

SAN FRANCISCO BAY CONSERVATION
AND DEVELOPMENT COMMISSION

ENFORCEMENT COMMITTEE MEETING

BAY AREA METRO CENTER
BOARD ROOM, FIRST FLOOR
375 BEALE STREET
SAN FRANCISCO, CALIFORNIA

THURSDAY, APRIL 19, 2018

9:30 A.M.

Reported by:
Ramona Cota

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

Greg Scharff, Chair

Marie Gilmore

Sanjay Ranchod

Jill Techel

Counsel to the Committee

Shari Posner, Deputy Attorney General
Office of the Attorney General

BCDC Staff

Adrienne Klein, Chief of Enforcement

Matthew Trujillo, Enforcement Analyst

Marc Zeppetello, Chief Counsel

Respondent

David R. Anderson
North Coast Rail Authority

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P R O C E E D I N G S

9:38 a.m.

1 COMMITTEE CHAIR SCHARFF: I call the meeting to order.

2 Do you want to call the roll?

3 MS. KLEIN: Good morning. Chair Scharff?

4 COMMITTEE CHAIR SCHARFF: Yes.

5 MS. KLEIN: Member Techel?

6 COMMITTEE MEMBER TECHEL: Present.

7 MS. KLEIN: Member Gilmore?

8 COMMITTEE MEMBER GILMORE: Here.

9 MS. KLEIN: And Member Ranchod.

10 COMMITTEE MEMBER RANCHOD: Present.

11 COMMITTEE CHAIR SCHARFF: Do we have any public
12 comment?

13 MS. KLEIN: I have no comment cards.

14 COMMITTEE CHAIR SCHARFF: All right.

15 Do I have a motion to approve the draft minutes?

16 COMMITTEE MEMBER TECHEL: So moved.

17 COMMITTEE MEMBER RANCHOD: Second.

18 COMMITTEE CHAIR SCHARFF: All in favor?

19 (Ayes.)

20 COMMITTEE CHAIR SCHARFF: That passes unanimously.

21 Now we come to a Public Hearing and Possible Vote on a
22 recommended enforcement decision involving proposed Cease
23 and Desist Civil Penalty Order No. CDO 2018.02; the North
24
25

1 Coast Rail Authority.

2 Did you want to go first?

3 MR. TRUJILLO: Yes.

4 CHAIR SCHARFF: If you could just introduce yourself.

5 MR. TRUJILLO: Good morning, Commissioners. I am
6 Matthew Trujillo, Enforcement Analyst for BCDC.

7 Today you are being asked to consider the adoption of
8 proposed Cease and Desist and Civil Penalty Order --

9 CHAIR SCHARFF: So actually, do we have the, do we have
10 the NCRA rep here?

11 MR. TRUJILLO: We do.

12 COMMITTEE CHAIR SCHARFF: So why don't you come
13 forward. Shouldn't he be sitting at the table?

14 I have a letter here requesting a continuance and I
15 actually thought we were going to deal with that first.

16 Sorry. So welcome. And if you could tell us who you
17 are?

18 MR. ANDERSON: Thank you. Good morning.

19 CHAIR SCHARFF: Good morning. So I have a letter here
20 submitted by Neary and O'Brien, I guess, and I assume -- so
21 if you want to make the argument -- if you want to ask for a
22 continuance and make the argument for a continuance we would
23 obviously listen to it.

24 MR. ANDERSON: Okay.

25 COMMITTEE CHAIR SCHARFF: But you don't have to, we can

1 just proceed.

2 MR. ANDERSON: I guess I would like to make a statement
3 regarding it.

4 COMMITTEE CHAIR SCHARFF: Okay.

5 MR. ANDERSON: I believe that the main reason for the
6 request from the attorney is the fact that Senate Bill 1029
7 by McGuire is basically going through the process of
8 dissolving NCRA.

9 I think the recent realization by the Board, which is
10 made up of a number of supervisors from the various counties
11 that the railroad goes through, they are very concerned
12 about the \$30,000 penalty. They are afraid that that's
13 going to be a personal fine to them. They really want to
14 understand if in fact NCRA is going to be dissolved and they
15 feel, I guess, that in 90 days they will have a clear
16 picture of that. So I don't know. Whatever is going to
17 happen at this meeting I will go to the NCRA board and ask
18 for direction, but right now I am proceeding with the plan
19 that we have worked out with staff.

20 CHAIR SCHARFF: Okay, all right.

21 Marc, do you want to respond and move forward?

22 MR. ZEPPETELLO: Good morning, Commissioners. Staff
23 opposes the request for a continuance.

24 This bill that is referenced, I have a copy of it. It
25 would -- first of all it is only a proposed bill, we don't

1 know how it's going to come out or be changed. But as of
2 the version I have it would require the Authority to
3 dissolve but not until April of 2019, so that's a year from
4 now. And the work that would be required by this Order
5 should be done or could be done, substantially done by that
6 time. Also the bill, at least the version that I have, says
7 that the liability of NCRA with respect to this site would
8 be transferred to SMART. Although there appears to be -- it
9 would exclude, the transfer would exclude liabilities
10 related to debt or litigation. So it's possible that the
11 liability with respect to the penalty may not transfer but
12 the liability with respect to doing the work would, I
13 believe, transfer. So that's with respect to the first
14 argument.

15 The second argument with respect to these cases that
16 are cited, these cases concern whether CEQA applies to
17 railroad projects. And underlying that, under federal law
18 there is an exemption for railroads that generally --
19 interstate railroads in particular, although it may also
20 apply to some state railroads, they don't have to obtain
21 state permits because there is an exemption under the
22 Surface Transportation Act.

23 But this is not a railroad project. There were earlier
24 discussions where it was proposed that the NCRA apply for a
25 permit to rebuild the road. At this point they are not

1 proposing to rebuild the road, so even if that were an issue
2 I don't believe these cases apply to the issues before us.
3 The Order is a cleanup order and to remove unauthorized
4 fill; it is not an Order that would require them -- they are
5 not being asked to apply for a permit under the McAteer-
6 Petris Act. Permits may or may not be required to implement
7 their plan but, you know, that's an issue that is not before
8 you with respect to this Order.

9 And the final point I'll make is that as the record
10 shows, the discussions between staff and NCRA have been
11 going on for about two years and that's part of the reason
12 that we are here today so we oppose a further extension.
13 Thank you.

14 CHAIR SCHARFF: All right, thank you very much.

15 It is not clear to me that an extension has actually
16 even been asked for, frankly, but I wouldn't be inclined to
17 grant it. I don't know, what do the rest of you think?

18 COMMITTEE MEMBER RANCHOD: Based on the rationale for a
19 90 day continuance that's been provided by counsel and the
20 correspondence we received and the comments we just heard I
21 would not support a continuance.

22 COMMITTEE MEMBER TECHEL: I think we need to hear this.
23 I think we may discover and really understand what the
24 options are and may come to a clearer picture about how that
25 case will affect it.

1 CHAIR SCHARFF: All right. Seeing no further I think
2 we are unanimous in denying the request for the continuance.

3 Would you like to then proceed with the case? It's
4 Matthew Trujillo, right?

5 MR. TRUJILLO: Yes and yes.

6 Good morning again. We can move on to the next slide,
7 the outline of the discussion.

8 To aid you in your decision as to whether or not to
9 adopt the proposed Order I will present a summary of the
10 facts of this case and a summary of the Executive Director's
11 recommended actions. Once I have completed my presentation
12 I will be prepared to respond to any questions you may have.

13 BCDC Staff alleges that the North Coast Rail Authority,
14 or NCRA, conducted unauthorized work in the Commission's Bay
15 jurisdiction in or around March 2016, resulting in
16 approximately 4 cubic yards of Bay fill consisting of dirt
17 and gravel and two large timbers weighing approximately 444
18 pounds each.

19 Staff was unable to resolve the alleged violation with
20 NCRA using the standardized administrative fines process
21 from May 23rd, 2016 until September 5th, 2017, at which time
22 the Executive Director issued a Violation Report/Complaint
23 for the Imposition of Administrative Civil Penalties to
24 NCRA.

25 Therefore, the Executive Director recommends that the

1 Enforcement Committee vote to adopt Commission Cease and
2 Desist and Civil Penalty Order No. CDO 2018.02 and recommend
3 adoption of the Order to the full Commission. The Order
4 would require NCRA to:

- 5 1. Cease and desist from all activity in violation of
6 the McAteer-Petris Act.
- 7 2. Submit a comprehensive site remediation plan to
8 the Executive Director for review and approval
9 within 60 days of adoption of the Order.
- 10 3. Implement the proposed remediation plan.
- 11 4. Pay a civil penalty of \$30,000, 50% of which may
12 be waived upon determination by the Executive
13 Director that NCRA has substantially complied with
14 the terms of the Order.

