

**Subject:** Westpoint Harbor Issues  
**Date:** Wednesday, January 10, 2018 at 4:26:22 PM Pacific Standard Time  
**From:** Goldzband, Larry@BCDC  
**To:** Marc Hershman, Mario Rendon  
**CC:** Goldbeck, Steve@BCDC, Zeppetello, Marc@BCDC, McCrea, Brad@BCDC, Klein, Adrienne@BCDC, Tara Mueller  
**Attachments:** [Westpoint Harbor -- ED Recommended DecisionPowerPoint-ZEPETELLO\\_21195.pdf](#), image001.png

Marc and Mario:

Thanks for being patient – I was out on Monday with that horrible cold/flu thing so I’m catching up. As promised, here is some information for you prior to our next conversation. I apologize for its length, but I want to ensure that you know of BCDC’s attempts to resolve this issue.

**Context:**

BCDC’s Violation Report was issued on July 24, 2017. That action began BCDC’s formal enforcement proceeding. However, the actual enforcement process began six years earlier. That is because BCDC always attempts to resolve enforcement issues more informally starting with a “notice of violation” letter (leading to negotiations and a resolution) rather than to immediately impose an enforcement “solution” by issuing a Violation Report. As you might imagine, permit holders that voluntarily work with BCDC to resolve violations, instead of working against the agency, receive far more consideration from BCDC for their cooperation than those who do not, and generally are assessed reduced penalties. In most cases, permittees and BCDC staff are able to cooperatively resolve outstanding issues.

BCDC staff notified Mr. Sanders by letter in *May 2011* of 10 violations, or categories of violations, of BCDC Permit No. 2002.002 that the Commission originally granted on August 7, 2003.

While BCDC staff, and members of BCDC’s Enforcement Committee, recognize that Mr. Sanders promotes clean boating and is committed to the Westpoint Harbor tenants, and that the marina operation is generally operated in an environmentally sound manner, this enforcement matter has little to do with marina operations. Since approximately September 2009, Mr. Sanders has failed to provide over 250,000 square feet of public access areas and public access improvements that are required by the BCDC permit that Mr. Sanders signed in 2003. He also has failed to comply with a number of permit conditions intended to prevent or minimize adverse impacts to wildlife, including endangered species found in the adjacent national wildlife refuge, which were imposed in response to comments by the U.S. Fish and Wildlife Service. And, during the course of the enforcement case prior to BCDC issuing its Violation Report, Mr. Sanders repeatedly refused requests by BCDC staff that he voluntarily comply with the BCDC permit.

**Enforcement Background:**

On April 11, 2011, BCDC’s former Executive Director sent Mr. Sanders a letter requesting that he cooperate in resolving various permit compliance issues first observed during a site visit on May 17, 2010. On April 17, 2011, staff conducted another site visit to determine if conditions had changed since that earlier visit and to assess what would be necessary to bring the project into compliance. On May 4, 2011, following that site visit, staff issued a notice of violation enforcement letter that

commenced an administrative civil penalty clock for 10 violations or categories of violations of the permit.

During the six years following BCDC's written notice, and prior to commencing the formal enforcement proceeding last July, BCDC staff met with Mr. Sanders and/or his representatives at least nine times, both at BCDC's office and at the marina. BCDC staff also met extensively with staff of Kevin Stevens Design Group, Mr. Sanders' former landscape architect. During this period, BCDC staff attempted to help Mr. Sanders secure BCDC approval of plans for pathways, signage, landscaping, site furnishings, etc., responded to Mr. Sanders' submittals and other changes requested by Mr. Sanders, *and offered five separate versions of an amended permit that included deferred deadlines for required public access improvements.* Despite BCDC staff's efforts to modify the amended permit five times to allay Mr. Sanders' concerns, and despite repeatedly meeting and communicating with Mr. Sanders and/or his representatives to achieve a positive outcome, Mr. Sanders found fault with different aspects of each revision of the amended permit and refused to sign each version. Indeed, since 2011 Mr. Sanders has retained at least three different landscape architectural firms and at least three different law firms, and none of those individuals and organizations were able to bring him into resolution, but not because BCDC has been intransigent.

In December 2016, during a site visit to the marina, BCDC's Chief Counsel informed Mr. Sanders and his counsel that BCDC staff had started to prepare a formal Violation Report; essentially, it had become evident that Mr. Sanders had no intention of resolving the permit violations despite such a long period during which BCDC staff had attempted to work with Mr. Sanders to reach agreement voluntarily on proposed changes to the permit. Only after learning of staff's intention that BCDC would issue the Violation Report, and bring the issue to the Commission's Enforcement Committee under the direction of BCDC staff and the Attorney General's Office, did Mr. Sanders finally agree to open all required public access areas. Yet, while this occurred in early July 2017, eight years after the deadline established by the permit, Mr. Sanders continues to restrict public access by pedestrians to the guest docks, which are a required public access improvement and in a dedicated public access area.

