

San Francisco Bay Conservation and Development Commission

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North Coast Railroad Authority
c/o Mitch Stogner, Executive Director
419 Talmage Road, Suite M
Ukiah, California 94582

Respondent

COMMISSION
CEASE AND DESIST AND CIVIL PENALTY
ORDER NO. CDO 2018.02

Effective Date: May 17, 2018

TO NORTH COAST RAILROAD AUTHORITY:

I. CEASE AND DESIST ORDER

Pursuant to California Government Code Section 66638, the North Coast Railroad Authority, all of its agents and employees, and any other persons acting on behalf of or in concert with it (collectively, "NCRA" or "Respondent") are hereby ordered to:

- A. Cease and desist from violating the McAteer-Petris Act ("MPA").
- B. Fully comply with the requirements of Sections III, IV, and V of this Cease and Desist and Civil Penalty Order.

II. FINDINGS

This Order is based on the following findings. The administrative record in support of these findings includes the documents cited herein and all additional documents cited in the Index of Administrative Record attached hereto.

A. The violation occurred within the Commission's Bay jurisdiction at the northern end of Hunters Club Road in Novato, Marin County, Assessor's Parcel No. 157-051-09. The parcel is owned by the Sonoma Marin Area Rail Transit Authority (SMART). The site of the violation is where the road crosses an approximately 565-yard-long, unnamed slough that runs through Beattie Marsh, parallel to the Northwestern Pacific railroad line to the north, providing a tidal connection between the marsh and the Petaluma River via a culvert under the road.

B. On March 29, 2016, BCDC staff received a complaint from a member of the public alleging that a retaining wall was being constructed in the Bay at the mouth of a slough under the Black Point Swing Bridge, concerned the retaining wall would block the flow of water and cause flooding.¹ Respondent was informed in a May 23, 2016 letter by BCDC Chief of Enforcement Adrienne Klein that it had thirty-five (35) days to resolve the violation, or else be subject to the imposition of standardized administrative fines.²

¹ BCDC Violation Investigation Report Form dated March 29, 2016.

² Letter by Adrienne Klein entitled, "Unauthorized reconstruction of a washed-out road in the Petaluma River, in SF Bay, located west of the Black Point Bridge and east of Grandview Avenue (which intersects with Beattie Avenue and Harbor Drive) in Novato, Marin County (Enforcement File No. ER2016.017)," dated May 23, 2016.

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C. From May 23, 2016 through August 2, 2017, BCDC staff pursued a resolution of the violation through the standardized administrative fine process, pursuant to BCDC Regulation (14 CCR) Section 11386, through correspondences and several phone conversations with Respondent. However, Respondent failed to comply with staff's repeated direction to seek and obtain a Commission permit to authorize the unpermitted Bay fill placed on the road and take affirmative actions to mitigate the damage wrought on the marsh, slough, and Bay by the washed-out road debris. On June 28, 2017, BCDC staff informed Respondent that it would no longer have the opportunity to resolve the violation through the standardized fine process effective August 2, 2017 (i.e., after 35 days of the notice), and that staff would initiate formal enforcement proceedings. ³

D. Administrative fines accrued to the maximum amount of \$30,000 on May 3, 2017.

E. On September 5, 2017, BCDC staff mailed a Violation Report/Complaint for the Imposition of Administrative Civil Penalties ("Violation Report/Complaint") naming NCRA and the Sonoma-Marín Area Rail Transit Authority (SMART), the property owner, as co-respondents for the violation.⁴

F. On October 3, 2017, BCDC staff met with NCRA Executive Director Mitch Stogner and NCRA's representative, David Anderson, to discuss the allegation set forth in the Violation Report/Complaint. They agreed to develop and implement a plan for removing gravel and any other unnatural material from the slough to the extent necessary to remediate the damages to Beattie Marsh and the slough that feeds it as a result of Respondent's placement of Bay fill in or adjacent to the slough for road repair purposes, which material was subsequently deposited in the slough as a result of high water flows in the slough.⁵

G. On October 16, 2017, SMART was dismissed from the enforcement proceedings without prejudice by the Executive Director of BCDC based on the information contained in its Statement of Defense received on October 6, 2017. In its Statement of Defense, SMART argued that it took no part in the actions that constituted a violation of the McAteer-Petris Act and, although it is the parcel owner of record, it bears no responsibility for the actions of the easement holder, NCRA.⁶ Also on October 16, 2017, NCRA was granted an extension of the 35-day deadline, until November 24, 2017, to submit its Statement of Defense.^{7, 8}

³ Letter from Matthew Trujillo entitled, "Termination of Standardized Fine Process to Resolve Violations of the McAteer-Petris Act; BCDC Enforcement File No. ER2016.017," dated June 28, 2017.

