

San Francisco Bay Conservation and Development Commission

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DRAFT MINUTES

TO: Enforcement Committee Members

FROM: Karen Donovan, Staff Counsel (415/352-3628;
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SUBJECT: Draft Minutes of October 23, 2019 Enforcement Committee Meeting

1. Call to Order. The meeting was called to order by Acting Chair Gilmore at the Bay Area Metro Center, 375 Beale Street, Tamalpais Room, Seventh Floor, San Francisco, California at 9:37 a.m.

2. Roll Call. Present were Members Gilmore, Techel and Vasquez.

Not present were Member Ranchod and Chair Scharff.

Staff in attendance included Executive Director Larry Goldzband, Regulatory Director Brad McCrea, Chief of the Bay Resources Division Erik Buehmann, Chief of Permits for Shoreline Development Ethan Lavine, Staff Counsel Karen Donovan, Chief of Enforcement Adrienne Klein, Enforcement Analyst Schuyler Olsson, Enforcement Analyst Matthew Trujillo and Legal Secretary Jaidev Kalra.

Also in attendance was Shari Posner on behalf of the Office of the Attorney General.

Also in attendance were Patrick Foster, Port of San Francisco and Ashley LaBass, Bay Planning Coalition.

3. Public Comment. Acting Chair Gilmore called for public comment on subjects that were not on the agenda.

No members of the public addressed the Committee.

4. Approval of Draft Minutes for the October 10, 2019 Meeting. Approval of the minutes was deferred to the next meeting.

5. Enforcement Report. Ms. Donovan gave a brief report as follows.

Staff continues to work on cases. They have also been involved in productive discussions with the City of Oakland.

The next meeting is scheduled for Thursday, November 14.

6. Briefing on Permitting Process and Permit Special Conditions. Ms. Donovan stated that the focus of the presentation was the types of conditions – standard and special – that show up in permits and require some action by the permittee after the permit is issued.



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Ethan Lavine, BCDC Chief of Permits for Shoreline Development, began the briefing. He gave a high-level overview of the structure of the BCDC permit, as follows.

The structure of any BCDC permit (major, administrative, region-wide, or emergency) has four sections:

1. It authorizes the project that is applied for. The information includes location, particularly street address and jurisdiction. It describes the size and the quantity of activities and uses. It includes deadlines for commencing and completing the work.
2. The second part explains the special conditions: terms and conditions that define alternatives or measures to offset adverse impacts to the Bay. They speak to the policy concerns raised within the law (the McAteer-Petris Act or the Suisun Marsh Law), BCDC regulations, and relevant plans (the Bay Plan or a special area plan). The special conditions are formulated specifically in response to the circumstances of the project. There are common policy issues that typically arise.
3. The third part lists the Findings and Declarations: statements of fact that explain how the project conforms to the law, regulations and policies. This is where the basis for special conditions is given. A finding is included that explains that the project is consistent with public needs and public trust for the area, and that it has been appropriately reviewed under CEQA. A finding shows that the permit is consistent with the approved coastal management program for BCDC.
4. The fourth part includes standard conditions which do not vary permit by permit. They are generally applicable to all project types.

Erik Buehmann, Chief of the Bay Resources Division, reviewed an example permit for a mixed-use development in Hercules that the Commission had approved two years ago. He explained that terms and conditions are changed and modified to reflect the project. Further, staff is always looking for opportunities to improve the approach and the permits language.

Mr. Buehmann explained the **Authorization** section in the permit example which is segmented by jurisdiction. It includes a mixed-use development portion and a public access portion. It also includes the date and deadlines for commencement and completion of authorized activities (which includes time extensions).

The **Special Conditions** section shows a number of special conditions

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routinely seen, including the Plan Review condition. Because of timeline and contracting, many times when BCDC files the application and issues the permit, they do not have 100% construction plans; the plan review condition gives the applicant flexibility and ensures that final plans are reviewed and approved.

Acting Chair Gilmore asked, since we have 90 days from the application to issue the permit, what does the application consist of – how much information does the applicant have to present before the timeline starts running? Mr. Buehmann answered that it depends on the project. There may be local discretionary approval, water quality certification, U.S. Fish and Wildlife Service approval, Streambed Alteration Agreements and Take Permits. Mr. Lavine stated that in terms of plans, BCDC is looking for a sufficient level of detail to understand the total impacts of the project.

Member Techel asked if the permit has already gone through the local government when it comes to BCDC. Mr. Buehmann confirmed.

