15 situation of noncompliance with his permit.

16 We are here today because the Commission needs to
17 consider the violations and adopt an order to resolve them.
18 And to the extent that the permit needs to be amended or
19 that Mr. Sanders would like to have it amended, those
20 amendments need to be considered at a future date by the
21 full Commission at a public hearing rather than resolved or
22 attempting to be resolved between staff and the permittee
23 administratively.

24 My presentation today will be in three parts, an
25 orientation to the site, a timeline of key events and then a

1 review of the key provisions of the Proposed Order.

2 It's a little hard to see on the screen with the lights
3 on but Westpoint Harbor was constructed by excavating half
4 of a former salt pond or bittern pond. The remainder of the
5 pond is to the south, the remainder of Pond 10. Westpoint
6 Slough is immediately to the north of the marina entrance,
7 Greco Island and the Don Edwards National Wildlife Refuge
8 approximately 500 feet to the north, home of a number of
9 rare and endangered species. The Pacific Shores Center to
10 the west predates Westpoint Harbor, they have a public
11 access trail along the Bay shore that would connect and has
12 not been connected to the public access paths at Westpoint
13 Harbor.

14 Here is a closer vicinity map or rather a site map.
15 This project was proposed and constructed in phases. Phase
16 1 being the marina itself and intended to be the public
17 access improvements. Phase 2, a boatyard to the east and
18 then Phase 3 remains undeveloped and it is future retail and
19 commercial. The Guest Docks are along the west side, there
20 is the unauthorized Rowers Dock that is down here in this
21 corner. There is a harbormaster building at the red dot.
22 The public boat launch is here on the east side. There is a
23 service dock or a fuel dock here. This is the area up here
24 where there are a number of unauthorized floating docks.
25 The trees along the slough are right along here. Originally

1 they were proposed and would have been acceptable along the
2 marina basin. For reasons that aren't clear, Mr. Sanders
3 planted them without approval along the slough itself.

4 As late as October of last year there was not a public
5 shore sign anywhere from the vehicle entrance anywhere
6 around the site. There were two signs that said "Members
7 and Guests Only" at the marina entrance.

8 As late as June of this year Mr. Sanders continued to
9 restrict access to the trails around the marina basis.
10 There were obstructions on the trail here saying, keep out,
11 restricted access. There were obstructions at the
12 harbormaster building saying, keep out, restricted access,
13 to discourage the public from driving to the end of the
14 parking lot. The boatyard was under construction in the
15 last year, year and a half around a construction fence but
16 Mr. Sanders also had a fence and gate blocking access to
17 this pathway and maintained a gate that continued to block
18 access from the Pacific Shores property.

19 Here is a permit exhibit, the Public Access Plan, which
20 is almost identical to the legal instrument that Mr. Sanders
21 recorded over a decade ago. It shows that the dedicated
22 public access includes the pathways around the entire marina
23 basin and out to the overlooks; it includes the guest docks.
24 The public access includes the public boat launch. It also
25 includes an area along the south side of the parking lot

1 where there are a number of unauthorized structures and
2 storage of construction material, a storage locker, there is
3 an asphalt pad that has been poured on the public access
4 area out on the east side.

5 Starting with the timeline.

6 The original permit was issued in August of 2003 and
7 envisioned the three phases. The marina would be
8 constructed with 416 slips and public access improvements as
9 part of Phase 1, the boatyard Phase 2 and then commercial/
10 retail as Phase 3.

11 Amendment Three was issued in 2006, which divided the
12 Phase 1 into two phases, Phase 1A being a portion of the
13 marina, the first three docks and 145 slips, Phase 1B being
14 the remainder of the docks for the additional 271 slips plus
15 the public access improvements.

16 Here is the language from Amendment Three which was
17 operative until 2016. There was a time extension. But the
18 operative language about the public access improvements is
19 that prior to the use of any structure authorized as part of
20 Phase 1B, including the marina berths, the permittee shall
21 install the following improvements, and then there is a list
22 of improvements in the permit, which we will be talking
23 about today.

24 Like almost all BCDC permits, this permit requires
25 public access first, before the permittee enjoys the benefit

1 of their permit. But Mr. Sanders did the exact opposite, he
2 pursued his development first and he put public access last.
3 And his approach on this issue reflects a pattern that comes
4 up time and again as we review the permit violations, that
5 whenever there was a conflict between what the permit
6 required and Mr. Sanders' plans or preferences, he did what
7 he wanted and he ignored his permit obligations.

8 Here is a Google Earth image from September of 2008
9 which shows the completion of Phase 1A, 171 berths and three
10 docks.

11 A year later, two docks of Phase 1B had been installed
12 and partially occupied. It was by this point under that
13 language that we just reviewed that the Phase 1B public
14 access improvements were to be installed and available for
15 unrestricted public access.

16 BCDC began an enforcement investigation in May 2011 in
17 response to public comments or complaints that staff
18 received that people had been turned away by either
19 Mr. Sanders or others at the site saying, there is no public
20 access here, you're trespassing.

21 In May of 2011 BCDC staff wrote a letter outlining the
22 violations. Mr. Sanders responded and there began a
23 dialogue. He corrected a number of the issues relatively
24 quickly, one of which was that the authorization had expired
25 in 2010; he got a permit amendment, which was a time

1 extension.

2 One of Mr. Sanders' concerns about public access was
3 that parts of the marina were still under construction and
4 that the Phase 3 areas, because the marina had been
5 constructed from fill out of this old salt pond, it was
6 unsafe and he didn't want people walking across the Phase 3
7 undeveloped areas. So an agreement was reached in 2012 to
8 allow temporary fencing; it was an agreement among BCDC,
9 Redwood City and the permittee. Staff prepared a proposed
10 permit amendment to authorize the temporary fencing.
11 Mr. Sanders refused to sign it, raising a number of
12 objections.

13 Staff subsequently prepared two more amendments as
14 shown here.

15 And then the permit authorization again expired in 2014
16 without an amendment in place.

17 In September of 2014 staff prepared the fourth version
18 of this proposed amendment number five accompanied with a 22
19 page letter which responded to each of his comments and
20 explained why certain changes could not be made
21 administratively.

22 In December staff received a letter back from
23 Mr. Sanders' counsel continuing to raise such issues as
24 challenging the Commission's salt pond jurisdiction and
25 live-aboard reporting.

1 On the salt pond jurisdiction, it's too late for the
2 permittee to be challenging jurisdiction and permit
3 conditions. California law is clear that if you accept the
4 benefits of a permit you accept the burden, that was
5 recently reaffirmed by the California Supreme Court this
6 year in *Lynch v. California Coastal Commission*.

7 On the live-aboard issue Mr. Sanders continues to take
8 the position and he has consistently said he shouldn't have
9 to provide information about live-aboards because all the
10 berths are properly sewerred and so there is no water quality
11 problems. And staff has repeatedly explained that the live-
12 aboard policies in the Bay Plan also require reporting
13 because there is a limit on the number of live-aboards
14 allowed in recreational marinas and also there is a policy
15 that the live-aboards be dispersed throughout the marina to
16 enhance security. But for whatever reason he continues to
17 argue about this condition and was doing so as late as the
18 end of 2014.

19 In 2015 staff prepared a fifth version of the Proposed
20 Amendment, which he also refused to sign.

21 Meanwhile, he had submitted an amendment to authorize
22 construction of the boatyard in 2015, which staff began
23 processing and acting on, but before it was issued
24 approached Mr. Sanders again and suggested that we attempt
25 to integrate the provisions of Proposed Amendment Five into

1 Amendment Six to resolve everything. Mr. Sanders refused
2 saying, his sole concern was to obtain an amendment to -- a
3 permit to authorize construction of the boatyard. Once
4 again he was pursuing development first and public access
5 last.

6 In December of last year BCDC staff visited the site
7 and informed Mr. Sanders that we had begun preparing a
8 Violation Report and Complaint. Mr. Sanders commented that
9 if public access was a concern he would submit a permit
10 amendment to install temporary fencing, as had been agreed
11 to almost five years ago.

12 He submitted that application in January; the permit
13 amendment was issued in May. The reason that it took five
14 months primarily was back and forth between Mr. Sanders and
15 staff about the setbacks from the temporary fencing from the
16 path. In April Mr. Sanders submitted a plan that he said
17 had been previously approved by BCDC to authorize two-foot
18 setbacks, which turned out to be false. The Design Analyst
19 went back and found the fence plan that Mr. Sanders'
20 architects, landscape architects had submitted in 2012 which
21 had larger setbacks than we had been asking for and allowed
22 landscape buffers along all of the pathways.

23 And so what we did is we prepared a permit amendment
24 that had that fence plan as the authorized fence plan and we
25 said, sign this permit amendment or the Executive Director

1 will issue an Executive Director's Cease and Desist Order to
2 open the public access whether or not there is a fence. And
3 that's how we got public access opened at the site last
4 year. If it weren't for this enforcement action this would
5 be still a members and guests only facility with restricted
6 access and signs telling the public to keep out.

7 The proposed terms of the Cease and Desist Order, the
8 first general section is a general requirement to cease and
9 desist from violating the permit or the McAteer-Petris Act.

10 A second provision or section is to make all the Phase
11 1B and Phase 2 public access areas available. The boatyard
12 is now substantially completed and so there are additional
13 public access areas associated with the boatyard.

14 One of the requirements is to remove the unauthorized
15 gates at the guest docks. This is an item of contention
16 between staff and Mr. Sanders. The guest docks, as I showed
17 previously, they are in a dedicated public access area under
18 the legal instrument, they are also designated as a public
19 access improvement in the permit. Mr. Sanders takes the
20 position that a grant from the Department of Boating and
21 Waterways that he received restricts public access by
22 pedestrians and only allows it by boaters. In fact, the
23 grant requires public access by boaters but it does not
24 restrict public access by pedestrians.

25 A second item that would be required is the removal of

1 an unauthorized sign installed at the boat launch requiring
2 the payment of a fee and obtaining a permit to use that
3 public access improvement. In August of this year we asked
4 Mr. Sanders to remove the sign or to cover up the portions
5 requiring a fee or a permit and he ignored our request.

6 The Order would also require no charge or fee to use
7 public access improvements at the site.

8 Another item is the restrooms, both now at the
9 harbormaster building and at the boatyard, that they remain
10 open at all times. There have been some security concerns
11 expressed in the public comments about the restrooms and
12 whether the restrooms need to be open at night. This permit
13 has always had a provision that would allow, like most BCDC
14 permits, reasonable rules and restrictions for public access
15 in response to a documented problem. This has been pointed
16 out numerous times. And although there have now been
17 comment letters, Mr. Sanders has never submitted a formal
18 request to impose rules and restrictions on use of the
19 restroom.

20 Another item is to the unauthorized rowers dock is
21 being used by a commercial business for renting boats and
22 kayaks. But it has been observed that those boats and
23 kayaks get stored on the public access area and the Order
24 would require that they not continue to do so.

25 The Proposed Order has a number of conditions. As

1 discussed in the Violation Report, Mr. Sanders has
2 consistently failed to comply with plan review and approval
3 requirements so there are no approved plans for really any
4 of the public access improvements out there, so the Order
5 would require plans for landscaping, plans for the public
6 walkways, plans for site furnishings as required by the
7 permit and as-built plans for the Phase 2 improvements that
8 he installed recently without plan review and approval.

9 The Order has a provision requiring maintenance of
10 public access improvements. When staff was out at the site
11 in December the trails, particularly around the northwest
12 side of the site, were in a very deteriorated condition and
13 overgrown. So we have just -- given that some public access
14 improvements and furnishings have been installed over the
15 years, although without approval, there is a one-time
16 requirement to do an inspection and provide a report on the
17 condition of those improvements and make any necessary
18 repairs or maintenance.

19 The next two provisions of the Order: One is to remove
20 unauthorized improvements, primarily improvements in the
21 public access areas; and second, to seek authorization for
22 unauthorized improvements.

23 There is an unauthorized gate and fence at the
24 northwest corner of the property. For years that was closed
25 and prevented public access. Now it's open although it

1 could be closed again at any time, but the fence is not
2 authorized.

3 This 101 Surf Sports has a number of accessory
4 facilities, a storage locker, a storage container, a
5 changing area and a portable toilet that are in the parking
6 lot in addition to the storage of the boats on the public
7 access areas and the Order would require removal of the
8 unauthorized improvements.

9 There also are a number of unauthorized improvements,
10 as I alluded to, along the south side of the parking lot in
11 a dedicated public access area.

12 And then there also is the issue of the trees. As I
13 mentioned there is no approved plan for landscaping.
14 Mr. Sanders installed trees that the Bay Design Analyst
15 years ago asked on two occasions to remove those trees
16 because of concerns that they could be perching sites for
17 raptors to prey on endangered species in the refuge
18 immediately across the slough. Mr. Sanders ignored the
19 request.

20 So this is the next section. Submit an application to
21 amend the permit to request after-the-fact authorization.

22 There are a number of utility structures in the public
23 access areas. It is not realistic, we understand those
24 cannot be removed, but they can be written into the permit
25 and authorized.

1 The rower's dock. Mr. Sanders claims that that's
2 always been authorized, staff's reading is it is not in the
3 permit. It was in plans, he put it on plans, but it's not
4 in the permit as authorized. But we are not saying, take it
5 out, we're saying it just needs to be authorized.

6 Similarly, assuming 101 Surf Sports is going to
7 continue to use that facility, that any accessory structures
8 or facilities that they need, such as storage containers or
9 picnic tables, needs to be authorized.

10 There's the three floating docks. There is a dispute.
11 They claim that they are not fill but under the McAteer-
12 Petris Act 66632(a) docks, floating docks stored for an
13 extended period of time are fill.

14 The guest docks. One of the issues with the guest
15 docks is that Mr. Sanders is allowing the City of Redwood
16 City fire boat and police boats to park there, which is --
17 it may be fine, it may be a public service, but there is an
18 issue here whether that's an appropriate use of these public
19 access areas or whether maybe the boat should be moored
20 elsewhere in the marina. In any case, it's just an issue
21 that needs to be addressed.

22 And finally, the unauthorized gates installed on the
23 gangway to the private docks. Again, there have been
24 security concerns and people have in some comment letters
25 said the public, the public is going on to the private

1 docks. BCDC staff's understanding is that all of those
2 docks are gated and are all locked and we are not asking for
3 the gates to be unlocked or removed, we are just asking that
4 they be authorized as part of the permit.

5 Several provisions of the Proposed Order address
6 wildlife issues. As I mentioned earlier, the permit
7 requires buoys to identify a "no wake" speed zone down the
8 center of the channel to discourage boaters. The concern
9 here is whether large wakes could cause damage or erosion to
10 the wildlife refuge.

11 The permit also requires a buoy system with signs 100
12 feet from the salt marsh to inform the public of access
13 restrictions to the refuge.

14 Mr. Sanders claims that he can't do this but there is
15 no evidence he actually ever applied to the Coast Guard to
16 install those things and the Fish and Wildlife Service
17 continues in a letter that they submitted to this proceeding
18 on November 1st to say, quote:

19 "We reassert the need to place and maintain
20 appropriate buoys/signage (fitted with perch
21 deterrents) to inform the public about the
22 sensitive habitat on Greco Island ..."

23 If Mr. Sanders wants to seek an amendment to allow
24 signs instead of buoys he can include that in his amendment
25 request, but what is before you today is enforcing the

1 permit that he has failed to comply with.

2 Visual barriers to the salt pond. This is another
3 issue we have gone back and forth on with no success. The
4 permit requires visual barriers which could be a combination
5 of setbacks and landscaping to reduce disturbance to birds
6 roosting in the adjacent salt pond.

7 Staff has pointed out -- the Respondent submitted an
8 engineer's drawing saying that the setback is 89 feet.
9 Apparently they measured that from the widest distance,
10 there are other places where it's less. But also as the
11 water level in the salt pond rises and falls the setbacks
12 are less than that. It is not clear to me why, why this has
13 to be something to fight about.

14 The permit requires the permittee to submit a
15 mitigation plan for shore bird roosting habitat.
16 Mr. Sanders takes the position that Cargill took on that
17 responsibility. But Cargill is not a permittee; and what we
18 have proposed in the Proposed Order is that they come up
19 with a plan or an agreement between Cargill and the
20 permittee to document that there is an agreement here and
21 that Cargill or the permittee actually are managing the
22 remainder of the pond then for roosting habitat and agree to
23 a monitoring and reporting program to just document that
24 that's the case.

25 Similarly on non-tidal wetlands mitigation. There is a

1 requirement for that in the permit. Mr. Sanders claims that
2 he completed that mitigation years ago although nothing was
3 ever submitted and approved by staff. Staff's proposal to
4 resolve this is simply that he document that he implemented
5 the plan that he proposed to the Corps of Engineers 14 years
6 ago. Part of that plan was active management of a drainage
7 ditch to make sure that there were tidal flows into that
8 ditch during the dry season to promote its habitat value and
9 we would like an agreement that some active management will
10 take place and that there will be a reporting obligation to
11 document that.

12 The remaining terms of the Proposed Order are simply in
13 part just to comply with existing requirements.

14 And then given the contentiousness and given the
15 seriousness and scope of these violations we propose that
16 there be follow-up, that there be a monthly reporting to
17 staff and then two future Enforcement Committee's hearings
18 where we and the Respondents can report on the status of
19 complying with the Order, complying with the permit and the
20 permit amendments that will follow as a result of the Order.

21 A couple of comments on the administrative penalty.
22 Staff has not over-counted the violations. In fact, we have
23 aggregated 34 separate violations into a total of 23 and we
24 didn't propose a penalty for 3 of them.

25 The proposed penalty is \$243,000 (sic) for 20

1 violations, all but one of which is capped at the statutory
2 maximum, and the reason for that is just the length of time
3 that these violations have been ongoing.

4 We did make some changes to the penalties between the
5 Violation Report and the Complaint. We removed two
6 violations in response to arguments made in the Statement of
7 Defense. We added one for the unauthorized sign at the boat
8 launch because we made a request in August that Mr. Sanders
9 remove the sign and he ignored it.

10 In response to the objections that were raised by
11 Respondents last night staff would be agreeable to
12 eliminating the one violation, the new violation 23 for the
13 sign on the grounds that they haven't had a chance to
14 respond. I would not remove it as a violation and it should
15 be subject to the Order in terms of a signage plan but we
16 would not object to removing that penalty, which would lower
17 the penalty to \$513,000 for 19 violations.

18 The penalty factors, there is an analysis in the
19 Proposed Order and in the Recommended Decision on the
20 penalty factors and I won't take time to go through them in
21 detail. I will say that it's clear this is another area
22 where they raise objections to a statement that the denial
23 of public access for six years has had an adverse impact on
24 public access. I would submit that is a reasonable
25 inference one could draw from the evidence. It's not

1 necessarily a factual assertion, it's a conclusion.

2 Similarly, failure to install the buoys to protect
3 wildlife, failure to put in visual barriers to the salt pond
4 to reduce impacts to birds, the reasonable inference is
5 those violations have had an adverse impact on Bay
6 resources.