⁴ BCDC Violation Report/Complaint for the Imposition of Administrative Civil Penalties, dated September 5, 2017.

⁵ E-mail by Matthew Trujillo entitled, "Violation Report/Complaint Served on 2017-09-05 for BCDC Enforcement File No. ER2016.017," dated October 5, 2017.

⁶ *Statement of Defense of the Sonoma Marin Area Rail Transit District*, received by BCDC staff on October 6, 2017.

⁷ E-mail by John Bowers entitled, "Violation Report/Complaint Served on 2017-09-05 for BCDC Enforcement File No. ER2016.017," dated October 16, 2017.

⁸ E-mail by John Bowers entitled, "NCRA's Request to Extend the Deadline to Submit a Statement of Defense for Enforcement Proceeding No. 2016.017," dated October 16, 2017.

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H. On November 22, 2017, instead of a formal Statement of Defense, Respondent submitted to BCDC staff a plan to remove, “gravel and any other unnatural material from the slough to the extent necessary to remediate the damages wrought on the Beattie Marsh and the slough that feeds it.”⁹

I. On January 10, 2018, staff informed NCRA that its remediation plan is inadequate, and that staff would be asking for a more comprehensive plan in the proposed order. Staff also informed NCRA that the proposed order would require NCRA to seek and obtain a Commission permit to secure the abandoned road against future wash-outs and would impose a civil penalty. Mr. Trujillo invited Respondent to work with staff to negotiate a proposed stipulated order to present to the Enforcement Committee but received no response.¹⁰

J. On January 11, 2018, BCDC staff visited the site at low tide to observe and record the conditions of the surface of the road, the culvert beneath the road, the slough and marsh, the flow of water through the marsh and slough via the culvert, and the extent of road debris in the slough and marsh.¹¹ Staff notified Respondent about the site visit in advance by e-mail (January 9, 2018)¹² and phone (January 11, 2018) and invited them to attend, but Respondent did not acknowledge the invitation and did not attend the site visit.

K. On January 19, 2018, Mr. Trujillo emailed Respondent with another invitation to engage in negotiations for a proposed stipulated order. Mr. Stogner replied on January 22, 2018 stating that he had directed Mr. Anderson to work with staff on a proposed stipulated order.¹³

L. On February 27, 2018, BCDC staff sent NCRA a draft copy of a proposed Commission Cease and Desist and Civil Penalty Order, requesting that NCRA review the draft document and mark it up with their suggested edits, and schedule a meeting for the following week to attempt to negotiate a stipulated order. On March 13, 2018, BCDC staff met with NCRA’s representative Dave Anderson and discussed the content of the draft order. No agreement was reached at the meeting, but staff carefully reviewed the content of the draft proposed order with Mr. Anderson and provided clarification on all of his questions and concerns. Mr. Anderson agreed to discuss the proposed order with NCRA’s board of directors the next day. Staff indicated that it would await further communication from NCRA.

M. On March 29, 2018, after two weeks without any follow up from NCRA, BCDC staff e-mailed NCRA advising it that a stipulated order would have to be completed by April 5, 2018 if it was to be presented to the Enforcement Committee on April 19, 2018. On April 2, 2018, Mr. Anderson submitted a version of the draft order with suggested additional findings and changes to the scope of the remediation plan that the Executive Director is requesting that the

⁹ NCRA’s proposed mitigation plan, dated November 22, 2017.

¹⁰ E-mail by Matthew Trujillo entitled, “Response to Your Implementation Plan and Rescheduling of the BCDC Enforcement Committee Hearing,” dated January 10, 2018.

¹¹ Record of Observations and Notes by Adrienne Klein, Matthew Trujillo, Rafael Montes and Walt Deppe entitled, “Thursday, January 11, 2018 Site Visit to NCRA Roadway,” January 2018.

