

San Francisco Bay Conservation and Development Commission

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TO: Enforcement Committee Members

FROM: Karen Donovan, Staff Counsel (415/352-3628; karen.donovan@bcdc.ca.gov)

SUBJECT: **Draft Minutes of August 8, 2019 Enforcement Committee Meeting**

1. Call to Order. The meeting was called to order by Chair Scharff in the Board Room, First Floor, Bay Area Metro Transit Center, 375 Beale Street, San Francisco, California at 9:33 a.m.

2. Roll Call. Present were Chair Scharff and Members Techel and Vasquez.

Not present were Members Gilmore and Ranchod.

Staff in attendance included Executive Director Larry Goldzband, Regulatory Director Brad McCrea, Chief Counsel Marc Zeppetello, Staff Counsel Karen Donovan, Chief of Enforcement Adrienne Klein, Enforcement Analyst Schuyler Olsson, Enforcement Analyst Matthew Trujillo, and Legal Secretary Amitabho Chattopadhyay.

3. Public Comment.

There was no Public Comment.

4. Approval of Draft Minutes for the July 24, 2019 Meeting. Chair Scharff asked for a motion and second to adopt the minutes of July 24, 2019.

MOTION: Member Techel moved approval of the July 24, 2019 meeting minutes, seconded by Member Vasquez.

VOTE: The motion carried unanimously with a vote of 3-0-0 with Members Techel, Vasquez and Chair Scharff voting “YES”, no “NO” votes, and no “ABSTAIN” votes.

5. Enforcement Report. Ms. Donovan gave the report as follows.

The meeting topics list is a living document. Staff has been making changes to accommodate questions and enforcement issues as they arise. For meetings beginning in September, BCDC may move the location of the second meeting of the month to rooms on the fifth or sixth floor of the Metro Center Building. On Wednesday, August 14, the meeting will still be held at SPUR.

Staff is still meeting weekly to discuss active cases.

Ms. Donovan gave an update on the enforcement action at Middle Harbor Shoreline Park. In accordance with the terms of the Cease and Desist order issued by the BCDC Executive Director, the Port has now submitted its Plan Review Request for two upcoming special events in 2019. Staff is reviewing the submittal. This coming Monday, BCDC staff are scheduled to meet with Port staff about the overall condition of the park and any necessary actions.

Contrary to implications in recent news articles about special events, BCDC’s understanding is that BCDC was not responsible for the decision to discontinue the Treasure Island Music Festival. The Port made this determination separately.

Chair Scharff asked if we should reach out to the media to clarify that BCDC did not cause this.

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ENFORCEMENT COMMITTEE MINUTES
FOR AUGUST 8, 2019

Mr. McCrea responded that he had spoken with a reporter at *SF Weekly* and made clear the understanding as explained by Ms. Donovan. Chair Scharff felt that as we step up enforcement, BCDC should be media-savvy and proactive in getting our story out.

6. Update on Inactive Cases. Ms. Klein provided the update via a slide presentation.

She addressed the Committee's request to understand the realm of open cases older than 2009. There are 52 such cases, 12 of which are high priority.

She also addressed the Committee's request to see the number of cases opened and closed per year during the prior decade. Chair Scharff asked why there were 70 cases closed in 2014 and 13 in 2015. Ms. Donovan replied that staff would look into it.

The first of the cases still open is a 10-home development in Benicia. The revetments for the stairway to the beach have failed over time and the City has closed the stairway for safety concerns. The City has maintenance responsibility, but in advance of the necessary repair and reconstruction, the property owner(s) need to conduct the shoreline protection work. They have slowly been working with the City to get approval for a concept plan. BCDC is recommending a voluntary resolution through City approval of the plan — a BCDC permit amendment and then stairway reconstruction.

Commissioner Techel asked the size of the beach to which the stairway gives access. Ms. Klein replied that you can walk the entire beach at low tide; there is an adverse impact on required public access.

Commissioner Vasquez asked if there had been an agreement for ongoing maintenance, or if the City was going to be solely responsible. Ms. Klein stated that the permit does have a maintenance condition, and this revetment is in the shoreline band. The permit had been issued to a developer who then transferred the property interest to 10 individual homeowners; they assumed responsibility for maintenance of the public access requirement in the permit. Ms. Klein's understanding was that there is no HOA.

Ms. Donovan stated that one of the key strategies is to contact all the responsible parties, i.e., the City and the homeowners, and make sure we get a schedule to move this to resolution.

Chair Scharff asked who is doing the revetment work. Ms. Klein answered that the homeowners have been slowly and voluntarily developing plans; they have retained a professional and recently submitted an updated concept design plan to the City.