7 Staff believes the violations have been knowing and
8 intentional and that Mr. Sanders has consistently refused to
9 cooperate with us when it doesn't suit his plan for his
10 marina.

11 On the costs to the state, one of the penalty factors I
12 would just note that staff has estimated over 2,000 hours
13 and over \$165,000 in staff resources. This is by far the
14 largest effort and cost to the state of any enforcement
15 action since I have been at BCDC. It's approximately double
16 what the estimate was for Scott's, which you considered
17 earlier this year and that also went on for years.

18 Finally in conclusion I would like to just comment
19 briefly on the Public Records Act request that the
20 Respondent submitted and the lawsuit that they filed against
21 us for alleged failure to comply. Staff believes that it
22 complied in good faith. We provided hard copy files,
23 complete enforcement and permitting files within seven days.
24 Those are the Agency's official records.

25 You know, this is the first time I've had a Public

1 Records Act request where somebody wanted to look at draft
2 Word documents and look at metadata, but the more they
3 pushed the more we gave them. We gave them everything
4 because it was clear where they were going with this, which
5 was to try to divert attention from the real issues from the
6 violations and try to point the picture at -- point the
7 finger at BCDC's alleged failure to comply. Well, in my
8 view we responded in good faith and we have given them
9 everything except documents that I highlighted as being
10 protected by exemptions, particularly the attorney/client
11 privilege and the work product doctrine.

12 And finally, as you consider this matter I would like
13 to highlight what I said a little bit earlier. I'd urge you
14 to focus on what are the material issues here. There are a
15 lot of details, there are a lot of facts and therefore
16 there's a lot of ground for factual dispute, but the
17 material issues are, what does the permit say and is there
18 evidence or not that Mr. Sanders is in compliance with the
19 permit?

20 Whether or not there is evidence that birds are using
21 those trees for perching is not relevant, there is a concern
22 that birds could use those; and it is not just BCDC, it's
23 the Fish and Wildlife Service.

24 Whether there is evidence that water birds are being
25 harmed because of the marina activities is not the issue,

1 the permit requires the visual barriers.

2 What might have been agreed to as part of Proposed
3 Amendment Five is not material, what's material is what is
4 the permit before you to be enforced.

5 And with that I will be happy to answer questions now
6 or later. Thank you very much.

7 COMMITTEE CHAIR SCHARFF: Mr. Sadler, do you want to --

8 MR. SADLER: Yes, thank you.

9 COMMITTEE CHAIR SCHARFF: Do you want to ask questions
10 now?

11 COMMITTEE MEMBER GIBBS: Yes, I would.

12 COMMITTEE CHAIR SCHARFF: I guess they have some
13 questions.

14 MR. SADLER: Oh, okay.

15 COMMITTEE MEMBER GIBBS: Attorney Zeppetello, could you
16 comment, give us brief descriptions on a couple of the
17 alleged violations set forth in Section B of the Violation
18 Report. Could you provide some detail? The first is:

19 "Refusal, since September 2008, to make
20 required public access areas available to the
21 public, but to instead actively prevent and
22 discourage public access;"

23 Could you -- I know you touched on this I think for a
24 second, but what did that entail, actively discouraging
25 public access?

1 MR. ZEPPETELLO: Well, we received a number of
2 complaints over the years. And they are arguably hearsay
3 but complaints from people who called to say, "I went to
4 Westpoint Harbor. I went to Westpoint Harbor with a copy of
5 the permit that shows public access and I was told there is
6 no public access here, this is a private marina, no
7 trespassing."

8 When I was out there in October of last year there were
9 signs at the harbormaster building saying, keep out,
10 restricted access. There was a trail, the trail around the
11 perimeter basin had like construction barricades saying,
12 keep out, restricted access. The gate that the fence --

13 COMMITTEE MEMBER GIBBS: And that trail was supposed to
14 be public?

15 MR. ZEPPETELLO: Public access nine years ago or, you
16 know, in 2009. The gate to Pacific Shores Center was access
17 that there was supposed to be a trail connection from one
18 property to the next; there was a gate maintained there.
19 The trail on the east side on the marina basin was blocked
20 by a gate even though the construction was behind another
21 six foot fence.

22 COMMITTEE MEMBER GIBBS: And we'll just go to number B:

23 "Failure to provide required public access
24 improvements, including but not limited to public
25 paths, landscaping, site furniture, signage,

1 public parking spaces, a public boat launch, and
2 public access to guest docks;"

3 MR. ZEPPETELLO: Okay. Well part of that is since the
4 public was being discouraged from even driving on to the
5 property by the "Members and Guests Only" signs the public
6 wasn't being invited and was being discouraged from even
7 being there. So to the extent that there were improvements
8 they weren't available to the public.

9 The guest docks even now, they're gated and there are
10 signs there that say "Members and Guests Only."

11 The public boat launch apparently wasn't completed
12 until last year, but again that was an improvement that was
13 supposed to be completed as part of the public access
14 improvements.

15 The restrooms on my first two visits to the site were
16 locked during the middle of the day. The first time I think
17 they weren't even signed as public restrooms, now they are.
18 They have taken some remedial measures since this started
19 although, again, without plan approval.

20 Landscaping is another example that he did put some
21 landscaping in but there is a requirement to submit a plan
22 for approval and then 170,000 square feet of landscaping. I
23 don't know what the square footage is but I think staff's
24 view is there is not a -- he has not implemented a
25 landscaping plan, certainly not one that we have reviewed

1 and seems to comply with or has agreed to comply with those
2 requirements.

3 COMMITTEE MEMBER GIBBS: Okay, thank you.

4 No further questions.

5 COMMITTEE CHAIR SCHARFF: Anyone else any questions?

6 All right, come on up.

7 MR. SADLER: Thank you. So good morning again. And
8 again for the record my name is Kevin Sadler and I am here
9 to represent Mr. Mark Sanders and Westpoint Harbor.
10 Mr. Mark Sanders is someone I did not know until about four
11 months ago, that's the very first time that I had the
12 opportunity to meet him, but I've got to read and digest a
13 lot of information about this entire dispute.

14 There's obviously not time this morning to go over the
15 factual detail of all of the 36 violations. We've submitted
16 125 pages of a detailed factual rebuttal to their 50 page
17 Complaint and 25 page Proposed Order and I commend that to
18 you. Although obviously I understand the limited amount of
19 time but that's sort of the nature of where we are.

20 I want to talk to you about what we believe are the
21 important issues this morning, then obviously I'll answer
22 each and every one of your questions.

23 Even in this administrative proceeding, this is a legal
24 proceeding that has very serious consequences. And in every
25 legal proceeding, and I've been a lawyer for 29 years and

1 this is the only way I've ever done it, there's only three
2 things that count, the evidence, the law and the record.
3 That's the only three things that count here, that's the
4 only three things that'll count if this has to go on to
5 judicial review.

6 Now I understand we do live in this very strange
7 environment outside of this room, outside of a courtroom,
8 where simply an accusation, a headline or a label can
9 sometimes be dressed up as fact. That's why we have this
10 popular term now "fake news." You just throw out a headline
11 and well, because I say it's true it must be true. But I
12 have to tell you, in this proceeding a headline is not
13 evidence. And you've heard some headlines here, albeit I
14 concede in somewhat of a surprising, gentle presentation
15 compared to the very harsh words used in the Proposed Order
16 and I want to talk about that.

17 I want to speak to five issues within my time. I want
18 to talk to you about the so-called environmental impacts,
19 the so-called denial of public access. I do want to talk to
20 you about proper notice and I do want to talk to you about
21 time limits. And lastly I want to talk to you about the
22 nature of this proceeding and why we are here and why it is
23 not appropriate, I think, that we are where we are. And
24 when I conclude Mr. Sanders has asked to just very briefly,
25 so you can actually hear his voice and just address you.

1 It's not testimony but to address you for a couple of
2 minutes.

3 The mission as I understand it of this agency, and I
4 got it right off the website, protect and enhance the San
5 Francisco Bay, encourage responsible and productive use of
6 resources. That's what this organization is all about and
7 Mr. Sanders obviously cares very deeply about both of those
8 things.

9 There are a number, and you've seen them and you'll
10 hear from the number of citizen complaints that have come in
11 that have raised and echoed some of the very issues and some
12 of the very concerns that we have and some of them in words
13 that I won't -- I couldn't do any better. And you'll hear
14 from, for example, like the safety and security concerns
15 about public access just wandering onto the boat docks.

16 But I think some of the concerns you will hear from and
17 you saw in some of the letters raised the fair question, why
18 are we even here? Why could this not have been worked out?

19 You have already, I think, drawn the conclusion from
20 Mr. Zeppetello, this is not a situation where these two
21 parties spent ten years ignoring one another and that's why
22 we're here. You can see from the record, the record is
23 replete with emails, discussions, meetings.

24 This has been a complicated project, as Mr. Sanders
25 lays out, as we've laid out. There's been construction

1 delays, construction setbacks, coordination issues; and he
2 has worked as best he can with the staff. Have they always
3 agreed on everything? Well of course not. But please do
4 not draw the false conclusion that this is someone standing
5 over in his corner ignoring his responsibilities. You don't
6 have a piece of paper to back that up.

7 In fact, there's a letter from Ms. Klein, it's document
8 60 in the administrative record, going all the way back to
9 2014 where she talked about at that time there's really only
10 five unresolved issues and Mr. Sanders has made tremendous
11 progress toward achieving compliance. This is not a record
12 that would allow you to conclude that Mr. Sanders has been
13 ignoring his obligations.

14 But what we did hear and what we see in the written
15 Proposed Decision and the Proposed Order is damage to
16 wildlife, damage to the environment, significant impacts,
17 eight years of complete denial of public access; and I am
18 here to tell you, you do not have the record that supports
19 that.

20 And I heard Mr. Zeppetello just a moment ago say, well
21 this whole concern about lack of public access. We heard
22 from people a few years ago and that's how it all got
23 started. Well, I have to say this, if you are going to be
24 asked to sign an order that penalizes someone tens of
25 thousands of dollars for, and the quote is, eight years of

1 complete denial of public access, where are you going to
2 find your evidence? Not in the two or three emails they
3 attached to their complaint.

4 Once again, this is why we talked about it earlier,
5 there is no witness, there is no declaration, there is not
6 even admissible hearsay under the relaxed rules of this
7 committee to support that. Eight years of complete denial,
8 you just don't have that record. And yet you have the
9 headline, you have the allegation of eight years of denial.
10 And it's just not backed up, it's not backed up by the
11 evidence, and I'll get into that a little bit more.

12 I am reminded of something - I try a lot of cases and
13 I'm reminded of something I always hear the judge tell a
14 jury, what the lawyers say is not evidence. And that
15 includes me, what I say is not evidence, what Mr. Zeppetello
16 said is not evidence either. The evidence is in the papers
17 before you and there's only one witness. It's kind of
18 remarkable if you think about it, there's only one witness
19 with admissible testimony in this entire proceeding, that's
20 Mr. Sanders. They chose not to cross-examine him, that's
21 fine, so his statement stands.

22 But I would submit to you that stepping back from the
23 down-in-the-weeds details of any of this it's pretty
24 remarkable, pretty remarkable for someone to say there
25 should be a Cease and Desist Order imposed on this gentleman

1 and a half million dollar fine on the basis of no witness
2 testimony. That's pretty remarkable, that's pretty
3 remarkable, and I don't think that's the kind of record that
4 will be viewed as very strong if we go to judicial review.

5 Let me talk about this harm to the environment because
6 this is one of the most concerning things about the charge
7 that the Executive Director has brought to us.

8 You saw in the list, and it's in the Proposed Decision
9 and the Proposed Order, repeated statements of significant
10 impacts to Greco Island, significant impacts to the
11 wildlife, significant impacts to the environment,
12 significant impacts to habitat, significant impacts to the
13 salt pond.

14 Page 41 to 43 of the Recommended Decision they use that
15 again and again and again. And I am here to tell you they
16 have had seven years or more, if there were any evidence of
17 any of that, to bring that to you. Just think about it for
18 a minute. If it were really true that what Mr. Sanders has
19 done by taking an old toxic pond and turning it into a place
20 that does have public access, if he had devastated the
21 environment, if he had trashed the wildlife, trashed the
22 habitat, wrecked Greco Island or let other people do it
23 don't you think we'd have seen some declarations from some
24 people? Wouldn't people be signing declarations saying, oh
25 my gosh, I went out there and you can't believe how this

1 whole area has been destroyed.

2 You know, we have this gentleman, Mr. Leddy, we talked
3 about his declaration. It appears his full-time job is to
4 kayak around the marina with a cell phone camera. Well,
5 wouldn't he have seen the devastation? Wouldn't he have
6 seen all the significant impact, taken a picture and they
7 could have submitted it? No. Why? Because it's not there.

8 But I want to be very clear with you. You are being
9 asked to approve an order and impose penalties based on the
10 headline that there's been significant impact to wildlife
11 and the environment out there. And I'm just telling you,
12 it's not in your record. It may be a headline but it's not
13 in your record. And if there were such evidence they'd have
14 brought it to you. They'd have brought it to you in the
15 form of declarations, they'd have brought it to you in the
16 form of photographs. You just don't have it. But tens of
17 thousands of dollars are being proposed as punishment for
18 impacts that just don't exist. A headline is not evidence,
19 even in this proceeding, and it's not going to be evidence
20 in court.

21 Denial of public access. This is another thing that is
22 so confounding. The only reason there is public access at
23 all is because of Mr. Sanders' decision and his years of
24 hard work to do this development, which as you heard is a
25 phased development, the last phase of which is retail. How

1 does anyone propose to have a successful retail development
2 if he's against public access? Does that even make any
3 sense? Of course it doesn't.

4 And again, this is another headline. You are being
5 asked to approve an order and a decision that says he
6 completely denied access for eight years. You would think
7 there would be a mountain of evidence if that were actually
8 true. What did we hear Mr. Zeppetello say? Well, one time
9 out there there was this construction barricade blocking
10 this area. Well you know what, and it's all set out in our
11 papers, the boatyard was under construction. Mr. Sanders
12 had a concern about people wandering in the construction
13 areas. Oh, there was a fence in this area. A fence for
14 what? Around the undeveloped portion of the property.
15 Sensible and safety security concerns. That's the evidence
16 you have. How do you turn that into eight years of complete
17 denial of public access?

18 Let me tell you, the same thing with these impacts on
19 the environment. If that were really true wouldn't you have
20 one declaration from one citizen that said, I've been going
21 out there for eight years trying to get out there and I've
22 never been successful. They've barricaded me, they've
23 blocked me, they've run me off every time. Wouldn't you
24 have at least one declaration from somebody over all these
25 years? And you don't. Why? Because it's not true. It's

1 not true that there's been a complete denial of public
2 access.

3 We objected to Mr. Leddy's declaration and I want to be
4 very clear, we assert that objection that none of his
5 statements is proper evidence for any finding. But I want
6 to draw your attention to one very ironic statement in
7 paragraph 37 of Mr. Leddy's declaration. Mr. Leddy
8 observes, and he says this was back in 2014 while he was out
9 there photographing things: "I was at a labeled public
10 parking space ..."

11 Well even Mr. Leddy didn't have trouble with public
12 access going all the way back to 2014. Isn't that ironic?
13 I think it is because this whole idea of a headline on some
14 future press release, marina owner fined for impacting the
15 environment, fined for eight years of denying public access,
16 is just a headline. You don't have the record to support
17 it, you just don't. You just don't.

18 And think about this, you just saw the references to,
19 oh, there's this rower's dock, and yes, there is a dispute
20 and we submitted on the papers. We think the rower's dock
21 has always been part of the approved plan. But what is this
22 rower's dock? What is this 101 Surf Sports? It's a place
23 where people, public come to kayak, to take lessons, to rent
24 kayaks. What is that? That's public access. And they're
25 fussing about that. They don't even understand how

1 inconsistent that is with this whole idea of eight years the
2 public couldn't get out there. But now they're fussing
3 about the poor kayakers and the rowers. You don't have the
4 record to support that kind of violation let alone that kind
5 of punishment, it's just not there. It's just not there.

6 I do want to talk about proper notice and procedure
7 because this isn't a court but we still have rules. And we
8 pointed out in our papers that almost a third of these
9 alleged violations we didn't get the required 35 day notice
10 and opportunity to cure; and they're listed out, page 16 to
11 17 of our Statement of Defense. And it's a lot of this
12 stuff that you heard Mr. Zeppetello talk about, the rower's
13 dock and the trees and this, that and the other.

14 The Director doesn't have unfettered, unbridled
15 discretion to just blow-by a notice and say, zap, you're in
16 violation. If that were true then we'd hear about
17 violations that they figured out yesterday afternoon and
18 we'd hear about them for the first time today. And so we
19 have pointed out that at least a third of these violations
20 shouldn't even be in front of you. There should be an
21 opportunity to go back and work with staff and figure that
22 out but they're not properly in front of you. And if you
23 impose fines based on that, when it gets to court it's just
24 going to come back.

25 I also want to talk about time limits. We said in our

1 papers that we don't think it's right to go back and make
2 allegations about alleged violations from 5 years, 10 years
3 or more ago. If there were things that they were unhappy
4 about 5, 10 or more years ago that was the time to raise it.

5 They take another view. They say, well courts allow
6 that all the time. Well, I didn't see any cases to that
7 effect in their brief. Maybe there were some words left out
8 there on page 38 of their brief but I didn't see any cases
9 that say that's true.

10 Again, think about it. If this goes to court the ask
11 of the Judge is going to be, "Judge, let us go back 5, 10,
12 15 years, as far as we want and we can wait as long as we
13 want." That's not right. I mean, the very idea that we're
14 here fussing about stuff from -- I mean, he even referenced
15 it, 2009, before 2008. This is 2017 for crying out loud.
16 If it were really that important it should have been brought
17 up a long time ago. That is an issue that I think should
18 weigh upon you and it's certainly going to weigh upon a
19 judge if we go to court.

20 I want to talk lastly about really a question of should
21 we even be here? Is this really the path that we want to be
22 on? Because right now we're on the litigation path. And
23 I'm not going to talk about the Public Records Act suit,
24 that's a lawsuit that is going to go on or not if we can
25 find a different path but right now we're on the litigation

1 path.

2 All of these things that are talked about, these
3 violations, the subject of long, ongoing discussions between
4 Mr. Sanders and different lawyers he had at that time,
5 different members of staff over the years. These are things
6 that could have been worked out, maybe still can be worked
7 out if we are on a different path.

8 But why are we here? I think you need to step back and
9 ask yourself, why are we being asked to impose the maximum
10 penalty on every one of these things? Why? Are they really
11 that egregious? Is Mr. Sanders really on the same level as
12 somebody who, you know, dumped motor oil into the Bay? What
13 is driving that? We don't have any witnesses that you can
14 question here today to try to get at that.

