

San Francisco Bay Conservation and Development Commission

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May 19, 2023

TO: Enforcement Committee Members

FROM: Lawrence J. Goldzband, Executive Director, (415/352-3653; larry.goldzband@bcdc.ca.gov)
Adrienne Klein, Principal Enforcement Analyst (415/352-3609; adrienne.klein@bcdc.ca.gov)

SUBJECT: **Executive Director’s Recommended Enforcement Decision and Proposed Civil Penalty Order No. CCD2023.003.00 in BCDP Enforcement Matter ER2019.063.00 for Seaplane Investment, LLC, Sausalito, Marin County**
(For Committee consideration on May 30, 2023)

Summary

The Executive Director recommends that the Enforcement Committee adopt this recommended enforcement decision (RED) as its recommendation to the full Commission. This recommendation includes issuing proposed Civil Penalty Order CCD2023.003.00 to require Seaplane Investment, LLC (“Respondent”) to pay the following administrative civil penalties: 1. Pay \$21,170 in administrative civil liability within thirty (30) days of Order issuance.

Background

The now-resolved violations occurred at APN 052-247-01 (Block 164) and APN 052-247-02 (Block 167), which are located on either side of Yolo Street, a Marin County public right-of-way. The violations also occurred on property owned by Marin County. VR&C Exhibit 1.

Violations 1 and 2, summarized in Section II and described in further detail in Section VI, occurred between August 20, 2021, 30 days following the July 21, 2021, property purchase date, and January 6, 2022, the date staff approved the two permit assignment forms. The fully executed permit assignment forms resulted in resolution of the violations on January 6, 2022, but accrued standardized fines were not paid between August 2 and October 26, 2022.

Violation 3, summarized in Section II and described in further detail in Section VI, occurred between August 31, 2021, the date of expiration of Permit 1973.014.03, and January 25, 2022, the date of issuance of Permit 1973.014.04. The issuance of Permit 1973.014.04 resulted in resolution of the violation on January 25, 2022, but accrued standardized fines were not paid between August 2 and October 26, 2022.

On November 11, 2022, Jillian Blanchard, Rudder Law Group, informed staff that her firm had been retained by Respondent to act as its counsel. Until that time, John Sharp had represented Respondent.

On December 1, 2022, Respondent’s Counsel submitted its Statement of Defense. Respondent states that the SOD is responsive to the allegations in Violation Report and Complaint mailed on



July 29, 2022, for six unresolved violations (VR&C #1), and the Complaint mailed on October 27, 2022, for civil penalties for three resolved violations (Complaint #2).¹

As of April 3, 2023, the second date of mailing of this Recommended Enforcement Decision (RED #2) to the Enforcement Committee,² Respondent has not paid any administrative civil penalties for the three resolved violations. On October 26, 2022, Respondent forfeited its opportunity to resolve the penalty portion of these resolved violations with a \$12,300 standardized fine, to appeal the standardized fine amount to the Commission Chair and Executive Director, or to request a public hearing with the Enforcement Committee. Instead, Respondent ignored staff's communication, dated August 2, 2022, a letter requesting remittance of the standardized fines within thirty days. On September 21, 2022, a letter was sent to Respondent withdrawing the opportunity to resolve the penalty portion of the violations using standardized fines within thirty-five (35) days of that date, or by October 26, 2022. Upon Respondent's failure to respond by the deadline, staff prepared and issued the Complaint, dated October 27, 2022.

Staff is recommending \$21,170 in administrative civil liability, which is a penalty greater than the \$12,300 of accrued standardized fines. This penalty is appropriate because the period that each violation is subject to daily penalties is the total number of days each violation persisted (versus the period from issuance of the letter that commenced the accrual of standardized fines to the date of resolution of each violation), and the penalty factors provided in the law result in a staff recommended daily penalty somewhat greater than the minimum daily penalty amount.

A. Admitted and Contested Essential Allegations. Respondent filed a Statement of Defense (SOD) on December 1, 2022.

1. Admissions.

Respondent admits to owning the property subject to the complaint.