¹² E-mail by Matthew Trujillo entitled, “Notice of Site Visit - BCDC Enforcement File No. ER2016.017,” dated January 9, 2018.

¹³ E-mail by Mitch Stogner entitled, “Response to Your Implementation Plan and Rescheduling of the BCDC Enforcement Committee Hearing,” dated January 22, 2018.

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Enforcement Committee recommend to the full Commission.¹⁴ However, staff determined that the edits of the findings were redundant, unsupported by the administrative record, and/or inappropriate; and also determined that the edits to the scope of the remediation plan, with the exception of one edit, would, if incorporated, limit the scope of the site assessment and remediation of the site to an unacceptably ineffectual degree. Therefore, staff did not accept NCRA's proposed changes to the order, except Mr. Anderson's suggestion to incorporate the use of available historical data to aid in the assessment of the impacts to the habitat and an extension of the deadline to submit its remediation plan from 45 days to 60 days.

III. CONDITIONS

A. On and after the Effective Date of this Order, Respondent shall cease and desist from all activity in violation of the MPA.

B. No later than 60 days after the Effective Date of this Order, NCRA shall submit of a comprehensive plan for review and approval by the Executive Director for the remediation of the damage at the site, prepared by a qualified professional or professionals, after consultation with all relevant local, state and federal agencies, including, but not limited to the Regional Water Quality Control Board, the Army Corps of Engineers, and the California Department of Fish and Wildlife.

The plan shall include, but may not be not limited to:

1. An assessment of the tidal cycle and storm effects in the area and the continued risk of road flooding and culvert congestion resulting from these influences.
2. An assessment of the full extent, volume, and nature of the debris originating from the road and deposited in the culvert, slough, marsh.
3. An assessment of all impacts to the habitat, including, but not limited to, the hydrology of the culvert, slough, and marsh, unnatural accretion and/or erosion, and any changes to the nature of the marsh and slough resulting from the wash out of the road and deposition of debris on plant and animal health. Where available, historical data should be used to assist with the assessment.
4. Provisions for the removal of all debris originating from the road as a direct or indirect result of the unpermitted road work that took place in or around the spring of 2016, including road debris that has been or will likely be deposited into the culvert, slough, marsh, and, if applicable, the Petaluma River as a result of subsequent storm and flood events during the intervening time period ranging from the last time the road was flooded in 2016/2017 through the date(s) that the remediation and mitigation work will be completed in 2018 or later.

¹⁴ Draft proposed "Commission Cease and Desist and Civil Penalty Order No. CDO 2018.02," annotated by Mr. Anderson, submitted to BCDC staff on April 2, 2018.

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5. Provisions to ensure that the road and associated structures will not continue to pose a hazard to the marsh or slough after the remediation has been completed.
6. Provisions for the mitigation of any identified impacts to the habitat of the slough and marsh as a result of the unpermitted road work. An explanation of the methodology used to conduct the assessment and the analysis of the data, and an appendix containing the raw data
7. An implementation schedule including the dates by which the work will commence and finish, taking into account any work windows required by BCDC or other agencies to avoid effects to spawning, migration, or other critical activities of species that may be affected by the work.
8. A provision to monitor the site for no less than two years after the completion of the remediation work to ensure the remediation was a success.

C. Promptly after approval of the remediation plan by the Executive Director, Respondent shall implement the approved remediation plan in strict accordance with the implementation schedule specified therein.

D. Extension of Time

1. If Respondent believes that an event arising from a cause or causes beyond its control will delay timely compliance with any provision of Paragraphs III.B and III.C and justifies an extension of a compliance date set forth therein, Respondent shall notify BCDC's staff counsel by e-mail within five business days of when Respondent first knew of the event. The e-mail notice shall describe the cause(s) of the delay, the anticipated length of time the delay may persist, the measures taken or to be taken by Respondents to prevent or minimize the delay, the schedule by which these measures will be implemented, and the additional time requested to comply.
2. The Executive Director may grant an appropriate extension of time, for demonstrated good cause, to comply with any provision of Paragraphs III.B or III.C in response to a request made by Respondent pursuant to Paragraph III.D.1.