15 I do commend to you one document which I found
16 remarkable, in the record. It's document number 14. It's
17 an email from Ms. Klein to one of her colleagues from all
18 the way back in 2010, just a few months before this thing
19 got off on the wrong track. And you can see there she talks
20 to her colleague about Westpoint Marina is going to be a big
21 and juicy case for you. I don't know what that means, those
22 are Ms. Klein's words, but I don't know anything about "big
23 and juicy case" that sounds like seasoned, calm, objective
24 discretion being applied here. And I think about why the
25 maximum penalty? Why the headline "Impacts to the

1 environment" when there's no evidence? Why the headline
2 "Eight years denial" when there's no evidence of that?

3 There's some pretty strong language you are being asked
4 to approve in this Cease and Desist Order. Mr. Zeppetello
5 tiptoed around it but what he wants you to approve is an
6 order that includes language such as "Mr. Sanders lied to
7 and misled the public." I just think that's awful.

8 I know many if not all of you members of the Committee
9 have political backgrounds and that's a rough and tumble
10 world where all sorts of people throw all sorts of nasty
11 words at you without regard to whether they're true or not.
12 Mr. Sanders is not a politician, he's a businessman, and it
13 is simply not fair at any level to ask you to sign an order
14 that would label him a liar, as someone who deceives the
15 public, when there is zero evidence. Who is the witness
16 that came in here and gave you a declaration, Mark Sanders
17 lied, Mark Sanders deceived the public. There isn't one.
18 But you are being asked to approve an order that puts that
19 label on him and I just have to tell you that it's just
20 wrong. It is just wrong.

21 Some of the things, and Mr. Zeppetello touched on them
22 very briefly and I will as well, I think really frame the
23 question of why are we on this path at all.

24 The whole dispute about public parking. There is no
25 dispute that there is public parking out there. The

1 complaint is, we wanted signs for public parking, you
2 painted "public parking" on the ground. Really? That's a
3 \$30,000 impact to the environment problem? We know
4 Mr. Leddy found the public parking, he put it in his
5 declaration.

6 But that's one of the things that's been driving this,
7 the land access to the boat docks. Anybody from the public
8 can come in and dock their boat, it's open to the public.
9 The people who are tenants, the people who are guests have a
10 concern about why is public access down this narrow walkway
11 between boats? They put it in words better than I can,
12 legitimate safety and security concerns. Why would
13 Mr. Sanders be punished \$30,000 over that? Why is that even
14 appropriate?

15 The restroom issue. There are restrooms, the key in
16 the harbormaster's office. How many of us have been driving
17 down the highway and stopped for gas somewhere and we wanted
18 to use the restroom and what do we have to do? We had to
19 ask the attendant, "Can I have the key?" Is that really
20 some kind of shocking problem that deserves a \$30,000
21 penalty? And we could go on.

22 I know they have withdrawn the boat launch issue but I
23 have to tell you, the idea that charging \$10 for a boat
24 launch fee is a denial of access to the public, that's just
25 wrong. There's a very similar case, *Surfrider Foundation v.*

1 *Coastal Commission*, 26 Cal. App. 4th 151, back in 1994.
2 People complained, you're charging us to park at the beach,
3 that's a denial of public access. And the court said, no,
4 that's not a denial of public access. But they came with
5 you. They withdrew it, thankfully, but that to them was a
6 \$30,000 issue. I don't understand that.

7 The buoys. There is no dispute you can't put buoys out
8 there without Coast Guard approval. You just can't. It's
9 in the CFRs, we cited it. Isn't that the kind of issue
10 that, all right, if there's a real issue with buoys versus
11 signs, the staff, Mr. Sanders, the Coast Guard could sit
12 down and figure that out. He can't do it on his own, the
13 Coast Guard has the jurisdiction. Isn't that something that
14 could have been figured out? But no, it's a \$30,000 fine.

15 And we could go on about, you know, you saw the list.
16 There's PG&E transformers intruding into the pathway.
17 That's a \$30,000 issue?

18 The surfrider people store kayaks, that's a \$30,000
19 issue?

20 I have to tell you, the idea of imposing a half-million
21 dollars in fines on this record, finding all these
22 violations on this record, you just don't have it. You just
23 don't have it. All of this stuff could have and probably
24 still can be worked out.

25 The one thing I agree with in the Proposed Order

1 they've given you is they say, the majority of these things
2 can be resolved. I agree with that. I agree with that.
3 Sitting down with the Coast Guard over the buoys, I agree
4 with that. But asking for a half-million dollars in fine
5 based on this headline of denial of access and environmental
6 impacts, that's not a pathway, that's not a pathway to
7 resolution.

8 I know you have limited time and there's hundreds of
9 pages of record in front of you. You can't possibly get
10 through it all this morning. But I ask you, in light of
11 that, in light of what you have heard, maybe the appropriate
12 step at this stage is not to continue the litigation path
13 but send it back to staff for a different path. Maybe that
14 would be the better outcome here than litigating over
15 restrooms and public parking spaces that really are there
16 that nobody disputes are there or whether the tenants have a
17 right to be secure.

18 I want, with your permission, to let Mr. Sanders speak
19 to you at this time.

20 COMMITTEE CHAIR SCHARFF: Yes.

21 MR. SADLER: Thank you very much.

22 COMMITTEE CHAIR SCHARFF: We're done with the 30
23 minutes?

24 MR. McCREA: Five minutes.

25 COMMITTEE CHAIR SCHARFF: He has five minutes. Okay,

1 go ahead.

2 MR. SADLER: Thank you. Mr. Sanders.

3 COMMITTEE CHAIR SCHARFF: Welcome, Mr. Sanders.

4 MR. SANDERS: So Commissioners, I'm Mark Sanders and I
5 think it's really important for you to know who I am, what
6 I'm about and understand the why of Westpoint Harbor.

7 You must wonder, how could this come to this? I'm not
8 a developer. I've been in the technology industry my whole
9 life and I have been a sailor and I have been an active
10 environmentalist for 30 years. In the '80s I was the
11 Director for the Marine Science Institute. We took kids out
12 on the Bay to teach them marine biology, thousands of
13 children a year; it's a wonderful program.

14 I set upon finding a permanent home for MSI. We were
15 on a month-to-month lease, no future, and I thought, there's
16 got to be a place.

17 The entire board of MSI were scientists so we did a
18 survey of the entire South Bay. It turns out there was a
19 single location that's ideal for a marina facility; it was
20 Westpoint Slough in Redwood City. It was on a natural deep
21 water channel and I reckoned, if you cleared all the wrecks
22 out of the channel and if we could get the land from Leslie
23 Salt, it was a bittern pond, if we could get rid of the
24 bittern we could make a first-class marina facility that was
25 environmentally thoughtful and a real asset to the Bay.

1 It took engineering techniques that were innovative and
2 never been done in California before, I learned about those
3 in Holland doing a lot of business over there, how they
4 recovered land. And it was a technical challenge which as
5 an engineer I really looked forward to.

6 As marinas in the South Bay closed - South Bay is by
7 far the largest bay - Pete's Harbor in Redwood City,
8 Peninsula Marina in Redwood City, Menlo Park had a small
9 marina, Palo Alto, Alviso, Cooley Landing, now San Leandro
10 now a dock town. Boating was dying in the South Bay. And I
11 realized if we didn't act it was done, it was done, and I
12 had the possibility of doing it.

13 I am a native Californian, I am a former naval officer
14 and I have been actively supporting the Bay and the
15 environment for my whole life. In addition to the Marine
16 Science Institute board I was on the Bair Island Restoration
17 Project together with Ralph Nobles for seven years, a salt
18 pond restoration project. I was on the Aquaterra project
19 which cleared all the wrecks out of the channels in the
20 South Bay. I am a member of the Bay Planning Coalition. I
21 am on the technical advisory board for the California
22 Division of Boating and Waterways. I am on the technical
23 advisory board for the San Francisco Estuary Project. I am
24 a member of the Maritime Legislative Committee in
25 Sacramento. I am a member of the California Boating

1 Congress. I am president of the Marine Recreation
2 Association, which is all the marinas, represents all the
3 marinas in California and the Pacific Rim. So I have been
4 an active person in terms of the environment and boating my
5 whole life. But not just talk, I actually acted on that.

6 I was warned many times, you are never going to get
7 through the gauntlet to build a marina in San Francisco Bay.
8 In the industry there is a saying, waterfront development in
9 Sacramento -- in the San Francisco Bay is second only to the
10 nuclear power industry in difficulty. I didn't really
11 believe that; I was wrong.

12 It took 15 years to get all the permits required, 15
13 years, and today we are recognized as one of the top marinas
14 in North America. We have won award after award. We were
15 named two times one of the 12 most innovative marinas in the
16 world, right here in Redwood City, and I think the Bay
17 deserves nothing less than that.

18 And yet this Violation Report portrays me like the
19 serial killer of the environment. I am killing animals, I
20 am killing plants, I am illegally damaging the Bay. And
21 some of these allegations go back 17 years.

22 Now, I'm going to take a little aside here. The
23 shorebird restoration, the buoys on Greco Island, those are
24 all mitigation measures, part of the CEQA process. Those
25 were all satisfied in 2002, a year before BCDC even issued

1 their permit. We did sit down with the Coast Guard and Fish
2 and Wildlife Service. They realized it was physically
3 impossible to put buoys 100 feet from Greco.

4 (Timer tone sounded.)

5 MR. SANDERS: So the solution was the signs. Steve
6 McAdam with BCDC was a participant in those meetings. It
7 was put to bed and satisfied a year before the permit and
8 here it is 17 years later it's an allegation.

9 I worked seven days a week for almost 30 years and I
10 struggled to build what I would think is a waterfront haven.
11 There is no corporation, there is no investor group, it's
12 just me. And I wonder, how did I become BCDC's public enemy
13 number one? How did that happen?

14 It took four years to convince Leslie Salt to sell me
15 the bittern pond; they didn't really want to do it.

16 Over time dozens of sailing, paddling, kayaking, rowing
17 groups all wanted to participate, they all wanted a way to
18 get access to the Bay. The South Bay has very few suitable
19 locations for getting out on the water, so suddenly the
20 project became bigger and broader and more important.

21 I applied to a dozen agencies, including BCDC. I was
22 very familiar with the McAteer-Petris Act, it was sort of my
23 play book. If you want to make a profitable, easy-to-do
24 marina you build it out into the Bay and put in a parking
25 lot, it's a parking lot for boats. If you want to do it

1 right you excavate a basin, create new Bay surface.

2 The basin we built was 26 acres, 25 feet top to bottom,
3 600,000 cubic yards. All that mud was used to build the
4 upland so beneficial reuse of dredge spoils. All the
5 materials we used, we made our own riprap, we made our own
6 base rock, all from recycled material. You couldn't imagine
7 a greener marina. We've gotten so many awards, 2010 Marina
8 of the Year, for our green approaches.

9 MR. McCREA: He's out of time.

10 COMMITTEE CHAIR SCHARFF: If you could just wrap up.

11 MR. SANDERS: Pardon me?

12 COMMITTEE CHAIR SCHARFF: If you could just wrap it up.

13 MR. SANDERS: I will, okay.

14 A mile of Bay Trail, 300,000 square feet of public
15 access. It's the more costly, more difficult way to do it
16 but it was the right way to do it. I had no opposition to
17 my project, the full support of all the environmental
18 groups.

19 So now it's 28 years later. I started this when I was
20 45, I am now 75, and I have done everything I know to do to
21 make this a great project, to comply with all 13 agencies'
22 rules and regs. I don't -- I've run large companies up to
23 5,000 people with offices around the world, I know how to
24 comply and follow rules. I feel like Sisyphus, I really do.

25 So I want you to know I am determined to keep going and

1 the best is yet to come. We are going to have a 1,000 foot
2 boardwalk, a full retail center. I am going to continue to
3 build this marina. It's a labor of love, I am never going
4 to get my money out of it. I knew that up front and I am
5 okay with it, it's my way of giving back. My last 30 years
6 have been dedicated to just that.

7 So I just want you to understand I passionately support
8 the Bay and the environment in acts not on paper. As to
9 public access, the marina depends on public access, we have
10 businesses that depend on public access. No boater will
11 bring his boat into a harbor if he doesn't get to see it
12 first. We are maximally about public access but not unsafe
13 public access. Access to areas with trenches six-foot deep,
14 construction equipment going, you have to keep people out;
15 we have OSHA consultants to advise us on that. It's got to
16 be a safe environment.

17 So I implore you to look closely at the facts but more
18 importantly the process over these last eight years. Don't
19 rubber stamp BCDC staff's allegations. Look at the value
20 we've created. We are regarded as the best example of a
21 marina done well and it deserves a future, and it deserves
22 to be treated ethically by a BCDC that's true to its
23 mission. I'll repeat that, be true to your mission. None
24 of these allegations are true, not a single one. Thank you.

25 COMMITTEE CHAIR SCHARFF: Thank you. Yes?

1 MR. ALDERSON: Mr. Chair, I advise that we swear in
2 Mr. Sanders because under the Commission enforcement hearing
3 procedures if the Committee is to allow oral testimony it is
4 supposed to be under oath.

5 COMMITTEE CHAIR SCHARFF: Let's do that.

6 MR. ALDERSON: So just out of an abundance of caution I
7 recommend that we swear him in.

8 COMMITTEE CHAIR SCHARFF: Could you raise your right
9 hand?

10 MR. SANDERS: Of course.

11 MR. ALDERSON: Can you say your name for the record.

12 MR. SANDERS: Mark Sanders.

13 MR. ALDERSON: Mr. Sanders, do you swear that the oral
14 testimony you just provided is true under penalty of
15 perjury?

16 MR. SANDERS: Yes.

17 MR. ALDERSON: Thank you.

18 COMMITTEE CHAIR SCHARFF: All right. Thank you.

19 Do you have any preliminary questions? Does anyone
20 want to ask?

21 COMMITTEE MEMBER GIBBS: I would like to ask counsel
22 some questions if that's --

23 COMMITTEE CHAIR SCHARFF: Go right ahead.

24 COMMITTEE MEMBER GIBBS: Okay. So I guess just as an
25 opening remark and to kind of set the context, it seems that

1 a recurrent theme through your remarks was the either
2 explicit or implied threat of litigation over this matter or
3 judicial review. And I just thought it would be important
4 for you and your client to know that neither this Committee
5 nor the Commission that we represent has any fear whatsoever
6 of litigation. In fact, we have a remarkably successful
7 record in that and so maybe it would help if you just
8 consider that as we go through the remainder of these
9 proceedings.

10 I do have a few questions. Let's start with the most
11 kind of neutral, if you will.

12 You referenced a document during your statement, a
13 letter from Ms. Klein to your client in 2014 that raised
14 five issues.

15 MR. SADLER: Yes.

16 COMMITTEE MEMBER GIBBS: And you characterized it as
17 stating or her as stating that they seemed basically ripe
18 for resolution at that time. Do you have it available?
19 Could you tell us what those five issues were?

20 MR. SADLER: Absolutely. So the document, just so
21 we're all clear on what we're talking about, is Document 60
22 of the administrative record. It's dated September 4, 2014.
23 It's actually addressed to Douglas Aikins who was a counsel
24 for Mr. Sanders at that time. It is a lengthy document that
25 goes over a lot of the back and forth that had been

1 happening up to that point in time, September 2014.

2 On the second page of the document Ms. Klein says
3 Mr. Sanders has five unresolved violations - and I'm going
4 to paraphrase rather than read verbatim: Approval of the
5 Phase 1B project; install public access improvements by the
6 marina occupancy; install the buoys, which is something
7 we've already talked about; the visual barrier between the
8 parking lot and the salt pond, and that's the dispute we
9 have over whether the setback is enough, which we say it is,
10 they say visual barriers are required but it's that issue
11 that's talked about there; and then staff approval for the
12 location of live-aboard tenants. So she lists those 1, 2,
13 3, 4, 5.

14 And then what I quoted immediately follows that:

15 "Mr. Sanders has made tremendous progress
16 towards achieving compliance ... With not much
17 more work he can resolve all of them."

18 So this is what I was referring to at that time.

19 COMMITTEE MEMBER GIBBS: So let us maybe try and agree
20 on something. With the exception perhaps of the buoys,
21 which you have said has a specific issue relating to the
22 Coast Guard, it is difficult for us to understand as we sit
23 here almost in 2018 why, in fact, those issues have not been
24 resolved.

25 MR. SADLER: With that premise I do not disagree.

1 COMMITTEE MEMBER GIBBS: Okay.

2 MR. SADLER: One of the reasons you have a record as
3 large as you have is there has been a tremendous amount of
4 interaction back and forth between the staff on the one hand
5 and Mr. Sanders on the other hand throughout the life of
6 this project. And that is not surprising given the scope of
7 this project, given that it is a phased-in project which
8 requires that certain things happen in a certain sequence
9 and you not get out of sequence.

10 As I said, I met Mr. Sanders four months ago and I am
11 the last person in the world to stand here and talk about
12 why didn't somebody resolve something. That was part of my
13 concern about time limits. If you're talking about 2014,
14 we're now talking about coming up on, you know, three and a
15 half years ago.

16 But my point, which I am not sure there is really
17 reason to disagree with, is the kinds of things we're
18 talking about here are things that can and should be
19 resolved without labeling somebody a liar, an environmental
20 devastator and imposing a half-million dollar fine. If
21 there's an issue with buoys let's take care of that, if
22 there's an issue with setback let's take care of that.

23 Being a lawyer for as long as I have I know you
24 frequently reach a point where you can't get two parties to
25 agree. People get entrenched on one view, people get

1 entrenched on another view. We are not trying to rewrite
2 history in that regard. But what I am suggesting is that
3 the outcome here, a very strong Cease and Desist Order and a
4 half million dollar fine, is just not justified over things
5 like this. That's what I'm trying to tell you.

6 COMMITTEE MEMBER GIBBS: So I'd like to extend an olive
7 branch to you and your client right now. In his testimony
8 he said that he wondered how he had become public enemy
9 number one of BCDC. And I can assure you, given the other
10 enforcement cases we have had this year, he is not public
11 enemy number one, okay. But the way you get on the top ten
12 list is by a tried and true strategy of kind of stonewalling
13 and playing the clock out.

14 And so again and again and again we have these matters
15 coming before us with records dating back, in fact, to 2009
16 as you stated and now even to an apparent resolution in
17 2014. So let me just suggest that we need to really try
18 and - if you are interested in a non-litigation path - move
19 towards that because again we do see it. You can have a
20 whole lot of communication but not ever a willingness to
21 actually take the hard steps to settle.

22 Just a couple of other points that I wanted --

23 MR. SADLER: May I just say?

24 COMMITTEE MEMBER GIBBS: Sure.

25 MR. SADLER: Thank you and I absolutely agree.

1 COMMITTEE MEMBER GIBBS: Okay.

2 MR. SADLER: Nobody here is anxious to run to court.

3 COMMITTEE MEMBER GIBBS: Okay.

4 MR. SADLER: Nobody is.

5 COMMITTEE MEMBER GIBBS: Okay. You said and you kind
6 of emphasized that there was no evidence of a denial of
7 public access and that it would never get to court. And I
8 am not a trial lawyer like yourself, but I believe Attorney
9 Zeppetello testified that staff had been out there and, in
10 fact, he had been out there himself and seen signs that
11 said, closed to -- you know, private entry, closed to the
12 public, locks on various things, gates on various things,
13 okay.