Respondent admits that though it submitted the two assignment forms on October 28, 2021, there may have been some delays and requests for additional information from BCDC related to these assignments (fourth full paragraph on SOD page 19).

Respondent admits that the houseboat remodeling and relocation project was not completed as of August 31, 2021, and that the project continued to completion following permit expiration and in advance of issuance of an extension of completion time.

¹ On September 2, 2022, Respondent's initial counsel prepared and timely submitted a SOD responsive to VR&C #1 and those defenses have been addressed in the RED pertaining to the six unresolved violations. Neither that RED, nor this one, address the late submitted evidence pertaining to the six unresolved violations included in the SOD submitted in response to Complaint #2.

² This Recommended Enforcement Decision was first mailed to the Enforcement Committee on December 9, 2022, but postponed to undertake settlement negotiations between December 2022 and March 2023.

2. Number of Violations and Penalty Factors.

BCDC staff identified three permit violations and one of these permit violations is also a violation of the MPA.

Since assuming ownership of the property on July 21, 2021, Respondent became responsible for the three violations, which have existed for 137 days (two permit assignments) and 146 days (failing to complete work prior to permit expiration and continuing to work with an expired permit). After considering the factors required by McAteer-Petris Act § 66641.9, BCDC staff recommends a \$5,440 penalty for each assignment violation and a \$10,290 penalty for working with an expired permit, totaling \$21,170 in administrative liability.

The staff finds that the nature and extent of harm caused by these violations is minor but permit requirements were nonetheless ignored that should have been fulfilled in a timely fashion. Each violation could have been resolved without imposition of administrative civil penalties, but Respondent was slow to complete the necessary paperwork and may not have done so without direction to do so from the BCDC staff.

The staff finds that while the violations are susceptible to resolution and, in fact, physically resolved, the violations were not resolved swiftly enough to avoid the issuance of the letter, dated October 8, 2021, that commenced the standardized fines penalty clock nor, following issuance of that letter, resolved swiftly enough to avoid the accrual of standardized fines. Since Respondent failed to resolve the penalty portion of the three violations with the accrued standardized fines (or with the procedures provided pursuant to Chapter 13, Enforcement Procedures, of the Commission's Regulations), staff commenced this formal enforcement proceeding against Respondent to resolve the penalty portion of three resolved 'paper' violations.

The staff finds the cost to the state in pursuing this case since 2019 was high. Staff invested time identifying the two permit assignment violations and the expired permit/unfinished project violation, advising Respondent how to resolve each of the three violations and reviewing Respondent's submittals for completeness. Because the violations were not resolved by October 8, 2021, staff drafted and issued a 35-day enforcement letter to commence a standardized fine penalty clock to incentivize speedy resolution of the violations. While the 35-day letter achieved its intended outcome and caused resolution of the violations, between August 2, 2022, and October 26, 2022, Respondent failed to pay the associated standardized fines that had accrued between October 8, 2021, and January 3, and January 25, 2022, respectively, requiring staff to draft and issue a Complaint to resolve the penalty portion of these three violations using a formal enforcement proceeding and administrative penalties pursuant to Section 66641.5(e) of the McAteer-Petris Act.

The staff finds that Respondent is culpable for the violations as it did not submit two approvable permit assignments until January 3, 2022, 166 days after it took ownership of the property on July 21, 2021, and it did not obtain after-the-fact authorization for the unauthorized completion of the

houseboat remodeling and relocation project until January 25, 2022, 147 days after the August 31, 2022, permit expiration date.

The staff finds the Respondent's inferred inability to pay is not substantiated by any evidence. Furthermore, staff finds that had Respondent resolved the penalty portion of each violation using standardized fines it would have saved time and money.

Based on these penalty factors staff finds that a \$40 penalty per day for each of two failures to take assignment of Permit 1973.014.03 and Permit M1985.030.00 (Violations 1 and 2), an \$70 penalty per day for the failure to complete a houseboat remodeling and relocation work in SF Bay by August 31, 2021, the date of expiration, and continuing the work with an expired permit. (Violation 3).

