

# San Francisco Bay Conservation and Development Commission

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May 14, 2020

**TO:** Enforcement Committee Members

**FROM:** Priscilla Njuguna, Enforcement Policy Manager (415-352-3640);  
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**SUBJECT:** Draft Minutes of May14, 2020 Enforcement Committee Meeting

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

**2. Roll Call.** Present were Chair Scharff and Member Commissioners Gilmore and Techel. Commissioner Vasquez joined the meeting at 9:53 A.M.

Not present was Commissioner Ranchod.

Ms. Njuguna stated that a quorum was present.

Staff in attendance were 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; Enforcement Analyst, Matthew Trujillo; and Enforcement Policy 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.

Robbie Powelson addressed the Committee. He implored them to start including environmental justice within the planning process, specifically BCDC's Environmental Justice Division. He stated that on Richardson's Bay his perspective is that BCDC is pushing a mass eviction of low-income people.

**4. Approval of Draft Minutes for the April 22, 2020 Meeting.** Chair Scharff asked for a motion and second to adopt the minutes of the April 22, 2020 meeting.

**MOTION:** Commissioner Gilmore moved for approval of the April 22, 2020, meeting minutes, seconded by Commissioner Techel. The motion carried unanimously with 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:

She provided a listing of the enforcement resolution rate of cases from May 1–12.

- Four cases have been opened; three were duplicate reports of existing cases and were closed.
- Management continues to review case resolution notes in the database to ensure thorough documentation of investigations.
- Staff continue working to resolve the oldest cases; they have had some success contacting responsible parties and property owners, as well as determining present site conditions within the limits of shelter-in-place.
- Staff continue to refine case management and case review procedures.
- Staff are also in the process of integrating simplified case status codes. Full integration of these status codes into the database is anticipated to be completed by the end of this quarter.

**6. One Year Audit Response.** Ms. Njuguna and Ms. Donovan briefed the committee as follows:

Ms. Njuguna stated that May 14, 2020, marked the deadline for the one-year response to BCDC's 2019 enforcement audit.

Ms. Donovan stated that BCDC is submitting the one-year response to the State Auditor. She reported that six audit recommendations have been fully implemented. These included the recommendations for a permit fee review and a review of local agency compliance with the Suisun Marsh Protection Program.

Ms. Donovan also reported that BCDC has fully implemented the recommendations for a number of procedural improvements, including the recommendations for a procedure to identify and resolve stale cases, and developing guidance on cases that are worthy of swift action and those that can be deferred.

Ms. Donovan then reported that BCDC has not fully implemented nine recommendations, but staff are making substantial progress on these. She gave the following specifics.

- In the fall 2019, the Committee approved a definition for *significant harm*.
- She reminded the Committee that they would be discussing the development of explicit criteria for delineating violations in multiple violation cases.
- She then noted that Ms. Njuguna and the Enforcement team have been working to update database data, to improve the dashboard, and to enhance the available database features. She also reported that the Enforcement Team have explored an alternative vendor for a database but noted that absent further funding, there would continue

to be limitations on technological tools.

**Questions and Discussion.** Commissioner Gilmore asked what would happen after the one-year audit response is submitted. Ms. Donovan answered that the State Auditor is obligated to prepare its own one-year report which goes to the State Legislature, identifying what BCDC has not accomplished in the year following the audit (although they had specified that certain recommendations cannot be completed within a year, such as regulatory changes). BCDC then has an obligation to prepare an explanation. Thereafter, BCDC does not have any other regular reporting obligations to the State Auditor; nonetheless, BCDC will be following up on the responses that are not fully implemented.

Executive Director Goldzband reported that BCDC informed the State Auditor that we will not implement two of the recommendations:

- Reconstituting the Citizens' Advisory Committee; and
- Stating how the Bay Fill Fund would be used to decrease bay fill and not used to fund enforcement staff salaries. He informed the Commissioners that BCDC does not have any supplementary revenue stream to pay enforcement staff salaries.

Executive Director Goldzband informed that Commissioners that Staff are preparing a letter for Chair Wasserman to send to members of the Bay Area legislative delegation, members of the Natural Resources Committee, Secretary Crowfoot, and Ocean Protection Council Executive Director Gold, which describes how BCDC has improved its enforcement program over the past year.

Executive Director Goldzband reported that he testified the previous day at the State Capital on Assemblymember Mullin's bill AB 2809, which would define the recommendations of the audit that would be implemented by the State Legislature as opposed to the Commission.

