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TO: Enforcement Committee Members

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SUBJECT: **Executive Director's Recommended Enforcement Decision Regarding Proposed Cease and Desist and Civil Penalty Order No. CDO 2017.04 Mark Sanders and Westpoint Harbor, LLC**
(For Committee consideration on November 16, 2017)

Executive Director's Recommendation

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I. SUMMARY OF BACKGROUND TO THE ALLEGED VIOLATIONS

BCDC Permit No. 2002.002.00, as amended through September 20, 2017 (BCDC Permit No. 2002.002.09), issued to Mark Sanders, authorizes the construction, use, and maintenance of the Westpoint Harbor and Marina (the "Site") in Redwood City that includes, but is not limited to, a marina and associated facilities, public walkways and trails, public access improvements, a boatyard, and undeveloped areas reserved for future commercial development. (For convenience the term "Permit" is used herein to refer to the amendment to BCDC Permit No. 2002.002.00 in effect at the particular time referred to in the text or to the amendment currently in effect, depending on the context.)

This enforcement action involves numerous longstanding and continuing violations of the Permit and of the McAteer-Petris Act by Mr. Sanders and Westpoint Harbor, LLC, which owns and operates the Site (hereafter collectively "Respondents" or "Sanders"), despite Commission staff's repeated efforts since May 2011 to bring Sanders and the Site into compliance.

The Permit requires Sanders to make available to the public an approximately 242,000 - square-foot area, referred to as the Phase 1B public access area, and to provide specified public access improvements, including 85,300 square feet of walkways and 170,500 square feet of landscaping, prior to the use of any authorized Phase IB structure, including the marina berths, which occurred by no later than September 2009. Sanders failed to comply with these requirements and instead actively prevented and discouraged public access for approximately eight years. Staff first notified Sanders in May 2011 to remove numerous unauthorized signs prohibiting public access -- signs stating such things as "Members and Guests Only," "Private Property/No Trespassing/Violators Will be Prosecuted," and "West Point Harbor/Private Facility."

From May 2011 through early 2017, Sanders claimed that Redwood City prohibited public access at the Site, even though Redwood City's Use Permit contains a condition of approval stating that "[p]ublic access to open space and parking shall be maintained at all times as well as parking facilities for visitors." In 2011 and 2012, Redwood City Planning Department staff had expressed concern regarding unrestricted public access to certain areas of the Site during active construction, but was under the mistaken impression that Sanders was providing public access to pathways in areas not under construction. Redwood City staff never asserted that Sanders was prohibited from providing required public access in areas where construction had been completed.

Sanders removed certain unauthorized signs at Commission staff's direction, but continued to improperly cite Redwood City's Use Permit on numerous "Restricted Access" signs as the basis for prohibiting public access to virtually the entire Site until July 5, 2017, many years after completion of active construction around the marina basin and in other Phase 1B areas. Sanders also continued to maintain numerous other unauthorized signs prohibiting public access, including two "Members and Guests Only" signs that were present at the marina entrance until early 2017.

In 2012, to address Sanders' concerns regarding public access to certain undeveloped portions of the Site, BCDC staff agreed to allow him to install temporary fencing to restrict public access to those areas (*i.e.,* the Phase 3 building sites), and staff prepared a draft Permit amendment to authorize such temporary fencing and to make certain other changes to the Permit requested by Sanders. Sanders declined to execute the proposed amendment, or any of the four subsequent versions of the amendment prepared by staff over the next three years, or to otherwise seek an amendment limited solely to authorizing the temporary fencing of the undeveloped areas. Not until May 2017, after staff informed him that it was preparing a Violation Report/Complaint for the Imposition of Administrative Civil Penalties ("Violation Report/Complaint" or "VR/C"), and that the Executive Director might first issue a cease and desist order directing him to immediately open all public access areas, did Sanders execute an amendment authorizing temporary fencing of the undeveloped areas and agree to open all required public access areas after installation of the fencing. Sanders completed the temporary fencing, removed all unauthorized signs, and opened most of the Phase 1B public access areas on or about July 5, 2017, but continues to prohibit public access to the guest docks, which are within the dedicated public access area; access to the guest docks continues to be blocked by unauthorized gates with signs stating "Members and Guests Only."

In addition to preventing physical access to the required public access areas, Sanders' violations of the Permit's requirements to provide public access improvements since September 2009 include his failures to: (1) install no fewer than 15 public access or Bay Trail signs; (2) make the public restrooms in the harbormaster's building available to the public; (3) provide all required site furnishings including lighting, seating, tables, and trash receptacles; (4) provide approximately 170,500 square feet of landscaping; (5) make a signed public boat launch available to the public; (6) provide eight signed public parking spaces; (7) provide fifteeen signed public parking spaces for vehicle and boat trailer parking; (8) provide public access signage identifying the ten guest berths.

Sanders has consistently violated the Permit's requirements for plan review and approval prior to constructing Site improvements. As of the date of this Recommended Enforcement Decision, Sanders has failed to obtain plan review approval for a signage plan, for the constructed decomposed granite pedestrian pathways, or for the partially completed landscaping, irrigation, lighting, and site furnishings.

Sanders has also constructed improvements in violation of terms of the Permit. He constructed a substantially larger fuel or service dock than authorized, which was later authorized after-the-fact by an amendment to the Permit. In violation of the Permit's requirement to construct "a 12 to 15-foot-wide public access path along the majority of the marina basin perimeter and overlooks of Westpoint Slough," Sanders instead constructed pedestrian paths that are only 10 feet wide.

Sanders has also constructed or installed many improvements that are not authorized by the Permit, including a rower's dock on the west side of the marina and three floating docks supporting large storage tents on the east side of the marina. Unauthorized construction or

structures placed on land include, but are not limited to: (1) a fence and gate at the northwestern portion of the Site that impermissibly blocked required public access from the adjacent Pacific Shores Center property; (2) a utility structure, two PG&E transformers, and fire suppression equipment on public access pathways; (3) a solar and wind powered container in the east end of the parking lot; (4) a fenced area south of the parking lot in a dedicated public access area that contains a garden and may also be used for storage; (5) a wooden storage shed, numerous planters, and stored construction material south of the parking lot in a dedicated public access area; and (6) an asphalt pad of unknown purpose in a dedicated public access area. In addition, Sanders has allowed the business that is using the unauthorized rower's dock to rent kayaks and stand-up paddleboards to also: (1) store kayaks in an adjacent public access area; and (2) use portions of the parking lot for a number of unauthorized accessory facilities including a large storage container, a wood-enclosed changing or storage area placed over designated public parking spaces, picnic tables, and a portable toilet.

Because Greco Island and other wetlands of the San Francisco National Wildlife Refuge ("Refuge") are located approximately 500 feet across Westpoint Slough from the Site, the Permit includes a number of conditions to prevent or minimize impacts to endangered species found in the Refuge, including the California clapper rail, the salt marsh harvest mouse, and the California least tern. Sanders has violated these conditions, and related conditions to minimize impacts to wildlife, as follows:

A. Sanders has failed to install and maintain required buoys and signs in the Slough to inform the public of access restrictions on Greco Island and other areas of the Refuge. In 2011, Sanders reported that he had installed 35 signs on Greco Island, in lieu of the required buoy system; at that time, Commission staff determined that the signage on Greco Island met the fundamental intent of required buoy system, but informed Sanders that the permit needed to be amended to reflect the proposed changes regarding the buoy and signage specifications. Sanders failed to execute any of the five versions of a proposed permit amendment that would have authorized these changes. In the meantime, photographs taken on April 9, 2017, document that: (1) there is a single sign adjacent to Greco Island stating "Sensitive Wildlife Habitat/Do Not Enter," but the sign is so faded that it is almost illegible; (2) there are two other faded signs on Greco Island with no writing visible; and (3) there is no evidence of signs along the majority of the perimeter of Greco Island.

B. Sanders has failed to install and maintain required buoys identifying a "No Wake" zone in Westpoint Slough. In June 2011, Sanders submitted to staff a photograph of a sign marked "3 M.P.H. No Wake." In contrast, photographs taken on June 5, 2016 and April 9, 2017, show a buoy in the Slough marked "Slow 10 MPH," and two photographs taken on June 6, 2016, show a ferry in the Slough generating a substantial wake.

C. Sanders has failed to provide the required visual barriers (*i.e.,* landscaped buffer) between the active marina areas (*i.e.,* parking lot) and an adjacent salt pond to reduce disturbance to water birds, despite staff's repeated requests that he comply with this Permit condition.

D. In 2011 and 2012, BCDC's former Bay Design Analyst directed Sanders to remove the Monterey Cypress and Poplar trees that he had planted along the Slough, without plan approval, because these trees serve as perching sites for raptors that can then prey on listed species found in the Refuge. Sanders has not removed these trees.

In May 2011, staff notified Sanders that he had failed to submit the required certification that, prior to commencing construction, his contractor had reviewed the requirements of the Permit and final BCDC-approved plans. Staff did not pursue past violations of this requirement, but reminded Sanders on two occasions, in September 2011 and September 2014, that prior to commencing future construction he was required to submit a signed certification that his contractor had reviewed the Permit and BCDC-approved plans. In 2016, Sanders repeated this violation by commencing additional work, pursuant to a Permit amendment, without submitting the required certification of contractor review.

Similarly, after staff notified Sanders in May 2011 that he had failed to complete all authorized work by the deadline specified in the Permit, he promptly requested and obtained a Permit amendment granting an extension of time. However, in August 2014, Sanders failed to comply with the extended deadline to complete all authorized work until the Permit was subsequently amended 19 months later, in April 2016, to grant a further extension of time to complete all authorized work.

Finally, Sanders violated a number of Permit conditions that require him to submit compliance documentation to BCDC. In 2011, after being notified of the violations by staff, Sanders incurred (unpaid) liability for standardized fines for failing to provide in a timely manner the required verification that he had submitted certain specified navigational information to the National Oceanic and Atmospheric Administration ("NOAA"). In addition, from May 2011 until January 2017, Sanders failed to submit required information regarding the number and location of live-aboard boats at the marina, despite staff's repeated requests for this information.

II. SUMMARY OF THE ESSENTIAL ALLEGATION IN THE VIOLATION REPORT/COMPLAINT

The essential allegation of the Violation Report/Complaint include the following:

A. Failure or refusal to make required public access areas available to the public, but to instead actively prevent and discourage public access;

B. Failure or refusal to provide required public access improvements, including but not limited to public paths, landscaping, site furniture, signage, public parking spaces, a public boat launch, and public access to guest docks;

C. Repeated failure to comply with the Permit's requirements for plan review and approval, and construction of various improvements without such approval;

D. Failure to construct improvements in accordance with the Permit's terms, and construction or installation of unauthorized improvements, including within and obstructing required public access areas;

E. Failure to comply with the Permit's requirements to protect wildlife and sensitive habitat in the nearby Refuge, including but not limited to:

- Failure to install and maintain required buoys and signs to inform the public of access restrictions on Greco Island and other areas of the Refuge;
- Failure to install and maintain required buoys identifying a "no wake" zone in Westpoint Slough; and
- Failure to install required visual barriers between the active marina area (*i.e.,* parking lot) and an adjacent salt pond;

F. Repeated failure to provide a required certification of contractor review of the Permit and approved plans prior to commencing construction activities;

G. Repeated failure to complete all authorized work by the time deadline specified in the Permit or obtain an appropriate extension of said deadline; and

H. Failure to submit documentation required by the Permit including:

- Information regarding the number and location of live-aboard boats;
- Verification of submission of navigational documentation to NOAA.

III. ADDITIONAL PERTINENT INFORMATION REGARDING MATTERS THAT OCCURRED AFTER ISSUANCE OF THE VIOLATION REPORT/COMPLAINT

A. **Recently Proposed Signage Plan Not Approved.** As noted in the Violation Report/Complaint, on June 7th, Sanders submitted a proposed signage plan. By letter dated July 27, 2017, BCDC's Bay Design Analyst ("BDA") determined that the signage plan is insufficient to perform a proper plan review and therefore is not approved. Sanders has not submitted a revised signage plan addressing the BDA's comments. Administrative Record Document ("AR Doc.") 100 at 1. (Staff adopts the convention used by Respondents of citing documents included in the record by staff as AR Doc. Documents included in the record with Respondents' Statement of Defense are cited herein by their exhibit number.)

B. **Additional Permit Violations and Additional Proposed Penalty. S**anders' knowing and intentional violations of the Permit's public access requirements has continued after issuance of the Violation Report/Complaint. On August 1, 2017, BCDC's Chief Counsel informed Respondents' counsel of additional Permit violations that had been called to BCDC staff's attention the previous week by a member of the public. Sanders has installed an unauthorized "Westpoint Harbor Boat Launch" sign that violates the Permit's public access requirements by: (1) requiring a permit and (2) charging a $10 fee for the public to use this required public access amenity which is located in a dedicated public access area. Respondents' counsel did not respond to BCDC Chief Counsel's request to advise staff promptly whether Sanders would remove the unauthorized sign or effectively cover the portion of the sign requiring a permit and the payment of a fee to use the public boat launch.

On August 3rd, BCDC's Chief Counsel directed Sanders, through his counsel, to remove the unauthorized "Westpoint Harbor Boat Launch" sign or to effectively cover the portion of the sign requiring a permit and the payment of a fee to use the public boat launch by no later than August 4th. BCDC's Chief Counsel also provided notice that if Sanders failed to comply with this request, staff would allege that his continued maintenance of this unauthorized sign, posting impermissible requirements for both a permit and a fee to use the public boat launch, is a separate violation from all other violations alleged in the Violation Report/Complaint, and would seek additional penalties of $1,000 per day for this violation commencing August 4th. AR Doc. 101 at 1. Respondents' counsel did not respond.

This signage violation has continued for approximately three months, from August 4th through the date of this Recommended Enforcement Decision. BCDC staff proposes a penalty of $1,000 per day for this knowing and intentional violation, which after 30 days would accrue to the statutory maximum of $30,000 for this ongoing violation.

C. **Respondents' Refusal to Provide Information Regarding Their Ability to Pay a Penalty and Assertion that Such Information Is Irrelevant. On** July 26, 2017, the Executive Director issued document subpoenas to both Mr. Sanders and Westpoint Harbor, LLC, as well as interrogatories to Mr. Sanders, requesting financial information relevant to the penalty factors of "ability to pay" and "effect on ability to continue in business. *See* Government Code § 66641.9(a). AR Docs. 97-99. In response, Respondents' counsel challenged the Executive Director's authority to propound such discovery requests and objected to the requests on numerous grounds.[1] Respondents refused to provide any of the requested financial records or information, but also stated that "the information sought through the Subpoenas and Interrogatories is not at all relevant to [this proceeding], as financial inability to pay administrative penalties has not been asserted by Respondents." AR Doc. 102 at, at 5. Because Respondents refused to provide requested financial records and information and because Respondents have not asserted an inability to pay the proposed penalty, the statutory factors of the violator's "ability to pay, [and] the effect on ability to continue in business" (Gov't Code § 66641.9(a)) are not relevant to the Enforcement Committee's determination of an appropriate amount of administrative civil liability.

