

San Francisco Bay Conservation and Development Commission

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April 22, 2020

TO: Enforcement Committee Members

FROM: Priscilla Njuguna, Enforcement Program Manager (415/352-3640;
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SUBJECT: Draft Minutes of April 22, 2020 Enforcement Committee Meeting

1. Call to Order. The meeting held online only via Zoom was called to order by Chair Scharff at 9:30 A.M.

2. Roll Call. Present were Chair Scharff and Commissioners Gilmore and Techel. At the time of roll call, Commissioner Vasquez was experiencing Internet difficulties at his location; he returned to the meeting as noted below.

Not present was Commissioner Ranchod.

Chair Scharff stated that a quorum was present.

Staff in attendance included Executive Director, Larry Goldzband; Chief Deputy Director, Steve Goldbeck; Regulatory Director, Brad McCrea; Staff Counsel, Karen Donovan; Legal Secretary, Margie Malan; Principal Enforcement Analyst, Adrienne Klein; Coastal Program Analyst, Schuyler Olsson; Enforcement Program Analyst, Matthew Trujillo; and Enforcement Program Manager, Priscilla Njuguna.

Shari Posner, Deputy Attorney General, also attended the meeting.

3. Public Comment. Chair Scharff called for public comment on subjects not on the agenda. There were none.

He stated that the Enforcement Committee had received one comment via email that was posted on the website.

4. Approval of Draft Minutes for the April 9, 2020 Meeting.

Chair Scharff asked for a motion and second to adopt the minutes of the meeting on April 9, 2020.

MOTION: Commissioner Gilmore moved for approval of the April 9, 2020 meeting minutes and was seconded by Commissioner Techel. The motion carried unanimously by a vote of 3-0-0 with Commissioners Gilmore, Techel, and Chair Scharff voting “YES”, no “NO” votes, and no “ABSTAIN” votes.

5. Enforcement Report. Ms. Njuguna gave the Enforcement Report as follows:

Staff opened four new cases in April, bringing the total number of cases opened in 2020 to 27. Staff closed two cases, bringing the total number of cases closed in 2020 to 10.

On April 16, Mr. Olsson began transitioning out of Enforcement and into the Permitting Unit. Mr. Olsson will retain the Union Point Park case and a few other cases that are close to resolution.

Ms. Njuguna then reported that staff received a fine payment of \$2,000 for an action resolved through an after-the-fact permit issued on March 23, 2020. There had been some delays in issuing the permit because of turnover in the permittee's staff. BCDC was able to find a new contact and continue with case resolution. This case is illustrative of delays that can arise in case resolution that are outside of BCDC's control.

The Enforcement Unit is continuing the mission-based review through the Department of Finance.

Ms. Njuguna also noted that the Committee received a letter from a San Francisco law firm on April 14 raising questions about the Enforcement Program that BCDC counsel is preparing a response to.

Executive Director Goldzband commented that he had spoken with Kristin Shelton at the Department of Finance (DoF) who had thought DoF could help BCDC with a budget adjustment in the May Revise. However, since the shelter-in-place began and because of its effects on the state budget, BCDC does not expect any financial adjustment during the upcoming fiscal year.

Chair Scharff asked who will take Mr. Olsson's role in Enforcement. Ms. Njuguna replied that eventually the position will be backfilled; for the moment hiring is on hold. Enforcement is hoping to hire in June, likely an applicant from the outside, although all applicants including internal applicants will be considered.

(At this point Ms. Donovan noted that Commissioner Vasquez had re-joined the meeting during the discussion.)

6. Enforcement Program Long Range Plan. Ms. Njuguna gave the presentation.

She noted that as a result of changes made in the past year the Enforcement Program has been transformed. Enforcement started by defining program goals that govern their actions, including the improvements toward which they are working namely: Deterrence, Transparency, Consistency, and Fairness.

