

SEAPLANE INVESTMENTS -
3 RESOLVED PAPER VIOLATIONS
PRESENTATION FOR RESPONDENT
PROPOSED CIVIL PENALTY ORDER NO. CCD2023.003.00 UNDER
ER 2019.063.00

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MAY 30, 2023

MAIN POINTS TO REMEMBER

- Seaplane Investments, LLC is an innocent purchaser who has been trying to comply since purchasing the property in July 2021.
- Three alleged violations have had zero impact on the Bay and have been fully resolved for over 1 1/2 years.
- BCDC is not authorized to levy either standardized fines or civil penalties for violations that did not take place.
- SI wants to resolve the issue in a way that ensures compliance and improvements on the site and does not bankrupt the company, causing foreclosure that would leaving a dilapidated site for the foreseeable future.

TIMELINE/CHRONOLOGY – IMPORTANT DATES

- **April 16, 2021:** BCDC issues extension for relocation of Houseboat #11 to Harold Hedelman - exp Aug 31st
- **July 21, 2021:** Seaplane Investments, LLC purchases the property
- August 9, 2021: Harold Hedelman requests another extension before deadline, BCDC does not respond
- **October 8, 2021:** First contact from BCDC to SI relating to any potential violations: Identifies need for 2 permit assignments + Houseboat - claims extension request was unauthorized party but sent by Hedelman who received previous extension
- **October 28, 2021:** SI Filed Permit Assignment Request - within 20 days & Pictures Showing Houseboat relocation complete
- **Oct-Dec 2022:** BCDC requests additional paperwork, which SI provides
- January 6, 2022: BCDC Acknowledges Permit Assignments Complete

TIMELINE/CHRONOLOGY – CONTINUED

- **January 25, 2022:** BCDC Acknowledges Houseboat Resolved; retroactive authorization back to August 9th Hedelman request
- **February 28, 2022:** SI Files Permit Application to address all outstanding compliance Issues.
- **March 12, 2022:** Emergency seaplane ramp repair
- **March 30, 2022:** BCDC Issues 30-day Letter in Response to Permit Application - all signs point to moving forward with permitting only (or so SI believes) - no further reference to standardized fines
- **July 29, 2022:** Violation Report (Hearing #2) - Six Violations, one brand new, no mention of paper violations.

AUGUST 2, 2022 LETTER - NO NOTICE OF APPEAL

August 2, 2022- Two days after July 29, 2022 Violation Report- Standardized Fines for Three Paper Violations

- Does not reference opportunity to appeal
- Does not identify appeal period
- Failure to provide adequate notice to respondents regarding their rights to an appeal- 14 CCR 11386
- Filed 4 days after July 29, 2022 Violation Report for 6 different violations, same Enforcement Number 2019.063.00, no explanation
- SI & its practitioner at the time utterly confused

TIMELINE/CHRONOLOGY – IMPORTANT DATES CONTINUED

- **September 2, 2022** - SI files Statement of Defense for 6 violations, but confused whether settlement is on the table; reserves right to file additional evidence.
- **September 6, 2022** - BCDC asks SI to delay hearings to 'reach resolution' on all outstanding issues; SI agrees believing this is for all 9 violations.
- **September 21, 2022 Final Warning Letter** - Issued while SI is trying to schedule meetings for resolution. No reference to right to appeal - completely conflicting communication;
- **No meetings between SI and BCDC** - due to broken leg and horrific accident for SI's attorney, Mr. Sharp, hearing delayed until November.
- **October 27, 2022**: Violation Report issued for Three Violations - No real settlement discussions
- **November 11, 2022**: SI Hires Rudder Law Group
- **December 1, 2022**: Statement of Defense addressing all 9 violations
- **December -March 2023**: Repeated attempts by SI to settle violations and complete compliance. Very little movement from staff;

VIOLATION #1 - NO VIOLATION OF PERMIT CONDITION M1985.030.01 - ACTUAL LANGUAGE IS KEY!