D. **Respondents' Requests for Extensions of Time, Public Records Act Request, Lawsuit Against BCDC, and Failure to Make Progress to Resolve Any of the Violations.** As discussed in the Violation Report/Complaint, between January 5, 2017 and July 7th, BCDC's Chief Counsel and Respondents' counsel, David Smith, engaged in a series of phone conversations and meetings, on occasion joined by staff, to discuss the alleged violations and narrow, or attempt to narrow, the issues in dispute. *See generally* VR/C at ¶¶ VI.VV to VI.UUU. On July 27th, a few

[1] While challenging the Executive Director's authority to request financial information, Respondents' counsel conspicuously failed to address the Commission's regulation, cited on the face of both document subpoenas and the interrogatories, that expressly states: "As part of any enforcement investigation, the Executive Director may issue subpoenas and staff may send interrogatories, conduct depositions, and inspect property at any time." 14 C.C.R. § 11320.

days after issuance of the Violation Report/Complaint, BCDC's Chief Counsel was notified that Respondents had retained new counsel, Christopher Carr and Kevin Vickers with the law firm Baker Botts, LLP. On July 31st, BCDC staff provided Respondents' new counsel with electronic copies of all documents listed in the Index of Administrative Record included as part of the Violation Report/Complaint.

On August 7th, Mr. Carr submitted a Public Records Act ("PRA") request for all records that relate to the alleged violations or the facts asserted in the Violation Report/Complaint. By August 11th, BCDC staff had made available to Respondents' counsel for inspection the complete hard copy permit and enforcement files for the Site. In addition to promptly copying the hard-copy records designated by Respondents' counsel, BCDC staff subsequently provided electronic copies of the electronic permit and enforcement files for the Site, electronic copies of documents in electronic individual staff folders for the Site, and hard copies and electronic copies of emails responsive to the PRA request that are not exempt from disclosure under the PRA.

On August 17th, Respondents requested a 179-day extension of time to submit their Statement of Defense ("SOD"). On August 18th, the Executive Director granted Respondents a 28-day extension.

On September 7th, 2017, Mr. Carr alleged in a letter that staff had not complied with the PRA "because (1) BCDC has not provided specific public records that are relevant; and (2) BCDC has not presented valid exemptions as a basis for withholding other public records." BCDC's Chief Counsel provided an initial, partial response in a September 12th letter that addressed the 19 specific documents discussed in Mr. Carr's September 7th letter and subsequently sent Mr. Carr a series of emails, on September 14th, 15th, and 19th, each including a Dropbox link or links to electronic copies of additional documents responsive to the PRA request. AR Docs. 103 and 104.

On September 15th, Respondents made a second request for an extension of time to submit their SOD. Respondents requested that the deadline be "extended to 60 days from the date that BCDC fully complies" with Respondents' PRA request. On September 18th, the Executive Director granted Respondents a second extension, of an additional 25 days, to submit their SOD.

On September 19th, BCDC's Chief Counsel informed Mr. Carr that BCDC had completed its supplemental production of records responsive to the PRA request (with the exception of the audio recordings of an August 2003 Commission meeting, which staff received from off-site storage a few days later and promptly made available to Respondents' counsel). In a September 27th letter, BCDC's Chief Counsel responded to the remaining issues raised in Mr. Carr's September 7th letter and, in particular, provided further descriptive information regarding the documents withheld as exempt from disclosure under the PRA and the bases for applicable exemptions. AR Doc. 104.

On October 2nd, Respondents' counsel filed a Verified Complaint for Declarative Relief and Petition for Writ of Mandate ("Petition") against the Commission in San Francisco Superior Court. The Petition includes causes of action for alleged violations of: (1) the PRA; and (2) Trustworthy Electronic Document or Recorded Preservation Regulations. In their SOD, Respondents threaten further litigation: "if [the Commission] forces Respondents to go through this exercise, they will do so and see this matter through to the end (and then seek damages and attorney fees against BCDC, and certain individuals)." SOD at 2:11-13.

From July 24th, when the Executive Director issued the Violation Report/Complaint, through the date of this Recommended Enforcement Decision, Respondents have not sought to engage in any discussions with BCDC staff regarding the alleged violations. Nor have Respondents submitted any documentation to staff that might resolve any of the violations (such as, for example, a revised signage plan or a proposed landscaping plan). While Respondents have made no effort to resolve any of the violations over the past three months, they have continued their past practice of installing improvements without plan approval, by installing additional signs and site furnishing without such approval. *See* SOD at 46:32-33 and 51:5-9.

IV. SUMMARY OF A LIST OF ALL ESSENTIAL ALLEGATIONS EITHER ADMITTED OR NOT CONTESTED BY RESPONDENTS

Respondents generally deny all essential allegations and further deny that they have violated the Permit in any manner as alleged in the Violation Report/Complaint.

Respondents admit the Permit requires that specified Phase 1B public access improvements be in place "prior to the use of any structure authorized herein (including the marina berths) under Phase 1B of the project." SOD at 34:10-12. Respondents dispute staff's allegation in the Violation Report/Complaint that the Phase 1B public access improvements were required to be in place by September 2008 because "boats began using the 145 slips authorized under Phase 1A in 2008, but the Phase 1B slips had not even been installed at that time." Id. at 34:16-18. Respondents fail to identify when they installed the Phase 1B berths, but Google Earth historical aerial imagery (attached hereto as Exhibit A) documents that by September 2009, Respondents had installed two Phase 1B docks containing 49 slips and that those docks were partially occupied by 11 boats. Thus, Respondents cannot dispute that under the Permit all Phase 1B public access improvements were required to be installed and available for public use by no later than September 2009.[2]

[2] In May 2011, Respondents informed staff that they had installed and were using the ten guest berths authorized as part of Phase 1B. Ex. 21, at 5-6. Therefore, if not by September 2009, Respondents clearly were required to have installed all required Phase 1B public access improvements by no later than May 2011.

In contrast to the Permit requirement to install all Phase 1B public access improvements by September 2009, Respondents admit that they did not provide access to the Phase 1B public pathways until July 2017. SOD at 51:5-7. Respondents also admit that they did not: (1) complete the 15 public parking spaces for vehicle and boat trailer parking required in Phase 1B until the summer of 2015 (*id* at 55:18-20); and (2) did not complete and make available the public boat launch required in Phase 1B until June 2017 (*id* at 59:21-22).

V. DEFENSES AND MITIGATING FACTORS RAISED BY RESPONDENTS; STAFF'S REBUTTAL EVIDENCE AND ARGUMENTS

A. **This Proceeding Does Not Violate Respondents' Due Process Rights.** Respondents argue that the Violation Report/Complaint and this enforcement proceeding violate their due process rights by making it impossible for them to have a meaningful opportunity to be heard. SOD at 103:11-17. There is no merit to Respondents' due process arguments.

Respondents claim that staff failed to comply with the Commission's regulations that require a violation report to refer to all documents on which the staff relies and to give notice that the documents may be inspected at BCDC's office and that copies will be provided upon request and payment of copying costs. SOD at 103:20-24 (citing 14 C.C.R. **§** 11321(b)). Respondents are mistaken. The Violation Report/ Complaint cites specific documents, references documents listed in an attached Index of Administrative Record, and twice states that all such documents may be inspected and copied.[3] VR/C at 1, 7, and Ex. A. Moreover, on July 31st, one week after issuance of the Violation Report/Complaint, BCDC staff provided Respondents' counsel with electronic copies of all documents listed in the Index of Administrative Record.

Respondents also claim that staff has failed to comply with the Public Records Act ("PRA") and argue that staff's allegedly incomplete response to their PRA has not provided them sufficient time to respond to the Violation Report/Complaint. SOD at 104:2:105:13. Contrary to Respondents' claim, by August 11th, four days after Respondents' counsel submitted their PRA request, BCDC staff had made available to them for inspection the complete hard copy permit and enforcement records for the Site. In addition to promptly copying the hard-copy records designated by Respondents' counsel, BCDC staff subsequently provided electronic copies of the electronic permit and enforcement files for the Site, electronic copies of documents in electronic individual staff folders for the Site, and hard copies and electronic copies of emails responsive to the PRA request that are not exempt from disclosure under the PRA. AR Docs. 103 and 104.

[3] The regulations require a violation report to refer only to all documents staff relies on "to provide a prima facie case," not to all documents contained in the Commission's files for the matter. 14 C.C.R. § 11321(b). Nevertheless, the Violation Report/Complaint states that "[a]ll the evidence to which this report refers is available in the enforcement file for this matter" and that these materials are available for review and copying.

On September 19th, BCDC's Chief Counsel informed Respondents' counsel that staff had completed its supplemental production of records responsive to the PRA request (with the exception of the audio recordings of an August 2003 Commission meeting, which staff received from off-site storage a few days later and promptly made available to Respondents' counsel). In a September 27th letter, BCDC's Chief Counsel addressed the remaining issues Respondents' counsel had raised regarding staff's response to their PRA request, including providing descriptive information regarding the categories of documents withheld as exempt from disclosure under the PRA and the bases for applicable exemptions.[4] AR Doc104.

In the Violation Report/Complaint, staff provided a detailed chronology of the violations and staff's repeated efforts, from May 2011 to July 2017, to work with Respondents to resolve the violations. Notwithstanding many of the details in the Violation Report/Complaint, and the additional detailed information contained in the Commission's permit and enforcement files covering the fourteen-year period of development of the Site, the facts that are material to this enforcement action – those facts essential to the Commission's determination of Respondents' liability -- are few.[5] Whether or not Respondents are liable for a particular violation depends solely on the terms and conditions of the existing Permit and the evidence demonstrating whether or not Respondents have complied with those terms and conditions.

The Executive Director granted Respondents two extensions of time to submit their SOD: (1) on August 18th, the Executive Director granted a 28-day extension; and (2) on September 18th, the Executive Director granted a second extension, of an additional 25 days. Respondents' extremely detailed 128-page SOD, supported by 135 exhibits, demonstrates that Respondents have had sufficient time to review and respond to the Violation Report/Complaint and a meaningful opportunity to present their defenses thereto.

B. **Because Sanders Refused to Sign Proposed Amendment Five, the Existing Permit Conditions Remain In Effect.** Before summarizing and responding to Respondents' defenses to specific alleged violations, staff will address two general but related assertions by Respondents: (1) certain construction activities at the marina took longer than anticipated; and (2) a number of the violations would have been resolved by proposed Amendment Five. *See* SOD at 7:23-8:33; 13:24-33.

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[4] Though Respondents' counsel claims that staff has not yet fully responded to their PRA request (SOD at 105:12-13), BCDC's Chief Counsel's September 27th letter explains that each of the withheld documents is exempt from disclosure under one or more of the following PRA exemptions: (1) the provisions of the Evidence Code and Code of Civil Procedure relating to the attorney-client and attorney-work product privileges; (2) as a preliminary draft that is not retained by BCDC in the normal course of business and for which the public interest in nondisclosure of the record clearly outweighs the public interest in disclosure; and/or (4) under the "deliberative process" privilege and for which the public interest in nondisclosure of the record clearly outweighs the public interest in disclosure. AR Doc. 104.

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

Respondents claim that staff was unwilling to work cooperatively with them on proposed Amendment Five and instead proposed new and acceptable conditions in versions of that proposed amendment.[6] *Id.* at 15:3-5; 14:21-23. However, the record demonstrates that staff expended considerable time and effort attempting to address Sanders' concerns and accommodate his requests for changes to the Permit, by preparing five different versions of proposed Amendment Five over a three-year period (September 2012 to September 2015). VR/C at ¶¶ VI.Z, VI.FF, VI.GG, and VI.HH. Sanders and his counsel found fault with various provisions or specific language of each version of the proposed amendment, and raised additional issues upon each subsequent version, even though staff prepared lengthy letters responding to the comments that Sanders and his counsel had made on previous versions and explained the basis for staff's determination that certain requested changes could not be made administratively. *See* AR Docs. 60 and 64. Even as December 2014, when Sanders's counsel submitted comments on version four of proposed Amendment Five, Sanders continued to challenge the Commission's salt pond designation for the Site and its jurisdiction, as well as the requirement to provide information on live-aboards, even though these provisions had been in the Permit signed by Sanders for over a decade. See AR 64 at 7-8.

Ultimately, Sanders insisted that staff prepare Amendment Six to authorize certain Phase 2 work at the boat yard, but which did not incorporate any of the provisions that would have been revised by proposed Amendment Five. VR/C at ¶ VI.KK. Whatever his reasons for refusing to execute proposed Amendment Five, as staff repeatedly advised him, Sanders remains bound by the terms and conditions of the existing Permit, including the deadline for providing all required Phase 1B public access improvements, which had been effect since Amendment Three was issued in 2006. *See* AR Doc. 57 at 3; AR Doc 60 at 4 - 5. The various modifications staff might have agreed to in proposed Amendment Five are irrelevant to determining Respondents' liability in this action to enforce the requirements of the existing Permit.

[6] Respondents' only example of a purportedly unacceptable condition is their unsupported claim that staff allegedly proposed a new requirement that swimming be allowed in the marina basin. SOD at 15:4-5. Staff may have raised the issue of whether the Permit requirement for unrestricted public access encompassed swimming, but only in connection with Sanders's request, in a May 20, 2013 email, to revise the Permit's public access condition to state: "no swimming or fishing inside of the marina basin." In response to this requested revision, staff included in version 3 of proposed Amendment Five, dated June 6, 2013, proposed text stating: "Fishing shall be permitted along Westpoint Slough, however the permittee may restrict fishing and swimming within the marina basin." Thus, staff did not seek to impose a requirement that swimming be allowed in the marina basin.

Sanders has enjoyed the benefits of the existing Permit for 14 years, but has failed to comply with the Permit conditions to which he objects or that do not comport with his personal timeframe for Site development. *See* AR Doc. 60 at 4 – 5. However, a permittee who accepts the benefits of a permit, as Sanders clearly has, must also bear its burdens. *Lynch v. California Coastal Commission*, 3 Cal. 5th 470, 478 (2017).

C. **Staff Has Not Over-Counted Violations.** Respondents claim that the staff has attempted to, "fracture alleged violations in order to inflate the penalties it wishes to impose." SOD at 19:18-19. More specifically, Respondents argue that staff has over counted two categories of violations: "failure to obtain plan approval," and "failure to install public access improvements."[7] *Id*. at 18:7-12. Respondents are incorrect.