15 This is BCDC's jurisdiction in the area. Pursuant to
16 Section 10121 of BCDC regulations, the Commission's Bay
17 jurisdiction in the vicinity of the alleged violation
18 includes sloughs and marshes up to five feet above mean sea
19 level along the portion of the Petaluma River located
20 bayward of the Highway 37 bridge. You can see by this
21 picture that the Bay jurisdiction extends quite a bit inland
22 of the banks of the Petaluma River, it's approximately a
23 quarter-mile.

24 This case centers around a private residential road
25 located in the city of Novato, in the county of Marin, known

1 as Hunters Club Road. The road crosses through Beattie
2 Marsh over an unnamed slough and provides a tidal connection
3 to the Petaluma River. Staff believes that Hunters Club
4 Road predates the enactment of the Commission's jurisdiction
5 over the site; and presumably, at the time of the road's
6 construction, a culvert was placed in the slough to enable
7 the natural tidal flows to continue to circulate throughout
8 the marsh despite the presence of the road. Thus, the road
9 and culvert do not require a BCDC permit to exist in the
10 marsh; however, a BCDC permit is required for any
11 maintenance activities that go on in the marsh.

12 As seen in this image, Beattie Marsh and its unnamed
13 slough are adjacent to the Lombard Segment of the
14 Northwestern Pacific Railroad line and for many years the
15 access road was used to access the Black Point Swing Bridge
16 operator's house, which is located on the other side of the
17 tracks from the road. But as of the initiation of this case
18 in 2016 the house was unoccupied and there are no plans to
19 continue to maintain this road.

20 The site is owned by the Sonoma-Marín Area Rail Transit
21 Authority, also known as SMART, but NCRA holds a freight
22 operating and maintenance easement over the Lombard Segment,
23 which includes, by contract, maintenance of the tracks, the
24 access road and the culvert.

25 It is important to note at this point that SMART was a

1 co-respondent to this case from May 2016 until October 2017
2 but was dismissed from the case by the Executive Director on
3 October 16th, 2017 based on the presentation of an operating
4 and maintenance agreement that covers this site which
5 demonstrated that NCRA is solely responsible for this
6 alleged violation.

7 This picture depicts a bit of background for this
8 violation. In the winter of 2015 to 2016, that's about a
9 year before this alleged violation occurred, the access road
10 flooded. Road-top materials and timbers flowed into the
11 marsh and the slough as the flood waters topped the road.
12 You can see here. This is looking approximately southwest.
13 Here is the Petaluma River this way. The slough runs
14 through here and back into the marsh and this is Hunters
15 Club Road. You can see that the road is completely flooded
16 and that the banks of the slough are completely inundated.

17 Subsequently, in or around March of 2016 the damage to
18 the road and the retaining wall was repaired by NCRA's
19 contractor, the Northwestern Pacific Railroad Company, as
20 shown in this annotated photograph taken by the contractor.
21 Approximately four cubic yards of new dirt and gravel fill
22 was placed on top of the road and the timbers were replaced
23 on the northeastern retaining wall. Right here, these two
24 top timbers.

25 This work was performed without a BCDC permit, which is

1 a violation of Section 66632 of the McAteer-Petris Act.

2 On March 29th, 2016, BCDC enforcement staff received a
3 report from a member of the public that fill had been placed
4 in the slough and it was blocking the flow of the tidal
5 water through the marsh and creating a risk of flooding in
6 the area.

7 Enforcement staff sent a letter notifying NCRA and
8 SMART of the alleged violation on May 23rd, 2016, initiating
9 the formal execution of BCDC Enforcement File ER2016.017.

10 Standardized administrative fines starting at \$2,000
11 began to accrue 35 days after the letter was sent on June
12 27th, 2016.

13 This photo was taken by BCDC staff on June 24th, 2016.
14 It shows the repaired access road and the retaining wall.
15 You can see here and here. What it also shows is road
16 debris from either the prior wash-out or prior wash-outs
17 that was not addressed when these repairs were made.

18 Now the next winter, the winter of 2016/2017, there was
19 a mixture of storms and unusually high King Tides in the
20 area causing flooding of the creeks and sloughs along
21 Highway 37, which included the site of the violation.

22 As the flood waters receded the road washed out again,
23 carrying away timbers and road-top materials and
24 redistributing all the unauthorized - not all, excuse me -
25 but at least a lot of the unauthorized road-top materials

1 primarily into the eastern extent of the slough. You can
2 see that illustrated here in this photograph. This
3 depression shows the bit of the road that was taken away and
4 then of course there are missing timbers and here is a bit
5 of the debris that you can see piling up in front of the
6 culvert. This is looking approximately east of the road
7 towards the Petaluma River.

8 All of a sudden what began as a relatively benign
9 matter of unauthorized road work had become a more serious
10 situation requiring marsh restoration and mitigation to
11 fully correct the problem. In the photograph on the left
12 staff found evidence of debris extending at least 100-feet
13 bayward of the access road. In the middle photo staff
14 observed scouring along the banks of the slough that may
15 have been caused or exacerbated by gravel from the road top,
16 which can be seen in the lower corner of the photograph
17 here. In the photograph on the right staff observed a large
18 mound of road debris on the eastern side of the culvert,
19 which appears to be causing tidal water to pool at the mouth
20 of the culvert.

21 NCRA does not dispute the origin of the debris in the
22 marsh and slough, however, BCDC staff has been unable to
23 persuade NCRA to take sufficient steps to fully assess and
24 mitigate the damage.

25 That brings us to a summary of staff's attempts to

1 resolve the alleged violation with NCRA before coming here
2 to the Enforcement Committee.

3 Between May 23rd, 2016 and September 5th, 2017, staff
4 engaged with NCRA via numerous letters, e-mails, and phone
5 calls repeatedly asking NCRA to submit an application for an
6 administrative permit to approve the unauthorized work after
7 the fact and to remediate the damage to the marsh. However,
8 staff (sic) failed to submit a permit application during
9 this time and failed to work with staff to sufficiently
10 remediate the site. Therefore, the Executive Director
11 issued a Violation Report/Complaint for the Imposition of
12 Administrative Civil Penalties on September 5th, 2017.

13 On October 3rd, 2017, staff met with NCRA to discuss
14 the Violation Report/Complaint and the steps that needed to
15 be taken to resolve the violation. At that meeting NCRA
16 agreed to develop a remediation plan for the site.

17 On November 22nd, 2017, NCRA submitted a one-page
18 remediation plan in which it proposed to excavate 10 to 15
19 cubic yards of material from the slough in the immediate
20 vicinity of the culvert. That mound that I showed you just
21 east of the culvert. Upon review of this plan staff
22 concluded that it was insufficient in scope and detail. It
23 did not indicate who prepared the plan, it provided a
24 negligible description of the methodology used in the site
25 assessment, there was no description of the data used to

1 prepare the plan, no analysis of why the proposed work plan
2 was the most appropriate and effective means of remediating
3 the site, and no consideration given to securing the road
4 against future wash-outs.

5 On January 10th staff informed NCRA that it would not
6 accept its proposed plan and then asked NCRA to commit to
7 work with staff to prepare a stipulated order to present
8 before the Enforcement Committee here.

9 NCRA responded on January 22nd that it welcomed the
10 opportunity to work together on a stipulated order.

11 Therefore, between March 13th, 2018 and April 2nd,
12 2018, staff attempted to negotiate that stipulated order
13 with NCRA but no agreement could be reached on the terms of
14 the order or the penalty amount. At this time, staff chose
15 to move forward with the proposed Order. However, the
16 proposed Order does incorporate two changes proposed by NCRA
17 during these discussions: The first one being an extension
18 of the deadline to submit the remediation plan, which is now
19 60 days from 30; and the use of the historical data to
20 assist with the site assessment.

21 If the proposed Order is adopted, in lieu of a
22 Commission permit NCRA will be required to present a
23 comprehensive site assessment and remediation plan within 60
24 days for review and approval by the Executive Director and
25 then to promptly implement that work.

1 The plan will have to be prepared by a qualified
2 professional or professionals who are able to conduct and/or
3 lead the assessment and identify the most effective
4 activities needed to remediate and secure the site. The
5 site assessment must also take into account at a minimum:

- 6 o The tidal cycle and storm effects in the area, the
7 continued risk of road flooding and culvert
8 congestion from these influences.
- 9 o The full extent, volume and nature of the debris
10 originating from the road and deposited in the
11 culvert, slough, and marsh.
- 12 o And all impacts that the debris has had on the
13 habitat.

