

San Francisco Bay Conservation and Development Commission

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TO: Enforcement Committee Members

FROM: Karen Donovan, Staff Counsel (415/352-3628;

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SUBJECT: Approved Minutes of November 14, 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, Board Room, First Floor, San Francisco, California at 9:35 a.m.

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

Not present were Members Ranchod and Scharff.

Staff in attendance were Executive Director Larry Goldzband, Regulatory Director Brad McCrea, Staff Counsel Karen Donovan, Enforcement Policy Manager Priscilla Njuguna, and Chief of Enforcement Adrienne Klein.

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

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 and October 23, 2019 Meetings.

Acting Chair Gilmore asked for a motion and second to adopt the minutes of October 10, 2019.

MOTION: Commissioner Vasquez moved approval of the October 10, 2019 meeting minutes, seconded by Commissioner Techel. The motion carried unanimously with a vote of 3-0-0 with Members Techel, Vasquez and Acting Chair Gilmore voting “YES”, no “NO” votes, and no “ABSTAIN” votes.

Acting Chair Gilmore asked for a motion and second to adopt the minutes of October 23, 2019.

MOTION: Commissioner Vasquez moved approval of the October 23, 2019 meeting minutes, seconded by Commissioner Techel. The motion carried unanimously with a vote of 3-0-0 with Members Techel, Vasquez and Acting Chair Gilmore voting “YES”, no “NO” votes, and no “ABSTAIN” votes.

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

This Thursday staff will be submitting the six-month response to the audit.

Ms. Donovan introduced Priscilla Njuguna, the new Enforcement Policy Manager.

Ms. Donovan announced that the next meeting will be November 20. It will include updates on Union Point Park and Richardson’s Bay.

Acting Chair Gilmore suggested for the entire Commission to receive a copy of the reply to the auditor’s report. Ms. Donovan agreed. She noted that

at the first Commission meeting in December, staff will provide an update of progress on addressing the audit.

6. Case Update. Ms. Klein briefed the Committee on changes in caseload between September 25 and November 7.

Eight cases have been opened, one of which is Tier 1 (priority). Staff has resolved nine cases.

The caseload has reduced from 284 to 283. There are 30 active cases, 12 of which are Tier 1 and 18 of which are Tier 2 (non-priority).

Five of the closed cases were newly opened from 2019.

7. Briefing on Policy Principles for Voluntarily Undertaken Environmentally Beneficial Projects. Ms. Donovan briefed the Committee as follows.

The projects are referred to as Supplementally Environmental Projects (SEPs).

During the briefing Ms. Donovan reviewed policy principles that other agencies have established regarding what makes an acceptable SEP. She also gave a brief introduction to SEPs.

SEPs are defined as:

- Environmentally beneficial.
- In settlement of an enforcement action.
- Voluntarily undertaken.
- Offsetting a portion of a civil penalty.

SEPs come into play in settling enforcement actions where the violators propose undertaking an environmentally beneficial action in lieu of paying a portion of the monetary civil penalty amount.

SEPs must advance at least one of the objectives of the statute that is the basis of the enforcement action.

Agencies typically use monetary limitations for the amount of the civil penalty that can be offset, as follows.

- EPA: The monetary penalty should recoup the economic benefit the violator gained, as well as an appropriate gravity-based penalty of the harm.
- CalEPA: Up to 50%.
- SWRCB: Up to 50% + \$15,000 for mandatory minimum penalties.

BCDC currently has the authority to use SEPs.

Ms. Donovan posed some questions to the Committee:

- *Would it be helpful to have written guidance for staff?*
- *If so, what should we include – legal requirements, categories of projects, monetary limitations?*

Member Techel asked why a person being fined wants this alternative.

Ms. Donovan answered that there can be many motivations. Many entities have access to equipment, raw materials, etc. and offer to accomplish projects that can benefit the environment in a way that is more cost-efficient to them

than paying a monetary sum. A number of benefits can be accomplished by the use of SEPs including directing actions toward communities in need. The typical motivation staff sees is people using their resources because it is more cost-efficient to them.

Member Techel asked how we can determine the value of that. Ms. Donovan answered that staff would draw on the guidance developed by other agencies. Staff has begun discussing economic calculations and how to monetize.

Acting Chair Gilmore asked for more information on cases in which BCDC has done something similar. Ms. Donovan stated that all the cases are quite case-specific. She would like to present them to the Committee as staff starts forming the guidance.

Acting Chair Gilmore asked how many cases could fall into the SEP category. Ms. Donovan answered that approximately 90% of cases are typically solved through the standardized fine process. Often the fine is reduced through the appeal process. The SEP option would come in and be utilized as we are negotiating settlements in cases where there is an administrative civil penalty involved.

Acting Chair Gilmore expressed wariness about putting new processes or procedures in place that do not involve a worthwhile number of cases. Should staff resources be better spent elsewhere?

Member Vasquez asked if we already have areas that could receive benefit from these actions – construction or money for these efforts. Ms. Donovan confirmed that we have had cases where we have allowed people to do environmentally beneficial actions (remove fill, preserve areas, etc.). She reiterated that the Committee has the statutory authority to use discretion in handling enforcement cases to determine appropriate resolution. Establishing guidance would afford an element of transparency. However, nothing precludes us from negotiating appropriate resolution of a case with a violator.