Staff properly determined that each of the violations as alleged is a separate and distinct violation. Permit Special Condition II.B.4 separately lists a number of specific public access improvements or categories of improvements, and the failure to install each such improvement or category of improvements is a separate violation. Similarly, each failure to submit a plan for review and approval as to a specified public access improvement is a distinct violation. Thus, for example, failure to obtain plan review approval to construct public access pathways is a distinct violation from failure to obtain plan approval to install landscaping.

Contrary to Respondents' claim that staff has over counted the violations, in ten instances, staff aggregated multiple separate violations as a single violation for purposes of a proposed penalty. Exhibit D to the Violation Report/Complaint is a four-page table summarizing the alleged violations and proposed penalties. As shown in Exhibit D, staff aggregated 35 separate violations into a total of 22 violations and did not propose any penalty for three of the violations, thereby significantly reducing the total proposed penalty from what it might be if many of the violations had not been aggregated as single violations. Staff has not over counted the violations.[8]

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[7] Respondents rely on dicta in *People v. Casa Blanca Convalescent Homes, Inc.,* 159 Cal. App. 3d 509 (1984) to argue that staff improperly counted each plan review and each failure to install a public access improvement as a separate violation. While noting that allowing a sanction for each violation would result in an unreasonable penalty in that particular case, the court further stated that, "to take all violations … of a particular rule or regulation and count them as only one violation would be equally unreasonable." *Id.* at 534-535. The court concluded, "aggregation of certain multiple species of violations into a single 'act' resulted in a … more than reasonable penalty," and that, "[s]evere sanctions were justified here because of … repeated violations…" *Id.* at 535. Likewise, here, staff has aggregated numerous violations and the overall proposed penalty is entirely reasonable under the egregious circumstance of this case. *See* Section VI, below, providing and analysis of the statutory penalty factors.

[8] Respondents also repeatedly complain that there is no logical basis to allege that their failures to provide public access improvement commenced in September 2008, but their failure to obtain plan review began in May 2011. The basis for this distinction is: (1) Respondents' failure to provide Phase 1B public access improvements commenced with their use of any structure authorized under Phase 1B, which was alleged to have occurred in September 2008 (but as discussed above, certainly occurred no later than September 2009, upon occupancy of the Phase 1B marina berths); and (2) Respondents' failures to obtain plan approval became eligible for standardized

D. **Violation 1 – Failure to Provide Public Access Pathways and Public Access to Guest Berths and Restrooms.** The Violation Report/Complaint aggregates the following four violations as a single violation for purposes of a proposed penalty: (1) failure to obtain plan review approval to construct public access pathways (Violation 1A); (2) failure to install and/or make available public access pathways (Violation 1B); (3) failure to make available for public access ten guest berths (Violation 1C); and (4) failure to make available public restrooms within the harbormaster building (Violation 1D).

Violation 1A – Failure to Obtain Plan Approval for Public Access Paths

Respondents claim that a September 8, 2011 letter from BCDC's former BDA, Ellen Miramontes, which provided comments on and "conditional approval" of revised Phase 1 construction drawing constituted plan approval for the public access paths. SOD at 24:2-5. However, Ms. Miramontes's approval was contingent on a number of requested revisions to the plans and her letter concluded:

> "I look forward to working with you and BMS Design Group further regarding the final public access plans. As you know, final public access plans should include screening the marina and adjacent salt pond, landscaping, irrigation, lighting, signage, and site furniture within the public access areas." AR Doc. 26, at 4.

Respondents further claim that they revised the Phase 1 construction drawings as requested by Ms. Miramontes and obtained full plan approval on September 13, 2011, upon mere submission of these revised drawings. SOD 24 at 16-17. But as detailed in the Violation Report/Complaint, Ms. Miramontes and Respondents' consultants were in frequent communication during the Fall of 2011 and throughout 2012 regarding plan review requirements. Respondents provide no evidence that they submitted revised plans in response to the comments provided by Ms. Miramontes on December 22, 2012 or that she granted final, unconditional approval of plans for the public access paths.[9]

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fines in May 2011, when staff issued its initial letter notifying Respondents of the violations and became eligible for administrative civil penalties each time construction occurred without plan approval.

[9] In responding to the plan review and approval violations, Respondents repeatedly cite to a November 3, 2005 letter from Brad McCrea stating that BCDC did not "currently have a licensed engineer on its staff and that we do not currently have the staff expertise to adequately review the above-mentioned plans." *See* SOD at 22:3-17. Mr. McCrea's letter was in specific reference to plans for road improvements and basin surcharge that required engineering expertise and concerned a then "current" staff limitation 12 years ago. His letter was not a general statement that staff was unable to review any and all plans required by the Permit. Any alleged lack of BCDC staff expertise in 2005 is not relevant to any of the alleged violations. Moreover, the extensive communications between Respondents' representatives and BCDC's former BDA, Ms. Miramontes, as documented in the Violation Report/Complaint, demonstrate that appropriate staff was engaged in reviewing and commenting on the plans submitted by Respondents and that Respondents had every opportunity to obtain approval of the necessary plans for the public access improvements.

Moreover, it is important to point out that the revised construction drawings prepared in September 2011 reflect certain changes to the Permit's requirements that staff anticipated would be authorized by proposed Amendment Five, including but not limited to revisions to the specifications for the public access paths. However, because Sanders refused to execute any of the versions of proposed Amendment Five prepared by staff, even if Ms. Miramontes had approved the revised construction drawings, Respondents would not have been authorized to construct improvements in accordance with those plans that conflict with the conditions of the existing Permit.

Violation 1B – Failure to Make Public Access Pathways Available

Respondents claim that "the pathways, landscaping, and other amenities in or near Phase 2 and 3 areas could not be completed or opened to the public until these areas were deemed safe by Redwood City." SOD at 9:20-22. They further claim that "BCDC staff saw firsthand that construction was still continuing" at the Site during its December 8, 2016 site visit. *Id.* at 31:10-11. Respondents' vague and generalized statements regarding safety concerns do not excuse their refusal to allow public access for many years after completion of active construction in the Phase 1B areas.

Respondents claim that they did not construct any improvements at the Site from August 16, 2014 to April 10, 2016. *Id*. at 92:11-12. During staff's site visit in December 2016, the only area where active construction was occurring was the Phase 2 boatyard at the eastern portion of the Site, to which Respondent's effectively and appropriately prevented public access by a six-foot tall chain link fence. Yet throughout this period, Respondents also prohibited public access on all required Phase 1B paths around marina basin, notwithstanding that no construction activities were occurring in these areas or the undeveloped Phase 3 areas in the western portion of the Site.

Respondents claim that "NO TRESPASSING" signs were placed "around the undeveloped Phase 3 areas to prevent members of the public from wandering into active construction areas." SOD at 31:31-33. However, Respondents blocked the Phase 1B public access paths around the marina and prevented public access with unauthorized signs for years after completion of active construction in these areas. *See* VR/C at ¶¶ VI.LL.2. and IV. QQ.2. Similarly, Respondents provide no evidence in support of their vague statement that the "Members and Guests Only" signs were accompanied by public shore signs. SOD at 32:30-31. There were no public shore signs posted during BCDC's Chief Counsel's Site visit on October 22, 2016. VR/C at ¶ VI.LL.1 and Ex. C (Site photos). Not until sometime prior to BCDC's staff's December 8, 2016 Site visit did Respondents post a public shore sign beneath the "Members and Guests Only" sign at the marina entrance. See VR/C at ¶ VI.QQ.1.

Respondents acknowledge that an agreement was reached in 2012 to allow installation of a temporary fence to prevent access to the undeveloped Phase 3 areas but they claim, incredibly and without support (other than Mr. Sanders's self-serving declaration), that "BCDC staff refused to authorize this fence for years." SOD at 30:5-6. As discussed above and in the

Violation Report/Complaint, Sanders refused to sign any of the five different versions of proposed Amendment Five prepared by staff between September 2012 and September 2015 that would have authorized such temporary fencing. VR/C at ¶ VI.Z.

Respondents acknowledge that the Permit requires 12 to 15-foot wide public access paths. SOD at 25:15. They claim there are 12-foot wide paths on the east and west sides of the marina basin, but admit that the paths on the south side of the basin and on the two peninsular paths along the slough leading to the harbor entrance are only 10-feet-wide. *Id.* at 25:15-18. Respondents' unsupported assertion that the paths on the east and west side of the marina basin are 12-feet wide is incorrect. The "as built" revised Phase 1 construction drawings submitted by Respondents on September 13, 2011, show 10-foot wide paths around the entire marina basin. Ex. 37, at sheets 8 & 9.

Respondents claim that staff is attempting "to backdate the alleged violations" because, in seeking to work with Respondents to address the violations in September 2011, staff proposed alternative dates for making the paths and certain other public access improvements available to the public. *Id.* at 34:25-35:8. However, staff never indicated that it would not seek penalties from the compliance date established by the Permit and in any case, Respondents failed to meet the alternative compliance dates proposed by staff.

In sum, Respondents cannot escape their admission that they did not provide access to the Phase 1B public pathways until July 2017 (SOD at 51:5-7), almost eight years after the Permit required them to do so.

Violation 1C – Failure to Make Guest Berths Available for Public Access

Respondents argue that the term "guest berths" as used in the Permit must be defined in reference to ordinary meaning of that term in boating industry. *Id.* at 36:4-6. However, the definition of that term in the boating industry is irrelevant to the issue of whether the Permit requires Respondents to provide unrestricted public access to those berths. Respondents do not and cannot dispute that: (1) Permit Special Condition II.B.4.e lists "[t]en guest berths, identified with signage," as required Phase 1B public access improvements; and (2) the public access guarantee required by Permit Special Condition II.B.2 and recorded by Respondents includes the guest docks where the guest berth are located within the dedicated public access area. *See* AR Doc. 11 at 15-16.

Permit Special Condition II.B.1 provides that all required public access areas "shall be made available exclusively to the public for unrestricted public access for walking, bicycling, sitting, viewing, picnicking, and related purposes." Thus, it is a clear violation of the Permit for Respondents to prohibit public access to these required public access improvements within the dedicated public access area.

Respondents argue that the guest berths are excluded from the public access area because Special Condition II.B.2, which requires dedication of the public access area by a permanent guarantee, contains a parenthetical "(excluding the vehicle and boat trailer parking,

as well as the guest berths)." This parenthetical was included in the original Permit as issued in 2003, but the accompanying staff report provides no indication that public access to the guest berths would be restricted. On the contrary, the staff report states in two places that the public access areas would include the guest berths. AR Doc. 95, 4 and 11. Similarly, the Permit's findings state that the public access areas include "visitor and transient berths." Permit Findings and Declarations, Section III.D. (Public Access). Moreover, the recorded public access guarantee, which Sanders executed, depicts the guest berths as dedicated public access areas and does not contain a parenthetical, or any other indication, that the guest berths are to be excluded.

Respondents claim, based on an unsupported statement by Sanders, that the Department of Boating and Waterways ("DBW") grant which provided partial funding for the guest berths "requires public access from the water, and restricts it from land." SOD at 36:18-20. The grant clearly requires that public boaters be allowed access to the guest berths but neither the terms of the grant nor the email from the DBW employee quoted by Respondents state that the grant requires the restriction of public access to the guest berths from land. Ex. 50 (DBW Grant), at 9 (quoted at SOD at 37:8-18); SOD at 36:24-34.

Violation 1D – Failure to Make Public Restrooms Available to the Public

Respondents fail to document when they completed construction of the restrooms at the harbormaster's building, but do not dispute that the restrooms were not available to the public by September 2009. Furthermore, Respondents do not dispute that even today the restrooms are not available for unrestricted public access.

Respondents admit that "the restrooms have sometimes been locked" and currently are unlocked only during daylight hours. SOD at 39:25-27. However, the restrooms were not posted as public restrooms and were locked during daylight hours as recently as BCDC's Chief Counsel's Site visit in October 2016 and staff's Site visit in December 2016. VR/C at ¶¶ VI.LL.5 and QQ.7. Moreover, under the Permit, the restrooms are required to be open to the public at all times and Respondents are not authorized to close the restrooms at night.

Respondents claim that the restrooms have only been locked in the past for purposes of protecting public safety and property, and note two incidents of alleged problems associated with public use of the restrooms. The permit allows Respondents to impose reasonable rules and restrictions for use of the public access areas "to correct particular problems that may arise," (Special Condition II.B.7) upon approval of such rules and restrictions by or on behalf of the Commission, but Respondents have never requested approval to restrict access to the restrooms at night with supporting documentation of a particular problem. Moreover, prior incidents of alleged problems with public use of the restrooms that may have occurred before Respondents opened the Phase 1B public pathways around the marina basin this past July, thereby activating those areas and increasing public use of the Site, are not indicative that such problems will continue or occur in the future.

Respondents claim that, at staff's suggestion, they have provided signage on a window at the entry to harbormaster's building stating that a key to restrooms is available in the office. Respondents fail to disclose when they installed this signage, but it was not present during staff's Site visit in December 2016. In addition, Respondents failed to install a second sign as suggested by staff, to be located between the two restrooms (SOD at 40:17-19), which would likely be more effective in informing members of the public needing to use the restroom that an access key is available than signage on the window at the building entrance.

E. **Violation 2 – Failure to Provide Phase 1B Landscaping.** The Violation Report/Complaint aggregates the following three violations as a single violation for purposes of a proposed penalty: (1) failure to obtain plan review approval for landscaping (Violation 2A); (2) failure to install landscaping (Violation 2B); and (3) failure to remove unauthorized trees planted adjacent to the slough upon request (Violation 2C).

Violation 2A – Failure to Obtain Plan Approval for Landscaping

Respondents claim they provided detailed landscaping plans to the Design Review Board ("DRB") in 2006 that were sufficient to satisfy the Permit's plan review requirements. SOD at 41:5-6. However, as staff has explained to Sanders countless times, the DRB provides advice to the Commission and permittees, but does not approve plans. *See* 14 C.C.R. §10270(b); AR Doc. 60 at 4 - 5. The DRB generally comments on design and public access issues before the Commission considers a permit or permit amendment. In contrast, BCDC's Bay Design Analyst ("BDA"), or in some cases a staff engineer, reviews plans submitted for approval after a permit or amendment is issued to ensure that those plans are consistent with the work authorized by the permit. At this point, the plans must contain a greater level of detail than those reviewed by the DRB as necessary to assure that the construction comports with the Permit's requirements, the Commission's design guidelines for landscaping and signage, and sound construction practices to assure durability and minimize the need for future maintenance.

Respondents acknowledge that BCDC's BDA, Ellen Miramontes, provided "additional comments" on their proposed landscaping plans in December 2012. SOD at 42:8-9. Respondents did not submit revised landscaping plans for her approval in response to those comments. Thus, in letter dated September 4, 2014, staff requested that Respondents revise the landscape and signage plans, as BCDC's BDA had directed in November and December 2012, and submit them for staff review and approval. VR/C at ¶ VI.EE.2; AR Doc. 60 at 8. Respondents failed to do so.[10] SOD at ¶ VI.HH.2.