14 The remediation component of the plan must include the
15 following provisions based on the results of the site
16 assessment:

- 17 o The removal of all road debris from the slough,
18 culvert, and marsh that occurred since the winter
19 of 2016/2017 as well as any road debris that had
20 been deposited in these areas during subsequent
21 flooding events, if applicable.
- 22 o It must also include a plan to secure the road
23 against future wash-outs.
- 24 o Provide mitigation for the assessed damage to the
25 slough and marsh.

- 1 o And monitor the site for no less than two years
2 after the completion of the remediation work.

3 If the proposed Order is adopted NCRA shall be liable
4 for a penalty totaling \$30,000.

- 5 o \$4,000 will be assessed for NCRA's initial failure
6 to seek and obtain a Commission permit to place
7 the fill in the Commission's jurisdiction.
- 8 o A total fine of \$24,000 or \$100 per day will be
9 assessed for NCRA's persistent failure to seek and
10 obtain a permit between May 23rd, 2016 and August
11 2nd, 2017.
- 12 o And then \$20 per day will be assessed for the
13 period between September 5th, 2017 through the
14 intended date of issuance of the Order on May 3rd,
15 2018, but that amount will be capped at \$2,000.

16 \$15,000 will be due within 30 days of the date of
17 issuance of the Order and \$15,000 will be held in abeyance
18 and may be waived if the Executive Director finds that NCRA
19 has substantially complied with the Order.

20 We believe the amount of the penalty is reasonable and
21 appropriate given the nature, extent and gravity of the
22 alleged violation and the cost to the state to pursue the
23 enforcement action from May 23rd, 2016 to date.

24 The waiver is offered in consideration of NCRA's
25 claimed, but unsubstantiated, limited ability to pay and its

1 voluntary, albeit insufficient, efforts to resolve this
2 violation to date.

3 Thank you for your attention. At this time I am
4 prepared to answer any questions you may have.

5 But first I would like to draw your attention to
6 several errors in the Executive Director's Recommendation
7 and the proposed Cease and Desist Order as noted in the
8 errata sheet you have before you. It should be about the
9 second page of your packet and I'll pull them up here on the
10 screen for the audience.

11 Okay, looking at the Executive Director's Recommended
12 Enforcement Decision:

13 On page 7, paragraph 3, last line, where the line
14 reads:

15 "... written notice of completion of the
16 remediation work submitted pursuant to Condition
17 IV.E."

18 Should be changed to:

19 "... written notice of completion of the
20 remediation work submitted pursuant to Condition
21 III.E of the proposed Order."

22 The next item, page 8, Item V.B, line 1, where it
23 reads:

24 "By March 30, 2018, submit a comprehensive
25 plan acceptable to the Executive Director ..."

1 Should be changed to:

2 "No later than 60 days after the Effective
3 Date of this Order, submit a comprehensive plan
4 acceptable to the Executive Director ..."

5 COMMITTEE MEMBER RANCHOD: Can I interrupt there,
6 Mr. Trujillo?

7 MR. TRUJILLO: Yes.

8 COMMITTEE MEMBER RANCHOD: I'm not following that. On
9 page 8?

10 MR. TRUJILLO: Yes. I'm sorry, I don't have the
11 document in front of me.

12 MS. KLEIN: Of the Recommendation, not the Order. Does
13 that help?

14 CHAIR SCHARFF: Yes, that helps.

15 COMMITTEE MEMBER RANCHOD: Got it. Okay, thanks.

16 MR. TRUJILLO: Okay. The same page, Item V.C, line 2,
17 that's the last line, I believe, on Item V.C states:

18 "... May 31, 2018."

19 Should be changed to:

20 "... promptly after approval of the
21 remediation plan by the Executive Director."

22 The same page, page 8, Item E. Okay. This item was
23 part of a prior draft of the Order and so it was actually
24 changed and the changes were not reflected or made in this
25 summary. So please bear with me, we are going to go through

1 Item E and then there's a couple more items we need to
2 insert after Item E. So Item E reads:

3 "To ensure significant progress is
4 maintained, submit periodic (not less than
5 quarterly) progress reports to BCDC staff
6 summarizing the progress of the project,
7 accompanied by photographic evidence."

8 That statement will be struck and replaced with:

9 "Provide written notice to the Executive
10 Director no later than five days after the
11 completion of the remediation work."

12 And then below that item we'll insert Item F, or
13 basically change the current Item F to this:

14 "Monitor the site for no less than two years
15 after the completion of the remediation work."

16 And then the current Item F will be moved and become
17 Item G and it will remain:

18 "Pay a civil penalty of \$30,000 to resolve
19 its civil liability for violation of the law.
20 \$15,000 shall be due within thirty days of the
21 issuance of the Order, but 50% of the penalty
22 shall be waived if the Executive Director
23 determines, in writing, that NCRA has
24 substantially complied with the terms of the
25 Order."

1 Any questions about that?

2 CHAIR SCHARFF: Continue on.

3 MR. TRUJILLO: Thank you.

4 The next document is the actual Order itself, Civil
5 Penalty Order No. CDO 2018.02, dated may 17, 2018. Looking
6 at page 4 - I'll wait until we get there - Condition
7 III.B.2, the second line. So Condition B.2, second line,
8 which currently reads:

9 "... the road and deposited in the culvert,
10 slough, marsh."

11 That's a typo, it should read:

12 "... the road and deposited in the culvert,
13 slough, and marsh."

14 Then going to special condition III.B.4. So that's the
15 same section, Item 4, fourth line, which currently reads:

16 "...the culvert, slough, marsh, and, if
17 applicable, the Petaluma River as a result of ..."

18 We decided not to require an assessment of the Petaluma
19 River so that little part about the Petaluma River should be
20 struck and should be changed to simply:

21 "...the culvert, slough, and marsh as a
22 result of ..."

23 And then the same section, Condition III.B.6, lines 2
24 through 4, so it's a single sentence:

25 "An explanation of the methodology used to

1 conduct the assessment and the analysis of the
2 data, and an appendix containing the raw data."

3 That should have its own condition so it would actually
4 be moved to -- it would become Condition number 7 and then
5 as a result the current Conditions 7 and 8 would be
6 renumbered so that they would read Conditions 8 and 9. So
7 we would have Conditions 6, 7, 8 and 9.

8 I believe the final change is again a typo on page 7,
9 paragraph 1, last line where it reads: "Condition IV.E."

10 Should be changed to: "Condition III.E." Reflecting a
11 renumbering of the sections that occurred.

12 And that's it in terms of the edits.

13 Now before you hear from NCRA, if NCRA is going to
14 present some more, Mr. Zeppetello would like to address you
15 briefly.

16 But before that I just want to make a note for the
17 record that following the mailing staff received three
18 letters from interested parties commenting on this matter
19 and they were included in your packets on the back. Thank
20 you.

21 CHAIR SCHARFF: Thank you. Mr. Zeppetello?

22 COMMITTEE MEMBER RANCHOD: Chair Scharff, have we
23 provided guidance on the time limit for the respective
24 presentations? We've had about twenty-plus minutes from
25 staff thus far.

1 CHAIR SCHARFF: So we haven't. So you'll have as much
2 time as staff has, which I assume is at most 30 minutes,
3 right?

4 MR. ZEPPETELLO: I just wanted to reserve the
5 opportunity to respond to any legal issues but I think that
6 we dealt with the legal issue on the request for a
7 continuance.

8 The only other thing is to note that NCRA did not
9 submit a Statement of Defense in this matter. Or more
10 precisely, they submitted the one page remediation plan and
11 they captioned it as a Statement of Defense but it didn't
12 address the issues as required by the regs. So at this
13 point we would take the position that any admission of late
14 evidence would be -- we would object to that but I don't
15 really believe Mr. Anderson plans to submit evidence and we
16 have no objection to him making a presentation and providing
17 comments on behalf of his client. Thank you.

18 CHAIR SCHARFF: Mr. Anderson.

19 MR. ANDERSON: Thank you and again, good morning.

20 I would like to begin with just a brief overview. I am
21 a civil engineer and I am a consultant to NCRA.

22 NCRA in this area that we are discussing has a lease, a
23 perpetual lease to run freight. NCRA is exercising that and
24 basically they went through a process and hired a private
25 operator. So we have the owner, which is SMART, of the

1 property, we have NCRA with a lease and we have NWP Co. with
2 an agreement, also a lease, with NCRA.

3 NCRA is basically an agency that was created by the
4 state of California, and as I mentioned previously, is in
5 the process of being dissolved. I can speak from my point
6 of view, having served NCRA for close to 20 years, it is a
7 godsend for everyone concerned because the state of
8 California - what do I say - established the agency with no
9 funding but gave it the mandate to preserve the rail
10 corridor for the state of California from basically American
11 Canyon, which is in the Napa region, and then all the way up
12 the 101 corridor to Eureka; 300 and some miles of railroad.