She then reported on the use of violator Initial Contact letters for new case reports enabling timely staff communication with violators and providing information on staff expectations. This has enabled staff to resolve cases in a more streamlined fashion. Staff have generally been receiving responses from violators within 15-days of mailing the letters. For the 12-14 letters that have sent mailed this year, Enforcement staff have received varied responses. She recognized the key advantage of the process as a means of determining who to hold accountable. Enforcement staff have also found that integrating other

state agencies early in the case resolution process helps develop a collaborative approach to enforcement. The agency with the most available tools in terms of enforcement of environmental law can potentially take the lead in certain aspects, while also meeting BCDC's requirements.

On case review procedures, Ms. Njuguna reported that staff examine an Aged Case Report and group cases by violator. As cases come in, staff have updated case status codes that currently define where a case is in the case resolution process. Staff can readily see any lag between when the case comes in and when it finally gets resolved.

The audit report had observed that staff should be managing cases within timelines and review measures regarding how things get done. Recognizing that cases vary in complexity, staff is looking to use case milestones as a way of having timeframes that are adaptable to different types of cases. Ms. Njuguna described the investigation and resolution processes.

Staff has received useful feedback from the Enforcement Committee on case prioritization improvement. Prioritizing ensures that staff are looking at the most critical cases first. In descending order, the priorities are: Significant harm, Most harm to the bay, Limits on maximum feasible public access, Unpermitted work that is permissible; and Integrating ethical considerations. Other prioritization approaches that are being refined are case context, grouping cases by respondent, and pairing cases by respondent.

In terms of case resolution: Historically if staff received multiple reports for the same issue, they would not create a new case – they would roll the new reports into the existing report. Presently, in order to clearly document the effort that goes into resolving the different reports Enforcement receives, staff are tracking each case as it comes in with a case number. This way, even if a case is opened and merged into something else, there is a clear record of how many cases came in for that year, and how they go through the case management progression of Intake, Assignment, Investigation, Resolution, and Closure.

Ms. Njuguna discussed the number of open cases and their status.

Staff has recognized that they have resources that they can use more effectively including the following:

- ArcGIS for improvements made in tracking cases.
- 1docStop tagging monitoring reports making them easier to find when verifying permit terms have been met (a proactive compliance measure). This builds efficiencies in the case resolution process.
- A defined process for monitoring report review.
- Documenting early coordination with other resource agencies impacted by enforcement cases.

- Measures to enable compliance proactively, including recognizing whose role by title in a respondent's agency is responsible for letting staff know the current status of a matter.
- Electronic file keeping that mirrors the paper file. Electronic files make remote work much more feasible, but it is also a way to improve efficiencies for case research. For maps and schematics, the paper file may sometimes be the best resource because of scales that are easier to see on paper.
- Template letters build efficiencies in process by reducing the work needed to bring cases to resolution.

Next steps include the following:

- Capacity building involving ongoing briefings to Enforcement Committee members to assist in the resolution of complex cases.
- Actions furthering case resolution mailing notices to violators as well as coordinated enforcement working with other resource agencies when possible.
- Policy development involving:
 - Criteria for violation delineation such as combining or separating violations;
 - Supplemental Environmental Projects – a means of resolving cases with work done to mitigate damages paid;
 - Penalty policy to define (over and above what already exists in regulation) how we apply the regulatory provisions, so the regulated community know what to expect.

Commissioner Questions. Commissioner Gilmore asked when the briefing to the full Commission on all this will occur so the Committee can check in with the full Commission. Ms. Njuguna answered that the presentation will be on May 7. She noted that the presentation will include specifics on all the different presentations that the Enforcement Committee has received, and how they relate to staff's response to the audit recommendations.

Commissioner Techel commented that the case resolution numbers do not show great progress. Ms. Njuguna replied that it is a matter of perspective. For example, she noted that when she joined Enforcement there were 296 cases. Staff is closing cases even as new cases come in without a dramatic increase in total cases. She asserted that the way progress can now be verified is the distinction between the total number of cases and those that are being actively pursued – how staff is working through them. Staff can now define where cases are in the process of resolution; that gives a clearer picture of what needs to be done to move through the resolution process, for example,

from the investigation phase to the resolution phase to the closure phase. The numbers in today's presentation give a visual representation of much broader work being done in the background to make clear that staff are pushing the needle from intake to closure in a systematic way that hasn't been clearly defined in the past.