[10] Respondents claim that in May 2014 they submitted "a set of landscaping and irrigation as built drawings." Staff believes that Respondents may have provided these plans to Redwood City but did not submit them to BCDC. Notably, there is no reference to the May 2014 plans in staff's September 4, 2014 letter to Respondents, which directed Respondents to submit revised landscaping plans addressing the comments provided by BCDC's BDA in November and December 2012.

Violation 2B – Failure to Complete Required Landscaping

Respondents claim that the 170,500 square feet of landscaped areas required by Special Condition II.B.4.g "covers the entire Westpoint Harbor project area, including some Phase 2 and Phase 3 areas." SOD at 43:3-5. This is incorrect. Special Condition II.B.4, Phase 1B, g requires 170,500 square feet of landscaped area as a Phase 1B improvement within the total public access area. The Permit establishes additional landscaping requirements for Phase 2 (Section I, Authorization, Phase 2, ¶ 1.g) and Phase 3 (Special Condition II.B.4, Phase 3, ¶ e).

As Respondents note, in the Fall of 2011, Ms. Miramontes requested that Respondents stop all landscaping work until landscaping plans were developed and approved. SOD at 43:23-24; AR Doc. 24. Ms. Miramontes' request was consistent with the Permit's plan review condition that prohibits any authorized work until final plans, including landscaping plans, have been reviewed and approved in writing by or on behalf of the Commission. Special Condition II.A.1. Ms. Miramontes was seeking to prevent Respondents from undertaking additional landscaping work that, if found to be inconsistent with the Permit or future approved plans, would have to be removed and replaced. However, Sanders chose to disregard staff's request to stop landscaping work; as staff observed during a November 21, 2013 Site visit, Respondents had installed additional landscaping and undertaken new trail construction, without obtaining plan approval. VR Doc. 60 at 7.

Respondents admit that the Phase 1B landscaping has not been completed. SOD at 10:4-5. Thus, Respondents are in violation of the Permit requirement to complete 170,500 square feet of landscaped areas by September 2009.

Violation 2C – Failure to Remove Trees Adjacent to Slough

Respondents claim that Monterey Cypress trees were "included in the landscaping plans approved by the DRB in August 2006." SOD at 44:33-34. As discussed above, DRB did not approve the landscaping plans. Moreover, while cypress trees are shown on the plans submitted to the DRB, those trees are shown at a different location – along the path on the west side of the marina basin – from the location where Sanders actually planted them without approval and to which BCDC's BDA staff objected – along the slough. *See* Ex. 61 at 10.

Respondents claim that the Poplar trees were planted along the slough consistent with Redwood City's Negative Declaration and that those trees "conform to the plant palette at Pacific Shore Center." SOD at 44:21-32. These considerations are irrelevant. Respondents planted the Monterey Cypress and Poplar trees without obtaining BCDC plan approval; BCDC's BDA twice requested that Respondents remove the trees because they can serve as perching sites for raptors that can use them to prey on listed species found in the adjacent Refuge (VR/C at 5). Respondents' ignored her requests.

Respondents claim that staff has provided no basis for its conclusion that these trees serve as perching sites for raptors beyond Ms. Miramontes's bare assertions. SOD at 45:12-13. However, the USFWS raised this concern as early as June 2002 in commenting on the proposed

project. AR Doc. 4 at 4-5 ("Project landscaping should be of a type that will limit opportunities of avian predator to affect listed species."). It is ironic that Respondents claim there is no basis for staff's concern that these trees – located directly across the slough from the Refuge – may be used as perching sites for raptors while Respondents object to placing public parking signs on vertical posts because such posts – which would be placed in the parking lot at the opposite side of the Site from the slough – can be used by predatory birds as perches. SOD at 53:14-16.

F. **Violation 3 – Failure to Provide Site Furnishings.** The Violation Report/Complaint aggregates the following violations as a single violation for purposes of a proposed penalty: (1) failure to obtain plan review approval to install site furniture, lighting, and irrigation (Violation 3A); and (2) failure to install and make available all required site furnishings (Violation 3B).

Violation 3A – Failure to Obtain Plan Approval for Site Furniture, Lighting, and Irrigation

Respondents claim the planting and furnishing plan they submitted to the DRB in 2006 "outlines all of the furnishings for Westpoint Harbor and is sufficient to meet" the Permit's plan review requirements. SOD at 46:24-26. As discussed above, the DRB provides advice to the Commission and permittees, but does not approve plans. *See* 14 C.C.R. § 10270(b).

Staff's letter dated September 4, 2014, advised Respondents that plan review and approval continued to be required for site furniture, lighting, and irrigation plans. VR/C at ¶ VI.EE.2. Respondents failed to obtain approval for such plans. *Id*. at VI.HH.2.

Violation 3B – Failure to Install Site Furnishings

Since opening the Phase 1B public access paths around the marina basin, Respondents have installed additional benches and trash containers in these areas (SOD at 46:32-33) without prior plan approval, in further violation of the Permit.

Respondents claim that the "current furnishings in place are appropriate to meet the needs of pedestrians in the Phase 1A, Phase 1B, and now Phase 2 and Phase 3 areas." *Id.* at 46:33-47:1. However, Respondents' view of whether the furnishings currently in place are appropriate is irrelevant for compliance purposes. Respondents are in violation of the requirement, set forth in Special Condition II.B.4.h, to install all site furnishings "as determined appropriate by the Commission staff as advised by the [DRB], including, but not limited to, lighting, seating (not less than 20 benches), tables, and trash receptacles (not less than 10 trash containers)."

G. **Violation 4 – Failure to Provide Public Access Signs.** The Violation Report/Complaint aggregates the following violations as a single violation for purposes of a proposed penalty: (1) failure to obtain plan review approval to install public access signs (Violation 4A); and (2) failure to install required public access signs (Violation 4B).

Violation 4A – Failure to Obtain Plan Approval for Public Access Signs

Respondents claim that because BCDC's BDA, Ms. Miramontes, failed to complete plan review within 45 days, the signage plans they submitted on August 24, 2012, should have been deemed approved. SOD at 47:30-31. While the Permit provides that plan review shall be completed with 45 days, it does not state that plans may be deemed approved if plan review is not completed within that time period; rather, the Permit provides that no authorized work shall be commenced until final plans for the work have been reviewed and approved in writing by or on behalf of the Commission. Special Condition II.A.1.

Moreover, Respondents acknowledge that Ms. Miramontes and their consultant were in frequent communication during the Fall of 2012 regarding the signage plan submitted by the consultant and that Ms. Miramontes provided comments on the signage plan on November 15, 2012 and December 22, 2012. Respondents did not submit a revised signage plan in response to Ms. Miramontes's comments until June 7, 2017. BCDC's Chief Counsel promptly informed Respondents' counsel that the plan was facially inadequate and requested that they submit a new plan prepared by a professional. Respondents ignored this request, and by a letter dated July 27, 2017, BCDC's current BDA, Andrea Gaffney determined that the recently submitted signage plan is insufficient to perform a proper plan review and therefore is not approved. AR Doc. 100 at 1.

Violation 4B – Failure to Provide Required Public Access Signs

Respondents essentially admit that they did not install public access signs while they were prohibiting access to the required Phase 1B public access areas. SOD at 50:9-11.

Since opening the Phase 1B public access paths around the marina basin in July 2017, Respondents have installed public access and Bay Trail signs where they deem appropriate (SOD at 51:5-9) without plan approval, in further violation of the Permit.

H. **Violation 5 – Failure to Provide Signed Public Parking Spaces.** The Violation Report/Complaint aggregates the following violations as a single violation for purposes of a proposed penalty: (1) failure to make available 12 signed public parking spaces (Violation 5A); and (2) failure to make available 15 signed public parking spaces for vehicle and boat trailer parking (Violation 5B).

Violation 5A – Failure to Make Available 12 Signed Public Parking Spaces

Respondents admit that the Permit requires them to install 12 signed public parking spaces at various locations around the marina basin. They claim that currently eight public parking spaces are available and that, as shown in the public access guarantee legal instrument, the remaining four public parking spaces are to be included in a parking lot that has not yet been constructed. Respondents should have requested a Permit amendment to defer the requirement to make available the remaining four public parking spaces that the legal instrument shows are to be located in a currently undeveloped area. Nevertheless, staff hereby modifies this violation to allege failure to make available eight signed public parking spaces.

Respondents should be required to submit an application to amend the Permit to specify eight public parking spaces as Phase 1B improvements and the remaining four spaces as Phase 3 improvements to be completed at a later date.

Staff disagrees with Respondents' claim that eight public parking spaces have been available "since the parking lot was constructed." As discussed in the Violation Report/Complaint, as recently as October 2016, there were two "Members and Guests Only" signs along the entrance road to the marina and not a single public shore or public parking sign anywhere along the entrance road or the parking lot. Moreover, until July 2017, Respondents continued to prohibit public access to the Site by maintaining signs restricting and discouraging such access and by obstructing the required Phase 1B public access paths. Respondents did not make the eight public parking spaces available until this past July.

Respondents argue that they satisfied the Permit requirement for "signed" public parking spaces by stenciling markings with paint on the pavement and that the Permit does not require signage to be on posts. SOD at 53:1-2. Staff disagrees -- stenciling on pavement is not a "sign" within the meaning of this Permit condition. Moreover, BCDC's Public Access Signage Guidelines, Shoreline Signs, published in August 2005, call for signs to be mounted on posts and do not provide for stenciling. AR Doc. 96 at 8, 16. Consistent with those Guidelines, staff has repeatedly informed Respondents that upright signs, clearly visible to the public, are needed for the required public parking spaces. VR/C at ¶¶ VI.T.5. and VI.EE.3.f; AR Doc. 100.[11]

Stenciling is not acceptable as signage because it is not as visible as a posted sign and because it weathers easily and requires more maintenance. In addition, because the marina itself is a private facility and most of the parking spaces will be used by members and guests, it is necessary to clearly identify the public parking spaces by posted signs.

Respondents claim that Redwood City's CEQA mitigation measures require them to implement best management practices ("BMPs") to limit roosting sites for predators, but the BMPs referenced by Respondents do not suggest minimizing posted parking signs (or recommend stenciling parking spaces) for this purpose. *See* AR Doc. 7 at 5-6. Moreover, the posted public parking signs are to be placed in an active area of the marina – the parking lot – a place unlikely to be used by perching predators, and on *the opposite side of the marina basin from the slough and the Refuge*.[12]

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[11] Respondents complain that stenciling of public parking spaces is the approach used for the neighboring Pacific Shores Center. BCDC staff approved the signage place for Pacific Shores Center on November 17, 2000, prior to publication of the Public Access Signage Guidelines.

[12] Respondents claim that "[e]xcessive numbers of posts" is a concern to minimize potential roosting sites for predators. SOD 53 at 16-19. As discussed above, Respondents showed no such concern in planting Monterey Cypress and Poplar trees along Westpoint Slough, and refusing to remove them when requested by staff to do because such trees can serve as perching sites for birds that prey endangered species in the Refuge, in a location immediately across the slough and adjacent to the Refuge.

Violation 5B – Failure to Make Available 15 Signed Public Parking Spaces for Vehicle and Boat Trailers

Respondents admit that they did not complete and mark the 15 parking spaces for vehicle and boat trailers as public until "the summer of 2015." SOD at 55:18-19. This was almost six years after September 2009, the date the Permit requires Respondents to provide these and all other Phase 1B public access improvements. In any case, as discussed above with respect to the eight required public parking spaces, because Respondents continued to prohibit public access to the Site until July 2017, by maintaining signs restricting and discouraging such access and by obstructing the required Phase 1B public access paths, Respondents did not actually make the 15 public parking spaces for vehicle and boat trailers available to the public until this past July.

Respondents claim that staff is being inconsistent in alleging this violation commenced on the due date established by the Permit because at one time staff directed Respondents to complete these improvements by April 1, 2012. *Id*. at 55:26-28. However, staff proposed this alternative date to complete these pubic parking spaces in September 2011 in an attempt to work with Respondents to address the violations. Staff never indicated that it would not seek penalties from the compliance date established by the Permit and in any event, Respondents failed to meet the alternative completion date proposed by staff.

Respondents once again claim that though the Permit requires these 15 public parking spaces to be "signed," this does not mean "a sign on a post." SOD at 56:7. For the reasons discussed above in response to Respondents' arguments on Violation 5A, staff disagrees – stenciling on pavement is not an allowable "sign." Stenciling is not as visible as a posted sign, weathers easily, and requires more maintenance. Moreover, since the marina itself is a primarily a private facility and most of the parking spaces will be used by members and guests, it is necessary to clearly identify the public parking spaces by posted signs.

I. **Violation 6 – Failure to Make Public Boat Launch Available to the Public.** The Violation Report/Complaint aggregates the following violations as a single violation for purposes of a proposed penalty: (1) failure to obtain plan review for the public boat launch (Violation 6A); and (2) failure to make available signed public boat lauch (Violation 6B).

Violation 6A – Failure to Obtain Plan Approval for Boat Launch

Respondents claim that the "conditional approval" of the Phase 1 construction drawings provided by Ms. Miramontes on September 8, 2011 confirms that Respondents received plan approval for boat launch ramp. SOD at 57:17-21. Respondents are incorrect. Conditional approval does not constitute final approval; submission of revised plans and approval of such plans is still required. Nevertheless, because none of Ms. Miramontes' comments in her September 8, 2011 letter relate to the boat launch ramp, and because Respondents have now completed this improvement, staff withdraws this violation.

Violation 6B – Failure to Make Public Boat Launch Available

Respondents admit that they did not complete and make available the public boat launch until June 2017. SOD at 59:21-22. This was almost eight years after September 2009, the date the Permit requires Respondents to provide this and all other Phase 1B public access improvements.

J. **Violation 7 – Failure to Install Buoys and Signs to Protect the Refuge and Endangered Species.** The Violation Report/Complaint aggregates the following three violations as a single violation for purposes of a proposed penalty: (1) failure to install buoys in Westpoint slough to identity the "no wake" zone and for other purposes (Violation 7A); (2) failure to install buoys and signs in the slough to inform the public of access restrictions to the Refuge (Violation 7B); and (3) failure to install signs at the public boat launch and other public access areas informing the public of access restrictions to the Refuge (Violation 7C).

Violation 7A – Failure to Install Buoys in Slough to Identify No Wake Zone.

Respondents argue that they cannot legally install "no wake" buoys over the length of slough channel. However, the only authority Respondents cite in support of this claim are California and Coast Guard regulations that clearly would allow them to do so upon obtaining authorization from the appropriate agencies. SOD at 59:32-34.

Respondents rely on unsupported and self-serving hearsay statements by Sanders that: (1) there were a series of interagency meetings at which the agencies discussed what navigational aids are required and that "all agencies agreed" Respondents could not install mid-channel buoys; and (2) Respondents discussed these issues with the Coast Guard, "who indicated it would not permit these buoys." *Id.* at 60:1-10. Staff objects to Sanders' inadmissible hearsay statements.