13 Of which -- I don't know if you've seen much of the
14 history of this railroad but the Eel River Canyon is part of
15 it. It's about 60 miles, it's a wild and scenic river.
16 Storms in I believe 1980-something; basically a storm came
17 in and created about 20 landslides. All total there were
18 about 200 slides, whether they were landslides, rock slides,
19 mud slides, so much of the railroad is requiring extensive
20 repair. It was built about 100 years ago with a number of
21 culverts that were undersized. So this is the task that we
22 have been charged with.

23 And about 20 years ago when I was originally hired, was
24 able to get the CTC to give us \$40 million to open the
25 segment of rail from the American Canyon to Windsor. And we

1 went through a long environmental document process. We
2 established an operating plan with the Water Quality Control
3 Board, which was a tremendous task, it's about three volumes
4 like this.

5 So NCRA is responsible for its lease, its operator, and
6 implementing all of these various rules for operation. It
7 is quite daunting for basically you have an Executive
8 Director, you have somebody who answers the phone and you
9 have me as their engineer.

10 So I don't, I am not standing here telling you this is
11 an excuse for not doing what we should be doing. We have
12 had several meetings over the last two years and what is
13 complicating it from my viewpoint is that this road, this
14 drive, was actually to the operator house for the Black
15 Point swing bridge which is, you know, in the same vicinity.
16 It was built over 100 years ago with a culvert that is
17 undersized. What we've observed has been going on for 100
18 years.

19 So for the last about 15 years that NCRA has had an
20 operator we know that this has washed out a couple of times.
21 And it has been the practice to fill -- we would, you know,
22 stay within the roadway limits because there is a water line
23 that goes underneath there that's chlorinated so it was
24 imperative that we cover that up. And basically all we
25 would keep doing is replacing the timbers and then put the

1 fill over the roadway where it was eroded. So now we're
2 faced with trying to resolve what I would say is 100 years
3 of mistreatment of this slough. And it is very difficult
4 when I am charged with assessing this to figure out over
5 these last two incidences, the original wash-out that we
6 filled and then the subsequent wash-out.

7 So to the best of my knowledge what we have done for
8 this last was-out, we had a survey because we were in the
9 process of going through getting a permit. We surveyed what
10 was done. Because what happened was they put too much fill
11 on the road and it diverted the water so we knew we had to
12 address it. So we took a survey, we came up with a grading
13 plan, we knew what the surface was.

14 And we recently flew it and developed -- through a
15 LiDAR we developed a detailed map and determined that this
16 last incident has put 2.27 yards of material in the slough.
17 And based on the history that slough probably did not get --
18 I don't know, one of the photos that was there, the massive
19 amount of debris that's just downstream towards the Petaluma
20 River, of the culvert.

21 So based on all of the conversations we've had -- and I
22 agree 100 percent with the current plan of removing this
23 material. So what we've determined through recent LiDAR and
24 with going out to the site with biologists is that about
25 2.27 yards recently was put in. And I'm assuming that the

1 previous was about the same and most of it is just deposited
2 within about 20 feet of this culvert.

3 So in speaking with a biologist, a wetlands specialist,
4 coming up with a plan of how we would do this, it became
5 clear that to remove that material - we were going to lay
6 plywood down, we were going to go down there with shovels
7 and put it into a bucket and take it away. So we came up
8 with a plan based on a survey, based on a biologist's input
9 and a wetland specialist, and wanted to sit down with BCDC
10 to work out a workable plan.

11 To the best of my knowledge at our last meeting and the
12 response that we have, I think it's seven or eight
13 conditions, I believe we are in complete agreement with what
14 needs to be done. And that's what I'm proceeding with.
15 What has complicated this is the recent, I guess -- the
16 staff, I guess, faced with the fact that we are probably
17 going to be dissolved, they want to step back and they want
18 to analyze just what this means.

19 Because to tell you the honest to God truth, the
20 solution to this is to remove this road, it is no longer
21 needed. We automated the bridge. It was a road to the
22 operator house. And there is no doubt in my mind that this
23 road has impacted this environment from day one and the
24 answer is to remove it. And yet SMART was removed from the
25 whole issue of trying to address this and they hold the key.

1 So I don't know that anything we do today, of taking
2 that material out, is going to solve the problem, it's going
3 to continue to happen. So that's part of the complication
4 of working this out. That we've worked with the staff and I
5 think they agree with it.

6 The bottom line is I now have to go back to the board
7 and get direction based on the language between the
8 attorneys and figure out how to proceed. But as a civil
9 engineer I am totally committed to the plan and pursuing it,
10 actually I have been pursuing it actively.

11 CHAIR SCHARFF: Is there anything in the Cease and
12 Desist Order that's different than the plan, besides the
13 penalty issues? Is that the same or are we --

14 MR. ANDERSON: To me it's basically the same.

15 CHAIR SCHARFF: Maybe staff wants to address that.

16 Let me first ask, is there anything you object to in
17 the Cease and Desist Order at all?

18 MR. ANDERSON: Nothing whatsoever other than the fact
19 that the agency has no money. And that is part of the
20 problem. I am not getting paid; as their consultant I
21 haven't been paid for years. So it's a very difficult
22 situation. And we don't really have complete control of the
23 situation because if I were to -- as a civil engineer,
24 looking at it from a hydrology and civil viewpoint, I would
25 take the road out, number one, because it's no longer

1 needed; but if it was needed I'd put in a larger culvert.
2 Probably something with some sort of a concrete overflow.
3 Because the history of this is it's in a location where at
4 high tides it's topped so you're always washing it out. So
5 no, I do not object to anything.

6 CHAIR SCHARFF: All right.

7 MR. ANDERSON: Other than the penalty.

8 COMMITTEE CHAIR SCHARFF: Other than the penalty.

9 MR. ANDERSON: Correct.

10 CHAIR SCHARFF: Does staff have any comments?

11 MR. TRUJILLO: Yes. In regards to your question. I
12 believe the Order -- So the plan that was submitted in
13 November, as I went over in my presentation, it was -- there
14 just wasn't much to it in terms of -- this has been a better
15 or more in-depth explanation than what appeared on paper.
16 So seeing that we came up with this list of requirements.

17 I guess one of the major -- to speak more directly to
18 your question, one of the major issues is the idea of the
19 road stabilization, which he just addressed in terms of, you
20 know, maybe there are some ideas in terms of hardening or
21 widening the culvert or what have you. That's one of the
22 big things.

23 We also felt that -- and though this work might have
24 been done it, again, didn't show up in the plan. We felt
25 that it just wasn't expansive enough. From what I

1 understand he had taken a drone and kind of flown over the
2 site and taken pictures of various areas and then somehow
3 determined that the area just in front of the culvert on the
4 east side was maybe the best place to focus his efforts.
5 And we wanted to know why, why that place, you know. There
6 was just no justification for why that was the best place
7 and there was no address of exactly what the extent of this
8 debris was and certainly no idea, we had no idea about
9 whether the marsh itself has been negatively or at all
10 impacted by this wash-out.

11 MS. KLEIN: If I may briefly supplement Matthew's
12 response. The timbers in Beattie Marsh are not part of the
13 removal plan, there is no written proposal to stabilize the
14 road. The debris removal is visible in the images beyond
15 the location where the removal is proposed. And there isn't
16 really a site assessment to give us a sense of whether the
17 proposed removal work is sufficient to stabilize things.

18 We recognize the constraint of the existing road and
19 NCRA's inability to remove it and the fact that the culvert
20 is too small and we are not asking NCRA to resolve those
21 issues. We are asking them to fix the situation that they
22 caused in the interim period until some future possible date
23 when the road may be removed. So we want that chlorination
24 line secured and so forth.

25 CHAIR SCHARFF: Anything further to add, Mr. Anderson?

1 MR. ANDERSON: Yes. Based on our last meeting - and I
2 forget what the date was. Basically we are to work out the
3 scope for the -- is it eight items? We came to a basic
4 understanding. I think the expectation originally was that
5 we were going to come up with a document with an appendix
6 and stamped and it was going to -- my estimation, it was
7 going to cost probably somewhere on the order of \$60,000 to
8 \$80,000 to get all of the experts involved, the expectation.

9 So we talked about it. And I think the staff was very
10 understanding of our limitations and the whole overall
11 complexity of the situation and basically we agreed to go
12 through historical data, photos, and to study the tide
13 cycles, to do a complete, detailed mapping, which the
14 original mapping, as Matthew described, was insufficient.

15 So we have gone down that path. I have hired a
16 biologist and she's done the historical investigations so
17 we're -- until just yesterday whenever I got this notice
18 from the attorney I, you know, I was going to be quite
19 pleased to present to you where we were at and staff. To
20 me, the discovery phase is going to alter the plan. We need
21 to understand what we're dealing with. And so that's the
22 process we are going through based on the scope that we
23 discussed.