Commissioner Techel stated that it would be very helpful to see the impact rating score. Ms. Donovan responded that staff will hold an upcoming briefing on prioritization so the Committee can see how scoring works.

Ms. Klein described the second case. A street in Marin County has pre-existing pile-supported homes; there have been multiple episodes of unauthorized fill placement under one of the residences in Corte Madera Creek. Staff hopes to contact the current owner and request submittal of an application and provide after-the-fact authorization if possible, providing a timeframe and resolving without fines.

The third case is a paper violation involving a public agency. After working diligently with the City and County of San Francisco, BCDC was unable to secure a draft document for street rights-of-way needing to be vacated in India Basin.

The fourth case is a similar issue: a permit involving public access issued to Oracle for a

development located inside the shoreline band, and the legal instrument was not recorded. The location is Belmont Slough. Staff plans to work with the property owner to achieve voluntary compliance under a timeline.

The fifth case is located on the Napa River, at a site where unauthorized boat docks have been removed. Staff is recommending closure of the case since the docks have been removed, with notification to the current property owner that work in the BCDC jurisdiction requires permits.

The sixth case involves a residence in Alameda whose owner has multiple properties. Staff authorized work to the boat dock but put an amendment in a permit associated with another address. Staff plans to look into this and correct the authorization as necessary.

The seventh case involves certain waterway jurisdiction in Sonoma County. Shoreline protection work was placed along the river. The owner was non-cooperative and non-compliant. Staff plans to investigate and determine the appropriate action.

The eighth case involves a 1985 consistency determination issued to the Army Corps of Engineers, authorizing dredging of the Stockton ship channel with disposal of material in various locations, including BCDC's managed wetland jurisdiction on Simmons Island at the Rich Island Duck Club. The material is still in place, and staff is proposing to re-engage to develop a plan for beneficial re-use of the excess dredged material, with coordination as necessary with the Attorney Generals.

Commissioner Techel asked if the Port has the authority to remove any excess materials. Ms. Klein answered that the Enforcement Committee had been comfortable with the idea of onsite re-use of the materials rather than moving it offsite, but they did not get to an approved plan.

Chair Scharff asked what staff would like the Committee to take away from the eight cases. Ms. Donovan answered that staff wanted them to see the proposed management plan for each of the cases. In some cases, the plans involve investigation as well as work with the violator to get the issues resolved and the cases closed. The most important objective now is to get the violations resolved and the cases closed.

Regarding the last case, Ms. Donovan stated that a complexity arises from the consistency determination; BCDC would have to coordinate with the Attorney General if we decide to commence litigation against the Corps. Chair Scharff noted that the case looks to be staff-intensive.

He commented regarding the seventh case, where the plan is to investigate the file and then come up with a case management plan. Ms. Donovan confirmed; the case is complicated in terms of what the very difficult property owner was doing. At various points the case has involved the County and the Corps of Engineers, but neither is currently engaged in enforcement actions.

Chair Scharff asked for clarification regarding the sixth case. Ms. Klein stated that the same person owned at least three properties, and it appears that there was an amendment issued for a permit governing another address on the street to do modifications to the boat dock at this property. Staff believes that in issuing the amendment, the dock reorientation had been authorized. During a site visit there was a discovery of shoreline protection that was unauthorized. Ms. Donovan pointed out that staff needs to spend some time with this file to determine what happened.

The group agreed that the fifth case has been resolved.

Regarding the two cases that had scored zero, Commissioner Techel asked the impact of

whatever instrument was not recorded. Ms. Klein answered that the permit itself is a contract that requires the provision of the public access and the maintenance of that area as open space. The legal instrument is a secondary assurance recorded on title, so if the property transfers, there is a legal metes and bounds description which is clear.

Mr. Olsson stated that the scoring system is for physical violations rather than paper violations. When a score is zero, staff might be using it as a placeholder to show that it has been scored. It does not mean that it has no impact. Ms. Klein added staff created a paper violation prioritization system which they have not really implemented yet. Staff has been applying the effort prioritization system only to their highest priority physical violation cases.

Chair Scharff sought confirmation that to close the fifth case, staff needs to send a single letter with no required follow-up. Ms. Klein confirmed. Ms. Donovan added that BCDC wants to be on record that the current property owner understands that if they move forward with any other work, it would require BCDC authorization.

Chair Scharff commented that all the cases except that one will require a substantial amount of effort.

He suggested that on the paper violation, we should send a notice stating that they have not recorded this document, then listing the fines – this is opposed to trying to work with them and cajole them.