Acting Chair Gilmore asked if the applicant comes in to have a discussion with staff to learn about the various requirements first. Mr. Buehmann confirmed. That is why staff rarely brings an application to the Commission recommending a denial. The Plan Review condition provides that the applicant can come back with their 100% plan and have it reviewed by Staff Engineer Raphael Montes or Bay Design Analyst Andrea Gaffney, depending on if it is a public access issue or an engineering issue. It is also flexible, because sometimes things change during construction and small changes can be approved administratively through a streamlined process.

Member Vasquez asked about a conceptual plan that has gone through a local agency and received approval – do they have to wait for BCDC? Mr. Buehmann gave the timeline: the local government's planning approval, with discretionary approval (which includes CEQA), will have happened before BCDC files the application. BCDC issues the permit, which is part of the local process to get their building permit. The local government checks that they have approval, then they can start construction. They should not be able to get a permit to start construction before they get the BCDC permit.

Mr. Buehmann stated that **Special Conditions** include **Construction Documents** which are referenced to provide a baseline, although it might change.

The timeline for Plan Review is usually about 45 days.

Foundation Layout Inspection is sometimes seen in developments with public access.

Acting Chair Gilmore asked if plan checks are actual site checks. Mr. Lavine answered that they can be. For the Hercules project, someone had gone

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out with a tape measure to check for an accurate distance between the foundations being poured and the public access path. This site had been very tight.

Mr. McCrea commented that BCDC can use many different people on the staff throughout the process to ensure compliance. BCDC is bringing on another Bay Design Analyst by the end of the year, which will help to enable us to get out to the site more often.

The **Public Access** section describes the amenities that must be built if there is to be public access. There is **Area** for required size and **Permanent Guarantee**, which is another way of saying a deed restriction. Ms. Donovan stated that notice is the main thing; the property may change hands in the future. Other components of the **Public Access** section are **Recordation of the Instrument** and **Improvements Within the Total Public Access Area**, which describes the specific amenities that should be constructed and usually includes an exhibit. Landscaping and hardscaping are included in the section.

Maintenance is a component of the Public Access section and includes preparing the path, trimming the hedges, and preparing for flooding impact. **Assignment** is a component for when a developer is building a property but is going to sign it over to another entity.

Mr. McCrea asked about the enforceability of **Maintenance**. Ms. Donovan replied that it is fully enforceable. If someone fails to satisfy the requirement that they maintain the improvements, that could be the subject of an Enforcement Action.

Reasonable Rules and Restrictions included as part of the public access allow for the permittee to submit a request to be reviewed and approved by staff. **Construction Operations and Staging** is for the possibility of more restrictions on pile driving and so on. **Sea Level Rise Adaptation Planning and Implementation** conditions are different for every project.

The next section is **Findings and Declarations** which wraps everything together and tells the story of the project. There is a large Public Access component that cites the Bay Plan policies and deals with the different amenities.

There is usually a summary of the Design Review Board review and the CEQA process.

The **Standard Conditions** section involves mostly procedural conditions: how BCDC makes sure the permit is enforceable and how BCDC gives notice of the permit.

Permit Execution is an important component of the section. Mr. McCrea noted that people do not always execute the original of the permit, nor do they

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always sign and return their permit.

Notice of Completion is another important component.

Member Vasquez asked if BCDC requires a bond for completion. Mr. Buehmann answered that it typically does not.

The language establishing that **Permit Runs with the Land** is important. Other components are **Government Approvals** and **Permission to Conduct Site Visit**.

Acting Chair Gilmore asked the difference between the deed restriction and the **Recordation** condition. Mr. Buehmann answered that the **Recordation** does not restrict anything but just shows that a BCDC permit has been approved. The permit runs with the land; if there are public access conditions on the site, it still applies to the person who may subsequently purchase the property. The permit guarantee does the extra step of outlining within metes and bounds the specific area for which the public access must be dedicated.

Acting Chair Gilmore asked why BCDC would not always want the permit recorded. Mr. Buehmann answered that BCDC typically does require it for projects involving public access except when it is a public entity (such as the Port of San Francisco) that we do not think is going to sell the property.

Mr. Buehmann showed a sample Notice of Completion.

Executive Director Goldzband asked the Committee if anything had surprised them because it did not move toward enforcement or compliance in a way that local governments do. Member Vasquez and Acting Chair Gilmore responded that enforcement is difficult for local agencies. Acting Chair Gilmore felt that local governments employ more resources and actually go out and do inspections. This is why violations tend to get caught. Member Techel agreed.

Executive Director Goldzband asked if that part of local government is paid for through the regulatory program, which includes the permits. All Committee Members confirmed.