24 CHAIR SCHARFF: Commissioners, any comments or
25 questions?

1 COMMITTEE MEMBER TECHEL: I was just interested in who
2 serves on the board?

3 MR. ANDERSON: Boy. They are primarily supervisors
4 from Marin County, Sonoma County, Mendocino County and
5 Humboldt County. I am not sure I could sit here and repeat
6 all their names.

7 COMMITTEE MEMBER TECHEL: No, just --

8 MR. ANDERSON: The board has gone through a fairly
9 sizable change lately. The board is 100 percent behind what
10 we're doing here. When I reported it out, I think we were
11 in Ukiah where the last meeting was, they were all very
12 excited about the progress that we are making with this but
13 they are also all very nervous about what is happening with
14 the Legislature.

15 CHAIR SCHARFF: Sanjay.

16 COMMITTEE MEMBER RANCHOD: Thank you for the context
17 for this, Mr. Anderson. There is a lot of history here
18 that's helpful for us to better understand and at the same
19 time there are some real issues that have to be addressed
20 and that's why there is a Cease and Desist and Civil Penalty
21 Order proposed here.

22 Can staff address what is the timeline for completion
23 of the contemplated remediation work? That is not clear to
24 me from the materials. I know there is not a date certain
25 because it depends on when an acceptable plan has been

1 submitted. Well, they need to submit the plan within 60
2 days of the effective date of the Order but then that needs
3 to be approved. So are we talking about the remediation
4 work being completed within a few months or roughly what is
5 the contemplated time line?

6 MR. TRUJILLO: Yes, once it's initiated we expect it to
7 be completed within a few months. I think the question
8 about when it will be initiated, aside from depending on
9 BCDC's approval they also have to consult with other
10 agencies such as the Regional Water Quality Control Board
11 and take into account any work windows. So if I were to sit
12 here now and estimate I would say six, seven months.
13 Hopefully sooner but probably that.

14 COMMITTEE MEMBER RANCHOD: Understood. A separate
15 issue is the Respondent's alleged ability to pay or lack of
16 ability to pay penalties and it states in the document here
17 that it is alleged but unsubstantiated. Has the Commission
18 received anything in writing from Respondent as to its
19 ability to pay?

20 MR. TRUJILLO: No, no evidence.

21 COMMITTEE MEMBER RANCHOD: So I would like to make a
22 suggestion that we add some language here with respect to
23 the ability to pay. With respect to other matters we have
24 insisted that documentation of ability to pay be provided if
25 we are going to allow for a waiver of a penalty amount. And

1 so I would like to add to page 7, this is of the proposed
2 CDO, page 7, the first paragraph. There is a sentence that
3 provides:

4 "... allow Respondent to be entitled to a
5 waiver of 50% of the total penalty amount if the
6 Executive Director determines that NCRA has
7 substantially complied with the terms of this
8 Order."

9 I would like to add to that language to the effect of:

10 "... and provided written documentation of
11 Respondent's limited ability to pay the full
12 penalty amount."

13 CHAIR SCHARFF: So often there have been two separate
14 issues, the issue of an incentive to get the work done,
15 right, versus the ability to pay.

16 COMMITTEE MEMBER RANCHOD: Correct.

17 CHAIR SCHARFF: I thought that staff -- we can clarify
18 with staff but I thought staff was looking at this as an
19 incentive to do the work, to save the \$15,000, as opposed to
20 an ability to pay issue; and that since nothing was in the
21 record we haven't really considered ability to pay. So that
22 was my understanding; staff could clarify if that was not
23 correct. On other items we have done that, we have said --
24 on other matters that have come before us we as a Commission
25 have said, if you get it done you only have to pay 50

1 percent. I notice this is the first time I've seen it in
2 the staff proposal so happy to have staff address that.

3 MS. KLEIN: Chair Scharff, you are exactly right that
4 it is offered as an incentive. But we recognize that though
5 unsubstantiated we don't doubt Mr. Anderson's statements so
6 I think that the ability to pay was factored in informally.

7 CHAIR SCHARFF: So maybe we could talk a little bit
8 about the \$15,000 first payment in 30 days. We've stated as
9 a group, as an Enforcement Committee, that our goal is to
10 get the work done, to get the marsh fixed up, and you've had
11 the same, staff has indicated the same thing. So the
12 question is, does the payment of the \$15,000 within the 30
13 days help or hinder that? I just really raise it to our
14 staff for some questions.

15 What I've heard from Mr. Anderson is he agrees that
16 everything in the Cease and Desist Order, except the
17 penalty, should be implemented and we as a Commission should
18 basically vote to impose this - that's really what I sort of
19 heard him say - except the penalty. And the penalty, half
20 of it gets waived if you do the work.

21 So the question is, on the other \$15,000 should we
22 impose the penalty or -- is that the right use of those
23 funds? I'm really just looking at staff for some thoughts
24 on that.

25 MR. ZEPPETELLO: I'll give just some comments. One

1 scenario would be if you adopt the Order as proposed that
2 NCRA would not pay the penalty and we'd be faced with the
3 situation of either enforcing or not enforcing on that
4 liability.

5 If they were to pay then the issue of whether that's
6 diverting funds from the work is a fair question, which I
7 don't know that any of us could answer.

8 You know, another option - and I don't know that I'm --
9 I'm not advocating this but I'll suggest it. You could
10 consider allowing for a waiver of the entire penalty or you
11 could reduce the penalty, you know, to a different number.
12 Under the McAteer-Petris Act though, any penalty that is
13 imposed that is not waived is required to be paid within 30
14 days, so we have got that as a constraint.

15 So I don't know if Adrienne or Matthew have more to add
16 but those are some comments.

17 CHAIR SCHARFF: Anything further or not?

18 MS. KLEIN: I think speaking to Member Ranchod's
19 comment, that if alterations are made to the staff proposed
20 penalty then substantiation should be provided into the
21 record.

22 CHAIR SCHARFF: Okay.

23 COMMITTEE MEMBER RANCHOD: So it seems like there's two
24 questions here; and thank you for the comments.

25 One is on the penalty amount and that really does go to

1 one of the considerations is ability to pay, whatever that
2 amount is. And then the separate but related issue is
3 waiver of part of the penalty amount in recognition that
4 there is a cost associated with completing the remediation,
5 which can be taken into account, and also acts as an
6 incentive for the timely completion of the remediation.

7 So there are two issues. Without having documentation
8 on the limited or inability to pay it's difficult here to
9 make a decision on the total penalty amount. Staff has
10 proposed \$30,000 and then a waiver of half that amount. If
11 the reality is that the Respondent under the proposed terms,
12 if they are unable to make the initial payment of \$15,000
13 within 30 days, then further penalties will begin to accrue;
14 is that not right?

15 MR. ZEPPETELLO: Yes, liability for additional
16 penalties would accrue. We would have to refer the matter
17 to the Attorney General to enforce it.

18 COMMITTEE MEMBER RANCHOD: So that seems to exacerbate
19 a problem that's directly related to the inability to pay.
20 So I think we need to really think through how this is being
21 structured. If we are setting up the Respondent for a
22 condition here that they cannot fulfill we are going to make
23 it more difficult, it seems, for the remediation to be
24 completed given their limited resources.

25 COMMITTEE MEMBER GILMORE: Okay, so I just wanted to

1 clarify, any penalty that we impose, at least half of it has
2 to be paid within 30 days?

3 MR. ZEPPETELLO: No, whatever penalty is imposed where
4 there is no opportunity for a waiver. If it is a penalty
5 that is imposed and not deferred or allowed to be inferred
6 as an incentive is required to be paid within 30 days.

7 COMMITTEE MEMBER GILMORE: Okay, well then I think I
8 have a suggestion. Could we impose the \$30,000 and
9 structure it this way? So if they provide evidence of
10 inability to pay then we could push off the \$15,000 that
11 would be due a certain number of days, 60 days, whatever
12 works for us, and then waive the rest of the penalty, and
13 then waive the penalty if the work gets done in whatever the
14 specified time frame is. Does that work?

15 MR. ZEPPETELLO: I'm not sure of the first part. We
16 would push off a portion?

17 COMMITTEE MEMBER GILMORE: Basically what I'm getting
18 at is we want to give them incentive to do the work, right?

19 MR. ZEPPETELLO: Correct.

20 COMMITTEE MEMBER GILMORE: But we don't want to
21 exacerbate the problem that they can't pay. So part of the
22 carrot would be, here is this fine hanging over your head,
23 but if you do the work in a certain amount of time we'll get
24 rid of 50 percent of the penalty, and then potentially if
25 you show that you can't pay then the rest of it goes away.