This six-year effort by the BCDC staff to work collaboratively with Mr. Sanders prompted Enforcement Committee Chair Greg Scharff to tell Mr. Sanders at the November 16, 2017 Enforcement Committee meeting: *"When I look at these specific permit violations I am convinced they are all valid, I'm convinced the record supports all of them... I think that you have not followed the permit and you have not worked with BCDC staff. I'm a little surprised how much time BCDC staff has had to put into this and I think that's really unfortunate."*

Indeed, this case needs to be viewed as a whole, in addition to understanding each single violation. Chair Scharff also said: *"I think a lot of the skills you have, Mr. Sanders, in getting that marina built, have made it difficult for you to work with BCDC on the permit. I actually agree with one member of the public that you have been very stubborn on these issues, you've been litigious, you have not worked easily with BCDC... I don't think I can recall so many specific violations."*

BCDC staff elevated the enforcement matter to the Enforcement Committee because Mr. Sanders refused to voluntarily resolve the numerous violations and work collaboratively with the staff to modify the permit, despite the fact that doing so likely would have resulted in a smaller penalty. It seems to me that BCDC staff placed far too much faith in Mr. Sanders' willingness and ability to resolve the permit violations voluntarily, which has delayed and made many of the public benefits and environmental protections years overdue.

**Recent Progress:**

Just as important, the site as it exists now is not what existed when the enforcement case commenced, or even as recently as a year ago. While the public access areas at the marina were required to be completed in Fall 2009 commensurate with the phased construction and occupancy of the marina, only after BCDC staff informed Mr. Sanders in late 2016 that it intended to commence formal enforcement proceedings did Mr. Sanders make important public improvements, such as opening and improving the public trail system around the marina.

For example, until July 2017, the vehicular/pedestrian entrance to the site was posted with multiple signs that read “Members and Guests Only,” a second pedestrian access point was blocked by a fence and was made impassable, and Mr. Sanders maintained numerous “Restricted Access” signs at various locations around the site that effectively prohibited or discouraged public access. While these particular problems have been remedied recently, even today the public shoreline trails are narrower than required by the permit and, until July 2017, long segments of the public paths were closed and overgrown with weeds. Other required public access improvements that were recently missing include signed public parking spaces, site furniture, landscaping, and public access to guest docks. Just as important, required natural resource protections such as visual habitat barriers and mitigation for shorebird roost habitat and wetlands, are not fully in place. Of course, Mr. Sanders also has installed numerous structures or uses at the site that are not authorized by the permit, and has done so without requesting the necessary authorization from the Commission by a permit amendment. All of these issues were discussed, and could have been resolved, during the six years of discussions offered by BCDC staff.

**State of Play:**

Although any single violation could potentially be viewed as having only a *de minimis* effect on the Bay’s natural resources and the public’s use and enjoyment of the shoreline, the total impact of Mr. Sanders’ refusal to comply with his BCDC permit has resulted in the public not receiving the benefits it was guaranteed in the permit while Mr. Sanders has materially benefited from the private gains of his marina. At the November 16, 2017 Enforcement Committee meeting, Commissioner Marie Gilmore addressed Mr. Sanders’ attorney on this point: *“...when we talk about public access, you talk about the signs, the striping, the impediments to the public pathways. Each one of them on their own, I agree with you, seems kind of small and maybe insignificant. But what really bothers me is when you take a look at them together, the totality of the circumstances.”*

It remains to be seen whether Mr. Sanders and his current legal team can resolve these violations with BCDC. At that meeting, Commissioner Jill Techel told Mr. Sanders’ attorney: *“I don't know that I have seen any evidence in the work you've presented that leads me to believe that you've really been trying to get these issues solved.”*

That being said, while the Enforcement Committee adopted the Executive Director’s recommended decision and the proposed cease and desist order (after the total penalty was reduced by \$30,000), it requested that BCDC staff and Mr. Sanders (and his representatives) attempt to agree on modifications to the order through further negotiations – and offered to waive half the penalty if Mr. Sanders complied with the adopted order and permit. Unfortunately, the parties were not able to agree on appropriate modifications to the proposed order. While the negotiations cannot be made public, Mr. Sanders’ representatives ended the negotiations by email.

However, based on the Enforcement Committee's decision, staff has modified the Executive Director's recommended decision to address many of the issues discussed by BCDC staff and Mr. Sanders' counsel in a continued effort to resolve this matter in a way that would allow Mr. Sanders to substantially reduce the proposed penalties for timely and full compliance with the order and permit. The Enforcement Committee will hold a second meeting on this matter on January 18<sup>th</sup> to consider the revised proposed order before the Committee provides its recommendation for consideration by the Commission in February.

**Additional Background and Information:**

I have attached a copy of BCDC's Chief Counsel's PPT presentation to the Enforcement Committee. His oral presentation to the Enforcement Committee can be found on pages 17 through 37 of the official transcript of the November 16, 2017 meeting. The transcript, public comments, and the documents comprising the administrative record are available on BCDC's website ([www.bcdc.ca.gov](http://www.bcdc.ca.gov)).

A complete summary of the staff's allegations is available by reviewing the following documents, all of which are found on BCDC's website in the Enforcement Committee section of the website (under the November 16, 2017 Meeting Agenda and Materials tab):

1. Violation Report/Complaint for the Imposition of Administrative Civil Penalties, Enforcement Investigation No. ER2010.013 issued to Mark Sanders and Westpoint Marina LLC on July 24, 2017;
2. The Executive Director's initial Recommended Enforcement Decision Regarding Proposed Cease and Desist and Civil Penalty Order No. CDO 2017.04; and,
3. The Executive Director's modified Recommended Enforcement Decision Regarding Proposed Cease and Desist and Civil Penalty Order No. CDO 2018.01.

**Conclusion:**

Our staff and I would be happy to provide you with further details about this case should you so desire, knowing that all that we can provide to you is that which is already in the record. Let me know if you would like to discuss this further.

**Larry Goldzband**

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