The Permit contains a finding that Sanders agreed to install and maintain buoys down the centerline of Westpoint slough to identify a "no wake" speed zone. Permit Findings and Declarations Section III.F. (Fish and Wildlife and Tidal Marshes and Tidal Flats). Yet, Respondents have provided no evidence that they ever even submitted an application to the Coast Guard for authorization to comply with this Permit requirement.

Violation 7B– Failure to Install Buoys re: Access Restrictions on Refuge

Respondents make the unsupported claim that the Coast Guard and USFWS were opposed to the placement of buoys in the navigation channel. SOD 61 at 12-14. However, the Permit does not require the placement of buoys in the navigation channel; it requires Sanders to install and maintain a buoy system 100 feet from the salt marsh on Greco Island along the slough up to its confluence with Redwood Creek, as he agreed to do. Permit Findings and Declarations Section III.F. (Fish and Wildlife and Tidal Marshes and Tidal Flats). Contrary to Respondents' assertion that USFWS was opposed to the placement of such buoys, in commenting on the project in 2002, USFWS specifically recommended in two different letters that Sanders install and maintain the buoy system that was later included as a Permit

requirement and to which Sanders agreed in accepting the Permit. AR Doc. 4, at 4; Ex. 81 at 1. As mentioned, Respondents have provided no evidence that that they ever even applied to the Coast Guard for authorization to install the required buoy system.

Respondents rely on an unsupported hearsay statement by Sanders that buoys placed 100 feet from Greco Island would be ineffective because they could only float at extremely high tides. SOD 63 at 14-15. Staff object to Sanders' inadmissible hearsay statement. In any event, the assertion that buoys would be ineffective does not seem credible given that Redwood City maintains a "no wake" buoy to the entrance to the slough (SOD 61 at 22-23), there is a buoy in the slough marked "Slow 10 MPH" (VR/C at ¶ VI.ZZ), and there are channel navigational markers in the slough.

As noted in the Violation Report/Complaint, in 2011, Sanders informed staff that he had installed 35 signs on Greco Island to inform the public of access restrictions to the Refuge, in lieu of the required buoys system, and at that time, staff determined that the signage on Greco Island met the fundamental intent of the required buoy system. VR/C at 5. However, staff repeatedly informed Respondents that the Permit needed to be amended to reflect the proposed changes regarding buoy and signage specifications. *Id.* This issue would have been addressed in the five different versions of proposed Amendment Five prepared by staff, each of which Sanders refused to sign.

Even if the Permit had been amended to authorize the installation of signs on Greco Island in lieu of a buoy system, the Permit would have required Sanders to maintain the signs so that they continue to serve their intended purpose of informing the public of access restrictions to the Refuge. Respondents claim that staff is relying on hearsay statements and photographs by third-parties that demonstrate an absence of the signage today, in 2017. However, Respondents have notably failed to provide any documentation, including photographs, to refute those assertions or to demonstrate that signs previously installed remain in place and the signage remains legible.

<u>Violation 7C – Failure to Install Signs at Public Boat Launch re: Access Restrictions</u>

Although Respoindents' claim the Permit does not state when signs informing the public of access restrictions to the Refuge must be installed at the public boat launch, they concede that a reasonable reading of Permit is that this requirement must be met when public boat launch is operational. SOD at 66:15-19. As discussed above, under the Permit, Respondents were required to make the public boat launch and all other Phase 1B public access improvements available by September 2009; therefore, the associated signage was also required at that time.

Once the public boat launch was finally completed and made available in June 2017, Respondents installed an unauthorized "Westpoint Harbor Boat Launch" sign without plan approval. As discussed above, the unauthorized sign violates the Permit's public access requirements by: (1) requiring a permit and (2) charging a $10 fee for the public to use this required public access improvement which is located in a dedicated public access area. As also

discussed above, on August 3, 2017, BCDC's Chief Counsel directed Sanders, through his counsel, to remove this unauthorized sign or to effectively cover the portion of the sign requiring a permit and the payment of a fee to use the public boat launch by no later than August 4. AR Doc. 101. Respondents' counsel did not respond to this request. Respondents' continued maintenance of this unauthorized sign, posting impermissible requirements for both a permit and a fee to use the public boat launch, is a serious violation of the Permit's public access conditions and therefore is asserted herein as a separate violation from all other violations alleged in the Violation Report/Complaint.

K. **Violation 8 – Failure to Provide Visual Barriers to Salt Pond**. Permit Special Condition II.K requires the permittee to "provide visual barriers between the active marina areas and the adjacent salt pond to reduce disturbance to water birds using the salt pond," and further provides that "visual screening can be achieved through setbacks (85 to 90 feet in width) or through a combination of reduced setbacks and landscaping or other visual barriers." Respondents claim that "an 89-foot setback has been achieved, when properly accounting for the slope of the levee on the Cargill property," between the marina parking lot and "the salt feature." SOD at 68:11-18. In light of this setback, Respondents argue that they are not required to do anything more to reduce disturbance to water birds using the salt pond, such as installing a landscape buffer, as directed by staff.

The fundamental flaw in Respondents' position is that the Permit requires visual barriers to the salt pond, not to an unspecified "salt feature," as characterized by Respondents, beginning at the toe of the levee. The setback from the marina parking lot to the salt pond varies with the amount of water in the salt pond. The setback might be as much as 89 feet when the water level is low and reaches just to the toe of the levee. But when the salt pond is full of water to the top of the levee (elevation 110 as shown on Respondents' Exhibit 89), based on the scale in the engineering drawing provided by Respondents, the setback distance is only approximately 25 feet. Because the setback distance will vary throughout the year with the water level in the salt pond, and will be considerably less than 85 feet much of the time, the Permit requires Respondents to provide visual barriers through a combination of reduced setbacks combined with landscaping or other visual barriers, which they have refused to do.

L. **Violation 9 –Failure to Provide Shorebird Roost Habitat**. Permit Special Condition II.F unequivocally requires Sanders, as the permittee, to "provide mitigation for the 2.3 acres of shorebird roost habitat lost as a result of this project with approximately 3.0 acres of replacement habitat with similar functions and benefits for shorebirds." Respondents claim that the required mitigation was achieved by a November 26, 2003 letter from Cargill that purportedly "guaranteed to Respondents that Cargill would 'create a similar habitat to the south' and that '[b]y modifications in [Cargill's] operations an equivalent area of habitat will remain to provide the same functions and benefits.'" SOD at 70:26-71:1 (quoting from Cargill memorandum attached to AR Doc. 9).

However, the letter (actually memorandum) from Cargill is not a guarantee, or any other type of binding commitment or enforceable document, that Cargill will in fact provide 3.0 acres of replacement habitat with similar functions or benefits for shorebirds. Moreover, the Permit requires the permittee's habitat creation plans to be reviewed and approved by or on behalf of the Commission after consultation with USFWS and the California Department of Fish and Wildlife, and there is no evidence that any of these agencies determined that Cargill's memorandum complied with the Permit's shorebird roosting habitat mitigation requirement. Similarly, Respondents have provided no evidence that Cargill has managed the claimed mitigation area (the remainder of Pond 10) for the past 14 years, and continues to do so, to ensure an equivalent area of habitat providing the same functions and benefits as the habitat impacted by Westpoint Harbor project.

Respondents also claim that Sanders is not responsible for this mitigation requirement because the Permit's findings state that the Permit "does not contain a condition requiring the permitte to permanently guarantee the shorebird roost habitat; Cargill will have to provide additional or replacement mitigation for this habitat if it develops the adjacent salt pond." Permit Findings and Declarations Section III.F. (Fish and Wildlife and Tidal Marshes and Tidal Flats). However, the absence of a Permit condition requiring Sanders to record an open space guarantee for the shorebird roost habitat on property owned by Cargill apparently reflects the assumption at the time the Permit was issued that the remainder of Pond 10 might be redeveloped for another use in the near future. This language in the findings does not excuse Respondents from complying with the Permit's requirement to provide shorebird roosting habitat mitigation.

M. **Violation 10 –Failure to Provide Non-Tidal Wetland Mitigation**. Respondents have provided evidence that in 2003, they submitted a mitigation and monitoring plan, including a plan for the wetlands mitigation, to the Army Corps of Engineers ("Corps").[13] However, Respondents also were required to submit a mitigation implementation and monitoring plan to mitigate for the project's impacts on wetlands to the San Francisco Bay Regional Water Quality Control Board ("Regional Board") (AR Doc. 5 at 5), but there is no evidence that they did so. Similarly, Respondents have provided no evidence that they submitted their mitigation and monitoring plan to BCDC, or that the wetlands mitigation plan was approved by or on behalf of the Commission, as required by the Permit.[14]

[13] Respondents claim that the Permit erroneously requires the USFWS, rather than the Corps, to approve the wetlands mitigation plan. Staff concurs that the Permit should have required the Corps to approve this plan.

[14] Respondents claim that staff approved the wetlands mitigation plan by approving a site preparation plan detailing excavation and construction of the marina in November 2005. SOD at 74:2-4 (citing AR Doc. 25 at 6). However, the site preparation plan shows nothing more than a cross-section with an area designated "Excavate for Wetlands Mitigation," and is not a habitat enhancement plan to provide approximately 3.0 acres of replacement habitat as required by the Permit (Special Condition II.G.).

Respondents claim that "almost all of the ditch" where the wetlands mitigation was to be implemented is outside BCDC's jurisdiction. SOD at 74 n.357. Whether or not the ditch was in BCDC's jurisdiction in 2003 is irrelevant. Respondents may not challenge the Commission's jurisdiction to impose and require compliance with this Permit condition now, 14 years after accepting the benefits afforded by the Permit.[15] In any event, the Wetland Vegetation Mitigation Monitoring report prepared by Respondents' consultant in October 2017 and submitted with their Statement of Defense documents that the ditch currently is subject to tidal action and contains tidal marsh vegetation. Ex. 102, at 1, 5. Therefore, today, the ditch is clearly within the Commission's jurisdiction under Government Code section 66610(a).

Respondents have submitted evidence that they re-sloped the drainage ditch to a 3:1 slope as required by their mitigation and monitoring plan. SOD at 73:1:10. However, the plan also required Respondents to: (1) place flap gates on the downstream end of each of the two 24-inch culverts placed beneath the primary access ditch crossing; (2) place a 10-inch PVC pipe with a control valve approximately one-foot below the mean high water elevation to connecting the marina basin with the ditch; and (3) manage the control valve to allow tidal water to be introduced into the ditch during the dry season to extend the duration and area of soil saturation and/or inundation within the mitigation wetland. Ex. 93 at 13. Respondents have submitted no evidence that they installed the flap gates on the culverts or the 10-inch PVC pipe with a control value to connect marina basin with the ditch, or that they have managed the control valve to introduce tidal water to the ditch during the dry season.[16]

In 2006, Respondents notified the Corps in 2006 that they had completed the wetlands mitigation, but both the Corps' permit and the Regional Board's water quality certification require Respondents to submit annual mitigation monitoring reports and Respondents have provided no evidence that they ever prepared or submitted such reports. *See* AR 5 at 5; Ex. 92 at 2. On the contrary, Respondents did not conduct wetlands mitigation monitoring until October 2017, apparently in connection with preparation of their SOD. Although Respondents' consultant reports that the wetlands mitigation exceeds the 5-year success criteria established by their 2003 mitigation and monitoring plan, this fortuitous result, even if accurate, does not excuse Respondents from fully implementing wetlands mitigation in accordance with their plan.

N. **Violation 11 – Unauthorized Rower's Dock**. The Violation Report/Complaint aggregates the following violations as a single violation for purposes of a proposed penalty: (1) unauthorized construction of a rower's dock on the west side of the marina basin (Violation 11A); and (2) 101 Surf Sports' use of unauthorized rower's dock, storage of kayaks in required Phase 1B

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[15] *Lynch v. California Coastal Commission*, 3, Cal. 5th 470, 476 - 77 (2017), ("[A} landowner may not challenge a permit condition if he has acquiesced to it either by specific agreement, or by failure to challenge to condition while accepting the benefits afforded by the permit."); *See County of Imperial v. McDougal,* 19 Cal. 3d 505, 510-511 (1977); *Rossco Holdings Inc. v. State of California,* 212 Cal. App. 3d 642, 654 (1989).

[16] The Regional Board's water quality certification requires Respondents' mitigation plan to include "a long-term maintenance program that adequately specifies the parties responsible for maintaining the created wetlands until mitigation is demonstrated to be successful." AR 5 at 5.

public access areas, and use of parking lot for storage container, a wood-enclosed changing or storage area placed over designated public parking spaces, picnic tables, and a portable toilet (Violation 11B).

Violation 11A – Unauthorized Construction of Rower's Dock

Respondents claim that the rower's dock is, and has always been, authorized and is "part of the 'remaining docks' referenced in Section I.A, Phase 1B.1 of the Permit." SOD at 76:15-20. There is absolutely no merit to this position. The rower's dock was not authorized in the original Permit issued in 2003 and has not been authorized by any subsequent amendment. As Respondents are well aware, the reference to "remaining docks" was added when Amendment Three divided the original authorization for a 416-slip marina into two phases – Phase 1A and Phase 1B. Thus, as amended, the Permit authorizes three docks for approximately 145 slips as part of Phase 1A and "the remaining docks at the marina, for the additional approximately 271 slips, for a total of 416 slips" as part of Phase 1B. Compare Section I. (Authorization), Phase 1A, ¶12 with Section I. (Authorization), Phase 1B, ¶1.

Respondents also argue that because the recorded public access guarantee shows the rower's dock, this confirms that the rower's dock was authorized. SOD at 76:26-28. However, the sole purpose of the legal instrument was to permanently guarantee the required Phase 1B public access area and the legal instrument does not authorize structures or other improvements at the Site. Rather, if the rower's dock were authorized, it would be specifically identified in the authorization section of the Permit, just as the guest berths, public boat launch and associated "670-square-foot boat dock, and service dock (formerly called a fuel dock) are specifically identified. See Section I. (Authorization), Phase 1B, ¶3 and 4, Phase 2, ¶2. The rower's dock is not included in the authorization section of the Permit.

Finally, Respondents claim that there is no basis for them to be liable for unauthorized construction of the rower's dock commencing in December 2014 because the rower's dock was not "fully installed" until June 2016. However, as documented in the Violation Report/Complaint, this violation commenced no later than December 15, 2014, when Sanders submitted various plans including "as-built" drawings showing that, as of that date, he had constructed an unauthorized rower's dock on the western side of the marina. VR/C at¶ VI.II.2.