1 Something like that.

2 CHAIR SCHARFF: You're suggesting a two step process.

3 COMMITTEE MEMBER GILMORE: Right.

4 CHAIR SCHARFF: You're suggesting that what we do is we
5 take the staff recommendation except for we actually say
6 that if you provide inability to pay within - you have to
7 have a time frame probably.

8 COMMITTEE MEMBER GILMORE: Right.

9 CHAIR SCHARFF: Within ten days or something like that,
10 and the staff agrees that there is an inability to pay, then
11 100 percent of the fine would be waived if you did the work.
12 Is that --

13 COMMITTEE MEMBER GILMORE: That's eventually where
14 we're getting to.

15 CHAIR SCHARFF: But only if there is inability to pay.

16 COMMITTEE MEMBER GILMORE: Right.

17 COMMITTEE CHAIR SCHARFF: But if they don't do the work
18 then the full fine is imposed regardless of inability to
19 pay. Is that right? That would be -- I understand. I
20 think inability to pay in a situation like this is -- this
21 is a government agency, right?

22 MR. ANDERSON: It is, yes.

23 CHAIR SCHARFF: I actually don't understand the law.
24 Can government agencies get out of their debts? Doesn't
25 somebody in the government eventually backstop that and pay

1 it? Especially if they were going to be dissolved, doesn't
2 Liabilities go somewhere or does the government just decide
3 not to pay? I don't know the answers to these, maybe
4 counsel knows?

5 MR. ANDERSON: Could I attempt to answer that?

6 CHAIR SCHARFF: Sure.

7 MR. ANDERSON: This is something very close to my
8 heart. I am not going to tell you how much they owe me but
9 it's in the hundreds of thousands. So if you go online and
10 go back to the committee meeting that Senator McGuire held
11 with the - I forget what the first committee was - the
12 transportation committee, that question came up and the
13 Senator sort of skirted it. He said, well, for their
14 engineer it's substantial, for their attorney, substantial,
15 for the operator, substantial. I can tell you that those
16 numbers are in the millions.

17 This is why -- because the Executive Director stood up
18 in front of the CTC and said, we cannot pay our consultants
19 and we need our consultants to operate on a daily basis. We
20 are having trouble paying our own staff. So the CTC said,
21 this is not good. Here is an agency that we created and
22 they are not able to pay their bills. So basically that's
23 what generated this new senate bill because what Mitch
24 Stogner was trying to address was to get a payment, get some
25 funding from the state for this agency that they created.

1 And they turned it right around and said, well, we're going
2 to dissolve you and we are going to create three more
3 agencies and we're going to fund it. Which is great. For
4 the state of California it's a giant step forward.

5 So yes, it is not going to be hard at all to
6 demonstrate our inability to pay, the agency's inability to
7 pay. In fact, when I do like an encroachment permit.
8 There's three hundred-some miles of railroad, we are always
9 getting encroachment payments. I would get paid for my
10 engineering and it would go into their bank account and it
11 would disappear because it was a negative account. So now I
12 have a third-party agreement with anybody who has an
13 encroachment on this railroad so they pay me directly and
14 not go into the NCRA's bank account where it disappears and
15 I don't get paid.

16 COMMITTEE MEMBER RANCHOD: I want to ask whether we
17 have an opportunity to actually enter into a closed session
18 and get advice from counsel on this issue, which relates to
19 this being a public entity and their ability to pay, which
20 impacts the terms of the proposed Order?

21 COMMITTEE CHAIR SCHARFF: I'll ask counsel. Do we have
22 to notice a closed session?

23 MS. POSNER: I think we do have to notice a closed
24 session.

25 COMMITTEE MEMBER TECHEL: I have a question about the

1 conditions and the cost of going through those conditions to
2 try and get a magnitude of what the cost will be for you to
3 follow the conditions. It asks for an assessment of the
4 tidal cycle and storm effects in the area. It sounds like
5 you have done some of that.

6 MR. ANDERSON: Yes, we have. We have -- I've hired
7 Lucy MacMillan who I have used -- when we did the
8 reconstruction - not reconstruction - the rehabilitation of
9 60 miles of railroad, much of that is in tidal zone and so
10 we had numerous, numerous permits. And Lucy was, she would
11 go through the JARPA process with all the different
12 agencies. So I've hired her knowing that she is an expert
13 at getting these permits. She does not believe that --
14 essentially because we are not putting any fill in that we
15 probably don't need to get into a lot of these permit issues
16 but we have to coordinate with these agencies, let them know
17 what we're doing. And she has also given me time periods of
18 when we could do this before the various habitats, impacts
19 on the birds and the fish. So it is a very narrow -- but I
20 do agree with Matthew that probably our first opportunity to
21 do this is going to be somewhere in the October area,
22 November. So my plan is to get this all resolved so that we
23 can do this construction this year.

24 COMMITTEE MEMBER TECHEL: But you won't get the data
25 until October?

1 MR. ANDERSON: Pardon me?

2 COMMITTEE MEMBER TECHEL: I didn't quite understand.
3 You're going to hire her and she's going to come in and get
4 all the information and then the actual construction won't
5 happen until then.

6 MR. ANDERSON: Yes, she's already hired.

7 COMMITTEE MEMBER TECHEL: Okay.

8 MR. ANDERSON: And we are going through the process.
9 And she has already told me that for the various habitat for
10 when we can actually get in and remove this material it's a
11 very small window, somewhere in October, November range for
12 us to do that.

13 COMMITTEE MEMBER TECHEL: So what is the ballpark cost
14 of hiring a consultant?

15 MR. ANDERSON: Well, it's climbing but so far I put
16 together something on the order of \$26,000. And I'm pretty
17 much donating my time at this point so that is not included
18 in that fee.

19 COMMITTEE MEMBER TECHEL: Any idea about what it would
20 cost to come in and remove the materials?

21 MR. ANDERSON: Based on Lucy's suggestion so far, based
22 on the historical photographs, et cetera, and our
23 understanding of the amount of material that has gone in,
24 which is about five yards for the last two events, we are
25 thinking it's going to be within a week period to remove the

1 material. The thing that I am still struggling with is how
2 do we, how do we stop further erosion, which is also part of
3 the plan. So we have to come up with some sort of a fill
4 that is unerodible, if you will, but not some gravel. We
5 are probably going to put some engineered fill in there that
6 we can compact that would be resistant and come up with some
7 sort of a mitigation for the next two years, as is
8 stipulated.

9 COMMITTEE MEMBER TECHEL: Again, I'm just trying to get
10 an idea of the cost --

11 MR. ANDERSON: Yes.

12 COMMITTEE MEMBER TECHEL: -- and where is the agency
13 finding these funds?

14 MR. ANDERSON: I would say it's in the order of \$50,000
15 by the time we're done.

16 COMMITTEE MEMBER TECHEL: Okay.

17 CHAIR SCHARFF: Marie.

18 COMMITTEE MEMBER GILMORE: Okay. So I would like to
19 make a proposal that basically we go ahead and implement the
20 \$30,000 fine. But if you complete the work in whatever the
21 parties agree is a reasonable time frame that we would waive
22 the entire fine.

23 CHAIR SCHARFF: And that the rest of the Cease and
24 Desist Order is imposed.

25 COMMITTEE MEMBER GILMORE: Is imposed.

1 CHAIR SCHARFF: Mr. Anderson, do you feel that's fair?

2 MR. ANDERSON: I do. This is something that I am going
3 to be taking back to the -- this is a very positive response
4 I can take back to the board and I will report back to BCDC
5 immediately on what my direction is.

6 COMMITTEE MEMBER RANCHOD: I would like to comment on
7 this and I'd like staff's response to this as well.

8 So In the civil penalty order, proposed Civil Penalty
9 Order, it states that the amount of the civil penalty, the
10 \$30,000 takes into account its claimed limited ability to
11 pay. What was the maximum total civil penalty that could
12 have been imposed here and to which \$30,000 already has been
13 adjusted downward?

14 MS. KLEIN: We alleged a single violation, therefore
15 the administrative maximum is \$30,000.

16 COMMITTEE MEMBER RANCHOD: Okay. So the \$30,000 amount
17 takes into account a claimed inability to pay, but because
18 it was not substantiated it hasn't been adjusted downward.
19 Okay. I think this goes to the issue before us which is, if
20 documentation of inability to pay was provided it would be
21 equitable to reduce the amount of the penalty or waive it
22 entirely if the mitigation work was completed in a timely
23 way.

