

# 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 14, 2019 Enforcement Committee Meeting**

**1. Call to Order.** The meeting was called to order by Chair Scharff in the First Floor Large Conference Room, SPUR, 654 Mission Street, San Francisco, California at 1:34 p.m.

**2. Roll Call.** Present were Chair Scharff and Members Gilmore and Vasquez.

Not present were Members Ranchod and Techel.

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

Staff will begin providing regular updates on the existing caseload and case resolution. They will also provide updates on the results of systemic changes for addressing paper violations.

At the previous meeting, the Committee had asked why there were far fewer cases closed in 2015 than in 2014. Ms. Donovan reported that in the first half of 2014, there had been a four-month period in which one of the Coastal Analyst II positions had been vacant and staff had been spread thin.

Ms. Donovan stated that staff is still looking for an alternative location for the second meeting of each month.

The next meeting will be held September 12 at the Metropolitan Center Building at 375 Beale, beginning at 9:30 a.m. The meeting will include an update of the Richardson Bay situation as well as a briefing on initiatives regarding abatement of abandoned and derelict vessels.

**5. Briefing on Penalty Policy Development.** Ms. Donovan provided an update via a PowerPoint presentation.

In response to a question about the prioritization scores, Ms. Klein stated that for each of the six criteria used by staff, they used the numbers 1, 2, or 3, or numbers 1 or 2. By means of the formula developed by staff, those numbers result in a score. The higher the score, the higher the priority.

Mr. Trujillo explained that some of the criteria are weighted higher than others; and staff also explained that, when applicable, the criteria scores of multiple jurisdictions (e.g. Bay, shoreline band, Suisun Marsh) are combined, resulting in a total prioritization score above the maximum score possible for any single jurisdiction.

Ms. Donovan then continued the presentation by discussing the economic benefit considerations of penalty policy development. The applicable statutory language in Section 66641.9

of the McAteer-Petris Act references economic savings, if any, resulting from the violation.

The basic goal of enforcement is that it ensures that the regulated community complies with statutory requirements.

Enforcement policy goals are deterrence, fairness, consistency, and transparency. The goals for considering economic benefit in setting penalties are:

- To deter violations by ensuring that civil penalties are more than a cost of doing business.
- To attach a financial risk to noncompliance.
- To level the playing field, providing equity between those who comply and those who violate.
- To promote consistency by establishing expectations as to what should be recovered in all enforcement actions.

Staff requested guidance from the Committee on whether staff should incorporate the recapture of economic benefit as part of the penalty policy. Ms. Donovan noted that she had provided a memo laying out the way various agencies do their penalty calculations. She broke them out into two possible options:

- Option 1: The calculated economic benefit gets added to a gravity-based sum.
- Option 2: The calculated economic benefit sets the minimum that must be considered as part of the assessment of any penalty.

Staff feels that in order to have an effective enforcement policy, an important element is to recapture the economic benefit that BCDC can calculate for a violation.

Member Gilmore agreed – if the penalty is less than the economic gain, there is an incentive to keep violating. She pointed out that we need to make it easy enough for the public to get some reasonable idea of the penalty. She saw some benefit in having a straight percentage over the economic gain. Calculating a gravity-based amount would be complicated for staff to do and to explain to the public.

Chair Scharff stated that it is important that the violator be allowed to come back and argue the economic benefit. Regarding Option 2 being 10% above the economic benefit – what about violations with no economic benefit? Ms. Donovan responded that economic benefit does not eliminate the gravity-based calculation, but is calculated in order to know where the “floor” is. Adjustments are made based on the violator, the culpability, etc.; always to be compared with the goal of the economic benefit, plus 10% in the case of the SWLCB policy.

Chair Scharff observed it would be better to start with the penalty, then look at the economic benefit, rather than vice versa.

Member Vasquez asked how district attorneys make their calculations when going after violators. Ms. Donovan explained the way the EPA approaches their policies and holds negotiated settlement talks. She stated that if a violator does not cooperate with BCDC in coming to some sort of agreement, the Commission has the statutory maximum penalties to fall back on.