Member Vasquez asked if we have the ability to put the dollars that would accumulate from this into a separate pot, and target projects that we thought we would not be able to get to, to help benefit a community. Ms. Donovan felt it a good idea but wanted to pursue it in some other type of discussion. She noted that typically because of the issues involved, the federal and state EPAs have established parameters that SEPs cannot be directed by the agency – essentially to ensure that the agency is not using the violator to the agency's work. Having a pot of money controlled by BCDC could be problematic.

Member Techel asked where our fines go. Ms. Donovan replied that they go to the Bay Fill Clean-Up and Abatement Fund. Executive Director Goldzband stated that the Legislature appropriates an amount of money each year that can be spent from that fund. They do not direct BCDC to expend those funds

on any particular project. Over the past several years the funds have been spent on staff salaries.

Acting Chair Gilmore felt that this is an issue of timing – maybe we should focus on higher priorities now. Further, she had a hard time giving guidance when she has minimal knowledge of this area and how we have used it. She requested examples of how we have used this and how it comes up.

Member Techel felt that the policies from other agencies would not be difficult to adopt.

Mr. McCrea recommended for Ms. Klein to share two example cases. She described a case in Richmond from 2009 that had resulted in the accrual of \$120,000 of standardized fines. The fine was appealed through the BCDC Chair and Executive Director and reduced by 50%. The responsible party was unwilling to resolve the case at that stage and negotiations proceeded. This resulted in a settlement agreement with a payment of \$50,000 to the Bay Trail for public access improvements in that jurisdiction.

Acting Chair Gilmore asked if that case would have been considered a Tier 1 case. Ms. Klein said it probably would have (it preceded the scoring system now in use).

Ms. Klein described the 2016 case of the Marina Village Associates at Loch Lomond Marina in San Rafael. The Commission had adopted a stipulated Cease and Desist Order. Staff had issued a violation report that stated the

administrative penalty to be \$563,500. During settlement negotiations the responsible party proposed to provide changes to the site to reduce the impacts of flooding already occurring at the site. They offered to pay a penalty into the Bay Fill Fund of \$210,000, and committed to resolving the flooding issue by preparing a report and implementing its recommendations after obtaining a permit amendment. The cost of the report and implementation of its recommendations were not limited, so long as they were not unreasonable and the flooding issue was resolved.

Mr. McCrea stated that having some guidance could provide clarity both to the staff on the expectations, and to the regulated community to better understand the procedures.

Acting Chair Gilmore proposed that as to categories of projects, they should be Tier 1 cases; that seems to be where the gap is. A lot of staff time goes into those projects and into the potential enforcement and resolution.

She asked if staff was seeking broad parameters for settlement of these large projects. Ms. Donovan confirmed: staff wanted to establish that there are general guidelines that should apply when someone is seeking to mitigate a portion of the monetary penalty.

Member Techel stated that the list on page 3 of the staff report showing projects that are not allowable was helpful.

Responding to the concerns about capacity, Member Vasquez asked the

level of staff effort it would take to pull together a draft guidance on the use of SEPs. Ms. Donovan felt that it would be relatively quick because staff could pull from the guidance used by the State Board, CalEPA, etc.

Acting Chair Gilmore suggested that we continue to use our statutory authority, with an eye to gathering data and working on some of the other priorities we have outlined.

Member Vasquez felt that since it is already occurring, if it does not take too much staff work to come up with the draft guidelines, we should go forward with it.

Member Vasquez asked if reporting back on SEPs starts to fill in some of the boxes for the audit itself. Ms. Donovan said that it does, although this was not a specific recommendation of the audit.

Executive Director Goldzband felt it wise for Ms. Donovan to bring this up at this time for two reasons. It is not going to take a lot of time or effort to draft the guidelines. Further, as BCDC moves forward during the next couple of years, there are large cases for which the leadership at BCDC and the Enforcement Committee will be asked to decide, approve, and change recommendations in a number of different ways. Staff would benefit from the Committee leadership providing a “box” and creating certainty with regard to proposing resolution of large cases.

Acting Chair Gilmore asked when the draft policy will come back to the

Committee. Executive Director answered that it will be part of the package coming back to the Committee in 2020 for decisions.

Member Techel asked about the settlement agreement at West Point Harbor – would that fit under this policy? Executive Director Goldzband answered that those types of resolutions are all very case-specific. It had been \$175,000 with \$75,000 used for the Marine Science Institute and \$75,000 to the Coastal Conservancy for a Bay-related project.

Member Techel asked if those organizations would fit the criteria on page 3 of the staff report. Executive Director Goldzband said he would need to review.

Acting Chair Gilmore asked staff to think about whether a threat of litigation pertaining to the enforcement action makes a difference. Ms. Donovan stated that litigation risk is an appropriate consideration in terms of things that might make it difficult to succeed in litigation.

8. Future Agenda Items. Ms. Donovan stated that in December staff will present the procedural improvements they have been working on.

Executive Director Goldzband stated that he will be on the agenda at the next meeting regarding ongoing discussions with the Department of Finance.

9. Adjournment. There being no further business, Acting Chair Gilmore adjourned the meeting at 10:33 a.m.