E. No later than five days after completing the remediation work, Respondent shall submit to the Executive Director a written statement declaring that the work has been completed in accordance with the approved remediation plan, signed by a qualified professional and the Executive Director of NCRA.

F. No later than five days after completing the monitoring program, Respondent shall submit to the Executive Director a written statement declaring that the monitoring program has been completed in accordance with the approved remediation plan, signed by a qualified professional and the Executive Director of NCRA.

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IV. CIVIL PENALTY ORDER

Pursuant to Government Code Sections 66641.5(e) and 66641.9, the Commission hereby assesses and orders Respondent to pay a civil penalty of \$30,000. This penalty payment shall constitute Respondent's full and complete satisfaction of its liability for civil penalties for the alleged violation, through the date of this Order.

The total civil penalty of \$30,000 includes the following:

A. Respondent is assessed a penalty of 4,000 for its failure to seek and obtain a Commission permit to place fill in the Commission's jurisdiction in or around the spring of 2016, which is presumed to have taken place over at least two days at a rate of \$2,000 per day.

B. Respondent is assessed a penalty of \$100 per day for its failure to seek and obtain a Commission permit to authorize the unpermitted road work after-the-fact from the date BCDC staff first notified Respondent of the violation on May 23, 2016, through the date Respondent lost the opportunity to resolve the enforcement action by paying a standardized administrative fine on August 2, 2017. At \$100/day, the penalty for this 436-day-long period shall be assessed a penalty \$24,000.

C. Respondent shall be assessed \$20 per day for the period from September 5, 2017, the date of issuance of the Violation Report/Complaint, through the date of issuance of this Order (May 17, 2018) for the unauthorized placement of fill. At \$20/day, the penalty for this approximately 255-day-long period, though totaling \$5,100, shall be capped at \$2,000.

The Commission finds that the amount of the penalty is reasonable and appropriate, given the nature, extent, and gravity of the violation, particularly its indirect effects on the slough and the marsh, as understood to date, and the cost to the state in pursuing this enforcement action from May 23, 2016 through the date of issuance of this Order. This effort was shared by one Enforcement Analyst, the Chief of Enforcement, Staff Counsel, Chief Counsel, two administrative support staff, the Staff Engineer, and one Permit Analyst, with additional support by the Regulatory Director and the Executive Director.

With respect to Respondent, the amount of the civil penalty takes into account its claimed limited ability to pay (alleged, but unsubstantiated), its degree of culpability, and its voluntary resolution efforts undertaken to-date. Respondent is a purportedly underfunded public entity that, as a lessee of the parcel, is limited in its authority to conduct intensive work on the road without the assent of the lessor (i.e., SMART). In the interests of resolving the violation, Respondent has made a limited effort to conduct a site survey and formulate a remediation plan. However, its efforts have been insufficient thus far, and those efforts are far outweighed by the significant damage to the nature of the site, as observed by BCDC staff, and the cost to the State in pursuing this enforcement action. Therefore, based on consideration of all relevant factors an assessment of total penalty of \$30,000, determined as described above, is warranted.

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However, in light of NCRA's alleged, but unsubstantiated, claim that it is an underfunded state agency, staff believes that given the choice between requiring NCRA to allocate its limited resources to pay the full penalty of \$30,000, which may adversely affect its ability to comply with the conditions of this order, versus allocating its resources to do its utmost to remediate the marsh and slough and secure Hunters Club Road against future wash-outs, it is in the best interests of the natural resource and the Bay Area community to allow Respondent to be entitled to a waiver of 50% of the total penalty amount if the Executive Director determines that NCRA has substantially complied with the terms of this Order. The Executive Director shall notify Respondent in writing of his determination as to whether or not Respondent has substantially complied with this Order, and therefore, whether or not Respondent shall be entitled to a waiver of 50% of the total penalty within 30 days of receiving Respondent's written notice of completion of the remediation work submitted pursuant to Condition IV.E.

Pursuant to Government Code Section 66647, Respondent shall remit payment to the Commission, in the form of cashier's checks payable to the San Francisco Bay Conservation and Development Commission - Bay Fill Clean-Up and Abatement Fund, as follows: (1) within thirty days of the issuance of this order, a payment of \$15,000; and (2) unless the Executive Director has determined, in accordance with the preceding paragraph, that Respondent is entitled to a waiver of 50% of the total penalty amount, within thirty days of the Executive Director's request for remittance of the remaining balance of the penalty, a payment of \$15,000.