Ms. Donovan stated that these are explicitly eligible for standardized fines. Currently the way the regulation is drafted, the violation is supposed to be resolved before the fine is determined, and finally closed out. Staff will discuss internally the tools available to move these cases with minimal effort. The question is when in the process you can assess those fines.

Chair Scharff asked if we are going to change the regulations in order to collect the fines before we close the case. Mr. Zeppetello noted that BCDC would have to amend the regulations and also deal with the due process issue involved in imposing fines without a notice that BCDC has an enforcement action related to the unresolved paper violation.

Chair Scharff requested that the agenda items be made broader to include the aim of streamlining the process, to enable the Commissioners to make useful comments.

Ms. Klein noted that in the past, there has been reluctance in the program to elevate things like failure to record a legal instrument. It is a permit condition and a violation, but if public access is available, is the effort worth the outcome? What BCDC is trying to do now is ensure that when we pick up a case, we bring it to completion which may include bringing the failure to record a legal instrument to the Committee for resolution.

Chair Scharff made a proposal for staff to come up with a system that applies to all cases. Failure to record an instrument should not ever be elevated to the Enforcement Committee; we should treat this as a parking ticket. The fines are not massive.

Ms. Klein clarified that we have these cases now, but we do not have any other tools. She asked what the Committee would like staff to do in the interim. Chair Scharff answered that he would like staff to spend time developing a system; we need to fix the system right away.

Ms. Donovan stated that staff is going to revisit this issue, particularly with regard to

taking a better systematic approach to paper violations.

Commissioner Vasquez stated that his sense for today was to look at the examples and discern what we should be doing moving forward, letting the current cases get resolved through the system. Ms. Donovan agreed that the staff's goal in doing the presentation had been exactly that.

7. Briefing on Penalty Policy Development - Base Penalty Factors. Ms. Donovan stated that this item was part of a multi-step process to pursue a penalty policy or penalty matrix. The purpose of the presentation was to seek Committee input on how to come up with base liability.

Ms. Donovan reviewed Section 66641.9, the section of the McAteer-Petris Act that addresses how to determine the amount of administrative civil liability.

The auditor had made a recommendation that staff create a penalty calculation worksheet.

Ms. Donovan reviewed factors common to many policies that staff has examined. Two primary factors are harm or potential for harm and impact to the regulatory program.

Commissioner Techel asked how staff is melding the penalty policies with BCDC's current authorities. Ms. Donovan stated that the basic structure is \$10-\$2,000/day with a maximum of \$30,000 per violation. BCDC is looking at ensuring that the duration of the violation is a factor.

Ms. Donovan posed a series of questions.

1. Should staff develop a scoring or ranking system for gravity of violations as part of the penalty policy?
2. If so, what are the criteria? Possibilities are the extent of the risk created, the resources at issue, the quantity, the extent of the public access impacted, and the importance of the regulatory requirement at issue.
3. What should be the possible range employed in a ranking or scoring system?
4. Should staff develop two different scoring or ranking methods to apply separately for public access violations and violations involving fill of the Bay?
5. Should staff predetermine the gravity score for certain violations? Ms. Donovan mentioned the NOAA schedule of offenses, although it may not fit for BCDC.

Commissioner Vasquez asked if we look at the quality of fill as well as the quantity. Ms. Donovan replied that typically that is an issue for dredging violations. As far as BCDC statutes are concerned, it is unauthorized. We would coordinate with the Water Quality Boards on anything representing a threat to water quality. Mr. McCrea noted that BCDC has standards it typically applies – for shoreline protection, we would look at clean engineered rock more favorably than a dump truck unloading broken sidewalk pieces.

Chair Scharff felt that the answer to the first question was yes: staff should develop a scoring system. It was helpful to compare NOAA and the EPA. He requested for staff to come forward with a proposal that takes the best parts of those penalty policies and makes sense. It should not be too complicated.

For the size of the scoring system, he encouraged staff to give a recommendation and explain why. For having separate scoring ranking methods for public access violations: intuitively you may want them separate. Again, staff should come forward with a proposal.

Having a specific gravity score probably makes it more transparent to the public and more

consistent than having individualized calculations.

He asked what staff feels are the goals in developing this policy. Ms. Donovan responded that the goals are to provide greater transparency for the public, and to receive Commissioner-provided guidance on how to assess civil penalties so that staff has a policy and a worksheet to follow. Another goal is to internally inform the staff process.

Mr. Zeppetello added the goal of promoting consistency to ensure that similar violations are treated alike, and to confirm that staff are not solely exercising their own discretion but are applying agreed-upon criteria and guidance.