7. Briefing on Compliance Improvements. Ms. Donovan began by stating that staff just does not have enough resources. The Committee realized that. Member Vasquez noted the importance of verifying that everything had gotten done that was supposed to as part of an authorization. Acting Chair Gilmore asked how we can make it better; putting different conditions in the permit still requires follow-up. She saw it as a two-pronged problem: tracking the permit conditions such that staff has some kind of tickler file requires resources; and finding something that needs to be checked requires resources.

Ms. Donovan listed the percentage of violation types in various

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categories:

- Failure to implement permit conditions (25%)
- Maintenance issues (25%)
- Unauthorized development (50%)

Challenges in tracking permit compliance are:

- Existing resource limitations (technological and staffing)
- Lack of staff time and resources
- Permittees not grasping the consequences of failing to implement the conditions

Acting Chair Gilmore commented that because of the first two bullet points, there is probably a set of permittees who feel it better to ask for forgiveness than for permission. It could be a cost-benefit analysis. Member Vasquez commented that every day he encounters people who do not want to put up with bureaucracy; further, there are no consequences for them to deal with.

- The current remedies for failure to comply are an enforcement action, fines, injunctive relief, or civil penalties.

Acting Chair Gilmore asked if we have ever used permit revocation as a consequence for permit violation. Ms. Donovan said that a report on that could be prepared.

Acting Chair Gilmore asked the average number of permits we receive per month or per year. Mr. Buehmann answered that for the past five years we have had about five major permits, 24 minor permits, and 80-100 non-material amendments per year.

Acting Chair Gilmore noted that the current backlog is about 270. If we are ever going to make progress on it, we need to be mindful about how we handle the new permits coming in.

Mr. McCrea stated that on the two permitting teams there are three analysts each. Sediment Management has one person working a little less than half-time on dredging permits amendments.

Ms. Donovan stated that another key challenge is that many staff are involved in approving the compliance with these special conditions. They are the Bay Design Analyst, the Engineer, scientists, staff attorneys, and the permits and enforcement staff.

Executive Director Goldzband asked the Committee if that is any different from what they see in local government. Member Vasquez answered

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that they also may have outside agencies such as fire districts commenting on a project.

Acting Chair Gilmore stated that if a project is wholly within the city, it is not that complicated. In certain cities you can get an inspection within 24 hours – that shows the amount of resources and staff they throw at projects.

She asked how BCDC compares with other agencies of similar size in terms of number of staff. Mr. Olsson answered that State Lands has just one person in enforcement for the whole state. The Coastal Commission has one person in each of their small field offices and three or four at the state level. Executive Director Goldzband stated that the Coastal Commission has six people who are designated with Enforcement in their title. Mr. Olsson said that they have a backlog of thousands of cases.

Ms. Donovan addressed actions that could lessen the compliance challenges:

- Develop additional measures to ensure that permittees return the executed permit and acknowledgment
- Emphasize to permittees the need to designate a contact
- Develop additional measures to inform permittees of the need to comply

Ms. Donovan described some additional actions that could improve compliance:

- Update the permit transmittal cover letter to more clearly state the requirements
- Set aside enforcement staff time to follow up on issued permits and establish a compliance protocol
- Revise the Notice of Completion to include identification of specific project portions that remain to be completed / Require separate Notices of Completion for phased projects
- Look into measures to explore more up-front submittals

Ms. Donovan posed the question: Should the enforcement staff explore means of better using some current time, absent any additional personnel, to do permit compliance?

Member Vasquez asked if this would entail a reminder letter. Ms. Donovan replied that it would start with actually pulling the permit and tracking whether there has been compliance. Mr. McCrea explained that currently we do not have a protocol for inspecting each project under construction; we do not go out during different phases as a local government

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building official would. Much of it we put on the permittee, telling them that they are ultimately responsible for complying with the permit.

Member Techel commented that some of these public improvements would definitely benefit the local communities. Is there a way to tie in BCDC permit compliance to what the local communities are reviewing? Executive Director Goldzband felt that asking the cities and counties to do BCDC's state work would not be a popular idea. Yet it was a great question. Member Techel suggested a pilot project in one or two jurisdictions.

Ms. Donovan stated that even the audit had honed in on the concept of finding a way of tracking compliance, being there to urge and help people through the submittal requirements: there is a certain amount of enforcement we could head off. This is universally recognized across agencies: compliance is a key element of keeping the enforcement load down.

Acting Chair Gilmore saw two separate issues: permit/compliance and catching people. Today's topic deals with the first. For the idea of looking at permits six months after issuance, she liked the idea of a pilot project but cautioned that we have to be very targeted because of limited resources. What kinds of cases will give us the most bang for the buck? As an agency, we would need to prioritize the kinds most important to us – public access, fill? We would then go after those as part of the pilot.