14 I am also wondering, frankly, why if the staff says
15 that over the years there have been several calls from
16 people saying, we couldn't get in or there wasn't public
17 access, why you would just kind of throw that away or
18 discount that as you did because I don't think people take
19 the time to just make up calls over matters like this.

20 You also kind of down-played or almost -- I want to use
21 the right words. You didn't attach a very high level of
22 seriousness to the issue of whether the public parking was
23 on the ground or in a sign or whether you had to get a key
24 to go to the restroom. But let me suggest that access is
25 the heart of what we do and if somebody is driving and

1 looking from 50 feet away, it does matter whether "public
2 parking" is on the ground or in a sign that they can see.
3 And the problem with the Bay is you still have to drive to
4 get to it. And if you need to go to the bathroom it does
5 matter whether it's open or you have to go try to find the
6 harbormaster. So please don't kind of downplay the
7 seriousness of these.

8 And I would also just say and I would like to give you
9 the chance to do the same thing that Mr. Zeppetello got a
10 chance to do, on B, the first couple of allegations, to
11 actually respond. Because it's one thing to say there's no
12 evidence or I discount your evidence that we refused to make
13 public access available, it's another to come forward and
14 say how you did make public access available. Are you
15 prepared to do that?

16 MR. SADLER: Absolutely. Let me address that and only
17 step back one minute on the parking issue.

18 And one of the things -- and again, there's so much in
19 our papers that I can't cover. But just as an example,
20 right next door at Pacific Shores, which you literally have
21 to drive through in order to get to Mr. Sanders' facility,
22 public parking is identified by stenciling on the asphalt.

23 In the permit, the permit doesn't mandate signs, it
24 mandates public parking. So right there -- I think this is
25 an excellent example. I said initially my comments about

1 that to draw attention to -- that's the perfect kind of
2 issue that ought to be worked out and doesn't deserve any
3 fine let alone a \$30,000 fine when you've got a permit that
4 doesn't say "signs" it just says "public parking." And what
5 Mr. Sanders did is adopt the convention used 100 yards away.

6 So minimizing it? No, absolutely there needs to be
7 public parking. And that's why I think it was clear from
8 Mr. Sanders and I hope it was clear from me, this
9 development doesn't work unless there is public access.
10 None of this is his private playground.

11 I know all of you are familiar with litigation in other
12 contexts over access to public places. There have been
13 lawsuits about, you know, I'll just say it, rich people
14 blocking access to pristine beach and other areas and people
15 having to go to court to get access. That's not this case.

16 There are a couple -- to get back to the denial of
17 access. What's in our papers clearly -- and you can see it.
18 There's also a couple of photographs attached to the
19 Violation Report and Complaint. There's one photograph that
20 shows a completed pathway and there's like a little
21 construction sawhorse sitting in the middle of it, there's
22 another photograph that shows part of the parking lot, again
23 with a little construction sawhorse sitting in the middle of
24 it.

25 What you don't see in the photographs is that what

1 Mr. Sanders is trying to do is keep people away from active
2 construction areas. The boat launch area, which you heard
3 was under construction. The Phase 3 which is undeveloped
4 property. The first time I went out there there was a bunch
5 of construction equipment stored on it, you know, backhoes,
6 this, that and the other. You don't want people going into
7 those areas.

8 But that's not denial of public access to the marina
9 and that's really what I wanted to get across to you and
10 what comes across in our papers, this is not the case where
11 Mr. Sanders has been chasing people off because he wants his
12 own little private playground out there along the Bay.
13 There is no evidence of that; that would be totally contrary
14 to what he is trying to do. As I said, he wants to build
15 out a retail development. How do you build out a retail
16 development if you have a reputation of, don't go down
17 there, you can't even get in.

18 So that's why the public access, I think, is more
19 headline than anything else. Look, I understand that that
20 gets a lot of people's attention, denial of public access to
21 public places. I also understand it gets a lot of people's
22 attention when you say, you have been doing things that have
23 impacted wildlife, have impacted sensitive areas, that gets
24 a lot of people's attention. But you just don't have the
25 facts on that in this record and he is not the gentleman who

1 would do something like that. I hope I've answered your
2 question.

3 COMMITTEE MEMBER GIBBS: You have, thank you.

4 MR. ZEPPETELLO: Commissioner Gibbs, could I just
5 comment briefly?

6 COMMITTEE MEMBER GIBBS: Yes.

7 MR. ZEPPETELLO: I would just say the permit on the
8 signs says 12 signed public parking spaces, 15 signed public
9 parking spaces for vehicle boats and trailers.

10 On the issue I -- just also on this working together
11 versus the litigation path. Before we issued the Violation
12 Report I spent from January through July attempting to work
13 with Mr. Sanders' former counsel and we went over, I went
14 over with him what I envisioned being part of an order and
15 attempted to negotiate a stipulated order. We made some
16 progress but not enough.

17 And since the Violation Report there has been no
18 discussion. They have come forth with 70 pages of
19 objections but no attempt to say, let's try to work out
20 something in these last two weeks. There's been no --

21 COMMITTEE MEMBER GIBBS: Thank you.

22 So counsel, let's call your 70 pages of objections the
23 equivalent to the Commission's proposed maximum \$30,000
24 fines. How do we move off of that?

25 MR. SADLER: You're talking about our objections to the

1 proposed --

2 COMMITTEE MEMBER GIBBS: Yes. Because we don't see
3 that, we don't see that here. We don't see this level of
4 procedural maneuvering as a general matter before this body.

5 MR. SADLER: Understood. And let me first make
6 something very clear. We do not consider our position to be
7 playing some sort of procedural game or engaging in
8 gamesmanship. Faced with the kind of Order that was
9 proposed to you and a half million dollar fine, for somebody
10 who is an individual, we take that - and this isn't
11 hyperbole - as the proverbial gun to the head.

12 So did we put on a defense? You bet we did and we mean
13 every word of it. We are not here playing around, not in
14 the least. Again, I can't -- I'm the last person in this
15 room to go back and sit in judgment of who said what in '09,
16 '10, '11 and, you know, just count up the years.

17 But what I can say and what I have said is you don't
18 have the record to support the kind of Order they are asking
19 you to approve. And I think we probably understand that
20 there is a different path here if we choose to take it,
21 which we're open to.

22 Now, we don't have all the time today that we want. If
23 you have, if any of you have questions about parking
24 spaces - and I heard the reference - signed parking spaces.
25 I don't think it's silly to say that painting words on the

1 ground signs the parking spaces but, I mean, is that really
2 what we're going to take the public's time to argue about,
3 whether words on the grounds versus a post is worth a
4 \$30,000 fine? I submit, and I think some of the citizens
5 from their remarks have the same idea, whatever we should be
6 arguing about, that ain't it.

7 COMMITTEE MEMBER GIBBS: See, but one way to remove
8 that argument is just to say, we'll put up the signs. You
9 could say that right now.

10 MR. SADLER: So rather than do this piecemeal, which I
11 heard in one context that the Commission doesn't or the
12 staff doesn't want to do, let's just press the pause button
13 right here. Because again, I take to heart what you said
14 about litigation and you guys aren't afraid of defending
15 yourself in court; and you know what, we're not afraid of
16 defending a Cease and Desist Order so we can just set all
17 that aside. Everybody is willing to, you know, go duke it
18 out in superior court.

19 The question is "Why?" at this stage? Would it not be
20 better to press the pause button? And I say that because
21 whatever has been brought to you and wherever the argument
22 ends on signs versus words on the asphalt or any of that, we
23 can all agree that you don't have a record that shows the
24 need for urgent, emergency, if we don't impose this Order
25 now there's going to be environmental harm, the public is

1 going to be hurt. That isn't this case. Even if you
2 believe every word, discard every rebuttal fact we
3 presented, that isn't this case. So why the rush?

4 I take to heart your comment about an olive branch and
5 perhaps I'm extending the same thing. We are very serious
6 about wanting to work this out but we are also very serious
7 about defending ourselves from the accusation that we have
8 hurt the environment, we have kept the public out for eight
9 years and we ought to suffer a half million dollar fine.

10 COMMITTEE CHAIR SCHARFF: Commissioner Gilmore, you had
11 a follow-up?

12 COMMITTEE MEMBER GILMORE: Okay, this is not a
13 question as much as it is a comment, a couple of comments
14 actually. So at the 30,000 foot level basically what we
15 have here is a signed contract, which is the permit that
16 Mr. Sanders inked a long time ago, and there are certain
17 requirements under that contract. And I think what the
18 fight is here is the fact that certain of the improvements
19 were not documented according to the contract, right, that
20 were made.

21 And I'm not saying that there was anything untoward. I
22 think what's happening now is that staff wants Is dotted and
23 Ts crossed and so there is a record. The original permit
24 said this but here is where we are today, let's document
25 that. That's at the 30,000 foot level and we are having

1 issues about how that all gets documented, number one.

2 Number two, to get to your point about why are we here
3 and this large fine that is proposed. BCDC as a Commission
4 has very limited tools, right? This is the tool that's in
5 our toolbox; if we had other tools we could potentially do
6 something else. But I think there is a sense that we need
7 to bring this situation to some sort of a closure. And if
8 it takes having you guys come before the Commission to get
9 some movement then I think that's what we need to do. That
10 was comment number two.

11 The third comment has to do with public access. Now I
12 have to say I am really impressed by your skills as a
13 lawyer. You do a very good job of breaking this down and
14 when we talk about public access you talk about the signs,
15 the striping, the impediments to the public pathways. Each
16 one of them on their own, I agree with you, seems kind of
17 small and maybe insignificant. But what really bothers me
18 is when you take a look at them together, the totality of
19 the circumstances.

20 I'll give you the benefit of the doubt and say, maybe
21 you're not trying to impede public access, but the facility
22 isn't as welcoming as it could be to the public, okay? And
23 I think that's, at least that's what I'm looking at right
24 here, okay? Each one of those little things may not amount
25 to much, but if you put them all together and you have a

1 member of the public who wants to walk down the shoreline
2 and they see the, you know, private property, members only,
3 and not a big welcoming sign that says, public shoreline
4 this way, or whatever it is. If they have to struggle to
5 find parking because it's not clearly marked. It's not as
6 welcoming as it could be.

7 And I can see a lot of members of the public -- I mean,
8 we had this case a while ago where somebody had a "no
9 parking" sign up, keep out, with no sign saying "the beach
10 is that way." I wouldn't want to go park there. I wouldn't
11 want to walk down and see where the beach -- it's just not a
12 welcoming environment.

13 So anyway, those are my comments.

14 MR. SADLER: And I appreciate all of that and I wanted
15 to extend, in case Commissioner Gibbs, if you had any
16 additional questions, whether it's on public access or
17 anything else, Mr. Sanders is obviously right here and ready
18 to talk to you.

19 And again, unlike me who came into this four months
20 ago, if there are specific questions about why something
21 happened in 2014 or 2011 or didn't happen in 2014 or 2011,
22 we put it all in the papers.

23 And again, nobody has time to relitigate everything but
24 I don't want to cut anybody off or make you think we are not
25 here to answer questions because we absolutely are, we

1 absolutely are.

2 COMMITTEE MEMBER GILMORE: I also have one more comment
3 to make and this goes to your comment about environmental
4 damage and there is no evidence of that.

5 So way back when, and this is the way it is for all
6 BCDC permits, when an applicant comes in and wants a permit
7 there are a whole bunch of experts that weigh in as to what
8 should happen to mitigate the development on the
9 environment, right? Which is why we have conditions and we
10 have special conditions and whatnot. Because the inference
11 is that if these conditions are not met there is going to be
12 some sort of environmental harm.

13 So if you are looking at the record and you go, "Oh,
14 the permit said we wanted buoys." And I'm using buoys, I
15 know there is a dispute about that. We wanted buoys and the
16 buoys aren't there. Well there is an inference, because of
17 how the permit was permitted way back in the day, that
18 without these things that are the special conditions,
19 environmental harm is going to be a result. That's the
20 basis, this is why we do this stuff, right?

21 And so to say that there isn't any evidence because
22 nobody has come in with a declaration or you haven't sent an
23 expert out there to, you know, count how many dead birds we
24 have or whatever it is, misses the point. The point of
25 getting the permit is to mitigate damage to the environment

1 from the development and it presupposes that there would be
2 environmental harm if these conditions weren't met. So I'm
3 not sure that I really buy your evidence argument, at least
4 on that point.

5 MR. SADLER: May I just and then I want Mr. Sanders to
6 have an opportunity to respond.

7 Nobody here minimizes the idea that the fact that
8 certain requirements based on expertise are included in the
9 permit, are included in order to minimize the risk of a bad
10 environmental outcome, I agree completely with you. But
11 there is a clear difference between that and signing an
12 Order that said a bad environmental outcome has, in fact,
13 happened. I believe those are two different things, not
14 diminishing at all the very valid points you made. But the
15 Order you are being asked to approve doesn't say, you put
16 the environment at greater risk, you put habitat at greater
17 risk. That's not what is being asked of you. You are being
18 asked to say, he damaged the environment, he impacted the
19 environment; and that's why I say, there is no evidence of
20 that. But I understand why those things are put in there,
21 but that's not the language they are asking you to approve.

22 MR. ZEPPETELLO: I would just respond, Commissioners,
23 that in the penalty factors there are statements such
24 "likely resulted, may have resulted" not "did result."

25 COMMITTEE CHAIR SCHARFF: Okay.

1 MR. SADLER: If I may.

2 COMMITTEE CHAIR SCHARFF: Just wait, I want to hear
3 from the Commissioners.

4 MR. SADLER: Yes, I'm sorry.

5 COMMITTEE MEMBER ADDIEGO: Chair Scharff, I would like
6 to get on to the public. I would prefer that we give the
7 public a chance to weigh in.

8 I do need to correct my colleague, Commissioner Gibbs,
9 he made a "we" statement in referring to the Committee as
10 far as litigation. Looking at what we already have into
11 this with staff time of \$165,000 and knowing that that could
12 easily double and just hearing, you know, initially, I am
13 very unsure of the outcome of litigation. I am in no hurry
14 to enter into that and I am not sure that the issues that
15 have been discussed today rise to that level.

16 COMMITTEE MEMBER GIBBS: I accept your comment,
17 Commissioner.

18 COMMITTEE CHAIR SCHARFF: Do you have any comments,
19 Commissioner?

20 COMMITTEE MEMBER TECHEL: I will wait until after --

21 MR. SANDERS: I would very much like to answer
22 Mr. Gibbs' questions. I would tell you what really
23 happened, not a legal argument, the facts.

24 COMMITTEE CHAIR SCHARFF: All right, I will allow it
25 but you're under oath again.

1 MR. SANDERS: Of course.

2 COMMITTEE CHAIR SCHARFF: Go ahead.

3 MR. SANDERS: So from '93 to 2003 was a very, very long
4 series of meetings with all agencies and so I would like to
5 address the three that you brought up specifically.

6 And Mr. Gibbs asked a very good question, why don't you
7 just put the signs on posts? It's not an economic question.
8 We have almost 500 public parking spaces. They are all
9 public access by law in Redwood City and the permit says, 12
10 signed public parking spaces and 15 more boat launch public
11 parking spaces. The EIR that was done for the entire end of
12 the peninsula, which applied to Peninsula, Westpoint Harbor
13 as well as Pacific Shores Center, had a bunch of specifics
14 about the environment and the concerns about Westpoint
15 Slough and Greco Island and it said minimize signs on posts
16 and trees that would have -- that provide roost habitat for
17 raptors. And so Pacific Shores Center did that. Fish and
18 Wildlife specifically said, paint them on the asphalt. So
19 all our signs are painted "public parking" on the asphalt.

20 The sign on posts came up years later when BCDC said,
21 we have a new sign plan. It came out years after our
22 permit. And it recommends, it says this is advisory only,
23 signs on posts. And we said, no, this is the worst thing
24 you can do. You have a letter from the at-the-time Clyde
25 Morris Refuge Manager saying, "No, no, no, we told you no

1 signs on posts, it's the worst thing you can do right next
2 to the water."

3 On the signs on the launch ramp, launch ramps are
4 drive-through so boats -- trailers can drive through the
5 parking space to drop off the trailer. A sign on the end of
6 the ramp makes the trailer parking useless. We covered all
7 this with meetings with BCDC. Erik Buehmann said, "You're
8 right, we didn't understand." That was in 2012 and here it
9 is still an allegation.

10 It's not about the money, it's not that I don't want to
11 put up the signs, it's that if you care about the
12 environment you don't put signs on posts. Pacific Shores
13 Center has 237 publicly marked sign posts -- I'm sorry,
14 painted spots on their parking lot right next to us. Can
15 you imagine a forest of 237 signs on posts right next to the
16 levee where endangered species may or may not be? That's
17 the reason. It's a practical, honest realistic reason.
18 It's nothing about me trying to avoid doing the right thing.

19 You brought up the buoys. Now I have been sailing my
20 whole life. I was, as I said, a naval officer. Buoys 100
21 feet from Greco Island at high tide are in one foot of water
22 so any buoy would be laying on its side. This was clear in
23 2001 when the CEQA process was going through and everybody
24 participated.

25 The Coast Guard said, by the way, it's in navigable

1 waters, we cannot allow it. Everybody said, we understand
2 why. Fish and Wildlife who wrote the letter that made the
3 permit requirement said, we just didn't understand. We
4 normally put signs on the edge of the island anyway, here's
5 the signs we want. Here's how we want to mount it, here's
6 where we want them placed.

7 The permit says, coordinate location and types of signs
8 with Fish and Wildlife. You have a letter from Clyde Morris
9 who was the Refuge Manager at the time who said, we did
10 agree with this. Steve McAdam was a participant. We did
11 exactly what we were supposed to do. Sanders carried out
12 the intent and the purpose of the amendment -- of the permit
13 requirement. All the other permits by the way. BCDC's
14 permit came out a year later after all these mitigation
15 measures were done and here's the buoy requirement back in
16 there. It made no sense, it made no sense.

17 Now they keep talking about the access along the trail
18 going from Pacific Shores to me. What the permit actually
19 says is, because I only had one legal access for a road
20 through Pacific Shores Center, I am to make my best efforts
21 to develop approvals with Pacific Shores Center to create
22 another access along the shoreline. And I did that. It
23 cost \$75,000 and took years. They finally agreed but there
24 was conditions. They said, when Redwood City says it's safe
25 to open that path to the retail area we will allow you to

1 open the gate.