V. TERMS

A. Under Government Code Section 66641, any person who intentionally or negligently violates any cease and desist order issued by the Commission may be liable civilly in the sum of up to \$6,000 for each day in which such violations persist. In addition, upon the failure of any person to comply with any cease and desist order issued by the Commission and upon the request of the Commission, the Attorney General of the State of California may petition the superior court for the issuance of a preliminary or permanent injunction, or both, restraining the person or persons from continuing any activity in violation of the cease and desist order.

B. This Order does not affect any duties, right, or obligations under private agreements or under regulations of other public bodies.

C. Respondent must conform strictly to this Order.

D. This Order does not constitute a recognition of property rights.

E. This Order is effective upon issuance thereof.

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VI. OPPORTUNITY FOR JUDICIAL REVIEW

Under Government Code Sections 66639 and 66641.7(a), within thirty days after service of a copy of a cease and desist order and civil penalty order issued by the Commission, Respondent may file with the superior court a petition of writ of mandate for review of the order pursuant to Section 1094.5 of the Code of Civil Procedure.

FOR THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

Dated: _____

Lawrence J. Goldzband
Executive Director
San Francisco Bay Conservation and
Development Commission

Record No.	Date	Document Description
1	11/10/1969	Aerial photograph of the violation site by Air-Photo Company, Inc.
2	4/30/1996	Quitclaim deed transferring fee ownership of the parcel from Southern Pacific Transportation Company to Northwestern Pacific Railroad Authority
3	5/17/1996	Surface Transportation Board Finance Docket No. 32910 entitled, "Northwestern Pacific Railroad Authority; Acquisition Exemption; Former Northwestern Pacific Railroad Line From Southern Pacific Transportation Company and Golden Gate Bridge, Highway and Transportation District," Federal Register Vol. 61, No. 97
4	2004	Dissolution Agreement Between the Golden Gate Bridge, Highway and Transportation District, the County of Marin and the North Coast Railroad Authority
5	9/14/2006	North Coast Railroad Authority press release entitled, "NCRA Approves Operator Contract"
6	12/14/2010	Notice of Intent of Proceed No. NOI2010.024 Under BCDC Regionwide Permit No. RWP-3, As Amended Through December 18, 2008
7	6/5/2011	Memorandum to the NCRA Board of Directors from Christopher Near, NCRA Legal Counsel, entitled, "Operating Agreement with SMART"
8	6/20/2011	Operating and Coordination Agreement for the Northwestern Pacific Line between SMART and NCRA
9	3/25/2016	Letter and photographs (taken ca. March 2016) from Jim Armstrong, private citizen, to the Marin County Department of Public Works "Northwest Pacific Railroad etal [sic] APN. 157-051-09 Request for Project Information / Environmental & property damage Stop Work Request / Project and Environmental Permits Required"
10	3/29/2016	BCDC Violation Investigation Report Form
11	4/11/2016	Handwritten notes of phone call between Adrienne Klein, BCDC Chief of Enforcement, and Gregg Jennings, SMART Engineer
12	4/11/2016, 4/12/2016, 4/14/2016	E-mail exchange between Adrienne Klein and Gregg Jennings entitled, "Apparently unauthorized road repair in a tidal channel connected to the Petaluma River next to the Back [sic] Point Bridge"
13	4/25/2016	E-mail exchange between Adrienne Klein and Gregg Jennings entitled, "Blackpoint Bridge Automation Project"
14	5/23/2016	Letter from Adrienne Klein to Mitch Stogner, NCRA Executive Director, and Gregg Jennings entitled, "Unauthorized reconstruction of a washed out road in the Petaluma River, in SF Bay, located west of the Black Point Bridge and east of Grandview Avenue (which intersects with Beattie Avenue and Harbor Drive) in Novato, Marin County (Enforcement File No. ER2016.017)"
15	5/28/2016, 5/31/2016	E-mail exchange between David Anderson and Adrienne Klein entitled, "Harbor Drive Emergency Repair"
16	5/31/2016	Handwritten notes of phone call between Adrienne Klein and David Anderson, NCRA's Representative, entitled, "NCRA/SMART"
17	6/24/2016	Site photographs and typed site visit notes entitled, "NCRA Site Visit on Friday, June 24, 2016 by Adrienne Klein"
18	6/28/2016	Letter from John Riley to Adrienne Klein entitled, "Enforcement File No. ER2016.017"
19	7/12/2016	Letter from Adrienne Klein to David Anderson entitled, "Violation 1 - Unauthorized reconstruction of a washed out road and Violation 2 - Unauthorized installation of bridge authomation equipment, in the Petaluma River, in SF Bay , located west of the Black Point Bridge and east of Grandview Avenue (which intersects with Beattie Avenue and Harbor Drive) in Novato, Marin County (Enforcement File No. ER2016.017)"
20	7/27/2016, 8/22/2016, 2/20/2017, 3/28/2017, 3/29/2017, 4/19/2017, 5/15/2017, 5/16/2017	E-mail exchanges between David Anderson, Douglas Bosco, NWPR Counsel, and Adrienne Klein entitled "BCDC Enforcement Case No. ER2016.017 NCRA at Black Point Bridge, Novato, Marin County"