Mr. Goldbeck informed the Commissioners that Assemblymember Mullin had said that he wanted to address the funding issue in the Budget Subcommittee, then reflect the resolution when the bill goes to the Senate for amendments. The Commission's position is to oppose provisions that would potentially put Enforcement funding at risk through the budget process. Currently Assemblymember Mullin's budget subcommittee is looking at BCDC's proposed amendments.

Commissioner Techel asked about the language in the narrative we are submitting to the State Auditor to convey why the Citizens' Advisory Committee and changes to the use of Bay Fill Clean-Up and abatement fund appropriations are not being implemented. Ms. Donovan answered that staff have explained the processes through which the community can provide input into BCDC's various activities. The Citizens' Advisory Committee would be duplicative and not add value to BCDC's established processes, including the new online

meeting format.

Chair Scharff added that that a Citizens' Advisory Committee would actually provide narrower input than the current processes provide in reaching out to the broader community.

Ms. Donovan stated that BCDC must explain why we are not going to implement a recommendation. She informed the Commissioners that BCDC is listing the working groups BCDC has set up for the Bay Plan amendments, for example, to show that BCDC has established formats that provide even greater public input.

Executive Director Goldzband noted that the BCDC draft response states "Will Not Implement" in straightforward language. The auditor gives three possible ways by which to respond to a recommendation: "Fully Implemented," "Not Fully Implemented," and "Will Not Implement;" BCDC is simply abiding by the way the auditors require BCDC to respond.

**7. Briefing on Criteria for Violation Delineation.** Ms. Njuguna introduced Ms. Donovan who provided a presentation on the criteria for delineating violations where cases involve multiple unauthorized activities.

Ms. Donovan stated that this was the third briefing on this issue. She noted that BCDC is implementing the audit recommendation that we provide explicit criteria for calculating the number of violations present in individual enforcement cases.

(Commissioner Vasquez joined the meeting at 9:53 a.m.)

Ms. Donovan reminded the Committee that the overarching BCDC goals are to protect the Bay and to ensure maximum feasible public access. Concurrently, the primary enforcement mission and goals are fairness, consistency, efficient and effective deterrence, transparency, and swift and timely action.

Ms. Donovan reminded the Commissioners that BCDC's regulations and the McAteer-Petris Act already define what constitutes a violation: "any non-conformance with the law or the term or condition of a permit". BCDC regulations further define violations in Section 11302.

Ms. Donovan referred to the Department of Toxic Substances Control's regulation that is specific to dealing with actions involving multiple violations. The regulation deals with violations that are multiple instances of the same violation. There is a catch-all addition where violations should be treated separately when is necessary to deprive the violator of the economic benefit of multiple violations.

In trying to find simplified criteria as recommended by the Committee in the March meeting, staff examined several regulations as well as case law in numerous circumstances. In putting the proposal together, staff borrowed

from case law centering on unfair business practices and other multi-violation cases, and when to aggregate violations for purposes of assessing a single penalty.

Staff separated criteria for single penalties into two main types of violations:

- Violations of the terms or conditions of a permit if the violations involve the same permit term or condition, when the harm resulting from the violations is not distinguishable, when the violations are not substantially separated in time and there has been no intervening enforcement action.
- Unpermitted activities when the harm resulting from the violations is not distinguishable, or the violations are not substantially separated in time and there has been no intervening enforcement action.

Ms. Donovan noted that the (c) overarching criteria should be that where it is necessary to deprive the violator of the economic benefit multiple violations should be cited separately.

In running through different scenarios, staff determined that it is important to ensure that the consequences of engaging in multiple unauthorized activities are going to be greater than the consequences of engaging in a single violation. Other considerations will include consistency, fairness, and transparency to provide transparency to the regulated entities.

Ms. Donovan identified the next steps as developing the written criteria then looking as appropriate at a potential comprehensive rulemaking package.

**Questions and Discussion.** Commissioner Techel requested an example of a case applying the criteria. Ms. Donovan used an example of someone who has not been maintaining a walkway or doing requested public improvements. The person has four or five unusable benches and an unusable landscaped pavilion. This person has also installed an amenity without seeking proper approval. Staff would possibly, using the criteria, determine that the benches involve the same permit term and their lack of maintenance is not substantially separate in time. BCDC could combine these violations and assess a single penalty. Ms. Donovan informed that Commissioners that it was extremely difficult to come up with prescriptive written criteria because the violations are ordinarily determined specific to case facts to ensure that the enforcement action achieves the enforcement objectives.