2 Now that gate and fence has been there since 1972,
3 placed by Leslie Salt. It's on Pacific Shores' property,
4 not mine, and so my hands were tied. The permit says do my
5 best, I did my best, Pacific Shores Center, we will let you
6 open that gate when it's safe and Redwood City will tell us.
7 Now Redwood City has written four letters to BCDC saying,
8 here is why we require Mark Sanders to keep this gate closed
9 for now.

10 Now then about the fence. In 2011 Redwood City said,
11 well look, they want the path open, we understand that. We
12 want this eight acre area under construction closed because
13 it's very dangerous, we already had accidents and injuries,
14 and so put up a temporary fence. That was a Redwood City
15 recommendation in 2011.

16 They approved it, it went to BCDC, I have a letter from
17 Adrienne that said we have the amendment ready to go for the
18 temporary fence, please send us \$300 for the fee and it's
19 done. I did that, waiting for it, it's off the table. I
20 said, "What's wrong? You want the path open, what's wrong?"
21 They said, "Well, we want to tie it to the rest of the items
22 in Amendment Five, which went on for years and years and
23 years. I was never allowed to put up that fence. At one
24 point in time Brad McCrea said, "Just put up the fence. Buy
25 the material and get it up there." Adrienne looked at him

1 and said, "No."

2 So I was absolutely prevented from putting up the
3 fence. I wanted a temporary fence. I wanted that. Why
4 would I build a path and not want it open? It made no
5 sense. The agenda was not public access, it was a different
6 agenda.

7 COMMITTEE CHAIR SCHARFF: Well what do you think that
8 agenda was since you are now complaining of some sort of
9 conspiracy or something?

10 MR. SANDERS: Well, there was a point in time -- well
11 first of all that's a really good point, this goes to the
12 crux of it. Where to start?

13 There was a reason my permit with BCDC was declared
14 incomplete for ten years. Steve McAdam, was a very honest
15 man. He said, "Mark," he said, "it's a wonderful project."
16 "But you'd understand, you're in the cross-fire between us
17 and Cargill. We can't allow this to happen." That was the
18 original issue, salt pond jurisdiction. They said, "We are
19 still working on it, we're still working on it." That was
20 the delay for the first half of this project.

21 And then when the allegations were made 2011, there
22 were four, Tom Sinclair who made the allegations visited the
23 harbor and I showed him the signs that he complained about
24 were actually Cargill signs. He had got the property lines
25 wrong. So he said, "You're right, we made a mistake."

1 MR. ZEPPETELLO: Commissioners, excuse me, I just need
2 to object for the record to this repeated hearsay of what
3 other people said; and also this is very irrelevant going
4 back 30 years, it's nothing to do with what's before us.
5 Thank you.

6 COMMITTEE CHAIR SCHARFF: I agree.

7 MR. SADLER: I think on behalf of Mr. Sanders we too
8 would like to get to the public comment.

9 COMMITTEE CHAIR SCHARFF: I agree.

10 MR. SADLER: I appreciate the indulgence of hearing our
11 remarks.

12 COMMITTEE CHAIR SCHARFF: All right, let's hear from
13 the public. Our first speaker is Bob Wilson, to be followed
14 by Maureen O'Connor Sanders.

15 SPEAKER FROM THE AUDIENCE: Bob Wilson left.

16 COMMITTEE CHAIR SCHARFF: He did, okay. Maureen
17 O'Connor Sanders.

18 MS. O'CONNOR SANDERS: Thank you.

19 COMMITTEE CHAIR SCHARFF: To be followed by David G.
20 South.

21 MS. O'CONNOR SANDERS: Good morning. I am Maureen
22 O'Connor Sanders, Mark's wife of 30 years, so I have been
23 present from the start of Westpoint Harbor.

24 I would ask you to please read the Statement of Defense
25 on the website. It contains all of the allegations that are

1 contended as well as the statements of defense; please read
2 that.

3 Here is all I can say in 30 seconds.

4 COMMITTEE MEMBER GILMORE: You have 90 seconds,
5 actually.

6 MS. O'CONNOR SANDERS: Okay. I probably have 30 left.

7 I personally believe the best route out of this
8 quagmire would be an independent arbitrator and an oversight
9 person knowledgeable in maritime law, marinas, water and
10 recreational boating. Try to move ahead.

11 Westpoint Harbor is a model, award-winning, certified
12 green marina and ought to be a credit to us all, not a
13 source of revenue and continuing conflict. Thank you.

14 COMMITTEE CHAIR SCHARFF: Thank you.

15 David G. Smith, to be followed by John Sanders.

16 MR. SMITH: It's C. Smith, maybe?

17 COMMITTEE CHAIR SCHARFF: David C. Smith.

18 MR. SMITH: Thank you, Commissioners. My name is David
19 Smith, I am actually counsel to the marina but not for
20 purposes of this proceeding. I am not part of the Baker
21 Botts team so my testimony here today is personally mine.

22 Commissioner Gibbs, I share what I sense was some of
23 your frustration. My role with the harbor was in December
24 2015, around the time of the referenced site tour that
25 General Counsel Zeppetello talked about, and there was an

1 incredible record, an incredible amount of information to
2 digest quickly.

3 But what struck me was that the seeming inconsistencies
4 between the on-the-ground condition and the exact language
5 of the permit was relatively finite, and in my estimation,
6 eminently fixable. My practice is entitlement, regulatory
7 compliance and things.

8 And Mr. Zeppetello and I rolled up our sleeves and
9 sought to see if we could get through. He said something
10 here I need to take issue with - Marc, I apologize - but at
11 the hearing he did inform me that he was preparing the
12 Violation Report and drafting was undergoing. I said -- and
13 I asked if we could put it on hold and start to work through
14 this list that I saw that I felt we could resolve. I think
15 I learned after the fact, particularly beneficial, that
16 neither he nor I had the long history. We were both
17 relatively new and could take sort of an objective
18 perspective.

19 (Timer tone sounded.)

20 MR. SMITH: Over a course of months, painfully slow
21 I'll admit, but issue-by-issue we solved the live-aboard
22 issue. We got the fencing up in the retail area and the
23 amendment. All of the 1B public access was made available.
24 We were in the midst of addressing the sign issues. Mr.
25 Sanders had prepared and I had submitted a sign plan. It

1 was returned to us --

2 COMMITTEE CHAIR SCHARFF: It's time. Thank you.

3 MR. SMITH: Can I ask if someone can cede time to me?

4 COMMITTEE CHAIR SCHARFF: It doesn't work that way, we
5 don't concede time, I'm sorry. Go on.

6 MR. SMITH: This is fixable. It was fixable and I
7 don't know what prompted the urgency to get the Violation
8 Report out.

9 COMMITTEE CHAIR SCHARFF: John Sanders, to be followed
10 by Ben Eichenberg.

11 MR. J. SANDERS: Hello, my name is John Sanders, I'm
12 Mark Sanders' brother. I'm retired. I work a couple of
13 days at the marina as a harbormaster to help him out. I
14 want to speak just briefly about Mr. Leddy's letter and the
15 signs and buoys in the channel.

16 One thing I hope people recognize, that putting 5 mile
17 an hour signs in the middle of a channel would be the
18 equivalent of putting a 65 mile an hour zone in the middle
19 of the fast lane of Highway 101, it's just idiotic. I
20 question how much maritime knowledge or seagoing knowledge
21 the people in BCDC actually have.

22 Regarding the signs that were put on the edge of Greco
23 Island. I worked with Clyde Morris at Don Edwards reserve.
24 I designed the foils on top of the signs to prevent the
25 raptors from roosting on those signs. We installed 35 of

1 them. If they're gone they were taken away by somebody.

2 That's enough said. Thank you.

3 COMMITTEE CHAIR SCHARFF: Thank you.

4 Ben Eichenberg, to be followed by Betty Kwan.

5 MR. EICHENBERG: Good afternoon. My name is Ben
6 Eichenberg, I am here on behalf of San Francisco Baykeeper
7 and our over 5,000 members and supporters.

8 We are here to support staff's recommendations against
9 Mark Sanders and Westpoint Harbor. Such enforcement falls
10 squarely under BCDC's authority under McAteer-Petris and
11 Baykeeper lauds the Commission's vigilance in protecting
12 public access and public trust resources. Enforcement such
13 as this is vital to fulfilling BCDC's duty to minimize
14 harmful effects on the Bay Area.

15 Westpoint Harbor's flagrant failure to meet specific
16 permit requirements in spite of more than ample notice and
17 opportunity to do so speaks to a lack of respect for the law
18 and for the public's right to access public trust resources.
19 Baykeeper is deeply concerned by the precedent set by
20 allowing these violations to continue.

21 The refuge next door and adjacent salt ponds support a
22 diverse array of wildlife and deserve to be protected
23 through, at a minimum, adequate permit enforcement.
24 Baykeeper is particularly disturbed that these violations
25 include Westpoint's failure to protect endangered species.

1 Given the gravity of these violations, Baykeeper urges
2 the Commission to impose the maximum penalties available.
3 We were disappointed to see violations 7A through C were 54
4 percent below the maximum allowed, which we believe sends
5 the wrong message about the importance of protecting
6 sensitive Bay ecosystems, particularly in light of
7 Westpoint's repeated offenses, disregard for past warnings
8 and demonstrated lack of remorse. These violations are
9 clearly not an innocent misunderstanding.

10 It is time to impose a penalty that sends the message
11 that violations aren't just the cost of doing business or a
12 fee to get what you want. There is no appropriate fee for
13 excluding the public.

14 (Timer tone sounded.)

15 MR. EICHENBERG: In conclusion, Baykeeper appreciates
16 the work of BCDC's staff in pursuing these violations and
17 generally in enforcing and keeping the Bay safe. Thank you
18 very much.

19 COMMITTEE CHAIR SCHARFF: Thank you.

20 Betty Kwan, to be followed by Mitchell Oster.

21 MS. KWAN: Good afternoon Commissioners and staff. I
22 somehow was also told it would be 30 seconds so I've
23 prepared these to be short. My name is Betty Kwan; I'm with
24 Bay Planning Coalition.

25 About a year ago we formed a Marinas and Boatyards

1 Committee and have been working hard to understand the
2 challenges that face the region's boating community as well
3 as working to develop stronger relationships with key
4 regulatory agencies such as BCDC.

5 We are here today because we recognize the importance
6 of marinas and boatyards for their economic and recreational
7 values. BCDC's Bay Plan acknowledges that boating allows
8 residents to take advantage of the unique recreational
9 opportunities provided by the Bay and that preserving
10 opportunities for all types of boating on the Bay is
11 important.

12 BPC is asking that both parties, as suggested by
13 Westpoint Harbor's counsel, to pursue a different path,
14 further dialogue on the issues that are being discussed
15 today in an effort to help preserve these unique
16 opportunities and fulfill BCDC's mission to protect and
17 enhance San Francisco Bay.

18 BPC would be open to facilitate such discussions in
19 order to reach an amicable solution for both parties. Thank
20 you.

21 COMMITTEE CHAIR SCHARFF: Thank you.

22 Mitchell Oster, to be followed by Steve McGill --
23 Medford.

24 MR. OSTER: Thank you, Commissioners. My name is
25 Mitchell Oster; I'm representing Save the Bay.

1 You have Save the Bay's full letter supporting the
2 staff's recommended enforcement actions and penalties. The
3 recommendation is reasoned and is supported with ample
4 evidence. The violations are extensive and serious for
5 appropriate public access and for wildlife protection. The
6 permittee has been stubborn and litigious instead of
7 correcting the violations and moving on to obey the law.

8 As the organization that helped create BCDC, Save the
9 Bay is proud that you have reasserted your enforcement role
10 strongly through this Committee's actions over the last two
11 years. You have shown you are serious about upholding the
12 law and requiring permit compliance. We urge you to
13 continue that effort today by voting for the recommendation
14 before you. Thank you very much.

15 COMMITTEE CHAIR SCHARFF: Thank you.

16 Steve McGill, Medford?

17 MR. MECKFESSEL (OFF MIC): Sorry for the bad printing.
18 I'm Steve Meckfessel.

19 COMMITTEE CHAIR SCHARFF: Sorry for butchering your
20 name.

21 MR. MECKFESSEL: I just wanted to come here to make
22 three points.

23 THE REPORTER: Could you pronounce your last name,
24 please?

25 MR. MECKFESSEL: Meckfessel.

1 THE REPORTER: Thank you.

2 COMMITTEE CHAIR SCHARFF: I wasn't close, sorry.

3 MR. MECKFESSEL: Of things that I could speak of that I
4 know or see. One is I know Mark Sanders, I have known him
5 for a number of years personally, and as a fellow member of
6 the boating community I've had a chance to work with him on
7 a number of issues.

8 My experience through that time is he has great
9 integrity, he's a champion for his customers, the community,
10 the public and the environment. I have seen that time and
11 time again; and his Westpoint Harbor development I think is
12 a model of environmentally sound development along the Bay.
13 When I read the allegations I don't recognize the person or
14 the harbor that is being discussed.

15 The other thing I'd comment on, and I don't know the
16 BCDC staff and I'm sure they're honorable and very
17 hardworking but I don't know them, this is an unusual
18 situation from my perspective because in this country we
19 have Legislative branch, police to enforce, DAs to
20 prosecute, judges to interpret laws, and somehow this agency
21 seems to have all of those powers. So I think it's
22 particularly important, I'm sure there was a reason for
23 that, but it seems to have quite a bit of --

24 And the last thing I believe, whatever fees they impose
25 actually go to BCDC, which to me honestly as a CPA, seems

1 like a tremendous conflict of interest.

2 So I would encourage -- I was encouraged by the
3 dialogue to really resolve these, these do not seem to rise
4 to the occasion of \$543,000 of fines. There seem to be
5 things that need to be discussed and worked out. Thank you.

6 (Timer tone sounded.)

7 COMMITTEE CHAIR SCHARFF: Lisa Belenky, to be followed
8 by Larned, Mr. Larned or Ms. Larned, Cort.

9 MS. BELENKY: Good morning, Commissioners. My name is
10 Lisa Belenky; I'm with the Center for Biological Diversity.

11 I had quite a few comments here but most importantly I
12 wanted to support what one of the Commissioners - I'm sorry,
13 I couldn't quite see who was saying it - was saying as to
14 the damage to -- potential damage or injury to any -- for
15 the endangered species and the habitats.

16 It really isn't a question of waiting until there is a
17 harm, it is a question of preventing those harms,
18 particularly in the Bay where we already have a very fragile
19 ecosystem and we are trying to restore and save the last
20 bits that we have. It is very important that these kinds of
21 conditions be followed. If there are problems with the
22 conditions, as have been raised with potentially the buoy,
23 it needs to be resolved by additional conditions that will
24 perform the same function.

25 The idea of a no wake zone is very important,

1 particularly for shore birds nesting and feeding in the area
2 as well as conditions that require education. Educating the
3 public is an incredibly important part of the signage, et
4 cetera, because people of course going out kayaking or
5 sailing - I myself sailed my whole life - they may not know,
6 they simply may not know that if you flush birds when they
7 are eating that is a kind of harm. If you interfere with
8 any of their activities, breeding, feeding, et cetera, that
9 is actually for a listed species a violation of the law.

10 (Timer tone sounded.)

11 MS. BELENKY: So I just wanted to encourage and support
12 the staff's actions in this matter, particularly in
13 preserving our endangered species. Thank you.

14 COMMITTEE CHAIR SCHARFF: All right, thank you.

15 Come on up. To be followed by David Wells.

16 MR. LARNED: I'm Cort Larned; I'm one of the owners and
17 my partner is following me. We have been in business for
18 six years and our mission is always to get people on the
19 water and to protect the environment, to create a community,
20 and Mark was fantastic in putting us at Westpoint Harbor.

21 Westpoint Harbor is an amazing place. It's great for
22 the community, a great asset to the Bay Area.

23 I'm just blown away that we can't reach an accord or a
24 compromise where everyone can be happy. I just wish it all
25 works out. Thank you.

1 COMMITTEE CHAIR SCHARFF: Thank you.

2 David Wells, to be followed by Doug Furman.

3 MR. WELLS: Yes, thank you. David Wells, thank you for
4 hearing us, also thank you for everything this Commission
5 has done to protect and preserve the Bay I use almost every
6 day. Wouldn't be here without you guys so thank you for
7 that. We operate another business in a marina, I grew up in
8 a marina, I've been sailing my whole life, part of the
9 waterways, been an active environmentalist.

10 So echoing what my partner said, we really see this as
11 one of the rare situations where you get this many lawyers
12 in a room and no one has to lose. We really could all walk
13 away from this win-win-win and we hope that this meeting
14 serves as a path forward to start that process.

15 It seems like every hurdle that was thrown up here was
16 one that could be jumped over if we simply got together and
17 had a clearer understanding of exactly what it means to get
18 over that hurdle. It's always a balance between development
19 and preservation. We really see that preservation and
20 expansion of protection has got to come from funding and
21 that funding has to come from development, so that
22 development needs to be managed so that we have a nice
23 balance.

24 We have a really unique situation that we have, you
25 know, a really robust regional community here that can

1 support that. With this body getting together with guys
2 like Mark Sanders who -- he was characterized as a
3 businessman, which he was in his past. This is not a
4 business. You know how many kayaks I have to rent to pay
5 this guy back? It's going to be a lot of kayaks. He is
6 here to leave something for the people that come after him.
7 I thank you for your time.

8 COMMITTEE CHAIR SCHARFF: Thank you.

9 Doug Furman, to be followed by Peter Leib.

10 MR. FURMAN: Good afternoon. My name is Doug Furman;
11 I'm a harbormaster at Westpoint Harbor. I have also worked
12 in the public sector for over 20 years reporting to council
13 members.

14 I spent a lot of time reviewing the minutes of the
15 enforcement workshops held on October 20th, 2016 and March
16 16th, 2017. You the Enforcement Committee was present at
17 the workshops. I would like to reinforce a few of the
18 statements you heard and made during those workshops.

19 A statement made by Executive Director Goldzband at the
20 workshop on October 20th, 2016 is reason enough why this
21 Committee should stop the enforcement action today. Your
22 Executive Director said that the Enforcement Committee
23 hasn't met for six years and that staff is doing enforcement
24 by the seat of their pants. This is on page 137 of your
25 minutes.

1 Mark Sanders appealed to the Enforcement Committee in
2 2011 and was refused by BCDC staff.

3 Let me say that again, your own Executive Director
4 stated this committee has not met in six years. The same
5 time period that Mark Sanders was trying to appeal these
6 issues to you but was refused by your staff. This is in
7 violation of your own written procedures. I also note the
8 fine of over half a million dollars includes the entire time
9 period where staff would not allow the opportunity to
10 resolve these issues.

11 In the meeting of March 16th Committee Chair Scharff
12 said he was acutely aware of the backlog of enforcement
13 actions and the need to address it. You also questioned
14 whether it was worth valuable staff resources to be chasing
15 down some of the issues.

16 On page 24 you mentioned it was your goal to bring
17 things quickly to the Committee.

18 (Timer tone sounded.)

19 MR. FURMAN: You asked if BCDC rules are too
20 bureaucratic. I think you have good instincts and ask that
21 you use them to stop this action. Thank you very much.