21	1/13/2017	Handwritten notes of phone call between Adrienne Klein and David Anderson
22	5/15/2017	Site Survey by ARE Corporation entitled, "Hunters Club Drive Repair NCRA"
23	6/16/2017, 6/18/2017	E-mail exchange between Matthew Trujillo, BCDC Enforcement Analyst, and David Anderson entitled, "Phone Call Follow-Up"
24	6/28/2017	Letter from Matthew Trujillo to NCRA, c/o David Anderson, entitled, "Termination of Standardized Fine Process to Resolve Violations of the McAteer-Petris Act; BCDC Enforcement File No. ER2016.017"
25	7/6/2017	RealQuest.com Property Detail Report for Property Located at 3026 Hunters Club Road, Novato, Marin County, accessed July 6, 2017
26	7/14/2017	Site photographs taken by Matthew Trujillo
27	8/18/2017	History of the North Coast Railroad Authority - www.northcoastrailroad.org/history.html , accessed August 18, 2017
28	9/5/2017	BCDC Violation Report/Complaint for the Imposition of Administrative Civil Penalties
29	10/5/2017, 10/16/2017	E-mail exchange between Matthew Trujillo, John Bowers, BCDC Staff Counsel, and Respondent entitled, "Violation Report/Complaint Served on 2017-09-05 for BCDC Enforcement File No. ER2016.017"
30	10/6/2017	Statement of Defense of the Sonoma Marin Area Rail Transit District, received by BCDC staff on October 6, 2017
31	10/16/2017	E-mail by John Bowers entitled, "NCRA's Request to Extend the Deadline to Submit a Statement of Defense for Enforcement Proceeding No. 2016.017"
32	11/22/2017	NCRA's proposed mitigation plan
33	1/9/2018	E-mail by Matthew Trujillo entitled, "Notice of Site Visit - BCDC Enforcement File No. ER2016.017"
34	1/11/2018	Site photographs taken by BCDC staff
35	1/19/2018	E-mail by Matthew Trujillo entitled, "Response to Your Implementation Plan and Rescheduling of the BCDC Enforcement Committee Hearing"
36	1/22/2018	E-mail by Mitch Stogner entitled, "Response to Your Implementation Plan and Rescheduling of the BCDC Enforcement Committee Hearing"
37	1/29/2018	Record of Observations and Notes by Adrienne Klein, Matthew Trujillo, Rafael Montes, BCDC Staff Engineer, and Walt Deppe, BCDC Permit Analyst, entitled, "Thursday, January 11, 2018 Site Visit to NCRA Roadway"
38	2/27/2018	E-mail by Matthew Trujillo entitled, "Please see the attached and let me know your availability to meet next week"
39	3/29/2018	E-mail by Matthew Trujillo entitled, "BCDC-NCRA Stipulated Cease and Desist and Civil Penalty Order"
40	4/2/2018	Draft proposed "Commission Cease and Desist and Civil Penalty Order No. CDO 2018.02," annotated by David Anderson, submitted to BCDC staff on April 2, 2018