Member Vasquez asked about a recent case involving a barge being dragged for twenty-four hours. Staff replied they would look at the cost of a tug for that time period, costs avoided by not seeking permission, cost savings from not moving the barges to an authorized facility, avoided costs, delayed costs, and economic benefit.

Chair Scharff cautioned against double counting factors. Ms. Donovan said that the language of an eventual policy will spell that out. The way most agencies look at it is to recognize that economic benefit covers several elements, including profit, late costs, and avoided costs. Most agencies look at the process as cumulative. She agreed that we do not want to look at the same thing twice.

Mr. Zeppetello commented regarding how district attorneys handle unfair business practice cases: it is often through civil discovery in terms of trying to get information about profits from the alleged violator. Mr. Zeppetello reminded the group that the regulations give the BCDC Executive Director authority to subpoena documents and do interrogatories. If the team could think of the questions to ask, we can try to get information from the alleged violator.

Chair Scharff commented that the ability to pay works well. He then raised the issue that this process seems quite complicated and requires much staff time. The tendency is always to want to create the perfect system. Chair Scharff stated that he would accept staff making approximations, as long as the violator has the ability to appeal.

Member Gilmore stated that whatever we come up with must be transparent and somewhat predictable – easy for the public to grasp without requiring a lot of staff time explaining a complex formula.

Chair Scharff agreed and expressed concern that the algorithm is difficult to understand.

Member Gilmore pointed out that there are two ways of achieving deterrence: making someone go through the process and pay the penalty, and having people know the penalty ahead of time and making a conscious decision that it is cheaper to follow the rules – but if they do not understand how the penalty works, that is not going to happen. Ms. Donovan responded that this is staff's primary focus in going through the goals: to ensure that the process is understandable and transparent.

Chair Scharff expressed a strong preference toward a simpler model in which the public could sit down and figure out a penalty. Ms. Donovan agreed. We need the data on how many people understand the statutory maximums and then make choices due to their economic benefit. It is helpful for the Legislature and the community writ large to understand the limitations in BCDC's stances.

Chair Scharff raised the issue that settlement may become impossible for a violator: the maximum fine is the minimum you are going to settle for.

Member Vasquez inquired about how to get the message out on handling violators. He and Chair Scharff preferred having the violator not wanting to go before the Enforcement Committee. Ms. Donovan stated that part of this is not allowing cases to linger; some hit the \$30,000 mark because they have gone on for so long. Member Vasquez commented that some of his constituents say they will continue in their violation until they get caught.

Ms. Klein felt that many violations are benign. After complying with local government requirements, regional water board requirements, etc., the legal instrument to dedicate a public access area is forgotten or not understood.

Chair Scharff suggested the idea of a conditional permit in which six months after it is issued, and the permittee has been walked through the conditions and done everything, the permit is then final. Mr. Zeppetello stated that they would have to check – the issue is whether this would be

consistent with the Permit Streamlining Act and the McAteer-Petris Act.

Mr. Zeppetello said that BCDC's permit streamlining process involves the clock running while the permittee does everything staff has required in the application and pays the fee. The permit is then complete. The pre-application process can go on for six months or nine months.

Chair Scharff asked if the pre-application process could include anything that needs to be recorded being provided to the general counsel, who would record the documents and fees. Ms. Donovan responded that regarding public access and other elements, sometimes the final design is not known until the project is completed.

Mr. McCrea explained that records involving the dedicated public access area may require finalization after construction, so the surveyor can do a metes-and-bounds description of the built area.

Chair Scharff was in favor of putting the burden on the applicant for public access. They would prepare the instrument, then staff holds onto it and tells them upon completion of the project that we will record it within 30 days. If there is a problem, the applicant fixes it. Member Gilmore agreed.

Mr. Zeppetello stated that the legal instrument is one thing, but the plan review is another. The permit would require construction of a path, for example, and the applicant is supposed to provide plans. Ms. Donovan stated that it comes back to personnel issues. Staff would need to go out and inspect the path before recording. If they found that the path was 12 feet where the instrument they just recorded said 15 feet, staff would have to pursue getting the permit amended, getting a new instrument, and getting it re-recorded.