Ms. Donovan continued with her example explaining that staff would then decide for the other portion of the public access area that has not been maintained, by focusing on the factor of whether it is distinguishable harm. For the amenity constructed without permit authorization, assuming that it is both revenue-generating and not done with the necessary oversight, the harm

is likely different. The time factor was not relevant for the example which involved different permit conditions (as it is unpermitted).

Regarding discerning the overall penalty, Ms. Donovan reminded the Commissioners that BCDC is not in the business of trying to accumulate penalties. In determining how to apply the statutory factors set forth in the McAteer-Petris Act, BCDC looks at the magnitude of the offense. It is a matter of deciding the violations at hand first then determining the appropriate penalty.

Chair Scharff noted that there may also be the issue of maintenance cost savings by not taking care of the benches in the example. Ms. Donovan confirmed that staff would take that into consideration. BCDC would look at the deterrent value. In terms of transparency, the public knows that anything you do that violates the law or a term or condition of a permit, is a violation. The importance to BCDC is finding an equitable way of assessing civil penalties when bringing an enforcement action.

Chair Scharff asked about the amount of discretion staff have. Ms. Donovan responded that it is important to allow staff discretion in bringing enforcement cases – the criteria need to fit the circumstances of the case. However, the discretion is bounded by the law and the regulations under which BCDC operates. Further, the public can access this Committee as a neutral arbiter if they want to appeal their case.

Chair Scharff asked what would be different from prior practice after we implement these criteria. Ms. Donovan responded that Ms. Njuguna has made numerous improvements to ensure that there is documentation and oversight – management oversight of each case, as suggested in the audit. All along staff has been emphasizing that fairness and consistency mean that we have criteria to apply.

Mr. McCrea added that Regulation 11302 states that civil penalties can be imposed for violation of any condition of a Commission permit. The Permitting staff is careful to be specific about the obligations of a permit. This does mean that violations can easily accumulate. Historically BCDC has taken a hard line with its interpretation of Regulation 11302; any condition of a permit that is violated is a separate violation. In negotiations during case resolution, those conversations get bogged down in the details of each violation. Having discretion going forward will provide clarity internally among staff, and externally for the regulated community as they better understand BCDC's approach to violated permit terms and conditions.

Executive Director Goldzband stated that he looks at this as a framework through which to view violations brought to the Committee. The discretion is involved as the Committee decides how to apply this fundamental transparent, externally focused framework to a case in a way that the regulated community

understands.

Commissioner Gilmore asked if all the criteria must be met to make a single penalty or if any of the criteria would be sufficient. Ms. Donovan answered that staff felt that the two concepts in (c) – time separation and no intervening enforcement action – had to be combined. For (a) – violations involving the same permit term or condition – and (b) – harm not distinguishable – Ms. Donovan supported the idea of leaving to staff the discretion to consider them separately. She reiterated that we have the overarching criteria because BCDC cannot effectively deter people from violating either the Act or their permit terms, if BCDC does not remove the economic incentive to undertaking unauthorized actions.

Chair Scharff and Commissioner Gilmore felt that there should be an “or” after (a) and (b), while “and” was suitable in the middle of (c) [see presentation slides page 10 available here <https://www.bcdc.ca.gov/enforcement/2020/05-14-Defining-Violations-Presentation.pdf>].

Chair Scharff called for public comment; there was none.

Commissioner Techel agreed that “or” was suitable in (a) and (b) for clarification.

Ms. Donovan stated that for next steps were that staff would bring the criteria back to the Committee in final form. In addition, staff are looking at a comprehensive package of appropriate enforcement regulation amendments.

Chair Scharff felt that having at least one Committee meeting with all the comprehensive regulatory changes would be beneficial for considering and reviewing them all as one package. Commissioners Vasquez and Gilmore agreed.

**8. Future Agenda Items.** Ms. Njuguna stated that staff intends to provide the Committee with a briefing in June on eelgrass restoration from Dr. Katharyn Boyer, who heads the Boyer Lab at the San Francisco State University Estuary and Ocean Science Center.

Executive Director Goldzband then reported that BCDC will deal with three types of changes in a comprehensive document: regulatory, legislative, and process changes. He added that the Estuary and Ocean Science Center used to be called the Romberg Tiburon Center, located on the Bay in Marin County. BCDC has used them many times before.

## **9. Adjournment.**

**MOTION:** Commissioner Techel moved to adjourn and was seconded by Commissioner Gilmore. The motion was unanimously carried by a hand vote.

The meeting was adjourned at 10:29 A.M.