Executive Director Goldzband listed four principles for the policy:

1. It is not arbitrary. Decisions made by BCDC are based upon some type of evidentiary standard.
2. The decision is reasonable on its face.
3. The penalty tends others toward compliance.
4. It will be seen over the long term as an arc toward fairness.

Chair Scharff suggested for staff to prepare a draft policy, and to list the goals in the staff report and explain how the choices they have made in designing the policy meet those goals. Ms. Donovan agreed to implement this suggestion. At the next meeting she intended to present some of the adjustment factors that are used, and she will give an introduction addressing some of the goals there as well.

Commissioner Techel felt that the Committee does not see cases enough to understand the factors used in scoring violations based on gravity. It makes more sense for staff to develop the template and then have the Committee react to it. She felt that public access violations involving fill of the Bay should be separated.

Commissioner Techel asked how the Richardson Bay case violated the McAteer-Petris Act. Ms. Donovan answered that there is nothing in the Act or the BCDC Bay Plan that allows someone to make a residential use of the Bay in the manner in which they are doing.

Commissioner Vasquez expressed the hope that staff would question any policy or direction in which we are going, because they are the ones who are going to implement it. Clarity needs to be at the forefront of what the Commission wants. We need to be able to articulate that what we are doing is fair to everyone.

Mr. Trujillo stated that to the issue of staff burden, a fortunate aspect of the policy that Ms. Donovan has laid out is that we have already done a lot of the work through the prioritization process to distill all of these factors in terms of severity, ecological impact, public access, etc. and can apply them to a penalty calculation. We all have a strong understanding the importance of these factors.

Mr. Olsson asked if it is worth discussing or clarifying whether this worksheet would be superseding the standardized fines. Ms. Donovan answered that it will not apply to standardized fines. The worksheet will apply when staff is making a penalty recommendation on a case coming before the Enforcement Committee. We have not yet answered the question as to how we are going to utilize the information we develop to inform the appeal process for standardized fines.

8. Briefing on Consideration of Violations Resulting in Significant Harm to the Bay or Public

Access. Ms. Donovan provided the briefing. She stated that the auditor had recommended a regulatory definition of significant harm.

- Section 11386(a) includes a reference to the term.
- *Significant harm* and *substantial harm* are interpreted largely the same.
- Ms. Donovan showed related regulations, particularly the CEQA/NEPA regulations and state CEQA guidelines.
- She suggested drawing on NEPA's use of *significantly*, which requires consideration of both context and intensity.
- CEQA also uses the word *significant*.

Chair Scharff and Commissioner Vasquez agreed on the second definition displayed by Ms. Donovan.

Commissioner Techel asked if the rating system has a piece of the definition. Ms. Donovan answered that the factors that go into determining the definition already fit in to the prioritization process. The factors will also be used as part of the penalty policy when staff comes up with the scoring for the gravity of the violation. However, they are going to be serving different purposes – this will be the definition of "significant harm to the Bay" for the standardized fine regulation.

Commissioner Techel mentioned that sometimes it pertains to an emergency that must be elevated right away, where some of what the Committee deals with is over time. Ms. Donovan responded that anything having significant harm to the Bay or public access is ineligible for standardized fines. The Committee already sees the cases that staff has determined as such.

Chair Scharff asked how to apply significant harm to existing or future public access. Mr. McCrea provided an example: someone might close off public access with a barricade because they have repairs to do.

Ms. Donovan stated that because of the efficiency in resolving cases through standardized fines, if a case is eligible there is a preference to use that process. The Executive Director has the discretion to take any action as appropriate to the Enforcement Committee and ultimately the Commission for resolution. There is no definite requirement to use the standardized fines process for any violation.

Chair Scharff noted that if we define significant harm, it lessens the Executive Director's discretion; this may have been the auditor's intention. He added that standardized fines may be a good way of dealing with public access violations. If so, we need a definition of "significant harm to future public access" and it should not preclude too many cases from being resolved using standardized fines. Ms. Donovan responded that staff would be considering that, coupled with a re-examination of the entire standardized fines regulation.

Mr. McCrea stated that the immediacy was an element of it – the public's ability to use a public space today. Staff knows that a standardized fines case will take months to resolve, since it starts out with low penalties and little incentive.

Chair Scharff agreed and pointed out that immediacy must be followed up by action if the case is taken out of the standardized fines. The case cannot languish.

Commissioner Vasquez asked about the Golden Gate Bridge suicide barrier – the district had closed off public access but did not believe they were under BCDC jurisdiction. Mr. McCrea said that in

the end, the district reserved the right to disagree that the bridge is under our jurisdiction. However, they did apply for a permit which BCDC issued – they seemed to understand that the most expeditious path was to go through the permit application process. Ms. Donovan commented that we moved that case because getting the objective satisfied sooner rather than later was in the public’s interest, in BCDC’s interest, and in the district’s interest.