Commissioner Techel suggested portraying this information in a slide to better document progress over time.

Mr. McCrea weighed in that the five-person Enforcement team is doing two things simultaneously: Working on the cases and Retooling the program. Both these efforts are taking a significant amount of time. This aspect could be included in the slides to the Commissioners.

Commissioner Gilmore noted that it had taken awhile for the Enforcement Committee to understand what staff does – what they do, how they do it, what is important. She urged staff to keep that in mind when they go before the entire Commission that has less information on internal process specifics.

Executive Director Goldzband explained that Ms. Njuguna intends to have a detailed document for the Commission that they can follow when she gives the larger-scale slide program introduction and presentation.

Commissioner Techel noted that Ms. Njuguna had referred to "moving the needle." A graphic portraying where staff is spending their efforts would be helpful.

7. Vote to Revise the Terms and Schedule for Adoption of Proposed Cease and Desist Order No. CCD2020.001.00. Mr. Olsson provided an update on the Union Point Park matter, particularly the City of Oakland's request that the staff-recommended enforcement order, which was approved by the Committee, be revised to change the dates that the actions in the proposed uncontested cease and desist order must be undertaken. The City had noted the necessity to change these dates based on recent delays related to public health requirements for the ongoing coronavirus pandemic.

On March 12, the Enforcement Committee voted to adopt the proposed uncontested order addressing homeless encampments and associated activities negatively impacting BCDC-required public access areas at Union Point Park in Oakland.

The City of Oakland has already achieved certain elements required in the order, including relocating residents to a temporary reprieve zone and providing them with appropriate services, conducting clean-up of surrounding park areas, and restoring safety lighting in the northern parking lot.

However, on March 16, seven Bay Area counties, including Alameda County, issued a public health shelter-in-place order in response to the growing

coronavirus pandemic. Consequently, the order was not presented to the full Commission for adoption.

The City of Oakland emailed BCDC staff a request to extend several of the deadlines in the proposed order by 30 days. Staff granted the extension.

On April 9, the City sent a letter requesting further extensions of deadlines in the proposed order, this time seeking to extend the deadlines for all the measures between 90 and 120 days beyond the original dates. The City's encampment priorities are currently focused on following the Centers for Disease Control (CDC) guidance and preventing the spread of the disease.

Mr. Olsson listed the requested time extensions.

He presented two options, noting that the first of the two is the option staff recommend. The staff recommendation was:

1. Adopt a revised order incorporating extended deadlines. This is the option the City originally requested. The benefit of this approach is that BCDC would issue the order as soon as possible and it would already be in place as the City undertakes work planning and budgeting processes in the coming months. The City could still request modification to the order post-issuance through the Executive Director as the pandemic situation evolves.

Mr. Olsson noted that the other option available to the Enforcement Committee was:

2. Postpone further action on the proposed order for at least 90 days due to the current uncertainty regarding the pandemic. During the postponement, BCDC and City staff would closely monitor COVID 19 developments and negotiate a revised order with measures and achievable deadlines for the City in line with public health requirements. Enforcement staff would expect to present a revised order to the Enforcement Committee in approximately July or August, and to the Commission in approximately August or September. Those dates are subject to change. The benefit of this approach is that neither party would expend further resources until they have more certainty about the specific measures and deadlines achievable by the City. The downside is that much could change over 90 days and it may be more difficult and/or time-intensive to renegotiate a new order, and the City would not be under any formal deadlines or requirements during the 90 days.

Mr. Olsson recommended option 1 – to get an order in place as soon as possible. It may necessitate future revisions to the order as circumstances change, but option 2 guarantees future negotiations.

The City of Oakland preferred option 2.

Discussion. Joe DeVries, Director of Interdepartmental Operations at the City of Oakland, stated that the current situation is difficult. Staff is doing everything it can to maintain safe conditions in encampments without violating

the CDC recommendations. Hitting the reset button in three months as opposed to having to come back and renegotiate dates seemed to make more sense to him.