The staff finds that Respondents have been responsible for: Violations 1 and 2 for 136 days from August 20, 2021 (which is 30 days following July 21, 2021, the property purchase date), to January 3, 2022; and Violation 3 for 147 days from August 31, 2021, the date of expiration of Permit 1973.014.03, to January 25, 2022, to date of issuance of Permit 1973.014.04. These time periods were calculated for the Violation Report and Complaint for Administrative Civil Liability, which was mailed to Respondent on October 27, 2022.

The staff thus finds that it is appropriate that each of the three violations are subject to less than the maximum penalty allowed by the MPA: \$5,440 for each permit assignment violation, and \$10,290 for working with an expired permit, for a total administrative civil liability of \$21,170.

B. Defenses and Mitigating Factors and Staff Rebuttal. Respondent makes the following twelve (12) affirmative defenses. None of the affirmative defenses undermine or affect the outcome of the recommended enforcement decision as outlined by the staff rebuttals:

1. Respondent Argues the Absence of a Due Date for the Permit Assignment Conditions Renders Them Moot. The requirement to complete a permit assignment form needs to happen as soon as possible after property transfer although Respondent argues that because the permits' conditions do not include a specific due date for completing the permits' obligations, they never need to comply with them. This is incorrect. The requirement is to provide an assignment form within a reasonable period following property transfer, and the Complaint gives a thirty-day grace period for penalty assessment from date of transfer to the date of compliance for Respondent's failure to submit two fully executed permit assignments for the 1973 and the 1985 permits, respectively.

2. Respondent Argues the Submittal of Incomplete Assignment Forms Within the 35-day Fine-free Grace Period Results in No Administrative Civil Penalty. Respondent did not provide two completed assignment forms within the timeframe to resolve the assignment violations without a penalty. Though Respondent states that they filed the assignment forms

within 35 days of receiving the BCDC notice, they admit to having filed two, incomplete assignment forms at that time and not filing complete and compliant documents until January 3, 2022, at which point they had accrued a standardized fine that they did not pay by October 26, 2022.

3. Respondent Argues that BCDC Claims that the Houseboat Project Was Completed Too Early and Too Late. As the property owner, Respondent is responsible for ensuring that all activities at its property are consistent with BCDC's laws and policies and compliant with any BCDC permits, including both the avoidance of undertaking work with an expired permit and the failure to request and receive an extension of completion time prior to permit expiration while continuing to complete the project. Between August 31, 2021, and January 25, 2022, Respondent failed to complete a houseboat remodeling and relocation project by the expiration date of the 1973 permit and Respondent continued working on said project with the expired permit in advance of obtaining the necessary extension of completion time. This renders the work that occurred between August 31st and January 25th unauthorized, though it was retroactively authorized upon issuance of the fourth permit amendment.

Respondent falsely claims that this is a "Catch 22." Respondent could have avoided this violation by requesting an extension of completion time sooner than it did to prevent any construction delays and by halting work while the permit was expired. Instead, Respondent continued work on this project after the permit completion date passed after failing to pursue a needed extension of completion time with enough lead time to obtain the amendment prior to the permit's expiration. The violation persisted for 147 days between permit expiration on August 31, 2021, and issuance of an extension of completion time on January 25, 2022. Even though the houseboat project was completed in advance of amendment issuance, the work that occurred in the interim period was unauthorized until retroactively authorized on January 25, 2022.

4. Respondent Argues the Date of Issuance of Complaint Harms Respondent with Respect to the Penalty Amount. To resolve the penalty portion of the three resolved violations subject to this proceeding, BCDC issued its Complaint consistent with the procedures outlined in its regulations after Respondent accrued and failed to appeal or pay the accrued standardized fines. The date of issuance of the Complaint does not change the date of resolution of the three violations cited in the Complaint nor their duration. Though, the fact that the penalty portion of each of these three violations is being resolved through a formal enforcement proceeding rather than via the standardized fine process does change the time-period for which each of the three violations is being assessed a daily penalty as well as the daily penalty amount, together resulting in a larger penalty per violation than if the accrued standardized fine had been paid. Respondent argues that BCDC delayed issuing the Complaint until eight months after it was notified that the assignment and houseboat

violations were resolved, which has no effect on the penalty calculation because, as stated, the date of occurrence and the date of resolution of each violation is the same independent of the date of issuance of the Complaint. The so-called delay favored Respondent in that it had more time to resolve the penalty portion the three violations using standardized fines, including submitting an appeal thereof, which it failed to do, than had the Complaint been issued sooner.