Violation 11B – 101 Surf Sports Unauthorized Use of Rower's Dock and Public Access Areas

Respondents claim that because the rower's dock is authorized, there is no support for staff's allegation that 101 Surf Sports is using an unauthorized structure. However, as discussed above, the rower's dock is not authorized. Use of the rower's dock by 101 Surf Sports is a substantial change in use under the Commission's regulations both because the rower's dock involves a change in the general category of use (i.e., from the water surface of the marina basin to a floating structure) and because 101 Surf Sports' operations would likely be found to adversely affect existing public access (i.e., the Phase 1B path around the perimeter of the marina basin) when under review for after-the-fact approval. 14 C.C.R. § 10125(b)(2), (4).

Respondents claim that the changing or storage area, picnic tables, and portable toilet associated with 101 Surf Sport's operations "are all of the type of equipment often brought in to provide support for public events…and are intended for use by the public." SOD at 81:14-16. Respondents provide no evidence that these accessory structures are available for unrestricted public access, but even if that were the case, it would not eliminate the violation because none of these accessory structures is authorized by the Permit. In addition, Respondents do not deny that 101 Surf Sports stores kayaks in a dedicated public access area adjacent to the rower's dock, thereby adversely affecting existing required public access.

O. **Violation 12 – Unauthorized Floating Docks**. Respondents claim that staff has alleged this violation based on its "misunderstanding of how modern marinas operate." SOD at 82:7-9. However, whether or not a structure at the Site is unauthorized depends on express terms of the Permit and is not dependent on Respondents' characterization of how modern marinas operate.

Respondents admit that there are three floating structures, as alleged by staff, that are used to hold (i.e., store) personal watercraft. SOD at 82:11-12. There is no basis for Respondents' bald assertion that these floating structures "serve as vessels akin to boats." *Id.* at 82:16-17. A floating structure used to store equipment is not a vessel. Although Respondents claim these floating structures may be "easily and readily moved" (*Id*. at 82:20), they have been moored on the east side of the marina for an extended period of time, and, therefore, constitute unauthorized fill. Gov't Code § 66632(a)(fill includes structures floating at some or all times and moored for extended periods, such as floating docks).

P. **Violation 13 – Construction of Larger than Authorized Fuel/Service Dock**.

The Violation Report/Complaint aggregates the following violations as a single violation for purposes of a proposed penalty: (1) failure to obtain plan review approval to construct fuel dock (Violation 13A); and (2) unauthorized construction of substantially larger fuel dock than authorized (Violation 13B).

Violation 13A – Failure to Obtain Plan Review for Fuel Dock

Respondents claim they could not have failed to obtain plan approval to construct a fuel dock because there is no fuel dock currently used for fueling, even though they admit that the dock contains "chaises to accommodate hoses, valves, and fittings…to be purposed for a future fuel dock." SOD at 83:11-12. Any semantic distinction is irrelevant to the violation, and, in any case, staff notes that Amendment Six changed the reference to the subject structure from "fuel dock" to "service dock" (*see* Permit Authorization Section I.A. Phase 2, ¶2).

Respondents claim they obtained plan approval by submitting various dock plans in 2005, 2007, and 2011. However, the violation is not for failing to obtain plan approval for the originally constructed 500–square–foot dock, but rather, failing to obtain plan approval for constructing in 2014 a dock that was substantially large than authorized under the then existing

Permit (Amendment Three). VR/C at ¶ VI.EE.1. Respondents admit that they "shifted" dock sections in 2014 to provide "the current layout" (SOD at 84:5-6), and offer no evidence that they obtained plan approval before doing so.

Violation 13B – Unauthorized Construction of Substantially Larger Fuel Dock

Regardless of whether the structure is called a fuel dock or a service dock, Respondents admit that they modified the dock in 2014, and do not dispute that they increased the size of the dock from 500 square feet, as authorized by Amendment Three, to 2,900 square feet. Respondents were in violation of the Permit as to this dock from at least December 15, 2014 (when Respondents' consultant delivered as-built drawings showing the modified dock) until the larger structure was authorized after-the-fact by Amendment Six on April 18, 2016.

Q. **Violation 14 – Numerous Instances of Unauthorized Fill and/or Substantial Change in Use**. Violation 14 includes a number of instances of unauthorized placement of fill and/or substantial change in use from those authorized in the Permit. Although each is a separate and distinct violation, the Violation Report/Complaint aggregates all of them as a single violation for purposes of a proposed penalty.

Fence and Gate Blocking Public Access from Pacific Shores Center. Respondents claim that a prior property owner placed a fence between Pacific Shores Center ("PSC") and Westpoint Harbor. However, even if no BCDC permit was required for the pre-existing fence, in 2012, Respondents replaced that old and ineffective wire-mesh fence with a new chain link fence and gate. SOD at 86:13-15. Any exemption from BCDC permit requirements expired when the old fence that had exceeded its useful life was replaced by a new fence.[17] Respondents also claim that they are maintaining the new fence and gate pursuant to an agreement with PSC. Id. at 30:12-14. Any such agreement is irrelevant to the violation.[18] Respondents were required to seek authorization for the fence and gate through a Permit amendment but failed to so.

[17] Under the law of nonconforming uses, an exemption from otherwise applicable land use regulatory requirements expires when the subject improvements reach the end of their useful life and undergo complete replacement or are otherwise renovated in a manner that substantially extends their life expectancy. *See Ricciardi v. County of Los Angeles*, 115 Cal.App.2d 569, 576 (1952).

[18] On November 21, 2013, Kris Vargas, who was then the onsite manager for the PCS, informed Adrienne Klein that she was aware of no impediments to completing the trail connection to PCS's property line from Westpoint Harbor and that she had no knowledge of any agreements with Westpoint Harbor that would prevent Westpoint Harbor from completing its trail to its property line. AR Doc 90 at 15; VR/C at ¶ VI.EE.3.h. Respondents object to staff's report of this conversation with Ms. Vargas as inadmissible hearsay (SOD at 86:1-22), and respond solely with inadmissible hearsay statements from Mr. Sanders, to which staff objects. SOD at 86 n.404 and Ex 1 (Sanders Declaration at ¶ 47). It is not necessary to resolve this factual dispute because, in any case, the fence and gate are not authorized.

Utility Structures on Public Access Pathways. Respondents do not dispute that there are utility structures impinging on public access paths at the Site. Respondents claim, without support, that the intrusion of utility structures into walkways is a common occurrence, and also note that the Bay Trail Design Guidelines contemplate obstructions within trails. Again, these arguments are irrelevant. While a utility structure may on occasion unavoidably intrude into a dedicated public access area, the structure still must be authorized. Through the permitting or permit amendment process, the Commission, not the permittee, determines whether: (1) the utility structure unreasonably impinges on required public access; (2) the permittee should be required to implement measures to minimize impacts on public access, such as the potential measures identified in the Bay Trail Design Guidelines; (3) the permittee should be required to provide mitigation for such impacts in the form of additional public access.

Solar and Wind Powered Container in East End of Parking Lot. Respondents do not dispute that they placed a solar and wind powered container over several parking spaces at the Site without authorization for an extended period of time. Respondents claim that the container was "placed temporarily for evaluation" (SOD at 88:5), but staff observed it during Site visits in both December 2016 and July 2017. Respondents' claim that this container is "consistent with the Permit" (Id. at 88:11), is irrelevant. Respondents were required to but did not seek authorization for placement of this container by a Permit amendment.

Structures Related to 101 Surf Sports. Respondents argue that the storage container, wood-enclosed changing or storage area, and portable toilet associated with 101 Surf Sports are the subject of Violation 11B and including those same structures here, in Violation 14, is duplicative. Staff agrees and withdraws placement of these unauthorized items from Violation 14.

Fenced Area South of Parking Lot that Contains a Garden and Appears To Be Used for Storage. Respondents admit that they have installed a garden on the south side of the Site and describe it as a "small amenity for marina tenants and visitors to enjoy." SOD at 89:7. While Respondents certainly could have requested authorization for a garden at the Site, the fenced enclosure containing the garden that Respondents installed is in a dedicated public access area, as shown by the recorded public access guarantee. AR Doc. 11. Thus, under both the Permit and the legal instrument, the area in which the enclosed garden is located must be available exclusively to the public for unrestricted public access, and may not be used as an amenity for marina tenants and their guests.

Respondents argue that garden is outside the Commission's 100-foot shoreline band jurisdiction, and therefore, BCDC has no jurisdiction over this structure and it does not constitute unauthorized fill or a substantial change in use. The Commission need not reach the jurisdictional issue because the Commission is a party to and may enforce the public access guarantee. However, there is no merit to Respondents' jurisdictional argument. As a former salt pond, the entire Site, including the location of the garden, continues to be within the

Commission's salt pond jurisdiction. Permit Findings and Declarations Section III.G (Commission Jurisdiction); 14 C.C.R. § 10710. Moreover, Respondents may not challenge the Commission's jurisdiction over the entire Site at this late date, 14 years after accepting the benefits afforded by the Permit.[19]

Wooden Storage Shed, Numerous Planters, and Stored Construction Materials South of Parking Lot. Respondents claim that the wooden shed is located on concrete pads designated for trash storage, as shown on revised construction drawings submitted to BCDC in September 2011. Even if concrete pads for trash storage are authorized in this area, based on staff's observations, the shed is used to store tools and equipment, not trash; large metal trash bins are located adjacent to and outside the shed. Respondents do not dispute that construction materials and numerous plants in pots are stored in this area, but argue that such materials and planters do not constitute fill or a substantial change in use.

Again, Respondents could certainly seek authorization for a storage shed and to store construction materials and planters in a designated area. However, the storage shed and stored planters and construction materials at issue here are located in a dedicated public access area, as shown by the recorded public access guarantee. AR Doc. 11. Thus, under both the Permit and the legal instrument, this area must be available exclusively to the public for unrestricted public access, and may not be used for a storage shed and to store planters and construction materials.

Asphalt Pad of Unknown Purpose in a Dedicated Public Access Area. Respondents claim that they cannot identify the asphalt pad based on the limited information provided by staff and, therefore, had no choice but to deny that such a condition exists. In identifying this violation, as observed by BCDC staff during their Site visit on December 8, 2016, the Violation Report/Complaint refers to the Site photographs attached as Exhibit C. VR/C at ¶ VI.QQ.2(e). Unfortunately, the photograph showing the asphalt pad was inadvertently not included in Exhibit C. To correct this error, the referenced photograph is attached hereto as Exhibit B.

As the photograph shows, the asphalt pad in located the southeastern portion of the Site, just south of a Bay Trail segment and within a dedicated public access area as shown by the recorded public access guarantee. AR Doc. 11 (Sheet 12).

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[19] *Lynch v. California Coastal Commission*, 3, Cal. 5th 470, 479 - 77 (2017), ("[A} landowner may not challenge a permit condition if he has acquiesced to it either by specific agreement, or by failure to challenge to condition while accepting the benefits afforded by the permit."); *see County of Imperial v. McDougal,* 19 Cal. 3d 505, 510-511 (1977); *Rossco Holdings Inc. v. State of California,* 212 Cal. App. 3d 642, 654 (1989).

R. **Violations 15 and 16 – Failure to Provide Certificate of Contractor Review.** The Violation Report/Complaint alleges two violations of Permit Special Condition II.U that requires Sanders to provide a Certificate of Contractor Review before "commencing any grading, demolition, or construction" on the project. The first violation occurred during the period between May 2011 to September 2014, and the second occurred during the period between October 2016 through May 2017. Staff has proposed a penalty for only the second violation.

As for the first violation, Respondents claim that Sanders was the general contractor for all portions of the project and therefore satisfied Special Condition II.U. when he signed the permit. There is no merit to this argument. Special Condition II.U. is a separate and distinct requirement from the requirement that the permittee sign and accept the underlying permit. The Certificate of Contractor Review and the permittee signatory assent to different requirements, and therefore, both must be signed.

As to both the first and second violations, Respondents claim that the Permit places responsibility to submit the certification directly on subcontractors, and not on the permittee. SOD at 90:16-17. Such an interpretation does not make logical sense and would render Special Condition II.U superfluous and unenforceable. The Permit establishes a contractual relationship between BCDC and Sanders, as the permittee, but not with any subcontractors. Sanders is responsible for ensuring that any third parties under his control comply with applicable Permit conditions, including the requirement to "submit written certification that s/he has reviewed and understands the requirements of the permit…" Special Conditions II.U. Sanders' failure to ensure the Certificate was signed by subcontractors and submitted to BCDC violated the Permit.

S. **Violations 17 and 18 – Conduct Work Without Authorization (Expired Permit).** The Violation Report/Complaint alleges that on two occasions, Sanders allowed the Permit to expire and thereby conducted work and operations without an authorization. The first violation occurred from August 16th, 2010 to June 15th, 2011, and the second occurred from August 16th, 2014 to April 18th, 2016. Staff has proposed a penalty for only the second violation. Respondents admit the first violation, but dispute the second.

Respondents claim that they did not "construct any improvements from August 16, 2014 to April 10, 2016, during the time the Permit had expired and prior to renewal." SOD at 92:11-12. Respondents' assertion that they performed no work during this period is inconsistent with the evidence that, as of September 30, 2014, they had both constructed a larger fuel or service dock than authorized and installed the unauthorized rower's dock. AR Doc. 60 at 3-4 (discussing recently completed improvements shown on as-built drawings.)[20] In any case, under Amendment Three, the Authorization Section I.C of the Permit required all

[20] Respondents claim that the rower's dock was not placed in the water until May 2016 (SOD at 79:6), but this structure is shown on as-built drawings prepared in September 2014. Respondents state that the fuel or service dock was "modified in 2014" (*id*. at 85:6), without identifying when in 2014 the modifications were made.

authorized work to be diligently prosecuted to completion and completed by August 15, 2014. Respondents clearly had not completed the required Phase 1B public access improvements by this time, and, therefore, were in violation when they failed to meet the deadline established by the Permit for completing construction of all authorized work.

T. **Violation 19 – Failure to Provide Information Regarding the Number And Location Of Live-Aboard Boats.** Respondents claim that staff's unfamiliarity with modern marinas led it to incorrectly assert violations of the Permit's requirements to provide information on the number and location live-aboards. Respondents further claim that there is "simply no need … to provide the specific locations of each live-aboard boat for approval," because, "all berths are equipped to handle live-aboard" boats. SOD at 94:27-29. However, these considerations are simply not relevant. To implement the policies of the San Francisco Bay Plan regarding live-aboards, the Permit requires Respondents to provide information regarding the location of live-aboards for security purposes, and not just to ensure the berths are adequately equipped to house the vessels.[21] As the Permit makes clear, "[t]he location of live-aboard boats shall be approved by or on behalf of the Commission…" Special Condition P.1. Respondents failed to provide this information from May 2011 until January 2017, despite Staff's repeated requests.