22 COMMITTEE CHAIR SCHARFF: Peter Leib, to be followed by
23 John Bradley.

24 MR. LEIB: Good afternoon. My name is Captain Peter
25 Leib. I spent my life at sea. I am also -- I am now a

1 sailing instructor here in the Bay; I've taught hundreds of
2 people sailing. I am also a tenant at Westpoint.

3 One of the things I tell all of my students is just how
4 clean and safe that harbor is, there is nothing like it in
5 the Bay, and I am in every marina in the Bay.

6 So I just wanted you to know he is doing a great job
7 and please let's keep it that way.

8 COMMITTEE CHAIR SCHARFF: John Bradley, to be followed
9 by Arthur Feinstein.

10 MR. BRADLEY: Mr. Chairman, Commissioners. My name is
11 John Bradley; I'm a board member with the Citizens Committee
12 to Complete the Refuge and a retired Fish and Wildlife
13 Service biologist, most recently with the San Francisco Bay
14 Refuge Complex.

15 It is frustrating to me that the permittee seems to
16 have failed to implement many measures to prevent the
17 harassment of endangered rails and salt marsh harvest mice
18 on Greco Island and the erosion of that fragile habitat from
19 marina operations. Greco Island represents one of the few
20 pristine remnants of historic salt marsh and it supports a
21 significant population of nesting Ridgway rails.

22 By ignoring the conditions of the permit the permittee
23 has broken its contract with a public agency and with the
24 public trust.

25 I want to -- I have submitted a letter with a few more

1 comments. You can read those. After ten years of permit
2 non-compliance the proposed enforcement action I think is
3 definitely warranted, thank you.

4 COMMITTEE CHAIR SCHARFF: Thank you.

5 Arthur Feinstein, followed by Gail Raabe.

6 MR. FEINSTEIN: Commissioners, Arthur Feinstein. I
7 have been doing environmental work for 40 years on now with
8 Audubon, Sierra Club and always with the Citizens Committee
9 to Complete the Refuge. And throughout that time BCDC has
10 sort of been the rock that environmentalists assume are
11 going to protect the Bay.

12 You know, public access is huge and I am sympathetic to
13 the problems that this project has put to public access but
14 my concerns have always been with the natural resources of
15 the Bay. And it's no small thing, high speeds erode
16 wetlands, erode shorelines, birds are easily disturbed by
17 kayaks. I mean, this is all science so when they dispute,
18 is there an impact, it's all science, there is no question
19 about whether there's an impact from wake or an impact from
20 too much access or inappropriate access without signage. So
21 it's all nonsense that you're being -- heard but very
22 excellently presented.

23 And it's ten years of non-compliance. And so for
24 people like myself and most of the public who expect when an
25 agency like you say, this is what you do to protect the Bay,

1 this is what you do to ensure that we have public access,
2 which we did not have before BCDC existed. And somebody
3 comes along and ignores all that, signs a contract and then
4 doesn't do it, holy crow, you've lost all credibility.

5 (Timer tone sounded.)

6 MR. FEINSTEIN: Why should we care? Why do you exist?
7 Thank you.

8 COMMITTEE CHAIR SCHARFF: Thank you.

9 Gail Raabe, to be followed by Leslie Flint.

10 MS. RAABE: Mr. Chairman and Commissioners, I am Gail
11 Raabe, co-chair of Citizens Committee to Complete the
12 Refuge. Our organization submitted a comment letter to your
13 Committee on November 3rd. It's a little famous at this
14 point, I guess, after this morning's discussion, but I would
15 like to make just three points out of that letter.

16 First of all, Citizens Committee on behalf of its
17 membership originally commented in support of the proposed
18 Westpoint marina at that time project, but only based on the
19 strength of the protective measures included in the permit's
20 special conditions and the seeming willingness of the
21 permittee to implement these crucial environmental
22 protective measures. Unfortunately we discovered they are
23 not in place.

24 I would like to again voice our strong support for the
25 proposed Cease and Desist Order and Civil Penalty Order with

1 one caveat to you and that is that what really matters with
2 an enforcement action are the subsequent changes that happen
3 on the ground. One of BCDC's primary responsibilities is
4 safeguarding San Francisco Bay habitats and wildlife and
5 therefore it's imperative that measures outlined in the
6 special conditions for the Westpoint Harbor permit are put
7 in place as soon as possible. Thank you.

8 COMMITTEE CHAIR SCHARFF: Thank you.

9 Leslie Flint, to be followed by G. Nelson Wolfe.

10 MS. FLINT: Hi, my name is Leslie Flint; I am the chair
11 of the Sequoia Audubon Society Conservation Committee.
12 Sequoia Audubon is the San Mateo County chapter of National
13 Audubon and I am speaking on behalf of the 1500 members of
14 our organization.

15 We are concerned that the permit conditions required to
16 protect over 50 species of water birds documented to occur
17 around the marina have not been put into place. Impacted
18 habitats utilized by water birds include the mud flats that
19 are used for foraging, salt marsh used for foraging and
20 nesting and the roosting/foraging habitat in the salt pond
21 next to the marina. Of particular concern to us are the
22 potential impacts to the endangered Ridgway's rail and
23 California least tern. In addition, our members are avid
24 birders and therefore the public access permit requirements
25 for the marina, including the pathways along Westpoint

1 Slough, are also very important.

2 We support BCDC's proposed enforcement action to ensure
3 that all the public access requirements and wildlife
4 protections are implemented and maintained. Thank you.

5 COMMITTEE CHAIR SCHARFF: Thank you.

6 G. Nelson Wolfe, to be followed by Therese "Terey"
7 Quinlan.

8 MR. WOLFE: Thank you. My name is Nelson Wolfe, I was
9 one of the original founding board members and spokesperson
10 for Save our Shores in Santa Cruz in the '70s. In that
11 capacity I was privileged to represent the environmental
12 concerns of Northern Californians regarding offshore oil
13 development and marine preservation. I later worked as a
14 consultant to the Marin Conservation League and Oceanic
15 Society on marine resource concerns. Michael Herz, founder
16 of San Francisco Baykeeper was a close colleague and friend.
17 We were boat partners for many years, sharing a love of
18 sailing on San Francisco Bay and coastal waters.

19 As a blue water sailor I have cleared into many marinas
20 over the years on both coasts of our country and in other
21 parts of the world. I have seen all manner and I can say
22 without qualification that Westpoint Harbor is the finest
23 and cleanest amongst all in the 40 years on the water. It
24 is a world-class marina, a state of the art facility. We
25 have been members of the Westpoint community for six years

1 and lived-aboard for five. We love living on the water and
2 feeling the magical marine rhythms of the tides and water
3 and wildlife.

4 I have known Mark Sanders to be an exemplary and
5 engaged owner, birthing a vision of a recreational portal
6 for those who wish to enjoy the Bay and its waters. While
7 it is a business it seems more a labor of love, born of a
8 care for all things nautical and the beauty of the marine
9 environment. In these past years I've known him to be a
10 present steward and a man of his word and high moral fiber
11 who cares deeply about the community he's created, the
12 surrounding sloughs and the living Bay.

13 Private and public interface is indeed a difficult and
14 delicate balance. Give and take is, I think, essential
15 around this sensitive and vital perimeter. I know we all
16 have reverence and respect for the charter, the mission and
17 the important work of BCDC Commission and staff --

18 (Timer tone sounded.)

19 MR. WOLFE: -- and the great vision of its original
20 founders to save the Bay.

21 I have spent the past couple of days reading the staff
22 recommendations and the Respondents' documentation. I am
23 saddened. What a waste of precious time and resources,
24 public and private. There are no bad actors in this room
25 and there are plenty out there deserving of attention. It

1 seems to me that the regulatory concerns could easily be
2 resolved in mediation or arbitration rather than litigation.

3 I would encourage the Commission to seek a different
4 resolution and cease and desist from their present course.

5 I do feel that it is incumbent upon those that dedicate
6 their professional efforts towards the high purpose of
7 environmental protection --

8 COMMITTEE CHAIR SCHARFF: If you could wrap it up,
9 you're over your time.

10 MR. WOLFE: -- to approach the stewardship of
11 enforcement efforts with judiciousness and fairness. I know
12 from personal experience how easy it is to personalize and
13 demonize players in matters --

14 COMMITTEE CHAIR SCHARFF: Excuse me; you're over your
15 time.

16 MR. WOLFE: -- the pursuit of BCDC mission. I have one
17 sentence left.

18 I encourage you to recover and recommend to staff a
19 more conciliatory and professional approach in this matter.
20 Thank you.

21 COMMITTEE CHAIR SCHARFF: Therese Terey Quinlan, to be
22 followed by Kevin Dew.

23 MS. QUINLAN: I have a very different message. Good
24 morning, Commissioners, staff, Westpoint Harbor
25 representatives and the public and thank you for having us

1 speak today.

2 I have had the privilege to work for many decades in
3 the Bay Area's nonprofit sector including at Grace
4 Cathedral, the Alzheimer's Association and others.
5 Collaboration and community is the spirit of this work.

6 Yet here I am today as an outdoors person. I have been
7 hiking the San Francisco Bay since the 1970s, from the East
8 Bay, North Bay, San Francisco, the Peninsula and South Bay
9 with friends and family to enjoy sweeping views, circuitous
10 water's edge and Pacific hairgrass, California sagebrush,
11 the buckeye, pelicans, ruddy ducks and countless songbirds.
12 We've wandered shore paths to celebrate holidays, birthdays,
13 anniversaries and passings and to swap jokes and concerns.

14 In the '80s I learned that a great plan was to take
15 place to connect all of the lovely gem paths to create the
16 San Francisco Bay Trail and it took my breath away.

17 When I met my sailor husband in the mid-1990s we
18 explored the Bay by boat. Being right on the beloved Bay
19 added that much more joy and connectedness to the movement
20 of her tides, the varying depths of her waters and the
21 sweeps of winds above her and the countless shapes of her
22 waves.

23 In 2009 we decided to move our very carefully restored
24 sailboat Celeste down closer to work to spare me the long
25 commute from our San Francisco home. We were delighted to

1 see a South Bay marina that was clean enough for Celeste.

2 Mark Sanders strode out to greet us with a big hearty --

3 (Timer tone sounded.)

4 COMMITTEE CHAIR SCHARFF: You're out of time.

5 MS. QUINLAN: -- handshake. May I have one more

6 moment, please?

7 My husband is a -- we moved our boat there since.

8 My husband is a paddle boarder. We have fully
9 integrated our lives. We share the marina with kayakers,
10 paddle boarders, outrigger canoes and wind surfers.

11 And I am here to show support for the community-
12 oriented staff of Westpoint and especially for -- I would
13 like to show my respect for Mark Sanders and his vision for
14 making this place of convergent so very special. Together
15 they are stewards of the small, natural gate to the Bay.

16 COMMITTEE CHAIR SCHARFF: You need to wrap it up.

17 MS. QUINLAN: Thank you very much.

18 COMMITTEE CHAIR SCHARFF: Kevin Dew, to be followed by
19 Paul Kaplan.

20 MR. DEW: Hello and thank you for your time,
21 Commissioners. My name is Kevin Dew and I'm an enterprise
22 software executive here in San Francisco and father who has
23 recently been embraced by the boating community.

24 I agree with what was said earlier. It does feel as if
25 we've devolved into a modern political era of fake news and

1 intimidation, which has trickled into all aspects of our
2 lives. And I apologize in advance, ever since becoming a
3 father I see the world through a modified lens and use
4 analogies an eight year old can understand.

5 But I'm here to talk about bullying. I have always
6 taught my son to stand up to bullies and defend those who
7 others try to take advantage of. I introduced him to this
8 community because of the life lessons I hoped that they
9 would teach him, hard work, passion for something beautiful,
10 respect for nature, generosity whether it's a neighbor
11 lending a wrench or in worst case a rescue.

12 The boating community, especially like the one at
13 Westpoint Harbor, is represented by the most authentic and
14 socioeconomically diverse I have ever known in the 20 years
15 I've been in the Bay Area. But I've never -- I've noticed
16 that there are no bullies, only the opposite. So now when I
17 see a good man like Mark being what feels like bullied and
18 taken advantage of I must make a stand.

19 I am sure the good people at BCDC are not bullies but
20 please heed the advice that was once given to Spiderman - I
21 warned you guys - with great power comes great
22 responsibility.

23 For the wonderful and welcoming people of this
24 community and my eight year old son --

25 (Timer tone sounded.)

1 MR. DEW: -- I humbly ask that they use theirs
2 responsibly and fairly. Thank you.

3 COMMITTEE CHAIR SCHARFF: Thank you.

4 Paul Kaplan, followed by our final speaker, Helen
5 Wolter.

6 MR. KAPLAN: Good afternoon, Commissioners. My name is
7 Paul Kaplan. I was born and raised in San Francisco and for
8 the longest time San Francisco Bay has served as a powerful
9 magnet in my life. This coming summer I will celebrate 50
10 years of being a sailor on this incredible bay and estuary
11 of ours.

12 I am speaking to you today because of a critical reason
13 I believe that BCDC exists and has actually achieved a goal;
14 but at the same time I believe this organization is lost in
15 a fog as it relates to its stated purpose, which also
16 includes development.

17 This organization's name begins with B because of the
18 Bay. And for all of us B is sacred.

19 At the same time we have the letter C, Conservation. I
20 get it. In college I studied to be a marine biologist. I
21 did research work in the Galapagos Islands for the Scripps
22 Institute and Smithsonian and as a Bay sailor I have seen
23 improvements and this Commission should take great pride in
24 the role it has played in its restoration. The return of
25 the harbor porpoises after an absence of 65 years is a

1 sparkling example, bravo. The letter C in BCDC is mission
2 critical.

3 This brings us to the letter D, Development. I'm a
4 partner in a company that provides services and repairs for
5 boats on San Francisco Bay. We are servicing the maritime
6 community from recreational boats to fishing boats. We're
7 located on the Bay because we can't repair boats in the
8 Sierra foothills. We're also no different than Westpoint
9 marina; neither of us can relocate. Boatyards and marinas
10 are an essential part of the Bay.

11 (Timer tone sounded.)

12 MR. KAPLAN: For someone who loves the Bay and is an
13 employer who must conduct our business on the Bay shores, it
14 is very sad to see this Commission bringing this enforcement
15 action, it's very discouraging in fact. As a small business
16 owner it's more than discouraging, it's also very scary to
17 think that we could easily be caught in the crosshairs of
18 this situation as well.

19 COMMITTEE CHAIR SCHARFF: Sir, you're out of time too.

20 MR. KAPLAN: Standing before you is a scary situation
21 as a permit holder and I think you need to recognize that.
22 As landlubbers we understand the expression "Not being able
23 to see the forest from the trees." I think you folks are
24 lost in a terrible fog here of your own creation. Thank
25 you.

1 COMMITTEE CHAIR SCHARFF: Thank you.

2 All right, now we turn to the Commission.

3 MR. ZEPPETELLO: Don't you have one more?

4 COMMITTEE CHAIR SCHARFF: Oh yes, Helen, come on up.

5 MS. WOLTER: Thank you for having me here today. I am
6 here representing the Committee for Green Foothills. I
7 appreciate the opportunity to speak.

8 As you all know, public access is key to our democracy.
9 It's covered under the California Constitution to the
10 shores, only areas that anyone can access within our
11 communities. Blocking access to the Bay is an affront to
12 the social fabric that binds us. Mr. Sanders' flagrant and
13 repeated violations indicates a strong disregard for the
14 foundation of the ties that bind our society.

15 We are also concerned by Westpoint's stance due to the
16 proximity to the many endangered species such as the
17 federally endangered Ridgway's rails. Again, disturbance to
18 endangered species is detrimental to these animals as well
19 as our society.

20 For the above reasons we support the Executive
21 Director's findings and believe that fines and enforcement
22 are justifiable. Thank you for your consideration.

23 COMMITTEE CHAIR SCHARFF: Thank you very much. Did I
24 forget someone?

25 (Two gentlemen in the audience asked to speak.)

1 COMMITTEE CHAIR SCHARFF: Bring the card. State your
2 name and speak.

3 MR. FARWELL: Sure. Good afternoon. Jay Farwell. I
4 am also a practicing lawyer but I am not here in that
5 capacity. I'm a rowing coach for Santa Clara University and
6 we row out of Lexington Reservoir above Los Gatos.

7 We were subject to drought conditions and struggling to
8 find water and we thankfully found Westpoint Harbor and Mark
9 Sanders and it really saved us for a number of years. When
10 we got access, he graciously provided us access and support
11 and facilities and I can't thank Mark enough of his support
12 of our sport in general and of our program at Santa Clara
13 University. Thank you.

14 COMMITTEE CHAIR SCHARFF: Thank you.

15 And there was one other person who wished to speak?

16 MR. KARWASIECKI: Good afternoon and thank you for
17 letting me say my two words. I will try to be very brief.
18 My name is Przemyslaw Karwasiecki and I have a boat in
19 Westpoint Harbor for the last six years.

20 As far as -- I am not a lawyer so I cannot voice my
21 opinion about any contractual breaches of the contract which
22 was stipulated by the permit.

23 I just have one very simple question. A lot of concern
24 was raised here about the public access. I consider that
25 this meeting is public, right? So this is public and I was

1 subject to the metal detector test, I have to pay the fee to
2 park my car in San Francisco, yet I am given access to this
3 meeting that I can say my words.

4 So let's think about the semantics of what really
5 public access means. I don't see the reason that if
6 somebody is approaching Westpoint Harbor he can't be
7 addressed by marina staff to present their reason for why
8 they are there. This is not a violation of public access in
9 my opinion. Thank you, that's all I wanted to say.

10 COMMITTEE CHAIR SCHARFF: Thank you very much.

11 Now we return to the Commission.

12 Thank you to all the public speakers for coming out
13 today on this rainy, difficult day.

14 I guess I wanted to start off this a little bit by
15 saying, you know, when I look at these specific permit
16 violations I am convinced they are all valid, I'm convinced
17 the record supports all of them, and I think what I would
18 respond to evidence law on record is the word "permit." I
19 think that you have not followed the permit and you have not
20 worked with BCDC staff. I'm a little surprised how much
21 time BCDC staff has had to put into this and I think that's
22 really unfortunate.

23 On the other side of it I did want to say, I think what
24 you've done with that marina is great. I think it's a real
25 plus for the Bay Area.

1 And I didn't think I was going to say this but I am
2 going to say this, I think a lot of the skills you have,
3 Mr. Sanders, in getting that marina built have made it
4 difficult for you to work with BCDC on the permit. I
5 actually agree with one member of the that you have been
6 very stubborn on these issues, you've been litigious, you
7 have not worked easily with BCDC. The record is clear to me
8 on that. I think really that is the problem here.

9 In listening to your presentation when you spoke,
10 you're going back to the EIR. You are trying to substitute
11 your judgment as to what is right for the environment, what
12 is right under the McAteer-Petris Act, for BCDC staff. And
13 that to me seems to be the crux of a lot of these issues.