Member Techel liked the idea and felt that we need to stay closer to the cases with longer-range improvement requirements. Staying in contact with them would help the staff turnover problem – to keep them aware of the timeline.

Acting Chair Gilmore noted the importance of getting a point of contact. The permittee should be required to update the point of contact if that individual leaves.

Executive Director Goldzband asked if local governments have separate enforcement staff. The Committee Members answered that they have a code enforcement staff which is usually under the building department. Member Vasquez stated that they do compliance and they are also handed cases to prosecute. Acting Chair Gilmore said that many times a member of the public will call about something their neighbor is doing; Code Enforcement will go out and check.

Executive Director Goldzband asked whether compliance should be part of enforcement or should be separate. Acting Chair Gilmore felt that it should be separate – if you want people to comply, you issue the permit and help them along to comply. If they do not comply and someone notices, it becomes an enforcement issue.

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Ms. Donovan commented that with more staff resources we could better coordinate. Ensuring that compliance provides a better connection heads off an enforcement action.

Regarding BCDC staff dealing with compliance assistance or enforcement, there are two different factors at play: the discretionary work and the statutory, deadline-driven work on the regulatory side.

She noted that the economy drives the number of permit applications coming in the door. It probably also drives how much diligence someone devotes to complying with their permit.

Acting Chair Gilmore addressed the maintenance issue. Is it possible to put in a permit a plan for maintaining the dedicated public access? Mr. Buehmann answered that for many large projects, it is a discussion topic in the application phase. Some large multi-phased developments have a maintenance document. It is a reasonable requirement for some circumstances. Executive Director Goldzband said that staff could do something that would be required as part of the pre-application process that would give assurance that something is there.

Ms. Donovan noted that they do have some enforcement cases involving the issue of failure to set up appropriate CC&Rs or the failure of the homeowners association to do what they should be doing.

Mr. McCrea questioned if there is some other mechanism that can be required legally and reasonably (the McAteer-Petris Act states that all conditions must be reasonable) that assures that all maintenance can get done, and that a future financing mechanism can kick into place to cover the cost of financing if maintenance falls through.

Acting Chair Gilmore wanted to ensure that there is a mechanism to actually fund it. Often money gets spent on something other than public access. She asked staff if this would be a helpful tool rather than just additional paperwork. Staff responded that they would look into it.

Mr. McCrea stated that at the end of the entire permitting process, the applicant is required to file a Notice of Completion that certifies that they have built the project in compliance with the permit and plans. He confirmed that BCDC finds out that they are not in compliance when a member of the public complains. Mr. Buehmann stated that some permits have had a condition that sets up a site visit after completion to ensure consistency.

Mr. McCrea stated that in the early 2000s, BCDC hired a second Bay Design Analyst for the purpose of doing inspections. However, the budget was reduced and we had to let that person go.

Acting Chair Gilmore felt that if we get the technology to track the

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permitting and it comes up on a tickler file, the next step is to send a letter; that could be as important as getting the resources to send people out to inspect. Her next desired priority would be to have the resources to follow up on whatever the technology flags. Third would be sending out inspectors.

Mr. Trujillo stated that getting back to the six-month check-in suggestion, one idea is that instead of dedicating staff time to initiating the process and doing the visit, that we actually require permittees to submit reports. It would be easier for us to notice when we do not receive reports.

Member Vasquez asked where the problems are in a permit that does not meet all the requirements. Mr. Trujillo answered that first it would be long-term maintenance, then construction.

Mr. McCrea pointed out that the permittee's copy of the permit usually gets filed in a binder and put on a shelf. The Committee discussed whether there should be a way to make our permits more accessible; they might be read more often.

Acting Chair Gilmore was in favor of software that makes permits available to the public in a read-only version.

Member Vasquez mentioned the idea of bonding. Staff confirmed that they will look into it.

8. Additional Agency Tools. Ms. Donovan briefed the Committee as follows.

The lack of resources hinders us – that is the overarching theme.

Member Vasquez commented that with the county, if someone builds a house, they do not have the power to make it final. The county goes out to check that everything was done.

Ms. Donovan stated that this presentation would focus on any changes we could make to the Act or the regulations that would help us to further compliance.

She listed actions to further compliance.

- Regarding inspections, she noted that standard conditions include permission for BCDC to access the site during business hours. However, we do not have the staff or the time.
- For reporting, we have special conditions including plan review and document submittal and recording.