24 MS. KLEIN: (Nodded.)

25 MR. TRUJILLO: (Nodded.)

1 COMMITTEE MEMBER RANCHOD: Is that correct and does
2 staff have any issues with that?

3 MS. KLEIN: We do not have any issues with that.

4 COMMITTEE MEMBER RANCHOD: So to go back to -- I think
5 Commissioner Gilmore is building on the comment I made
6 earlier which was that we add a provision to the first
7 paragraph on page 7 that we require Respondent to provide
8 written documentation of their inability to pay the full
9 penalty amount. Or even a partial penalty amount; it's
10 their inability to pay a penalty. And then we then adjust
11 the waiver to 100 percent of the penalty as provided here.

12 CHAIR SCHARFF: If they complete the work.

13 COMMITTEE MEMBER RANCHOD: If they complete the work.

14 COMMITTEE MEMBER GILMORE: If they complete the work.

15 And I just wanted to say that the documentation is a very
16 important part of it and it sounds like there is going to be
17 no problem providing that. But I am leery of just going
18 around waiving penalties without sufficient documentation
19 because people will be looking at what's done in this case.
20 So documentation/penalty waiver, no documentation/no penalty
21 waiver.

22 MR. ANDERSON: Understand.

23 MR. TRUJILLO: I have just a question of clarification.
24 Did you want to put kind of a time frame as to when they
25 should provide that documentation?

1 CHAIR SCHARFF: How much time do you need,
2 Mr. Anderson?

3 MR. ANDERSON: I wouldn't think that it would take more
4 than 20 days to -- I am not exactly sure what is needed to
5 actually, you know, sufficiently document it.

6 CHAIR SCHARFF: Is staff fine with 20 days, does that
7 work?

8 MR. TRUJILLO: Yes.

9 CHAIR SCHARFF: Yes? You look, you look --

10 MR. ZEPPETELLO: Yes. Twenty days is fine. I'm just
11 sort of trying to figure out - because this won't go to the
12 Commission for two or three weeks - whether we can get that
13 information and how we would edit the Order.

14 CHAIR SCHARFF: So I think the answer is 20 days from
15 today we would like you to have the information. And we may
16 not get it to the Commission but it would be nice to have
17 that information before we go.

18 MR. ANDERSON: Okay.

19 COMMITTEE CHAIR SCHARFF: Did that make sense,
20 Mr. Zeppetello?

21 MR. ZEPPETELLO: Yes.

22 CHAIR SCHARFF: You can edit the Order, you know how to
23 edit the Order.

24 MR. ZEPPETELLO: Yes. I guess what I'm thinking is if
25 they could provide documentation -- and maybe Dave can go

1 back and talk to his client. I mean, if we could get
2 documentation - this may not be feasible but within - I
3 would just move it up to say within 10 days or so. Perhaps
4 we could revise the Order to say that documentation has been
5 provided and therefore edit this to provide the 100 percent
6 waiver so that it's not something that is hanging out there
7 post-hearing this matter, that would not be provided until
8 after the matter was scheduled before the Commission.
9 Because we need to present them with an Order that they
10 can't change or else it has to come back; we want to try to
11 avoid that.

12 COMMITTEE MEMBER GILMORE: Well, has it already been
13 scheduled for the Commission?

14 MR. ZEPPETELLO: It has not yet been noticed. We were
15 tentatively scheduling it either for May 3rd or May 17th.

16 COMMITTEE MEMBER GILMORE: Well, if we schedule it for
17 May 17th shouldn't that give us enough time?

18 MR. ZEPPETELLO: I would think so.

19 CHAIR SCHARFF: I would suggest we just do it for May
20 17th.

21 COMMITTEE MEMBER GILMORE: Yes, yes.

22 MR. ZEPPETELLO: So presuming they could provide
23 information now we have to consider the mailing schedule as
24 well. We would want to mail the Order ten days before. So
25 I guess I would urge Mr. Anderson if he can work with his

1 client to follow-up with us next week, if possible, and if
2 it's not possible maybe we would have to kick it to a June
3 meeting. But the idea would be if they provide
4 documentation that we would edit the Order to document that
5 they provided inability to pay. Assuming the Executive
6 Director agrees with that we would edit this to confirm that
7 they provided documentation and therefore 100 percent waiver
8 and the payment would be due unless the Executive Director
9 finds that they have substantially complied, in which case
10 the waiver would be effective.

11 CHAIR SCHARFF: So if you did it in 15 days it would
12 work, right? You'd still have your 10 days to mail and all
13 that?

14 MR. ZEPPETELLO: I should look at --

15 CHAIR SCHARFF: If it's the 24th today, your board
16 meeting is coming up fairly soon you said, right? Today is
17 the 19th.

18 MR. ANDERSON: The NCRA Board meets the first Wednesday
19 of every month so that's not going to be -- yes, May 2nd.

20 CHAIR SCHARFF: So if you have until the 17th but you
21 can go back and your Executive Director can start putting
22 this together.

23 MR. ANDERSON: Yes, yes. I don't see why we can't get
24 started immediately to put some documentation together.

25 MR. ZEPPETELLO: Let me ask. I mean, we were looking

1 at the calendar. I guess it's a question of whether you
2 need your board or whether you and the Executive Director
3 could provide something. In order to meet May 17th we'd
4 want to mail by May 4th so I'd like to propose April 30th or
5 May 1st as a deadline to get us information; if you can at
6 least try to work with that.

7 MR. ANDERSON: I will.

8 COMMITTEE CHAIR SCHARFF: Okay.

9 COMMITTEE MEMBER GILMORE: Okay. Can I just ask a
10 question?

11 COMMITTEE CHAIR SCHARFF: Sure.

12 COMMITTEE MEMBER GILMORE: Okay. Are we going to be
13 able to provide them with clear direction as to what
14 constitutes -- what are we looking for? I mean, it could be
15 something -- I'm not putting any suggestions out there but
16 it could be something as simple as a letter signed by the
17 Executive Director on their letterhead or it could be a bank
18 statement. I mean, I don't know what it is that we are
19 looking for as proof but we just need to make whatever it is
20 very clear to them.

21 MR. ZEPPETELLO: Well, I will comment and maybe others
22 can comment or Dave can comment. I just know from personal
23 experience that BCDC has a budget. They may have some kind
24 of budget or balance sheet or bank statement or -- I would
25 like documentation more than just a letter from the

1 Executive Director making an assertion.

2 COMMITTEE MEMBER GILMORE: Okay. But my point is as
3 long as we're clear as to the types of proof that we want.
4 Because the last thing I want is for them to go back and
5 submit something and for us to say, no, this isn't good
6 enough, we need something else. I just want us to be very
7 clear up front as to the types of documentation that we will
8 accept.

9 MR. ANDERSON: All right. One of the very first things
10 that I'm going to ask -- they do have a budget. They get
11 from encroachments and just a couple of other sources and I
12 think it's something on the order of \$200,000 a year as far
13 as their revenue. And their expenses exceed that so I'm
14 sure we can show that.

15 COMMITTEE MEMBER GILMORE: Okay.

16 CHAIR SCHARFF: All right, any further comments? Okay.
17 Is the motion clear? Do you want to restate the motion?

18 COMMITTEE MEMBER GILMORE: Sure.

19 CHAIR SCHARFF: Do you want me to restate the motion?

20 COMMITTEE MEMBER GILMORE: No, no, no, no. Okay.
21 Okay. I move that we accept the staff's recommendation as
22 to the proposed Cease and Desist Order and that we impose a
23 penalty of \$30,000. But if the Applicant provides
24 sufficient evidence of inability to pay and completes the
25 work, that the penalty of \$30,000 will be waived.

1 MS. KLEIN: Completes the work according to the staff-
2 approved remediation plan?

3 COMMITTEE MEMBER GILMORE: Yes.

4 MS. KLEIN: Actions and timelines?

5 COMMITTEE MEMBER GILMORE: Yes.

6 MS. KLEIN: Thank you.

7 MR. ZEPPETELLO: Well, and along the same lines, we'll
8 keep the language of the draft Order in terms of the
9 Executive Director making that determination --

10 COMMITTEE MEMBER GILMORE: Correct.

11 MR. ZEPPETELLO: -- once the work is completed.

12 CHAIR SCHARFF: The actual language change would be
13 something like: the waiver of 100%.

14 MR. ZEPPETELLO: Correct.

15 COMMITTEE CHAIR SCHARFF: You'd keep the rest of the
16 language exactly the same and add the part about providing
17 the documentation.

18 MR. ZEPPETELLO: Yes.

19 COMMITTEE MEMBER RANCHOD: No later than April 30th.

20 COMMITTEE CHAIR SCHARFF: Right, no later than April
21 30th.

22 MR. ZEPPETELLO: Well, it will have been provided and
23 we will modify the Order to say it was provided and
24 reviewed.