5. Respondent Argues that Staff Changed the Duration of the Violations. The period of time a violation is subject to administrative civil penalties in a formal enforcement proceeding (FEP) is longer than the period of time that a violation is subject to administrative civil penalties if the penalty portion of a violation is resolved using the standardized fines process (SFP). As directed by Section 66641.59(e) of the MPA, the penalty period in a FEP is each day the violation occurs or persists, in other words from the date the violation began to the date of resolution. This is, by definition, a static time period.³ Whereas the penalty period in the SFP instead commences upon issuance of a letter that starts a standardized fine clock through to the date of resolution, which time period is by necessity less than the total duration of each violation and by definition includes a 35-day, fine-free grace period. Now that Respondent is subject to an administrative penalty pursuant to a FEP versus pursuant to the SFP, the number of days Respondent is subject to daily penalties has changed from 87 days to 136 days for the assignment violations and from 109 days to 147 days for the unauthorized work violation as outlined in staff's letter, dated August 2, 2022. Respondent falsely argues that the fines should be dismissed because staff lengthened, without justification, the duration of each violation resulting from the 35-day letter, dated October 8, 2021, compared with the duration outlined in the Complaint, dated October 27, 2022. As stated, the actual duration of each of the three violations has not changed but the number of days that are subject to administrative penalties does cover the entire period of each violation.

6. Respondent Argues an Error with Permit 1973.014.03 Relieves Respondent from the Houseboat Violation. On April 16, 2021, BCDC issued the third time extension of the 1973 permit to Commodore Marina to the attention of Harold Heldman, the owner of the houseboat that was the subject of the houseboat remodeling and relocation project. Respondent purchased the property three months later on July 21, 2021. The third amendment of the 1973 permit expired one month later, on August 31, 2021. On August 9, 2022, 22 days before permit expiration Respondent submitted a request for the fourth amendment, an extension of completion time. On January 25, 2022, BCDC issued the fourth time extension of the 1973 permit to Respondent retroactively authorizing an extension of completion time from August 31st to October 31, 2022. Respondent argues that it should not

³ For each of two permit assignment violations, the assignment form was due at time of sale and was provided 166 days following that date (though fines are being pursued for only 136 days allowing for a 30-day grace period to have voluntarily submitted each one). The unauthorized houseboat relocation project lasted for 147 days, from the date of permit expiration to the date of permit extension.

be liable for the houseboat violation since BCDC issued the third amendment to a marina tenant rather than to the former owner. This is incorrect and irrelevant to the fact that under Respondent's watch, tenant conducted houseboat remodeling and relocation with an expired permit for a 147-day-long period between August 31, 2021, and January 25, 2022. Between August 9, 2022, and January 6, 2022, Respondent failed to submit the information required to file its pending application as complete, precluding sooner issuance of the amendment.