Respondents further claim that there was an informal agreement with staff that Respondents would not have to provide the location of live-aboard boats. SOD at 94:29. In support of the claimed agreement, Respondents cite only Sanders' own letters stating his position, not staff's. SOD at 94:n.443. There was no such agreement, as reflected by staff's repeated requests for this information.[22]

U. **Violation 20 – Failure to Provide Berthing Agreement.** Special Condition II.O.4 requires Respondents to submit a copy of a "berthing agreement" setting forth certain requirements. Although BCDC's records document that the berthing agreement was not received until September 2011, Respondents allege that they complied with this provision in 2007. SOD at 97:11-22. In addition, Respondents have provided evidence that they were using a berthing agreement at Westpoint Harbor as early as 2008. Ex. 122. In light of this evidence, staff agrees to withdraw this violation and the associated proposed penalty.

V. **Violation 21 - Failure to Provide Verification of Submission of Documents to NOAA.** Special Condition II.AA. requires Respondents to provide the Commission verification that Respondents had sent updated nautical charts to NOAA. Respondents claim staff erred in assessing penalties for this violation because: (1) Special Condition II.AA. is only triggered after completion of all stages of the Westpoint Harbor "project"; and (2) even if this condition was triggered, Respondents complied. SOD at 98:3-18. However, "project" for purposes of this condition clearly refers only to the construction of the marina. Further, Respondents admit they failed to send staff the necessary verification timely.

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[21] "Live-aboard boats should be placed so as to increase security for the marina." Special Condition P.1; *See* San Francisco Bay Plan Part IV: Recreation Findings and Policies 3.C.

[22] *See e.g.,* VR/C at ¶¶ VI.M.8, VI.T.2, and VI, EE,7.

Special Condition II.AA. states that within, "30 days of the completion of the project authorized by [the] permit, the permittee shall provide written verification to the Commission" that it has sent updated nautical charts to NOAA. As used in this condition, the term "project" refers only to the Phase I of the overall development (i.e., the marina), which is the subject of the nautical charts of interest to NOAA. To argue that "project" means completion of all phases of development at Westpoint Harbor would allow the required verification of the nautical chart submission to be delayed indefinitely despite ongoing marina operations. Completion of the marina triggered Special Condition II.AA, requiring Respondents to send the required verification.

Respondents' further claim that they complied with Special Condition II.AA in 2009 is controverted by Respondents' own Statement of Defense.[23] Regardless of when Respondents submitted the updated nautical charts to NOAA, Respondents admit that they did not send the required verification to the Commission until July 2011. SOD at 98-99:30-1. Respondents may have believed that NOAA representatives would send the verification to the Commission in 2009, but the Permit clearly places responsibility to send the verification on Sanders as the permittee. As such, penalties accrued until staff received the verification in July 2011.

W. **Violation 22 – Failure to Maintain Public Access Improvements.** Respondents claim that staff provided insufficient evidence to show Respondents did not maintain the public access improvements. SOD 99:20-21. However, in addition to the public maintenance issues observed by staff in May 2011, there is ample evidence that Respondents have failed to maintain certain improvements through December 2016.[24] In particular, during Staff's Site visit on December 8, 2016, the public access paths along the slough was in severely deteriorated conditions as were the Phase 1B paths along the future Phase 3 building sites and along the south side of the marina. VR/C at ¶¶ VI.QQ.2-4.

Despite Respondents' failure to maintain certain public access improvements, staff has not proposed a penalty for Respondents' violations of this Permit requirement because (as stated in its September 2011 letter to Sanders) the required Phase 1B public access improvements have not been approved by plan review or completed in accordance with such plans.

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[23] *See* SOD at 98-99:30-1 ("Tom Sinclair of BCDC admitted in AR Document 25 that '[o]n July 29, 2011, [Respondents] submitted copies of email correspondences between NOAA staff, Coast Guard staff, and [Respondents] regarding updated chart corrections for Westpoint Slough, and the harbor. Following our meeting on July 29, 2011, I confirmed the corrections to the NOAA nautical charts.'")

[24] See VR/C at ¶ VI.QQ.2-4 and Exhibit C (Site photos); AR Doc. 17.

X. **Laches Does Not Bar the Commission From Finding Liability.** Respondents claim that "penalties … before July 24, 2014 are barred by laches, under the rule that a delay 'for more than three years is unreasonable as a matter of law' unless BCDC 'prove[s] that their delay was excusable and that Respondents are not prejudiced thereby.'" (SOD at 100-101:34-1).[25] There is no such rule. Courts have consistently held that the equitable defense of laches does not apply to claims brought by government agencies to enforce environmental and land use regulations on public policy grounds, and, thus, does not bar the Commission from assessing civil penalties.[26]

The law with respect to laches and administrative proceedings is clear. "The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." *Feduniak,* 148 Cal.App.4th at 1381; *Albert R. Conti v. Board of Civil Service Commissioners of the City of Los Angeles*, 1 Cal.3d 351, 359 (1969). "In the absence of prejudice or acquiescence, delay does not establish a defense [of laches]." *Conti*, 1 Cal. 3d at 362. Respondents have not satisfied these mandatory requirements for the successful assertion of the defense of laches.

First, Respondents fail to cite any evidence of "acquiescence" on the part of staff regarding Respondents' noncompliance with the Permit. On the contrary, staff's communications with Respondents over the course of the past six years have repeatedly expressed non-acquiescence in the violations.

Second, Respondents put forth no evidence that any prejudice occurred, but simply asserts that, the "six-year delay in bringing Allegations Nos. 17, 20 and 21 is unreasonable and results in substantial prejudice to Respondents." SOD at 101:28-29. Such conclusory accusations are insufficient since mere "delay does not establish a defense of laches." *Conti*, 1 Cal. 3d at 362.

Finally, staff has not unreasonably delayed enforcement. Since 2011, staff has continuously attempted to resolve the violations with Respondents, and it is Respondents who have repeatedly delayed and obstructed BCDC staff's attempts to resolve the violations. Because Respondents have not established staff's acquiescence in the violations, prejudice due to the alleged delay, or unreasonable delay, the defense of laches fails.

To support their laches claim, Respondents improperly rely on an de-published opinion in *California Coastal Comm'n v. Alves,* 176 Cal. App. 3d 952 (review denied and ordered not to be officially published April 24 1986) to argue that "in cases in which no statute of limitations directly applies but there is a statute of limitations governing an analogous action at law, the period [of the statute of limitations] may be borrowed as a measure of the outer limit of

[25] Respondents cites *Brown v. State Pers. Bd.,* 166 Cal.App.3d 1151, 1160-61 (1985) in which the court found, "that unless excused, a delay in the initiation of *disciplinary proceedings* for more than three years is unreasonable as a matter of law." (emphasis added). This enforcement action is not "disciplinary" in nature.

reasonable delay in determining laches," SOD at 101:12-15.[27] Even if citable as precedent, *Alves* determined which of two conflicting statutes of limitation applied to a "court action" to recover penalties and does not apply to this administrative proceeding. The statute of limitations period established by the Code of Civil Procedure ("CCP") § 338(a) for a "court action" is inapplicable. Courts have consistently held that the limitations periods established by the CCP do not apply to administrative proceedings.[28] Moreover, administrative penalties for violations are "not barred by the mere passage of time." *See Bernd v. March Fong EU*, 100 Cal.App.3d 511, 516 (1979).

Y. **The Commission Is Not Estopped from Finding Liability.** Respondents claim that BCDC is "estopped from finding liability for alleged violations … from June 2012 to September 2015," (SOD at 103:3-4) because the Executive Director held the enforcement action in abeyance while negotiations continued on proposed Amendment No. Five. SOD at 102:14-22. There is no law to support this proposition. While staff held off on initiating a formal enforcement action while trying to resolve compliance issues, staff made no representations to Respondents that the Commission would not ultimately pursue enforcement. Moreover, staff made it clear to Respondents that penalties would continue to accrue during negotiations.[29]

Estoppel by a private citizen against a government agency must overcome the public policy of protecting the public's benefit, especially in the land use context. *Feduniak,* 148 Cal.App.4th at 1372 Courts have routinely said, "estoppel can be invoked in the land use context in only 'the most extraordinary case where the injustice is great and the precedent set by the estoppel is narrow.'" *Id*. Respondents have not overcome this standard and therefore, the Commission is not estopped from finding liability for the violations that occurred between June 2012 and September 2015, or any other violations.

Z. **The Executive Director Is Not Required To Provide Written Notice Before Pursuing Enforcement As To Violations Discovered During An Investigation.** Respondents claim several violations are not ripe for enforcement because the Executive Director failed to give Respondents notice and an opportunity to cure them under the Commission's regulations providing for standardized fines.[30] SOD at 17:14-35. However, these regulations apply only in situations where the "*Executive Director determines*: (1) that the alleged violation is one of the

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[28] *City of Oakland v. Public Employees' Retirement System* 95 Cal.App.4th 31 at 63 (2002) (statute of limitations did not bar administrative claim for reclassification of employee; a 'civil action' under CCP applies only to proceedings in courts, not administrative hearings); *Robert F. Kennedy Medical Center v. Department of Health Service,* 61 Cal.App.4th at 1357, 1362. (1998) (statute of limitations in CCP did not apply to agency's demand for repayment of liability in an administrative action); *Little Co of Mary Hosp. v. Belsh,* 53 Cal.App.4th 325, 329 (1997). ("Statutes of limitations found in the [CCP] … do not apply to administrative actions."); *Bernd v. March Fong EU,* 100 Cal.App.3d 511, 516 (1979) ("A statute of limitations barring a civil action brought by an aggrieved party long has been inapplicable to a disciplinary proceeding of a state administrative agency.")

[29] *See* AR Doc. 57 at 3 ("failure to execute Amendment No. Five to the BCDC permit means that you are still bound by the authorization and requirements of the previous permit amendment …")

[30] 14 CCR § 11386(b)

types identified in subsection 11386(e); and (2) that the alleged violation has not resulted in significant harm to the Bay's resources or to existing or future public access. 14 C.C.R. § 11386(a) (emphasis added). The plain language of § 11386 gives the Executive Director discretion to make these determinations, and he has made no such determination in this case.[31]

While the regulations provide for notice and an opportunity to cure in certain circumstances, the regulations also authorize the Executive Director to commence enforcement proceedings by issuing a Violation Report/Complaint whenever he "believes that the results of an enforcement investigation so warrant." 14 C.C.R. § 11321(a). In an ongoing enforcement investigation, the Executive Director is not required to simultaneously provide notice and opportunity to cure as to violations that are discovered during an investigation. Such a requirement would result in piece-meal enforcement, impair comprehensive resolution of violations, and result in an inefficient use of staff resources. Moreover, Respondents have had ample prior notice and opportunity to resolve these violations.

VI. SUMMARY AND ANALYSIS OF UNRESOLVED ISSUES; APPROPRIATE CIVIL PENALTY

The preceding section summarizes and analyzes the unresolved issues related to the violations and Respondents' liability for the violations. The remaining unresolved issue is the appropriate amount of civil penalties for Respondents' violations of the Permit and the MPA. Government Code section 66641.5(e) provides that the Commission may administratively impose civil liability for any violation in an amount which shall not be less that $10 nor more than $2,000 for each day in which the violation occurs or persists, but may not administratively impose a penalty of more than $30,000 for a single violation. To determine the amount of civil liability, Government Code section 66641.9(a) requires the Commission to consider:

> *the nature, circumstance, extent, and gravity of the violation or violations, whether the violation is susceptible to removal or resolution, the cost to the state in pursuing the enforcement action, and with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary removal or resolution efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require.*

[31] Respondents argue that the violations fit within section 11386 because they believe "failure to remove trees … that present problem[s] for wildlife," "[f]ailure to provide shorebird roost habitat mitigation," and "[f]ailure to provide non-tidal wetland mitigation," will not "result in significant harm to the Bay's resources." *See* SOD 16-17. However, under the regulations, the Executive Director makes such determinations, not a permittee. In any event, Respondents provide no evidentiary support for their conclusory assertions.

Respondents claim that the proposed penalties are not commensurate with the alleged harm because none of the violations "resulted in any harm to the public or the environment" (SOD at 110:24-25), but submit no evidence to support their argument. Staff disagrees and provides the following summary and analysis of the statutory penalty factors. A revised and updated Summary of Violations and Proposed Administrative Civil Liabilities table is attached hereto as Exhibit C.

A. **Nature and Extent of the Violations.** Respondents have consistently violated a broad range of Permit requirements concerning many aspects of the Westpoint Harbor Project, throughout the entire Site and over a long period of time. The violations concern nearly every element and geographic area of the project, and a number of violations have off-Site impacts affecting Greco Island, other marshlands of the Refuge, and the adjacent salt pond. The violations include: (1) prohibiting required public access for almost eight years; (2) failing to provide required public access improvements for almost eight years; (3) repeatedly failing to comply with Permit requirements for plan review and approval; (4) construction or installation of unauthorized improvements; (5) failure to comply with Permit conditions for the protection of listed species and sensitive habitat: (6) failure to provide required mitigation for project impacts; and (7) failure to provide required information or documentation.

B. **Circumstances of the Violations.** In May 2011, after commencing a review of the Westpoint Harbor Project and Permit compliance, staff notified Sanders by letter of 10 violations or categories of violations. Sanders resolved a few of the violations relatively quickly, including obtaining a Permit amendment to extend the past-due date to complete all authorized work and providing documentation to staff regarding submission of specified information to NOAA, but failed to address or resolve most of the violations notwithstanding staff's repeated efforts over the next six years to bring the Site into compliance.

Respondents continued for six years to actively prevent and discourage public access by installing numerous unauthorized signs around the Site prohibiting public access, obstructing the required Phase 1B public paths around the marina basin, and refusing to remove a gate and fence along the shoreline that blocked public access to the Site from Pacific Shore Center's Bay shoreline trail. In 2012, BCDC staff agreed to allow Sanders to install temporary fencing to restrict public access to certain undeveloped portions of the Site, and staff prepared a proposed Permit amendment to authorize such temporary fencing, and to make certain other changes to the permit requested by Sanders. Sanders declined to execute any of the five versions of a proposed Permit amendment prepared by staff or to otherwise seek an amendment limited solely to authorizing the temporary fencing of the undeveloped areas. Not until May 2017, after staff had informed Sanders that it was preparing a Violation Report/Complaint, and that the Executive Director might first issue a cease and desist order directing him to immediately open all public access areas, did Sanders execute a Permit amendment (Amendment Seven) authorizing temporary fencing of the undeveloped areas and agree to open all required public

access areas after installation of the fencing. However, Respondents continue to prohibit public access to the guest docks, which are within the dedicated public access area, and to impermissibly charge a fee for use of the public boat launch.