Commissioner Techel asked if special events that close off part of public access cause significant harm. Mr. McCrea replied that it depends on the special event. Staff sees a broad range of special event proposals: small weddings, fun runs, stages set up for lunchtime concerts, events involving thousands of people and multi-day use including set-up and break-down. Because those kinds of special events are temporary, standardized fines are difficult to use for them.

Ms. Donovan added that injunctive remedies might be preferable depending on the type of event.

Commissioner Techel commented that special events can bring people into the public space who didn’t know it was there. Mr. McCrea agreed; staff has a longstanding tradition of supporting this kind of activation of public spaces.

Chair Scharff asked about next steps. Ms. Donovan answered that staff would take the Committee’s input and come up with a proposal for some specific language. The goal is to satisfy the auditor recommendation of creating a definition. The update on this topic is scheduled for November. Chair Scharff requested that staff update the schedule so that the Committee can remember that the language is coming then – to keep us moving toward deliverables.

Chair Scharff asked about the base penalty factors. Ms. Donovan stated that she will introduce another aspect of the penalty policy at the next meeting. She will be taking Committee input on each of these aspects, and stitching the various factors together into a draft policy.

Chair Scharff asked the staff direction for the inactive cases. Is the goal to close the cases? Ms. Donovan affirmed that it is to activate the cases and move them to resolution. Mr. McCrea mentioned another goal: that staff will be working on a system that helps them close the cases.

Chair Scharff felt that the policies and procedures are the highest priority. He also suggested that a regular update on the progress of the eight old cases from today would be helpful.

Mr. Trujillo agreed with the goal prioritization. Ms. Donovan noted that there is a kind of tension between the goal of developing the policies and procedures (and possibly regulatory changes), and the goal of moving the cases. Doing them simultaneously takes a lot of effort.

Executive Director Goldzband spoke of the tension between creating systems and leaving other work behind. He asked if the Chair wanted to have staff spend 75-80% of their time on developing the systems, and 25% of the time on cases that staff believes are most important. Chair Scharff agreed with this work distribution.

Commissioner Vasquez stated that the Committee wants to support staff and not put roadblocks in their ability to do the work.

Executive Director Goldzband offered the perspective that the Committee’s job is to create burdens for staff – to find problems for them to solve.

Commissioner Vasquez stressed the importance of giving clear direction to staff.

Commissioner Techel viewed the old cases as an opportunity to understand what ended up in the backlog. Going forward, it would be interesting if part of staff's report back to the Committee listed new cases and closed cases, just to recognize that work is going on. Ms. Donovan agreed with that recommendation, which had been done in the past.

Ms. Donovan stated that staff hopes to pilot some of the process improvements. Maybe some actions will serve both to develop process and policy improvements, and to move cases.

Executive Director Goldzband noted that in September, Ms. Donovan is going to provide an update for the full Commission on what the Enforcement Committee has done. He proposed devising a "roadmap" for the Committee and the whole Commission about the fall: decision points, examples of the tension between policy/process improvements and case management, and the probability that we will start implementing some of the changes we are working on now.

9. Future Agenda Items. Ms. Donovan requested any new agenda items.

Chair Scharff requested to know if staff is piloting anything that is changing the current processes, and how that is going. This would be a standing agenda item. It would be nice to have a sense of progress.

He continued that it would be helpful to revisit the subject of calculating the prioritization. What is the logic that informs the algorithm's score? Does it need to be changed?

He commented that discussing cases in terms of how they apply to our processes and procedures does not mean we are getting off topic. It is informing a concrete application.

Mr. McCrea asked if the Committee would like staff to use real permittees in the context of these enforcement discussions. He was hesitant about naming names. Chair Scharff said that he was fine with not naming names (unless the case is closed).

Commissioner Techel suggested that as staff calculates the penalties, they give a summary of the next steps in a paragraph; that topic is next scheduled for November. Ms. Donovan stated that the schedule is iterative and items can be moved around. Commissioner Techel felt that there is quite a time gap between now and November. A summary of our actions would be helpful, rather than having to pull it out of the Minutes. Ms. Donovan agreed.

Commissioner Techel noted that a briefing on Richardson Bay is scheduled for September 12th and asked, "Are we moving to a case study?" Ms. Donovan answered that staff wants to give an update on Richardson Bay that day, as there have been some developments.

Ms. Klein noted that the schedule is available on the website.

10. Adjournment. There being no further business, Chair Scharff adjourned the meeting at 11:58 a.m.