7. Respondent Argues that BCDC Improperly Noticed Them and Failed to Follow the Standardized Fine Appeal Procedures Provided by the Regulations. On October 1, 2022, BCDC's Enforcement Regulations were updated. The regulations applicable to the standardized fine process that staff employed prior to issuing the Complaint on October 27, 2022, were the regulations as they existed prior to October 1, 2022. These two sets of regulations have differing notice requirements for payment of accrued standardized fines. BCDC staff issued three letters pertaining to standardized fines: 1. A letter, dated October 8, 2021, that commenced the standardized fine clock; 2. A letter dated August 2, 2022, informing Respondent to pay the accrued \$12,300 standardized fine amount within 30 days; and 3. A final warning letter, dated September 21, 2022, that informed Respondent it had 35 days to resolve the penalty portion of the violations using standardized fines and to avoid the commencement for a formal enforcement proceeding. Respondent ignored the second and third letters. Respondent claims both that it was improperly noticed of its option to appeal standardized fines as required by 14 CCR 11387 and/or never afforded a proper opportunity to appeal the fines resulting from the underlying assignment and houseboat violations as required by 14 CCR 11388 and, therefore, that the Complaint should be dismissed, including all fines. Prior to October 1, 2022, these sections of the Regulations and their requirements did not exist. Respondent was afforded notice of the Regulations and their contents and could have but did not submit an appeal of the fine amount anytime between August 2nd and October 26, 2022. When it failed to either pay the \$12,300 dollar amount or to appeal the amount of the fine, Respondent knowingly forfeited its right to resolve the penalty portion of this matter using standardized fines. Both the August 2nd and September 21st letters stated that Respondent's failure to resolve the penalty portion of the violations using standardized fines would result in commencement of a formal enforcement proceeding. Respondent made no overtures to discuss its options if it was unclear or concerned about this aspect of the enforcement action.

8. Respondent Argues the Complaint Fails to Allege Permit or MPA Violations. Section 66641.6(a) of the MPA requires that complaints "shall allege the act or failure to action that constitutes a violation of law" and 14 CCR Section 11302 states that the grounds for the imposition of civil penalties are the undertaking of any activity that requires a BCDC permit without having obtained such a permit or the violation of any term or condition of a BCDC permit. Respondent failed to comply with the permit condition in two permits that requires permit assignment to occur following transfer and Respondent undertook an activity that requires a BCDC permit, i.e., houseboat remodeling and relocation work, without having

obtained such a permit, i.e., after permit expiration. Even though the administrative record and the Complaint plainly state these facts, Respondent incorrectly argues that the Complaint fails to make this mandatory allegation and should, therefore, be dismissed. The facts bely Respondent's failed argument.

9. Respondent Argues the Permit Process Gave Impression There Would Be No Penalties.

BCDC always accepts permit applications and amendment requests, especially and including to resolve violations and, the permit process and the enforcement processes often run in tandem to one another. BCDC gives responsible parties a running start to resolve violations without the threat of penalties yet, when that clock is commenced, it is because efforts to date have indicated that without a stick, more time will elapse before responsible party achieves resolution of its violations. Such was the case in this matter when staff issued its letter on October 8, 2021, that commenced the standardized fine penalty clock for Respondent's violations. Respondent suggests that because it submitted in early 2022 an amendment request for violations that are the subject of VR&C #1, as opposed to the violations that are subject of this complaint, and because staff responded to said request, it had the impression that 'staff was working with' Respondent to resolve the violations without penalties. Staff is always working with responsible parties to help them resolve their enforcement issues and in this case staff has been doing and is continuing to do that. The October 8, 2021, letter states that for violations that need a permit or amendment, penalties will accrue until the permit or amendment is issued. Though Respondent's initial request to extend the completion date for the houseboat project was submitted in August 2021, it was not until after staff had commenced a penalty clock in October 2021 that Respondent submitted the information staff required to file as complete the application for the fourth amendment to the 1973 permit and to retroactively authorize the extension of completion time for the houseboat project. The civil penalty process and the after-the-fact permit process are parallel, and not mutually exclusive, procedures. Respondent's point of view that one counters the other is incorrect.

10. Respondent Argues It Is an Innocent Purchaser. In *Leslie Salt Co. v. BCDC*, 153 Cal.App.3d 605 (1984), the California Court of Appeals found that the McAteer-Petris Act holds landowners strictly liable for unauthorized fill placed by third persons on their property. The court determined that strict liability "is an appropriate and traditional consequence of the possession and control of land," *id.* at 611, and more than justified because of important public policy objectives the McAteer-Petris Act is designed to achieve. Respondent is responsible for the site conditions as they existed at time of transfer and purchase and is liable for administrative civil penalties for the time it took to resolve the three resolved violations despite its self-promotion as innocent purchaser who since buying property made every effort to address the violations.