Chair Scharff felt that option 1 makes sense because the City has already asked for 120 days and the Enforcement Committee is probably going to grant it. The Executive Director can extend those dates if needed. Option 2 sends us back to square one. Chair Scharff noted that BCDC and Staff have been working cooperatively on this and it seems as if it would be more work to hit the reset button and start over.

Michael Branson of the City of Oakland's City Attorney's Office stated that the City prefers option 2 because it provides more flexibility outside of just the changed timelines. There is much uncertainty about what the shelter-in-place order will be in 90 days or 120 days. It may make more sense to allow for discussions around not just the timelines, but also some of the deliverables such as park activation.

Mr. DeVries stated that it would be possible to use portions of the park today, and if the City could remove the people violating the reprieve zone order, the rest of the park could be used. They might not change some of the specific timelines, but it gives them the ability to work with City staff before bringing the package back to BCDC.

Chair Scharff stated that the City has the flexibility to do the restoration plan and amendment. If they want to extend the timelines, they can go to the Executive Director.

Commissioner Techel asked if there have been any changes in the encampment during this pandemic. Mr. DeVries answered that it has stayed the same to the best of his knowledge. The City is providing weekly garbage service and increased handwashing station services. He did not have accurate data on whether people have moved out of the site.

Public Comment. Chris Iglesias of the Unity Council stated that they have been listening in and support Mr. DeVries and the plan. Either option is acceptable; they are going to leave it to the leadership. They are ready to engage when appropriate.

MOTION: Commissioner Gilmore moved to close the Public Hearing session. This motion was seconded by Commissioner Techel. The motion carried unanimously by a vote of 4-0-0 with Commissioners Gilmore, Techel, Vasquez, and Chair Scharff voting "YES", no "NO" votes, and no "ABSTAIN" votes.

Commissioner Discussion. Chair Scharff stated that he had discussed beforehand with staff the matter of delaying or postponing the proposed uncontested order. He had felt it important to explore both options. He felt

that it would be less disruptive to the case resolution process to choose option 1.

Commissioner Gilmore asked whether if option 1 were adopted and something unforeseen happened due to this virus, anything would prevent the City of Oakland from coming back and requesting to renegotiate or change something. She preferred option 1 because of its concrete deadlines and guidelines. Chair Scharff affirmed that they can come to the Committee at any time and request to reconsider something. He felt that the Committee has been clear that they would give a sympathetic hearing to any concerns the City may have. Ms. Donovan affirmed that the City can subsequently amend the order.

Commissioner Techel sought to ensure that the Committee has the option of dealing with the City if the situation changes; this should be included in the revised order.

Commissioner Vasquez agreed that option 1 with a small revision is important in giving everyone flexibility.

Ms. Donovan noted that in the order as negotiated there are provisions that would allow the Executive Director to extend certain deadlines upon request from the City. Substantive changes would come back through the Committee.

MOTION: Chair Scharff moved for adoption of option 1 seconded by Commissioner Gilmore. The motion carried unanimously by a vote of 4-0-0 with Commissioners Gilmore, Techel, Vasquez and Chair Scharff voting “YES”, no “NO” votes, and no “ABSTAIN” votes.

Ms. Njuguna confirmed for Chair Scharff that the vote by the full Commission will go on the May 21 Commission meeting agenda.

8. Future Agenda Items. Ms. Njuguna stated that staff will be presenting a more detailed version of the long-range plan to the full Commission integrating the Committee’s input from today.

Executive Director Goldzband stated that Ms. Donovan and Ms. Njuguna will be coordinating and presenting a one-year audit recommendation response report in May to the auditors. The Committee will receive a copy.

9. Adjournment.

MOTION: Commissioner Gilmore moved to adjourn the meeting seconded by Chair Scharff. The motion carried unanimously by a vote of 4-0-0 with Commissioners Gilmore, Techel, Vasquez and Chair Scharff voting “YES”, no “NO” votes, and no “ABSTAIN” votes.

The meeting adjourned at 10:42 A.M.