Acting Chair Gilmore commented that she liked Mr. Trujillo's idea of having the permittee report back periodically as to where they are. If they do not report back, they get a letter.

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- For monitoring, standard conditions already allow site visits.
- For remedies, we have revocation and other enforcement tools.

Acting Chair Gilmore commented that revocation may be an idle threat. Regarding inspecting and monitoring, since we do not have the resources to implement them, she preferred to focus on things we can do in the short-term such as having permittees give reports periodically.

Mr. McCrea suggested that we can inform permittees of what the expectations are – maybe a compliance brochure to be mailed out with every set of permits. Once produced, the brochure would not take much effort.

Member Vasquez commented that people need to read what they receive. There is an amount of personal responsibility. How do we ensure that they understand what they are supposed to do?

Mr. Olsson commented that the person who signs the permit may not be the person in charge of implementing it. Ms. Donovan noted that having permittees designate a project manager may ensure that the permit gets read.

She continued the presentation. BCDC needs the ability to record a Notice of Violation, which functions like a lien. There is a process that goes along with it. Acting Chair Gilmore asked to know how successful the Coastal Commission is when they issue their Notices of Violation; does it work for them? Ms. Donovan noted that the process takes time.

She stated that other agencies and authorities also include more explicit authority to collect penalties and costs.

Acting Chair Gilmore felt that the cost of investigation, which is outside of our statutory limitations, could be a real tool in terms of when we pursue violations and investigations. Eventually it could be full cost recovery. Ms. Donovan responded that it would require additional time to track all of those costs. But it could potentially further the deterrent function of the enforcement program.

Member Techel asked for an update on the software effort. Executive Director Goldzband responded that the administrative staff is starting to look at the effort. BCDC will be working on it with the Resources Agency.

Member Techel acknowledged that in the process, the permitting part and the document seem pretty solid; it is compliance that gets challenging.

Executive Director Goldzband noted that the audit stated that in general, BCDC's permitting conditions are reasonable.

Acting Chair Gilmore complimented the staff on their hard work in processing 135 applications per year. She felt that they are doing a very good

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job of making very complex processes more understandable to those of us who do not deal with it every day. She acknowledged the amount of time, thought, and energy that have gone into producing possible solutions even with the limitations on the regulatory side and the resource side.

9. Future Agenda Items. Ms. Donovan addressed the item.

She stated that staff will schedule a briefing to address the Committee's questions about permit revocation. They will also have a follow-up to this meeting to evaluate their ability to implement some tools such as bonding, reporting, and ensuring the designation of project managers mainly for the more complex projects and the public agencies.

At the request of Executive Director Goldzband, Ms. Donovan reviewed the timeline for the rest of the year.

- November 14: Projects that agencies will allow a violator to undertake in lieu of paying penalties.
- November 20: Conceptual penalty policy; follow-up briefings on Richardson's Bay and Union Point Park.
- December 12: Briefing on process improvements.
- January 9: TBD

In 2020 Ms. Donovan would like to schedule meetings as we are ready to take action, scaling back from twice a month. She would still like to meet at least once a month.

In February she would like to follow up on the briefing on delineating and calculating violations – potentially to bring that guidance to the Committee for approval.

Staff is coming up on its six-month check-in for the audit.

In December staff will brief the full Commission on progress on the enforcement program.

Acting Chair Gilmore asked when Richardson's Bay is going to come to the full Commission – their joint powers had an idea to do a permanent mooring in the Bay and they may need to be hearing from the full Commission that this is not a possibility. Executive Director Goldzband responded that unless there is some legal action that the Enforcement Committee has brought to the Commission, there will be none taken. On the other hand, if this Committee believes that the proposed mooring field is unacceptable, is there a reason that we cannot schedule an early 2020 full Commission meeting in which the Enforcement Committee gives some kind of update?

Ms. Donovan stated that the Committee can ask the Richardson's Bay

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Regional Agency (RBRA) to present the elements of the permanent mooring idea. We do not want them acting without a clear understanding of what is and isn't acceptable to both the Committee and the Commission.

Ms. Posner stated that this would be a briefing where the public would be able to comment. Until the RBRA submits a permit application (or other proposal) there is nothing to vote on. Before they get an application together, we should communicate within the proper procedure that the permanent mooring would not be possible (if that is the case).

Executive Director Goldzband suggested that Ms. Posner, Ms. Donovan, and the rest of the team come up with the appropriate process and present it to the Committee at the next meeting.

10. Adjournment. There being no further business, Acting Chair Gilmore adjourned the meeting at 11:58 p.m.