C. **Gravity of the Violations.**

1. **The Violations Have Had Substantial Adverse Impacts On Required Public Access.** In granting the Permit, the Commission found "that the project as proposed, provides the maximum feasible public access to the bay consistent with the proposed project because the public access provided will result in high quality, dedicated access through the site that provides views of the marina and surrounding habitat." Permit Findings and Declarations, Section III.D (Public Access). Respondents' long-standing violations of the Permit's public access requirements have resulted in the complete denial and loss of the public access areas and improvements at the Site for an approximately eight-year period, from September 2009 to July 2017. Respondents continue to deny required public access to the guest docks and, in knowing disregard of direction from staff, continue to impermissibly require a permit and charge a fee for the public to use the public boat launch located in a dedicated public access area.

2. **Respondents Have Knowingly Disregarded the Permit's Requirements for Many Years.** Respondents have: (a) knowingly and repeatedly violated the Permit's requirements to provide public access and public access improvements, as well as the Permit's requirements for plan review and approval prior to constructing Site improvements; (b) knowingly constructed Site improvements in violation of the terms of the Permit, and (c) knowingly constructed or installed many unauthorized improvements. These violations reflect Respondents' intentional disregard for the terms of the Permit and the permitting process.

3. **The Violations Have Had Adverse Impacts On Bay Resources.** In granting the Permit, the Commission found "that the project will result in the protection of Bay resources including marshes and fish and wildlife habitat because Special Conditions ensure the protection of surrounding valuable habitat and require mitigation for any impacts to wildlife or habitat at the project site." Permit Findings and Declarations, Section III.F (Fish and Wildlife and Tidal Marshes and Tidal Flats). Respondents' long-standing violations of the Special Conditions that the Commission imposed to protect Bay resources have likely resulted in significant adverse impacts to listed species and sensitive habitat. These violations include Respondents' failures to:

   a. Install and maintain buoys adjacent to the navigation channel of Westpoint Slough to identify the "No Wake" speed zone, delineate the center of the channel for adequate draw, and discourage boats from deviating out of the navigable channel;

b. Install and maintain a buoy system in Westpoint Slough, with approved signs, to inform the public that access to Greco Island and other marshlands of the Refuge is prohibited;

c. Provide the required visual barriers between the active marina areas and the adjacent salt pond to reduce disturbance to water birds using the salt pond;

d. Remove the Monterey Cypress and Poplar trees that Sanders planted along Westpoint Slough, without plan approval, after BCDC's former Bay Design Analyst twice directed Sanders to do so, in 2011 and 2012, because these trees serve as perching sites for raptors that can prey on listed species found in the Refuge; and

e. Provide required mitigation for the 2.3 acres of shorebird roost habitat lost as a result of the project with approximately 3.0 acres of replacement habitat with similar functions and benefits for shorebirds.

D. **Susceptible to Removal or Resolution.** Most of the violations are, and have been, susceptible to removal or resolution, including Respondents' failures to: (a) make required public access areas available; (b) complete or install required public access improvements; (c) obtain BCDC staff approval of required plans; and (d) comply with Permit conditions to protect wildlife and sensitive habitat, and to mitigate for adverse project impacts. Respondents have been on notice and capable of removing or resolving most of these violations since May 2011, but have refused to do so.

Moreover, although the majority of violations are susceptible to removal or resolution going forward, there is no way to recover from or compensate for the adverse impacts that have occurred in the past a result of Respondents' long-standing violations. In particular, there is no way to recover or restore to the public the lost public benefits caused by Respondents' conduct in actively preventing and discouraging public access to the Site, and in failing to provide all required public access improvements, over an approximately eight-year period, from 2009 to 2017. Similarly, there is no way to remove or compensate for the adverse impacts to listed species and sensitive habitat that have occurred as a result of Respondents' violations of the Permit requirements included by the Commission to prevent or minimize such impacts. There also is no way to remove or compensate for the past impacts to wildlife that have resulted from Respondents' failure to provide required mitigation for the project's adverse impacts to shorebird roosting habitat.

E. **Cost to State.** Commission staff has incurred substantial costs in pursuing this enforcement action. These costs consist of time spent by numerous staff members at multiple site visits; multiple meetings with Sanders and/or his various counsel and landscape architects over the years; multiple letters by BCDC staff; preparation of five different versions of a proposed Amendment Five, at Sanders's request, each of which he refused to sign; and preparation of the Violation Report/Complaint. The estimated costs to the state in pursuing this

enforcement action from May 2011 through November 2017 total at least 2,160 hours and a cost of over $165,000, and staff will incur additional costs in the future to oversee Respondents' compliance with any cease and desist and civil penalty order adopted by the Commission.

F. **Violator's Ability to Pay and Effect on Business.** In response to document subpoenas and associated interrogatories issued by the Executive Director for the production of financial records and information, Respondents challenged the Executive Director's authority to propound such discovery requests and objected to the requests on numerous grounds. Respondents refused to provide any of the financial records or information requested by the Executive Director, but also stated that "the information sought through the Subpoenas and Interrogatories is not at all relevant to [this proceeding], as financial inability to pay administrative penalties has not been asserted by Respondents." AR Doc. 102 at 5. Because Respondents refused to provide the requested financial records and information and because Respondents have not asserted an inability to pay the proposed penalty, the statutory factors of the violator's "ability to pay, [and] the effect on ability to continue in business" are not relevant to determination of an appropriate amount of administrative civil liability.

G. **Voluntary Removal or Resolution Efforts.** Although Respondents partially resolved certain longstanding violations in July 2017 (including opening most but not all of the Phase 1B public access areas, removing most but not all unauthorized signs prohibiting public access, and making the restrooms in the harbormaster's building available to the public during daylight hours only), these resolution efforts cannot be characterized as voluntary. To the contrary, as noted above, Sanders implemented these measures only after being notified that staff was preparing a Violation Report/Complaint and that the Executive Director was considering the issuance of a cease and desist order to require Sanders to immediately open all required public access areas.[32] The record reflects that Respondents have taken little, if any, voluntary action to remove or resolve the violations. Besides failing to voluntarily remove or resolve violations, Sanders has consistently refused to cooperate with staff's efforts to bring the Site into compliance.

H. **Any Prior History of Violations.** Staff does not allege a history of violations prior to May 4, 2011, when staff first notified Sanders of ten violations or categories of violations, except to the extent that Respondents were required to provide public access to all required Phase 1B public access areas and to complete all Phase 1B public access improvements by no later than September 2009, upon occupancy of the Phase 1B marina berths. However, over the past six years, from 2011 to 2017, Sanders has a history of repeated violations including but not necessarily limited to the following:

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[32] *See Feminist Women's Health Center v. Blythe*, 32 Cal.App.4th 1641, 1659 (1995) (compliance with court order is not voluntary" discontinuation of prohibited activity); *Phipps v. Saddleback Valley Unified School Dist.*, 204 Cal.App.3d 1110, 1118–1119 (1988) (same).

1. In May 2011, staff notified Sanders that he had failed to submit the required Certification of Contractor Review, certifying that his contractor had reviewed the Permit requirements and final BCDC-approved plans prior to commencing construction. Staff elected not to pursue this violation but reminded Sanders in September 2011 and September 2014 that he was required to submit such a certification prior to commencing future construction. Nevertheless, in 2016, Sanders repeated this violation by commencing additional work, pursuant to a Permit amendment, without submitting the required certification.
2. After staff notified Sanders in May 2011 that he had failed to complete all authorized work by the deadline specified in the Permit, he promptly requested and obtained a Permit amendment granting an extension of time. However, in August 2014, he failed to comply with the extended deadline to complete all authorized work, until the Permit was subsequently amended 19 months later, in April 2016, to grant a further extension of time to complete all authorized work.
3. Respondents have repeatedly violated the Permit's requirements for plan review and approval. As of the date of this Recommended Enforcement Decision, Respondents have failed to obtain plan review approval for a signage plan, the constructed decomposed granite pedestrian pathways, or the partially completed landscaping, irrigation, lighting, and site furnishings. In addition, Sanders repeated his practice of constructing improvements without plan review in approval in 2016 and 2017, after the Permit was amended (Amendment Six) to authorize the boatyard and associated facilities (*i.e.,* Phase 2 of the project), including additional public access amenities.

I. **Respondents' Culpability.** Sanders executed the Permit in 2003, and executed a number of subsequent Permit amendments, attesting each time that he understood and agreed to the Permit terms and conditions, but proceeded for an approximately eight-year period (from 2009 to 2017) to flagrantly disregard those Permit conditions that he disagreed with or found inconvenient or unacceptable, even though staff communicated in writing on a number of occasions how to fulfill each of the Permit's outstanding obligations.

Respondents' violations of the Permit's requirements to provide public access to the required Phase 1B public access areas, and to complete all required Phase 1B public access improvements, were knowing, intentional, and willful. Moreover, in actively preventing and discouraging public access, Sanders knowingly and intentionally deceived and misled the public for years by maintaining numerous unauthorized signs around the Site prohibiting public access, including signs that misleadingly cited Redwood City's use permit as basis for restricting public access, even though said use permit states as a condition of approval that: "Public access to open space shall be maintained at all times."

In addition to Respondents' continuing violation of the Permit's requirement to provide public access to the guest docks, since August 3, 2017, Sanders has knowingly and intentionally refused to comply with Staff's request to remove the unauthorized "Westpoint Harbor Boat Launch" sign or to effectively cover the portion of the sign impermissibly requiring a permit and the payment of a fee to use the public boat launch.

Respondents have also knowingly and intentionally: (a) violated the Permit's requirements for plan review and approval prior to constructing Site improvements; (b) constructed Site improvements in violation of the terms of the Permit; and (c) constructed or installed many unauthorized improvements.

J. **Economic Savings.** The Commission is not in a position to quantify the economic savings to Respondents resulting from the violations. However, Respondents clearly have benefitted economically from violating numerous Permit requirements for years, including saving money by:

1. Not providing public access to the Site, and not completing all required public access improvements, for an approximately eight-year period from 2009 to 2017. Cost savings included deferring the costs necessary to construct and install public access improvements, including but not limited to landscaping and Site furnishings, as well as the avoidance of costs that would have been necessary to maintain the required public access improvements for eight years.
2. Constructing or installing Site improvements without submitting plans to Commission staff for plan review and approval, which would have required him to revise plans in response to staff comments and to ensure that the constructed improvements comply with the approved plans;
3. Constructing Site improvements in violation of the terms of the Permit. For example, Sanders saved money by constructing 10-foot wide pathways around the marina basin rather than the 12 to 15-foot wide pathways required by the Permit;
4. Constructing or installing numerous unauthorized improvements at the Site. For example, by installing the unauthorized rower's dock on the west side of the marina basin, Sanders not only avoided the costs of seeking a Permit amendment to authorize this structure, he also has been able to generate income by renting the rower's dock to a commercial business, 101 Surf Sports, that offers paddleboard and kayak rentals and lessons. Similarly, Sanders presumably has been able to generate rental income from use of the three unauthorized floating docks supporting large storage tents on the east side of the marina basin;
5. Not installing the required buoy system in Westpoint Slough, with approved signs, to inform the public that access to Greco Island and other marshlands of the Refuge is prohibited (and by not maintaining the signs he installed on Greco Island in 2011 in lieu of the required buoy stem); and
6. Not providing the required shorebird roost habitat mitigation.

VII. RESPONDENTS' REQUEST TO CROSS EXAMINE NUMEROUS INDIVIDUALS, AND RESPONDENTS' AND STAFF'S HEARSAY OBJECTIONS

A. Respondents Are Not Entitled to Examine or Cross-Examine Witnesses

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

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

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

Respondents' counsel argues, based on the detailed allegations in both the Violation Report/Complaint and their Statement of Defense, that there are numerous disputed factual issues that can best be addressed by cross-examination. However, the disputed facts identified by Respondents in requesting cross-examination are not material to this enforcement proceeding in that their resolution is not essential to the Enforcement Committee's and Commission's determination of whether a violation has occurred.[33] The disputed factual issues identified by Respondents relate to discussions between Respondents and staff or other agencies over the past several years regarding the violations and to information provided to staff by third-parties. But those factual matters are not material to this proceeding because whether or not Respondents are liable for a particular violation depends solely on the terms

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

and conditions of the existing Permit and the evidence demonstrating whether or not Respondents have complied with the Permit's requirements. Neither direct nor cross-examination is essential to resolve those factual issues.

B. Respondents' and Staff's Hearsay Objections

Respondents object to numerous "proposed findings of fact" in the Violation Report/Complaint which they claim are based on hearsay statements on the grounds that adopting such findings would violate what Respondents claim is a "hearsay prohibition" in the Commission's regulations. SOD at 107:10-110:21. The regulations do not prohibit hearsay evidence. On the contrary, the regulations provide that "[a]ny relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of such evidence over objection in civil actions." 14 C.C.R. § 11329(a). In addition, the regulations expressly provide that "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence." *Id.* at § 11329(b).

Respondents are correct that the regulations further provide that hearsay evidence "shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action" or unless the hearsay is in the form of a declaration under penalty of perjury or in a cited document and the declarant or document author is subject to cross-examination. *Id.* However, the alleged hearsay statements to which Respondents object are not the sole evidence in support of any finding of violation; nor do such alleged hearsay statements relate to material facts essential to determining whether a violation has occurred.[34] Nevertheless, in light of Respondents' objections, none of the hearsay statements to which Respondents object is included in the findings in the proposed cease and desist and civil penalty order that is part of this Recommended Enforcement Decision.

Throughout their Statement of Defense, Respondents rely on a lengthy Declaration of Mark Sanders. While staff does not object to the admissibility of the Sanders Declaration, staff objects to the numerous unsupported hearsay statements made by Sanders regarding statements, agreements, or objections allegedly made by other individuals or by agencies. Staff's specific objections to the hearsay statements in the Sanders Declaration are set forth in Exhibit D hereto. Because Mr. Sanders will not be subject to cross-examination at the enforcement hearing, his hearsay statements are not sufficient to support a finding. *Id.* In light of staff's objections, none of the hearsay statements in the Sanders Declaration is included in the findings in the proposed cease and desist and civil penalty order that is part of this Recommended Enforcement Decision.

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[34] Staff does not agree that all of the statements cited by Respondents are hearsay because some of the statements are not offered in the Violation Report/Complaint to prove the truth of the matter asserted. In addition, certain hearsay statements cited by Respondents come within an exception to hearsay rule, including but not necessarily limited to the exception for official records and other official writings. Evidence Code section 1280.

VI. RECOMMENDATION

For all of the foregoing reasons, the Executive Director recommends that the Enforcement Committee adopt the accompanying proposed Cease and Desist and Civil Penalty Order No. CDO 2017.04 to Mark Sanders and Westpoint Harbor, LLC and Mark Sanders.

Attachments to this staff recommendation include: (A) Google Earth images of marina build out between September 2008 and September 2009; (B) Photo of concrete pad, dated October 22, 2016; (C) A revised penalty chart; (D) Staff's objections to portions of Sanders declaration; and (E) The proposed Cease and Desist and Civil Penalty Order with an updated Index of the Administrative Record.