Mr. Trujillo stated that an important and missing aspect of the permitting process is to put most of the onus on permittees to ensure that they remain in compliance with their BCDC permits.

Ms. Klein stated that there are layers within the process. For example, permits with public access requirements are supposed to be recorded within 30 days of approval because the legal instrument comes later – prior to occupancy. Ms. Klein's perspective is that the legal instrument is the most specific description of public access.

Mr. McCrea commented that the legal instrument is probably not the best tool for ensuring the permittees comply. It is a linear process with many steps.

Ms. Donovan summarized that it may be helpful to give a presentation explaining this process to the committee. She would like to look at ways the process can be improved to make compliance easier.

Returning to the presentation, Ms. Donovan said she wanted to work on some factors for the penalty policy internally: culpability of the violator, violator history, and voluntary removal or resolution efforts. Chair Scharff felt those are important factors that could affect the penalty going up or down.

He continued that with public agencies, various people may be involved in violations and there may be more culpability than violator history.

Ms. Donovan stated that she wanted to have one more discussion on factors before drafting a policy.

She listed factors in the statute and other policies that she would like to discuss further: cost to

the state in pursuing the enforcement action, violator size and unique characteristics, and ability to pay and ability to continue in business. Regarding the last, Chair Scharff felt skeptical because of the potential for unfairness.

Member Gilmore agreed that including the ability to continue in business could be opening a can of worms. Regarding cost to the state, there may be businesses, cities, or communities you do not want the state to come in and hammer on. Ms. Donovan stated that “cost to the state” typically refers to staff hours. She felt that if the staff time involved in pursuing something is significant enough, incorporating it into the violation makes sense.

Chair Scharff said that he was still a bit concerned with how prioritization works with the factors.

Ms. Klein said that in scoring “Nature, Type of Use of Fill” staff does consider violation history. Some of the factors coming from the law are considered and some are not.

Mr. Olsson commented on the separate scores for the Bay and the upland: a violation in the Bay and also the surrounding band would be scored and added together. Further, one enforcement case can include major and minor violations and have one score. We tend to think of the score as a holistic figure or as the most severe violation, but calculating the penalty needs to be done for each specific violation.

Member Vasquez asked if penalties under the Suisun Marsh Preservation Act are higher or lower than those under the McAteer-Petris Act. Mr. Zeppetello said that in the Marsh Act there are statutory but not administrative penalties. The Commission would have to refer a violation of the Marsh Act to the Attorney General to bring an action to court.

Ms. Klein commented that the Marsh Act provides the Commission the ability to issue a cease and desist order. If that is violated, a penalty can be assessed at up to \$6,000 per day, collected through litigation.

**6. Briefing on Database Utilization and Limitations.** Mr. Olsson stated the presentation would focus on limitations of Enforcement’s spatial database and web tool, the related criticisms in the audit report, and staff’s planned response.

The tool is an online, GIS-based system to intake and track enforcement cases. Violations can be reported online, and staff can use the system obtain data on individual cases. Mr. Olsson explained the color coding.

Executive Director Goldzband stressed that the database is internal to BCDC. Ms. Donovan stated that it is available to all staff, as is the permit database.

Mr. Olsson stated that the database has increased efficiency, accuracy, and consistency in case intake, management, and reporting.

He listed the limitations.

- It is not designed for enforcement case management – it is basically a spreadsheet linked to points on a map.
- It is not integrated with permitting data (although enforcement is closely linked to permitting) or electronic case files.
- It does not give notifications, it is not automated, and it does not generate letters/notices, etc.

- The user interface is not designed for frequent updates to data.
- It is missing certain data for older cases resolved before 2002.
- It has various system glitches.

Mr. Olsson listed the criticisms of the tool in the audit report. Basically, the auditors focused on the lack of data on notification letters to violators, the number of violations per case, and missing older cases (which probably will not ever be added).

Chair Scharff mentioned records retention policies regarding keeping no records more than 20 years old for closed cases. Member Gilmore felt that cases before 2002 still open could be added to the database, but the rest do not need to be included.