14 I don't think I can recall so many specific violations.

15 And I agree with your counsel, if we had one of these
16 violations where you hadn't put the sign up and you put it
17 on the ground, we'd be more sympathetic.

18 There are 34 violations here and there is no sense from
19 you of any, that I'd like to resolve this with BCDC, that
20 I'd like to get this done. There is no sense at all.

21 So I am going to just ask you straight out. In the
22 Cease and Desist Order are you willing to do, put aside the
23 money for a second, are you willing to do everything in this
24 Order that they're asking or would you rather go to court on
25 that issue?

1 MR. SANDERS: Are you asking me?

2 COMMITTEE CHAIR SCHARFF: I am.

3 MR. SANDERS: So my answer is, I am willing to do
4 anything that is possible or legal.

5 COMMITTEE CHAIR SCHARFF: So that's not the question.

6 MR. SANDERS: Yes.

7 COMMITTEE CHAIR SCHARFF: In this Order.

8 MR. SANDERS: Okay. For example, putting navigational
9 hazards in the channel where I have been told by the Coast
10 Guard you will not do it, I cannot do it. I have no desire
11 to flaunt the law. So the answer is, yes, if it's possible.

12 COMMITTEE CHAIR SCHARFF: So that's where I think these
13 issues break down.

14 MR. SANDERS: Paths into the water, not possible. One
15 of the requirements, put a path out into the Bay.
16 Streetlights in the saltwater. It's not possible. I mean,
17 some of it is so stupid.

18 COMMITTEE CHAIR SCHARFF: Well, I would ask you to
19 point, or your counsel if it would be easier, if there is
20 anything in here - you can have three minutes or four
21 minutes to confer with your counsel if you need to - but I
22 want to know if there is anything in here that you are
23 unwilling to do.

24 MR. SADLER: Understand. Could we have some time to
25 confer on this?

1 COMMITTEE CHAIR SCHARFF: How much time do you need?

2 MR. SADLER: I'd be grateful if we could.

3 COMMITTEE CHAIR SCHARFF: How much time do you need?

4 MR. SADLER: Five minutes.

5 COMMITTEE CHAIR SCHARFF: You have five minutes. We'll
6 take a five minute break.

7 (Off the record at 12:45 p.m.)

8 (On the record at 12:58 p.m.)

9 COMMITTEE CHAIR SCHARFF: So go ahead and start.

10 MR. SADLER: Appreciate very much the opportunity to
11 confer. The direct answer is --

12 COMMITTEE MEMBER GIBBS: Call this hearing back into
13 order, Mr. Chair.

14 COMMITTEE CHAIR SCHARFF: Yes, go ahead.

15 COMMITTEE MEMBER GIBBS: Call this hearing back into
16 order.

17 COMMITTEE CHAIR SCHARFF: Thank you. Go on.

18 MR. SADLER: The direct answer is, we're ready to work
19 on all of this. I think there are three different
20 categories of things. There are things in here that were
21 either completely or largely addressed through that whole
22 back and forth on Amendment 5 so we are not starting from
23 ground zero on that.

24 But there are things in here with respect to asking us
25 to do things within certain time limits that we are not sure

1 we can do within those time limits but for goodness sake
2 we're willing to talk about a reasonable time limit.

3 There are also some things in here like the buoys, like
4 things with Cargill, that we are going to need to work with
5 somebody else to accomplish this, but we are absolutely
6 willing to do that.

7 I don't know that it can be -- you know, there are
8 things here we are supposed to do in 45 days or this amount
9 of days. If we can be flexible with each other about timing
10 we are absolutely committed to getting, to getting this done
11 and getting off the litigation path.

12 COMMITTEE CHAIR SCHARFF: So what I need, to be more
13 helpful I need specifics. I need you basically to look at
14 this Order and tell me. If there's a time thing I'll ask
15 Mr. Zeppetello if he needs more time to give it to him.

16 I tell you, I'm either going to make the motion that we
17 just enforce the penalty and we approve staff's Cease and
18 Desist Order - and I don't know if I'll get support for
19 that - but I'm either going to go there or I'm going to say,
20 what on this do you need more time for, what do you need to
21 do? But I don't want it to go back to where you then --

22 MR. SADLER: No, sir.

23 COMMITTEE CHAIR SCHARFF: -- basically tell staff, you
24 know, back in the EIR, we shouldn't have to do this.

25 MR. SADLER: I commit to you we are not relitigating

1 history. I think everybody has had enough relitigating
2 history. Let's start with the buoys. I don't know if we
3 can get with the Coast Guard and get their sign-off or not
4 in 45 days on buoys. I don't think any of us know that.

5 COMMITTEE CHAIR SCHARFF: Mr. Zeppetello, would you
6 like to suggest?

7 MR. ZEPPETELLO: Well one thought that I've had
8 listening to this is -- and I don't know that -- this is
9 just an idea, I don't know that this would be acceptable.
10 If the Committee were to adopt this Order as it's written we
11 could have an understanding - and again this is just an
12 idea - that between now and when this goes to the
13 Commission, it's actually scheduled to go to the Commission
14 on January 4th, that if we could work out agreements that
15 would be mutually agreeable to modify the conditions, the
16 timing or, for example, what might be the subject of a
17 permit amendment versus complying immediately, for example
18 the buoys.

19 I mean, maybe we work out an arrangement where they
20 apply to the Coast Guard or we give it 90 days to see what
21 happens and if not it goes into amendment. If we could work
22 out language in the next couple of weeks that we could agree
23 to then we could propose that as an amendment to Part III of
24 the Order that perhaps we could have the Enforcement
25 Committee convene an hour before the Commission meeting to

1 review it. That's just --

2 COMMITTEE CHAIR SCHARFF: No, I think that's a very
3 good suggestion. What do you think?

4 MR. SADLER: Obviously my concern is about the
5 Committee adopting the Order.

6 COMMITTEE CHAIR SCHARFF: Well, I think we're heading
7 in that direction unless you -- well, we'll see what the
8 rest of my Committee Members say. From the comments my
9 sense is that's -- I'm happy to have you -- I think
10 Mr. Zeppetello is giving you an out to say he'll work with
11 you to resolve this.

12 MR. SADLER: Perhaps we are on the same page. It's
13 obviously a little bit fluid to be negotiating this, you
14 know, on the fly like this. What I would suggest, which is
15 just a slight version of what he's talking about, is could
16 we not continue this hearing for some very defined period of
17 time, whether it's 10 days or 14 days, during which time we
18 work with Mr. Zeppetello to address these various timing
19 issues, it's not just the buoys, and then come back to the
20 Committee at that time with an agreement that we have all
21 had time to think through and commit to. I think that would
22 be an appropriate resolution which is, I don't think,
23 fundamentally different from what he's suggesting.

24 You have someone standing before you saying, we are
25 willing to work this out. We can't agree on the spot to do

1 everything in the time, in the way that this proposed. But
2 giving two lawyers a week or ten days to go through this
3 item by item, some of this we probably can, there is no
4 issue with time limits. But giving us a week or ten days to
5 sit down together and work out what would have to be changed
6 I think is a very reasonable suggestion and I'd encourage
7 you to go that route.

8 COMMITTEE CHAIR SCHARFF: When would you come back to
9 the Commission on this? How much time is it then until we
10 plan on coming to the Commission?

11 MR. ZEPPETELLO: Well, as I said, this currently would
12 be schedule to go to the Commission on January 4th. At this
13 point there wouldn't be -- I don't think there will be a
14 meeting on December 21st or December, whatever, the 7th.

15 COMMITTEE CHAIR SCHARFF: So how about this: How about
16 if we adopt the Order but, as you said, you can suggest
17 modifications for it. We would then meet on the 4th.
18 January 4th?

19 MR. ZEPPETELLO: Correct.

20 COMMITTEE CHAIR SCHARFF: January 4th. Or you could
21 bring it to a later meeting if you needed more time. You
22 might need more time. I would leave that with you guys.

23 MR. ZEPPETELLO: Clarifying, it's scheduled to go to
24 the Commission on the 4th. The next meeting of the
25 Enforcement Committee at this point is January 18th.

1 COMMITTEE CHAIR SCHARFF: Right. We could hold it, as
2 you suggested we could hold a meeting on the 4th before the
3 Commission meeting, you know, an hour beforehand and ratify
4 this.

5 MR. ZEPPETELLO: Well I think that, I think that doing
6 it by the 4th of January is a reasonable amount of time,
7 that's 45 days.

8 COMMITTEE CHAIR SCHARFF: I do think they're going to
9 cancel that Commission meeting though. They tend to cancel
10 those, I don't know. Is it going to go?

11 MR. ZEPPETELLO: January 4th is what Mr. Goldbeck told
12 me the other day.

13 COMMITTEE CHAIR SCHARFF: You might have trouble
14 getting Commissioners there for the 4th. In fact I'm
15 thinking I may not be there on the 4th, as we think about
16 it. So I think we should plan on bringing this to the
17 Commission meeting the 18th. That gives you more time as
18 well. I would plan on the 18th.

19 MR. ZEPPETELLO: Okay.

20 MR. SADLER: And to be clear, so that I know what I'm
21 agreeing to before I agree to it, is what's being proposed
22 is that this Committee would adopt the Order as they've
23 submitted it, every fines, violations and everything. But
24 what is being proposed by Mr. Zeppetello is that between
25 today and January 18th we get together and work out what can

1 be done -- I'm not talking about fines. What can be done in
2 the way of activities, either in the time frame proposed or
3 some different time frame because it can't be done for a
4 variety of reasons.

5 COMMITTEE CHAIR SCHARFF: Mr. Zeppetello can withdraw
6 the Order, he can ask to be modified, whatever. He can then
7 come say, we've talked, you've talked, and then come forward
8 with something that hopefully works.

9 MR. SADLER: Well, and that's what I'm getting at. If
10 we reach agreement to do these things in an agreed time
11 frame and in agreed manner, which may be different from the
12 Order actually proposed, are we saying that we will then
13 come back to this Committee, that will be adopted and the
14 issue of fines is then off the table?

15 COMMITTEE CHAIR SCHARFF: No, we still have to talk
16 about fines. So I think, I think we would have a -- would
17 it be the right thing to call it a tentative adoption? Is
18 that how we would do it or we'd actually adopt it and then
19 you would ask for modifications?

20 MR. ZEPPETELLO: We would ask you to adopt it subject
21 to modification on either stipulation or not.

22 COMMITTEE CHAIR SCHARFF: Okay. So that's what I'm
23 suggesting, subject to modification or the stipulation.

24 When it comes to fines I think we would adopt the Order
25 currently with all of its fines. That in terms of not -- in

1 terms of if you don't -- if you work out something with
2 Mr. Zeppetello I think we're going to have to have a little
3 discussion about what the fines would be. I can tell you my
4 preliminary thought is something like this: I heard we spent
5 \$186,000 worth of time on this.

6 MR. ZEPPELLO: One-sixty-five.

7 COMMITTEE CHAIR SCHARFF: What?

8 MR. ZEPPELLO: One hundred and sixty-five. That was
9 estimated.

10 COMMITTEE CHAIR SCHARFF: One hundred and sixty-five.
11 I do think that -- you know, I personally could see -- well.
12 I'm not sure where the discount would go if you work things
13 out with Mr. Zeppetello. I guess I could leave that up to
14 you guys. I don't think I as a Commissioner would be
15 comfortable with anything less than \$200,000, frankly,
16 because you've spent that. I am actually thinking -- for
17 me, you know, this has gone on a really long time, you did
18 violate it, moving forward there is a fine that will have to
19 be paid. I think we can have a little bit of discussion
20 about what the number is.

21 COMMITTEE MEMBER TECHEL: And we don't, it doesn't end
22 with us, it goes back to the Commission.

23 COMMITTEE CHAIR SCHARFF: The Commission, right.

24 COMMITTEE MEMBER TECHEL: And they have sent them back
25 to us if the fine wasn't enough.

1 COMMITTEE MEMBER GILMORE: What's a 25 percent
2 reduction? What would that be?

3 MR. ZEPPETELLO: It's 513, actually, because we
4 withdrew --

5 COMMITTEE CHAIR SCHARFF: You did, so it's 513 minus 25
6 percent is what?

7 (Off the record discussion calculating.)

8 COMMITTEE CHAIR SCHARFF: So for me it's somewhere
9 between a 50 percent and 25 percent; I don't think it's less
10 than \$250,000 for me. I think it's somewhere in that range
11 and the fine would have to be paid within 30 days of working
12 it out kind of thing. And if you didn't pay it you'd owe
13 the whole thing if you didn't make the payment within X
14 number of days. That's somehow I would think about it but
15 I'm going to --

16 COMMITTEE MEMBER GILMORE: Well, what we have always
17 done as a Commission, and I am not talking about specific
18 numbers here, but we are always more interested in seeing
19 the violations corrected than necessarily the amount of the
20 fine. So that weighs very heavily on me. We want to see
21 things done or there be an agreement in place that they will
22 get done within a reasonable amount of time. And for me, if
23 we get to that agreement and things are done on the ground,
24 I mean, I could see 50 percent going down to 200. I mean,
25 that's kind of -- but that's just me.

1 COMMITTEE CHAIR SCHARFF: You want to weigh in?

2 COMMITTEE MEMBER TECHEL: Just quickly. Yes. In the
3 past we have come with a fine amount and the full Commission
4 has decided it wasn't enough and so they've sent it back to
5 us so we have to really think about it and be able to defend
6 it when we go back to the Commission.

7 I am supportive. Normally when we get one of these
8 hearings and send out a Cease and Desist Order there is a
9 flurry of activity to try and solve the issues. And there
10 were some, I saw the sign issue got solved and some signs
11 got put up.

12 But, you know, you told me several times that you have
13 been on this case for four months and it seems to me your
14 time hasn't been spent trying to resolve the issues like
15 you're talking about today but in creating three binders of
16 materials. You know, if now you're saying you really are
17 going to lead this effort I am supportive of it, but as you
18 said earlier, I don't know that I have seen any evidence in
19 the work you've presented that leads me to believe that
20 you've really been trying to get these issues solved.

21 MR. SADLER: Well there is no question that in the
22 last, since the Violation Report was served on us we have
23 been focused on defending ourselves. I think that is
24 certainly --

25 COMMITTEE MEMBER TECHEL: And usually what happens --

1 I'm just saying what normally happens or happens a lot is
2 somebody gets one, they go, they work it out and I get a
3 phone saying, the hearing is canceled because we have been
4 able to work out the issues.

5 MR. SADLER: And so the offer that I think we have been
6 very clear that we're willing to make is to look, again,
7 fines aside. You asked the question, what are we willing to
8 do, and I've given you an unconditional direct answer.
9 Everything in there, we'll work with them. If it can't be
10 done in the time frame that is written in that draft
11 document or can't be done in the way it's written, I think
12 reasonable people could work that out and that's what we're
13 willing to agree to. But to ask us to agree to that and
14 then say, well, even if you do that we might hit you with a
15 quarter million, 200,000, I can't agree to that.

16 COMMITTEE CHAIR SCHARFF: Well I'm not asking you to
17 agree right now. What I'm telling you is we are going to --
18 well, I'm not going to speak for the Commission, but I think
19 we are going to come up with something we are going to do
20 today which allows you a chance to work it out. And I do
21 think it is not fair to staff if we don't set what the
22 parameters are of those fines.

23 And you could say, I'd rather litigate than pay those
24 fines, that's clearly your -- And in some ways that's easier
25 for us if you were to just tell me today, no, if you're

1 going to impose a quarter million dollars of fines I'd
2 rather litigate, then I don't have to bother Mr. Zeppetello
3 about trying to work stuff out with you, I can just say,
4 we're going to -- I can just make the motion and see if I
5 get support from my fellow Commissioners to impose all of
6 the fines and approve this.

7 MR. SADLER: So I would ask this, if what I'm hearing
8 is the following: We'll give you -- we'll adopt the Order,
9 we'll give you time to go talk to Mr. Zeppetello and work
10 out something on the things that need to be fixed. But at
11 the end of that process you're looking at close to a quarter
12 million dollars in fines. Not committing to that number but
13 that's kind of where you are. If that is what is being
14 proposed to me may I have three minutes to step out in the
15 hall with Mr. Sanders?

16 COMMITTEE CHAIR SCHARFF: You may.

17 MR. SADLER: Thank you.

18 COMMITTEE MEMBER GILMORE: Can I just?

19 COMMITTEE CHAIR SCHARFF: Wait, she has a question.

20 COMMITTEE MEMBER GILMORE: No, it's actually not a
21 question.

22 COMMITTEE CHAIR SCHARFF: A comment.

23 COMMITTEE MEMBER GILMORE: It's a comment. I think
24 Commissioner Techel's comment was right on point and I want
25 to make sure it doesn't get lost in all of this. Is the

1 realization that whatever we decide here, whether it's today
2 or whether we come back in January and you come before this
3 Commission, we've got to sell - assuming we all work this
4 out, I want to be positive here that we work this out -
5 we've got to sell whatever is agreed upon to the full
6 Commission, right?

7 MR. SADLER: Understand.

8 COMMITTEE MEMBER GILMORE: So I just want you to keep
9 that in mind. And they will not have sat here for however
10 long we've been here today. But that's a very important
11 point for you to keep in mind.

12 MR. SADLER: I'm crystal clear on that, crystal clear.

13 COMMITTEE MEMBER GILMORE: Okay.

14 COMMITTEE CHAIR SCHARFF: Okay. Five minutes?

15 MR. SADLER: Three.

16 COMMITTEE CHAIR SCHARFF: Three minutes.

17 (Respondent and Counsel exited the hearing room.)

18 COMMITTEE MEMBER ADDIEGO: Chair Scharff, while they're
19 conferring I just wanted to concur with Commissioner
20 Gilmore's first remarks and I'll let her words speak for me.

21 I think there is some merit to a continued hearing and
22 I think that we should be prepared to put in some time. We
23 are used to those marathon sessions that begin at 9:30, end
24 at 12:00 and then we roll into the -- I'm not looking
25 forward to that but I think that this issue and the

1 negotiations are almost going to require that kind of
2 commitment.

3 COMMITTEE MEMBER GILMORE: So in other words that means
4 we shouldn't count on an hour before the full Commission?

5 COMMITTEE MEMBER ADDIEGO: No.

6 COMMITTEE MEMBER TECHEL: No.

7 COMMITTEE CHAIR SCHARFF: Fair enough.

8 MR. ZEPPETELLO: Well I think there will be actually
9 some other -- there's at least one other item, unless it
10 resolves, that will be -- maybe two, actually two. So there
11 will be probably a full Enforcement Committee hearing that
12 morning.

13 COMMITTEE CHAIR SCHARFF: On the 18th?

14 MR. ZEPPETELLO: On the 18th.

15 COMMITTEE CHAIR SCHARFF: Okay.

16 (Off the record at 1:15 p.m.)

17 (On the record at 1:24 p.m.)