Permit 1985. Standard Conditions, Section IV.C: Permit Assignment. The rights derived from this amended permit are assignable as provided herein. An assignment shall not be effective until the assignee shall have executed and the Commission shall have received an acknowledgment that the assignee has read and understood the original application and amendment request for this amended permit and the amended permit

itself and agrees to be bound by the terms and conditions of the amended permit, and the assignee is accepted

by the Executive Director as being reasonably capable of complying with the terms of the amended permit.

****PERMISSIVE ONLY; NO AFFIRMATIVE DUTY** on the transferee. Permit condition was not violated.

Permit assignment form filed by Seaplane 20 days after first notice from BCD.

Unlawful to levy fines for violations that did not take place - will be overturned by a court of law.

SI being charged \$5, 440 for no actual violation

VIOLATION #2 - NO VIOLATION OF PERMIT CONDITION 1973.014.04 - PERMIT LANGUAGE IS KEY

Permit 1973.014.03 Standard Conditions, Section IV.C: Permit Assignment. The rights, duties, and obligations contained in this amended permit are assignable. When the **permittees** transfer any interest in any property either on which the activity is authorized to occur or which is necessary to achieve full compliance of one or more conditions to this amended permit, the **permittees/transfersors and transferees** shall execute and submit to the Commission a permit assignment form acceptable to the Executive Director.

*More affirmative, but **no 30-day deadline** as suggested in Violation Report and RED. Staff is not authorized to add language to permit conditions without Commission approval.

**Permit assignment form was provided by SI within 20 days of receiving the first notice from BCDC on October 28, 2021. Law requires an actual violation of a Permit Condition to levy a fine.

Unlawful to levy fines for violations that did not take place - will be overturned by a court of law.
SI being charged \$5, 440 for no actual violation.

PERMIT CONDITIONS HAVE NOT BEEN VIOLATED

No violation of permit assignment conditions:

- Permit 1985 Condition - not a proactive requirement and staff cannot make it a proactive requirement through the informal October 8, 2021, letter
- Permit 1973 did not require permit assignment within a particular period of time
- Unlike suggestion by staff, we agree that the permit must be assigned, but simply is not a violation if it's not done more than 30 days after property transfer.
- Importantly, SI filed permit assignment forms within 3 weeks of October 8, 2021, letter on October 28, 2022

Staff is creating a new requirement that not only did the permit need to be assigned by a specific date, which neither permit requires, but also that it needed to be done in a particular way as dictated by BCDC. Cannot be left up to BCDC to delay by requesting additional paperwork.

PERMIT ASSIGNMENT: UNLAWFUL ISSUANCE OF FINES & CIVIL PENALTIES - PERMITS HAVE NOT BEEN VIOLATED

Issuance of Civil Penalties only authorized to issue standardized fines or civil penalties:

“For failure to comply with a Commission permit” 14 CCR 11390

BCDC was not authorized to issue standardized fines or civil penalties for the two permit conditions.

HOUSEBOAT VIOLATION - CAUSED BY BCDC DELAY

August 9, 2021 - Extension Request - BCDC never responded

October 8, 2021 - First notice to SI from BCDC

October 28, 2021 - SI confirms that Houseboat has been completed with pictures

January 25, 2022- Houseboat Extension issued based on August 9, 2022 request - 3 months after construction completed

- Previous owners failed to finish the houseboat relocation over 5 years. One of the extensions was issued 12 months after received - no violations against the previous owner for this delay.
- SI completed job within 2 months of ownership and fined, even though timely extension request filed.
- Staff says “failure to request” an extension - FALSE - By staff’s own admission, an extension request was made on August 9, 2022, 3 weeks before the permit was to expire. BCDC never responded. BCDC issued extension based on the Hedelman request, so no issues with having tenant make this request.

\$10,290 fine could have been avoided if BCDC had responded to August 9, 2021 request

UNCLEAN HANDS: BCDC DELAY CANNOT TRIGGER FINES FOR THE PUBLIC

Unclean Hands: Courts do not allow agencies to levy fines based on delays that it had a hand in causing.