11. Respondent Argues the BCDC Should Have Named Another Respondent. There is one owner of the property and that single owner is solely responsible for paying the administrative civil penalties that are due in this matter. Respondent may independently

pursue recourse against any third party it believes is or was responsible for the now-resolved violations at the property that resulted in the administrative civil penalties that are the subject of this complaint. Respondent's defense that BCDC should have named a former owner and current tenant is flawed. Further, Respondent did not contact BCDC for a due diligence report prior to purchasing the property.

12. Respondent Argues It Is Confusing to Have Two Formal Enforcement Proceedings With a Single Case Number and That the Timing of Staff's Communications, Pertaining On the One Hand to Settlement, and On the Other to Fines, Is Confusing. On October 8, 2021, as has been discussed, staff issued a 35-day enforcement letter that commenced a standardized fines clock. In January 2022, three of the violations cited in that letter were resolved and, therefore, they are not part of a separate Formal Enforcement Proceeding (FEP) that stems from the Violation Report and Complaint issued on July 29, 2022 (VR&C #1). On October 27, 2022, BCDC staff commenced a second FEP against Respondent for its failure to remit \$12,300 in standardized fines between August 2, 2022, and October 26, 2022 (Complaint #2). The violations that are the subject of VR&C #1 and Complaint #2 occurred at the same property and are subject to the same permits and, therefore, both stem from BCDC Enforcement Case ER2019.063. Respondent also states that the timing of the Final Warning Letter, dated September 21, 2022, to resolve the penalty portion of the resolved violations using the standardized fines is confusing because it was apparently issued two days after Respondent agreed to delay the enforcement hearing for the six, unresolved violations and because it used the same enforcement case number. There are two formal enforcement proceedings, one for unresolved violations and a second for penalties for resolved violations and Respondent is keeping track of these two parallel FEPs without issue.

Unresolved Issues

There are no unresolved issues.

Previous Enforcement Actions

This is the second RED pursued by BCDC against Respondent. The initial VR&C dated July 29, 2022 (VR&C #1), and its associated RED pertain to six unresolved violations, which are separate and distinct from the three resolved violations for which administrative civil penalties are being pursued in this secondary matter. Both formal enforcement proceedings are part of a single enforcement case, ER2019.063.

Recommendation

The Executive Director recommends that the Enforcement Committee adopt this Recommended Enforcement Decision and recommend that the full Commission issue the proposed Civil Penalty Order CCD2023.003.00.

Proposed Civil Penalty Order CCD2023.003.00

A proposed Civil Penalty Order consistent with this recommendation is attached (Exhibit A), along with the Complaint for Administrative Penalties (Exhibit B) and Respondent's Statement of Defense (Exhibit C).

Exhibit List

Exhibit A: Proposed Civil Penalty Order CCD2023.003.00

Exhibit B: Complaint for Administrative Civil Penalties with exhibits, dated October 27, 2022, ER2019.063.00

Exhibit C: Respondent's Statement of Defense (SOD) with exhibits, dated December 1, 2022, 71 pages

Enforcement Committee Recommendation to the Full Commission:

Please check one of the three boxes indicating your decision, then sign and return the memorandum to BCDC Staff:

By a vote of __ yeses, __ noes, and __ abstentions, the Enforcement Committee adopts the Executive Director's Recommended Enforcement Decision as its recommendation to the full Commission.

By a vote of __ yeses, __ noes, and __ abstentions, the Enforcement Committee conditionally adopts the Executive Director's Recommended Enforcement Decision as its recommendation to the full Commission as specified in the attached memorandum.

By a vote of __ yeses, __ noes, and __ abstentions, the Enforcement Committee declines to adopt the Executive Director's Recommended Enforcement Decision and recommends that the full Commission decline to issue the proposed Cease and Desist and Civil Penalty Order for the reasons specified in the attached memorandum.

MARIE GILMORE, Chair
Enforcement Committee
San Francisco Bay Conservation and Development Commission

Date