25 COMMITTEE MEMBER GILMORE: Okay.

1 COMMITTEE CHAIR SCHARFF: All right.

2 MR. TRUJILLO: Sorry, one more thing. I believe there
3 were some modifications in the errata sheet. Do we need to
4 have those --

5 CHAIR SCHARFF: Yes and we agree to all the errata
6 sheet modifications.

7 MR. TRUJILLO: Thank you.

8 COMMITTEE CHAIR SCHARFF: Everyone agree to that?

9 COMMITTEE MEMBER GILMORE: Yes.

10 COMMITTEE CHAIR SCHARFF: Okay. So you made the
11 motion, who seconded it? Just for the record.

12 COMMITTEE MEMBER RANCHOD: I'll second.

13 COMMITTEE CHAIR SCHARFF: Okay. All in favor?

14 (Ayes.)

15 COMMITTEE CHAIR SCHARFF: That passes unanimously.

16 MR. ANDERSON: Thank you.

17 MR. ZEPPETELLO: Thank you.

18 MR. TRUJILLO: Thank you.

19 MS. KLEIN: I have a very brief report. I just want --

20 CHAIR SCHARFF: And we have all this time, Adrienne.

21 MS. KLEIN: For a change. (Laughter.)

22 COMMITTEE CHAIR SCHARFF: I know.

23 MS. KLEIN: I briefly wanted to let you know that we
24 are moving forward with responding to some of the
25 information that you've provided regarding the enforcement

1 strategy and we will be coming back to talk further with you
2 this summer.

3 Related to that, you've expressed some interest in
4 better understanding the regulations that guide your role.
5 You may recall that in July 2016 we provided a training for
6 you but I'd like to know if you would like staff to provide
7 a second training on the regulations that guide the formal
8 enforcement proceedings at some point this year?

9 CHAIR SCHARFF: I think that would be a good plan. I
10 look to other Commissioners. (Commissioners nodding.) I
11 think it's unanimous.

12 COMMITTEE MEMBER TECHEL: It was the hypothetical 'Here
13 is what could happen,' now we'll have a lot more questions.

14 MS. KLEIN: Thank you, we'll go ahead and schedule
15 that.

16 And the second and final subject that I wanted to cover
17 is the date that we meet. So we learned last year that the
18 formal enforcement proceedings require at least and often
19 more than the three hours that we have available to us on
20 the first and third Thursday mornings preceding the
21 Commission meetings in the afternoons.

22 Some months ago Commissioner Scharff asked me to
23 conduct an informal poll with each of you about possible
24 alternate meeting times. Unfortunately, there wasn't an
25 obvious alternate time that you all preferred; there was a

1 pretty strong range. There is a strong preference both for
2 and against the current time slot, split right down the
3 middle and the same split exists for the second, fourth and
4 fifth Thursdays of the month, which would give you
5 additional time since you wouldn't need at least to be
6 present for a BCDC Commission meeting. That obviously
7 doesn't contemplate your other obligations.

8 We asked you about Wednesday morning and afternoon and
9 that could be a compromise time that many of you could live
10 with. If you prefer the Commission-free Thursday mornings
11 we have gone ahead and reserved the available rooms in this
12 building and in our office, which gives you two meetings a
13 month in July and August and one per month during the months
14 of September through December.

15 CHAIR SCHARFF: So what day in July, what days in July
16 did you reserve?

17 MS. KLEIN: So available days - and this obviously
18 doesn't necessarily line up with future possible actions but
19 for trainings - so we have July 12th and 26th. Shall I
20 provide you the other dates?

21 COMMITTEE MEMBER GILMORE: Sure.

22 MS. KLEIN: And I would be happy to communicate this in
23 writing if that would be helpful. We have August 9th and
24 23rd, September 27th, October 11th, November 8th and
25 December 13th.

1 CHAIR SCHARFF: Okay. So you wanted to provide us
2 those so we could give feedback; is that the thought?

3 MS. KLEIN: I'm so sorry, please repeat that.

4 CHAIR SCHARFF: Did you want us to try and figure out
5 dates now or would you prefer to give this to us in writing
6 and respond?

7 MS. KLEIN: We don't need to decide dates now. We have
8 been trying to have this conversation since November and we
9 have not had a spare minute at the end of that or the
10 January meeting. I simply wanted to give you an opportunity
11 to discuss among yourselves whether to stay the course and
12 continue to meet during this time slot or to consider an
13 alternate time. We could --

14 CHAIR SCHARFF: So I'm fine with this time slot if we
15 have a short meeting like this. Where it's not okay is when
16 we have things that are clearly going to take longer. So I
17 don't know how everyone else feels but if we have something
18 that is clearly going to take longer we are going to need a
19 different time slot for that.

20 COMMITTEE MEMBER GILMORE: I agree with that. I think
21 things like training can be done on the morning, on this
22 time slot, that seems to make a lot of sense, and any like
23 workshops that we might have about procedures and whatnot;
24 but I think it's difficult to do a full-blown enforcement
25 hearing. This didn't look like it was going to be really

1 contested so I had no problem doing that. But I think
2 enforcement hearings where there is a lot of public
3 interest, I just don't think it's feasible to hold in this
4 time slot.

5 CHAIR SCHARFF: All right, is that enough direction or
6 do you want --

7 MS. KLEIN: Yes. We will then use the alternate dates
8 if we have an item that we anticipate will take longer and
9 we will be conservative in our estimates.

10 CHAIR SCHARFF: But why don't we try and check with
11 Commissioners early because there may be different choices
12 of the dates and, you know, some people -- especially as we
13 go into the summer there's probably vacation plans, there's
14 all sorts of things that, you know, we don't have to hold
15 these days.

16 MS. KLEIN: Well that was going to be my next question.
17 Would I endeavor not to bother you unnecessarily if you
18 preferred me to Outlook you for these dates so that they
19 don't get blocked, with the recognition that we wouldn't
20 necessarily meet on many of them, these additional second
21 and fourth Thursdays.

22 CHAIR SCHARFF: Why don't we sort of see what --
23 because I know that most of those dates work but I know that
24 there's a couple of those days I think I'm on vacation. And
25 I think other people probably have that so you might want to

1 Doodle poll and figure out which of those dates.

2 COMMITTEE MEMBER TECHEL: I always like when I get to
3 take it off the calendar. That's like, wow, I've got the
4 day back.

5 COMMITTEE CHAIR SCHARFF: That's true.

6 COMMITTEE MEMBER TECHEL: And maybe we'll go back to
7 the original premise which is, if we schedule an enforcement
8 hearing they're going to settle and we won't have as many.
9 (Laughter.)

10 MS. KLEIN: I will conduct a Doodle poll and then I'll
11 look at the dates when the Chair and a quorum of you are
12 free.

13 CHAIR SCHARFF: All right, sounds good.

14 MS. KLEIN: Thank you very much. That concludes my
15 report.

16 CHAIR SCHARFF: Do we have any enforcement hearings
17 coming up that you are aware of? Besides the Westpoint
18 Harbor thing, which we are all aware of, is there anything
19 else that we are looking at?

20 MS. KLEIN: We are working on a few things. As you
21 will recall from the strategy, we identified a number of
22 priority cases and we now have capacity to turn our
23 attention to the next set of those. Not all of those will
24 resolve through a public hearing and formal enforcement
25 proceeding but we anticipate that some of them will so yes,

1 we will be asking for you to convene again, thank you.

2 COMMITTEE CHAIR SCHARFF: All right.

3 MR. ZEPPETELLO: I've got just a comment on that. The
4 regulations provide that we mail you the Violation Report
5 and the Statement of Defense at least 10 days before the
6 hearing. We are sending out the Violation Report and then
7 sometimes we have extensions of time. But I guess I am
8 throwing open the issue that maybe we should at least give
9 you notice of when we issue violation reports so then you
10 know that there is something that is out there. We don't
11 necessarily even have to send it to you but it's now become
12 a formal proceeding that is going to come to you at some
13 point, usually within 35 or whatever it is, 60 days. So I
14 just throw that out as maybe --

15 CHAIR SCHARFF: I think that's a good idea.

16 MR. ZEPPETELLO: -- as a suggestion.

17 COMMITTEE CHAIR SCHARFF: You can e-mail us something,
18 it doesn't have to be the formal mailing or anything.

19 MR. ZEPPETELLO: Then it's become concrete.

20 CHAIR SCHARFF: Right. All right, anyone else have
21 anything to add?

22 All right, so then I think we're adjourned, thank you.

23 (Thereupon, the Enforcement Committee meeting
24 was adjourned at 11:05 a.m.)

25 --oOo--

26

CERTIFICATE OF REPORTER

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

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

IN WITNESS WHEREOF, I have hereunto set my hand this 23rd day of April, 2018.



RAMONA COTA, CERT**478