18 MR. SADLER: After visiting with Mr. Sanders here is
19 where we are on what you have outlined. I think if we want
20 to try to work this out in a way that avoids the litigation
21 track, continuing this process, allowing us to work out can
22 the things in the Order be done either in the same time
23 frame or different time frames, working out that agreement
24 is the way to do it. I am not hearing you say that the
25 Committee is willing to give us that opportunity.

1 So what we are willing to do is the following: We will
2 work with Mr. Zeppetello to see if we can come up with the
3 items in the Order that they want done, come up with
4 agreement on all of those that can be done the way they're
5 outlined in the time frame or in a different time frame. We
6 will come to an agreement, with a little "a," on all of
7 that. Once we have that our view would be to present that
8 back to this Committee and if that's acceptable as a
9 resolution, without holding the fines over our head, we
10 would be fine with that.

11 If what you're telling us is that we could go off and
12 reach this agreement with a little "a," come back to you and
13 you would still suggest fines on us, at that point we would
14 have the option to say, no thank you, and we'll see you in
15 court.

16 COMMITTEE CHAIR SCHARFF: Of course. So I think we
17 proposed something differently. I think we're -- I think
18 I'm just going to speak where I think we are and if anyone
19 disagrees, jump in.

20 I think what we're thinking of is that you actually
21 wouldn't come back to us. Ten days before the Commission
22 meeting, the actual BCDC Commission -- remember, what we do
23 here as a body is we recommend to the BCDC Commission.

24 MR. SADLER: Understood.

25 COMMITTEE CHAIR SCHARFF: The BCDC Commission actually

1 makes the final acceptance. They can't modify our
2 recommendation, all they can do is either accept it or send
3 it back to us or decide to hear the matter themselves. So
4 as long as we're sort of clear on this.

5 So what we were thinking was that you would go work
6 this out with Mr. Zeppetello if you can. And if you can get
7 him to agree to modify this agreement and you guys come to
8 an agreement, we're good with that. We would recommend as
9 modified by that and then we would send that off to the
10 Commission.

11 I wasn't thinking we'd hear it again, unless you think
12 I'm wrong on this, because you have to get it ten days
13 before in a packet out to the Commission for them to accept.
14 So we could have another step where it comes to this
15 Commission again just for say -- but I don't see that as
16 necessary. If you work it out, you've worked it out. And
17 then we would recommend that, whatever you've worked out, to
18 the Commission.

19 With the exception of fines. The Commission is very
20 sensitive to fines. I think we as a group here have to tell
21 you what that fine is going to be now. We are not going to
22 have the two of you negotiate the fines, I don't think that
23 works for us.

24 MR. ZEPPETELLO: But are you saying that you would
25 resolve the fines today?

1 COMMITTEE CHAIR SCHARFF: That's what we were planning
2 on doing.

3 MR. ZEPPETELLO: Okay. Because otherwise we would have
4 to come back to you.

5 COMMITTEE CHAIR SCHARFF: No, no, we were planning on
6 resolving the fines today. And I thought what we were
7 basically indicating was if agreement is reached the fines
8 shall be X. Well, if agreement is reached the fines shall
9 be X as long as it's paid within 30 days. You know, if it's
10 not paid then the full fine is owed. And if you don't work
11 something out then we impose whatever the fine is we're
12 going to impose. Does that make sense to you?

13 MR. SADLER: If I could get you to restate it, please.

14 COMMITTEE CHAIR SCHARFF: Yes, I apologize. So, if an
15 agreement is reached between the two of you we will suggest
16 a reduced fine. We haven't determined what that reduced
17 fine is. Say for sake of argument it's \$250,000, right.
18 That would be the fine you pay. If you do not pay that
19 within 30 days you would owe the full fine of \$513,000
20 because they withdrew one of their numbers. If on the other
21 hand you don't work it out with them you would pay the full
22 \$513,000.

23 MR. SADLER: Well, and so --

24 COMMITTEE CHAIR SCHARFF: Or you would just go to
25 court.

1 MR. SADLER: Exactly.

2 COMMITTEE CHAIR SCHARFF: We recognize that.

3 MR. SADLER: The second piece of this, nobody agrees on
4 anything, we are just going to keep focusing on litigation
5 and off we go. That sounds like the second piece to that.

6 COMMITTEE CHAIR SCHARFF: That is the second piece of
7 that.

8 MR. SADLER: Okay. So what we are being offered is if
9 we can work out the details of what I'll call "the work."

10 COMMITTEE CHAIR SCHARFF: Yes.

11 MR. SADLER: The Committee will recommend a reduced
12 fine. If we don't work out that then we're just right where
13 we are right this minute and off we go.

14 COMMITTEE CHAIR SCHARFF: That's correct.

15 MR. SADLER: I can see that under that circumstance
16 there is, as there would be because -- I don't know that
17 we've really focused on this but it does occur to me that
18 the BCDC and Westpoint Harbor have to live together going
19 forward if there is going to be a Westpoint Harbor. Unlike
20 normal litigation where it's plaintiff and defendant and if
21 we settle then it's like divorce, I never have to see you
22 again, I never have to talk to you again. We are going to
23 have to live together.

24 So perhaps there is some value in us having a dialogue
25 over the work items, knowing that even if we agree on the

1 work items we may see each other in court. Because I'm
2 telling you right now so it's absolutely clear, we are not
3 conceding to a fine, we are not agreeing to a fine, we are
4 adamantly opposed to a fine of anything.

5 COMMITTEE CHAIR SCHARFF: It will be a business
6 decision. You can tell us. In looking at this record I am
7 fairly confident that we will prevail wholeheartedly in
8 court. I feel confident about that. I think that staff has
9 done a really good job on this. So I think it's a business
10 decision from your point of view, whether or not you want to
11 litigate it or whether or not you want to pay the fine.

12 In any event I agree with you. I think you need to
13 work out with staff because it is an ongoing relationship
14 and I think you need to work that stuff out. And I am, as
15 the Commissioner here said, I am also more interested in
16 making sure that the stuff is resolved.

17 And I actually am looking for a bit of an attitude
18 adjustment in that other things will come up in the future
19 and that you go through the permit process and that you
20 change -- and that when staff asks you modify a permit or
21 you want something different you need to modify the permit,
22 you can't just go ahead and do the work. You actually have
23 to work through the process within the confines of the
24 process. So that's what I'm hoping we end up with and we
25 end up with a working relationship going forward that makes

1 sense like that.

2 MR. SADLER: I will say for Mr. Sanders, I hope we end
3 up there was well. I do have to say that this I think
4 presented an opportunity for us to clearly get off the
5 contentious litigation path and we haven't done that; we
6 haven't gotten off the litigation path and I think that's
7 very unfortunate.

8 But if you want -- and I'll respond to that. You
9 wanted a change in attitude. I don't know how I could have
10 been more plain than I have been, we're willing to work this
11 out. It is difficult, it is difficult in a circumstance
12 where fines are being held over our head. It just is, it
13 just absolutely is.

14 COMMITTEE CHAIR SCHARFF: I would think of it a little
15 differently. I would think of it as an opportunity. You've
16 engaged in activities of which the fines are appropriately
17 \$513,000. We are suggesting a lower fine. It is an
18 opportunity to cut your fines dramatically. If you choose
19 not to take that opportunity -- and in fact I think when I
20 go before the BCDC Commission and tell them that we have cut
21 the fines dramatically on this for you to work it out they
22 will have some skepticism, which we will have to get over.

23 I heard from Baykeeper and I heard from other
24 environmental groups, I think you should take that to heart.
25 I think you earned those fines, we are not hanging them over

1 your head. We are, in fact, being lenient in giving you an
2 opportunity to not have to pay the full fine. And I would
3 take that opportunity to heart.

4 MR. SADLER: I understand completely, I understand
5 where we are. We'll engage in a dialogue. Whether that
6 dialogues ends in a resolution with a reduced fine or it
7 ends in us being in court, we can't say, and I hope you
8 appreciate -- notwithstanding the fact that I'm an advocate,
9 which of course I am, that I was sincere in my expressions
10 that we do want to work this out without going to the
11 litigation path. And that's not just lawyer talk. I've
12 settled far more cases than I've litigated to the bitter end
13 and usually litigating to the bitter end nobody ends up
14 happy. Nobody ends up happy.

15 COMMITTEE CHAIR SCHARFF: All right. What do you think
16 the reduced fine should be?

17 COMMITTEE MEMBER TECHEL: I'm fine with your 250. I
18 think I can sell it.

19 COMMITTEE MEMBER GILMORE: Well I like 200 but that's
20 just me. I mean, assuming that we reach agreement. Because
21 like I said, I'm more interested in having the changes on
22 the ground than the fine.

23 COMMITTEE MEMBER GIBBS: What was the estimate of staff
24 time?

25 COMMITTEE CHAIR SCHARFF: One hundred eighty-six,

1 right?

2 COMMITTEE MEMBER ADDIEGO: One sixty-five.

3 COMMITTEE CHAIR SCHARFF: One sixty-five.

4 COMMITTEE MEMBER ADDIEGO: The 200 number might keep us
5 out of court.

6 COMMITTEE MEMBER GILMORE: I'm sorry? I couldn't hear
7 you.

8 COMMITTEE MEMBER ADDIEGO: The 200,000 number might
9 better keep us out of court.

10 COMMITTEE CHAIR SCHARFF: I would just say that I think
11 it is bad precedent to go below 50 percent on the fines.

12 COMMITTEE MEMBER GILMORE: That's not below 50 is it?

13 COMMITTEE MEMBER ADDIEGO: Yes, it is.

14 COMMITTEE MEMBER GILMORE: Okay, let's do the 50
15 percent then. So that's what, 207 or something like that?

16 COMMITTEE MEMBER ADDIEGO: Mr. McCrea has it.

17 COMMITTEE CHAIR SCHARFF: No, it's 250 plus change.

18 MR. McCREA: It's 256.

19 COMMITTEE CHAIR SCHARFF: All right, I will make the
20 motion that we go with --

21 COMMITTEE MEMBER GIBBS: Let me --

22 COMMITTEE CHAIR SCHARFF: Oh. Go on.

23 COMMITTEE MEMBER GIBBS: Let me agree with the motion
24 you are about to make. And I would like counsel to respond
25 and to understand that one of our functions here is actually

1 deterrence and the Commission expects us to deter. And we
2 cannot continue to have these cases that last 10 and 15
3 years and just somehow it's not able to be worked out.
4 Because that also was a business decision and those are the
5 business decisions that need to stop occurring.

6 So we are not going to be able to get you an agreement
7 unless we bring - under these facts and circumstances -
8 unless there is a meaningful fine associated with it. There
9 can be details about how and when the fine is paid but I
10 just think it's most useful if everybody understands before
11 we leave here today that that's the environment we're
12 operating in.

13 So I will support, I take your comment about the 50
14 percent and I will support that.

15 COMMITTEE CHAIR SCHARFF: All right. So I will make
16 the motion then that we adopt the Cease and Desist Order as
17 recommended by staff, subject to modification by agreement.
18 And I think we have to set a date of January 5th it was
19 pointed out to me, because if we are going to go to the
20 Commission, subject to you can extend it and take it to a
21 different Commission meeting if you so choose. That means
22 it would give you more time if you needed that for some
23 reason.

24 If the agreement is reached the fines shall be 50
25 percent of the proposed fine, which is \$256,500, as long as

1 it is paid within 30 days. Is that reasonable, from the
2 Commission endorsement?

3 MR. McCREA: Yes.

4 MR. ZEPPETELLO: Yes.

5 COMMITTEE CHAIR SCHARFF: From the Commission.

6 Otherwise it would be the full fine. Is that clear? Do you
7 need any clarifications?

8 MR. ZEPPETELLO: Maybe, let me just ask then. if we
9 engage in an effort to resolve, and we are focusing on
10 Section III of the Order, the Conditions, the cease and
11 desist provisions of the Order.

12 COMMITTEE CHAIR SCHARFF: Yes.

13 MR. ZEPPETELLO: If we reach an agreement to modify
14 that in certain respects presumably we would have language
15 that we would agree to that we would substitute in this
16 document for those provisions only of Section III and then
17 we would revise the penalty amount down to the \$256,000.

18 COMMITTEE CHAIR SCHARFF: Well, I think you should
19 revise it. But if for some reason the Cease and Desist
20 Order is not within the time frames contemplated then the
21 full fine would be owed.

22 MR. ZEPPETELLO: If the Cease and Desist -- if we don't
23 reach agreement.

24 COMMITTEE CHAIR SCHARFF: No, if you don't reach
25 agreement but I think also if they don't actually do what

1 they say they are going to do.

2 MR. McCREA: In terms of the Order?

3 COMMITTEE CHAIR SCHARFF: In terms of the Order. If
4 they don't fulfill the Order within the time frames. So
5 they need to pay the fine, the reduced fine, and they need
6 to do what they say they will do in the Order.

7 COMMITTEE MEMBER GILMORE: Within the time frames that
8 they said they were going to do it.

9 COMMITTEE CHAIR SCHARFF: Within the time frames set
10 forth. And that's why you need to work out time frames that
11 make sense. So if you say you're going to apply for a
12 modified permit within 30 days, they apply for the modified
13 permit.

14 MR. ZEPPETELLO: Okay, then let me just -- again, to
15 clarify. We did something similar in the Scott's Order.

16 COMMITTEE CHAIR SCHARFF: That's correct.

17 MR. ZEPPETELLO: And we had language that allowed the
18 Executive Director to make a determination as to whether
19 compliance was achieved by a certain date. These counsel
20 maybe are not familiar with that but I can share that with
21 them, but what I am hearing you say is that we need to add a
22 provision and we'll have to, again, mutually agree to it.
23 The Executive Director presumably would make a
24 determination, whether it's four months or six months into
25 the future. So we're talking about suspending 50 percent of

1 the penalty provided we come back with a modified Order and
2 they comply with that agreement within a time frame.

3 COMMITTEE CHAIR SCHARFF: That's correct.

4 MR. ZEPPETELLO: And presumably we don't even need to
5 go there if they were to decide to sue us instead and stay
6 the Order, then obviously the full fines would become due.

7 COMMITTEE CHAIR SCHARFF: That's correct. If you don't
8 come to an agreement then this Order becomes the
9 recommendation of the Committee to BCDC.

10 MR. ZEPPETELLO: The full Order.

11 COMMITTEE CHAIR SCHARFF: The full Order.

12 MR. ZEPPETELLO: Subject to modifying the one penalty
13 we removed and lowering the amount.

14 COMMITTEE CHAIR SCHARFF: No, if you don't come to
15 agreement then it's --

16 MR. ZEPPETELLO: I'm talking about the one violation
17 where we voluntarily withdrew it

18 COMMITTEE CHAIR SCHARFF: Yes, that is correct, that is
19 correct. All right.

20 MR. ZEPPETELLO: Okay, I think I've got it.

21 COMMITTEE CHAIR SCHARFF: Do you have it, sir,
22 Mr. Sanders?

23 MR. SADLER: Sadler.

24 COMMITTEE CHAIR SCHARFF: Sadler, sorry.

25 MR. SADLER: Yes, I think we understand what is being

1 proposed to us.

2 COMMITTEE CHAIR SCHARFF: I am not asking you to agree,
3 I just want to make sure that you clearly understand what is
4 being proposed.

5 MR. SADLER: I understand the proposal, yes.

6 COMMITTEE CHAIR SCHARFF: Good. All right. All right.

7 MR. ALDERSON: If I can be clear about something you
8 said just so I know too.

9 COMMITTEE CHAIR SCHARFF: Yes.

10 MR. ALDERSON: What you are doing is you are
11 recommending this decision to the Commission. There's one
12 thing I want to be clear about too is that you are -- this
13 is a recommended decision to the Commission, so I want to
14 make sure that there is built in time here that - because
15 they are going to be working on potential modifications -
16 that there is a minimum of ten days as preparation of the
17 recommended decision. Because 14 CCR Section 11331 requires
18 that at least ten days prior to the Commission's
19 consideration of the recommended decision that the
20 recommended decision be mailed to the Commission and other
21 folks. So I guess I just want to make sure that all that is
22 built in here. And what we are contemplating is not coming
23 back to this Committee but the recommended decision will be
24 going to the Commission.

25 COMMITTEE CHAIR SCHARFF: That's correct.

1 COMMITTEE MEMBER GILMORE: So that means that the
2 agreement has to be out by what, the 5th?

3 MR. ALDERSON: Subject to, what my understanding is,
4 mutual agreement by the parties to extend that date
5 depending on how their negotiations are going.

6 COMMITTEE MEMBER GILMORE: Okay.

7 MR. ALDERSON: That they have that discretion. That's
8 my understanding of what the section is.

9 COMMITTEE CHAIR SCHARFF: I think everyone is shooting
10 to have it on the 18th, on the Commission meeting. You guys
11 should come to an agreement by Friday, January 5th, I think
12 it's Friday, because you need to get it out in your packet
13 by the 8th if you're going to get it ten days beforehand.

14 But I'm leaving that up to you guys. If you guys are
15 close and it looks like you need to bring it to a different
16 Commission meeting because you need a little more time I'm
17 fine with that.

18 COMMITTEE MEMBER TECHEL: Should it come back to us
19 then on the 18th if it doesn't go to the full Commission?

20 MR. ALDERSON: No, this is a recommended decision that
21 goes to the Commission.

22 COMMITTEE MEMBER GILMORE: So it's not coming back to
23 us?

24 MR. ALDERSON: Correct.

25 COMMITTEE MEMBER GILMORE: Okay.

1 COMMITTEE CHAIR SCHARFF: All right. All in favor of
2 that motion?

3 COMMITTEE MEMBER GILMORE: Do we have a second? Did
4 you second it?

5 MR. ALDERSON: We need a second.

6 COMMITTEE MEMBER TECHEL: Second.

7 COMMITTEE MEMBER GIBBS: I'll second it.

8 COMMITTEE CHAIR SCHARFF: Okay, seconded by
9 Commissioner Gibbs.

10 All in favor?

11 (Ayes.)

12 COMMITTEE CHAIR SCHARFF: That passes unanimously.

13 Thank you all for coming today.

14 We have one other item, right? It's a short report, I
15 assume, or something quick because I think we all want to --
16 there was something else on the agenda. Report of the Chief
17 of Enforcement.

18 MS. KLEIN: I have no report. I have your per diem
19 forms.

20 COMMITTEE CHAIR SCHARFF: That's the best report yet.

21 Thank you very much, the meeting is adjourned.

22 (Thereupon, the Enforcement Committee
23 meeting was adjourned at 1:43 p.m.)

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CERTIFICATE OF REPORTER

I, Ramona Cota, an Electronic Reporter and Transcriber, do hereby certify that I am a disinterested person herein; that I recorded the foregoing San Francisco Bay Conservation and Development Commission, Enforcement Committee Meeting and thereafter transcribed it.

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

IN WITNESS WHEREOF, I have hereunto set my hand this 22nd day of November, 2017.



RAMONA COTA, CERT**478