- Houseboat extension request was filed before expiration correctly on August 9, 2021, BCDC did not respond
- BCDC claimed three months later request was filed by the wrong party
 - *BUT extension request was filed by the same houseboat owner, the same person who received the previous April 2021 extension from BCDC, so this claim makes no sense
- BCDC failed to respond until January 25, 2022, even though SI had been diligently trying to receive an extension request in August 2021
- SI cannot be held accountable for BCDC's delay in responding

DUE PROCESS CONCERNS = FAIRNESS IS KEY

BCDC has failed to meet its burden of providing clear notice and following the procedures. Nowhere in ANY of letters (October 8, 2021, January 2022 emails, August 2, 2022 letter, September 21, 2022 letter is the word “APPEAL” ever used)

SI only told that they could dispute violations in enforcement hearing

FIRST opportunity to adjudicate underlying violations

Fairness: Arbitrary extension of penalty clock

October 8, 2021 started penalty clock - November 12, 2021

August 2, 2022 letter: Fines from November 12, 2021 - Jan 25, 2022

October Violation Report: Fines extended August 20, 2023 - Jan 25, 2022 (from 87 days to 136 days) Arbitrary 30-days after purchasing

There is no support in MPA, Title 14 regulations, or law for this change

CLAIMS MADE IN THE RECOMMENDED ENFORCEMENT DECISION 2023.003.00

- BCDC staff claims: “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.” (RED, p.2)
 - ◆ How could that be the case? This hearing was already scheduled to adjudicate these violations, so why would SI need to file anything further?
 - ◆ SI’s rights were preserved when it agreed to BCDC’s request to delay the public hearing to resolve all issues.
 - ◆ This is the FIRST and ONLY public hearing that SI has received on these three violations - FIRST AND ONLY opportunity to adjudicate their rights

CLAIMS MADE IN THE RECOMMENDED ENFORCEMENT DECISION 2023.003.00 – (CONTINUED)

- “Respondent was slow to complete paperwork” - FALSE
 - ◆ October 8, 2021 letter - FIRST NOTICE FROM BCDC
 - ◆ October 28, 2021- Response from SI with 2 permit assignment forms and pictures of houseboat completion - WITHIN 20 DAYS
 - ◆ BCDC asked for paperwork; SI timely complied
 - ◆ Staff was late in approving houseboat extension that caused the violation
- Staff time in resolving was not “high” - Compliance required one letter and 3 follow up emails for complete resolution.
- RED acknowledges that “nature and extent of harm caused by these violations is minor” - TRUE;
No impact to Bay

ALL VIOLATIONS COMPLETELY RESOLVED, NO BAY IMPACTS

- Permit 1973 Assigned - January 2022 - No impacts to Bay
Filed Permit Amendment Request February 2022 to address ALL BCDC Concerns
- Permit 1985 Assigned - January 2022 - No impacts to Bay
- Houseboat #11 Relocated in October 2021 - No Impacts to Bay
- No actual violations of 1985 Permit or 1973 Permit because one is a permissive condition and the other has no time requirement
- Houseboat 'violation' caused by BCDC failing to respond to August 9, 2021 permit extension request
- SI told in repeated letters that underlying violations could be adjudicated at an enforcement hearing - This is first enforcement hearing to adjudicate underlying violations - Major Due Process Violation

SOLUTION

- **Fairly adjudicate SI's rights**
 - No Permit Conditions Were Violated in Either 1973 or 1985
 - SI Filed Permit Assignment Forms within 20 Days - diligently trying to comply
 - Houseboat extension request timely filed - but BCDC did not respond
 - Houseboat completed within three months of ownership, previous owner could not complete in over 5 years of notice. They were never fined
 - No violations here, fines must be dismissed
- **Allow SI to focus on Compliance and Improvements to Site**
- **Public policy of promoting compliance and protecting Bay Resources dictates dismissing fines, supporting property owner diligently trying to comply**
- **Fairness and due process requires notice of appeal & dismissal of all three violations**
- **Work together on settlement of remaining six violations**