Mr. Zeppetello mentioned two orders from 1994 in which the current property owner recently wanted to make some changes. However, the orders still may not need to be in this database.

Mr. Olsson read a quote from the audit stating that staff "...still rely on paper files to conduct their work." He felt this to be inaccurate; they constantly use the database and it greatly facilitates their work. He also emphasized the broad context that all of BCDC's systems are in need of modernization, digitization, and integration between permitting and enforcement.

Member Gilmore asked how we should use this audit to improve our data systems. Has staff looked to other agencies, such as the Regional Water Quality Control Board and the State Lands Commission, to see what kind of database they use and whether their data is integrated? Once a database system has been identified, how can the information from the audit and staff's daily work experiences be used to request money from the state?

Mr. Olsson stated that staff is considering minor incremental short-term improvements to the existing tool. In the long term, we want to find a better tool. BCDC senior management is looking into this. Some agencies use Accela; there are off-the-shelf tools that would already be better than what we have, and we are looking to customize. BCDC is working with an IT consultant to do this.

Executive Director Goldzband stated that the goal has to be a unified data system that starts from the time someone comes in to talk about a permit possibility to the time an enforcement case is closed. This fall Andrew Chin, BCDC's IT consultant, will be working with the Enforcement staff. We will talk with Tim Garza, CIO at the Water Resources Agency, with whom we have a contract, to discern how to move forward. This will include hiring a consultant who understands how to create databases. We will include a lot of information on what other state agencies have and are developing. We will develop a plan and present it to the Department of Finance, which has the ability to say yes or no.

Executive Director Goldzband expressed the hope that BCDC can get financing for this fiscal year to finish some kind of plan that allows the Department of Finance to provide BCDC with next fiscal year funds to develop "stuff." This may mean an additional IT database person.

Chair Scharff asked if they will allow us to hire consultants. Executive Director Goldzband answered that we will be hiring a consultant to develop the database. The consultant's first task will be to figure out what we need, then to figure out the universe of options.

Member Vasquez asked if it is difficult to justify why we need the consultant. Executive Director Goldzband stated that Peggy Atwell had been able to identify unused funds this past fiscal year and begin a contract with the CIO at the Water Resources Agency, so we can use some of those monies to start this process. Executive Director Goldzband noted that the Department of Finance has read the

audit and understands the situation.

Chair Scharff noted that when the City of Palo Alto went through the process, it was poorly handled and poorly managed even though people tried hard. Part of the problem is too many options. We should be careful about ambitions – the more ambitious and perfect the system, the more it may collapse.

Member Gilmore noted that State Lands has gone through the process. Executive Director Goldzband said that they do not yet have a deliverable. He explained the benefits of going through a CIO who recognizes what other agencies have done in other areas. The consultant also looks at the other agencies.

Mr. Olsson noted that State Lands has a customizable tool built from scratch.

Mr. Trujillo commented on the amount of staff resources that go to maintaining the current database, developed in-house. That is time taken away from permitting and enforcement.

Mr. Olsson felt that the City of Palo Alto had run into issues because they have so many different services they provide, and trying to integrate them was overwhelming. BCDC Permitting and Enforcement should be more simple.

**7. Future Agenda Items.** Ms. Donovan proposed that staff bring the prioritization to the Committee at the September 25 meeting.

Staff will also put on the schedule a meeting for a briefing of the project approval process.

Executive Director Goldzband mentioned the “road map” for the September 12 meeting. The Committee will receive this supplement to their calendars: a visual depiction of the decisions that staff will ask them to make by the end of the year.

Member Gilmore requested a list of dates showing when responses to the audit must be done. Executive Director Goldzband answered that it will be part of the road map.

Executive Director Goldzband noted that Channel 5 contacted him about a story on Richardson Bay they are doing; he will be interviewed.

## **8. Adjournment.**

**MOTION:** Member Vasquez moved to close the meeting, seconded by Member Gilmore.

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

The meeting adjourned at 3:28 p.m.