San Francisco Bay Conservation and Development Commission
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September 10, 2020

TO: Enforcement Committee Members

FROM: Priscilla Njuguna, Enforcement Policy Manager (415/352-3640; priscilla.njuguna@bcdc.ca.gov)

SUBJECT: Draft Minutes of September 10, 2020 Enforcement Committee Meeting

1. **Call to Order**. The meeting, held virtually, was called to order by Chair Scharff at 9:30 A.M. He stated that Facebook Live was being used to increase public access and gave instructions for participation.

2. **Roll Call**. Present were Chair Scharff and Commissioners Gilmore, Techel, and Vasquez. A quorum was achieved.

Not present was Commissioner Ranchod.

Staff in attendance included Executive Director, Larry Goldzband; Chief Deputy Director, Steve Goldbeck; Regulatory Division Director, Brad McCrea; Chief Counsel, Marc Zeppetello; Staff Counsel, Karen Donovan; Legal Secretary, Margie Malan, Principal Enforcement Analyst Adrienne Klein; Enforcement Analyst, John Creech, 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.

James Waters commented that he had called in at 9:00 to check the connection and could hear everyone talking.

4. **Approval of Draft Minutes from the August 13, 2020 Meeting**. Chair Scharff asked for a motion and second to adopt the August 13, 2020 meeting minutes.

MOTION: Commissioner Vasquez moved for approval of the August 13, 2020 meeting minutes, seconded by Commissioner Gilmore. The motion carried unanimously with a vote of 3-0-0 with Commissioners Gilmore, Vasquez, and Chair Scharff voting "YES", no "NO" votes, and no "ABSTAIN" votes.

5. **Enforcement Report.** Ms. Njuguna presented the Enforcement Report, in which she covered developments during the period August 13 – September 9.

She informed the Commissioners that a new Enforcement Analyst, John Creech, has been hired noting that he has land use experience, having worked on construction maintenance projects which will be valuable in the resolution of enforcement cases. She also noted that Mr. Creech holds a master's degree

in Environmental Management and a bachelor's degree in Environmental Science.

Ms. Njuguna proceeded by reporting that staff opened nine cases and closed 12 cases for the following reasons:

- Two were outside BCDC's jurisdiction.
- Two were closed because there was no violation.
- Three were duplicate reports.
- Five were resolved when documentation was provided to show Bay Trail public parking and public access maintenance requirements were met.

She informed the Committee that the total caseload was 254 cases a three-case decrease from the August 13 total caseload.

Ms. Njuguna informed the Committee that staff has begun working with the State Lands Commission and several other potential government agency partners to obtain grant funding for the removal of the tug *Polaris*, which run aground in Contra Costa County in 2013. The tug was mentioned in the BCDC enforcement audit. The cost of abatement is approximately $161,900.

Ms. Njuguna then reported that staff are close to resolving one of Enforcement's oldest cases related to the beneficial re-use of dredged material in a managed wetland. She informed the Committee that Ms. Klein would provide an update as the next agenda item. She noted that staff's substantial progress was in large part because of the collaborative approach undertaken by all the interested parties, including the U.S. Army Corps of Engineers, the Port of Stockton and their consultant, the Rich Island Duck Club management, and the Suisun Resource Conservation District.

Ms. Njuguna concluded her report by mentioning that staff are continuing to refine case management and case review procedures, ensuring effectiveness in enabling staff to meet the enforcement goals of deterrence, consistency, fairness, and transparency. Staff are still in the process of integrating their simplified case status codes.

6. Briefing on Proposed Negotiated Resolution of Enforcement Action ER1990.026. Chair Scharff introduced the matter and stated that the case involves Consistency Determination CN1985.006 for the beneficial reuse of dredged material. The U.S. Army Corps of Engineers will submit an Amendment to the Consistency Determination which will substitute a new letter agreement and beneficial reuse plan for the letter originally prepared. The new agreement will be the means of resolving the case.

Ms. Klein briefed the Committee with a general overview of the updated beneficial reuse plan and next steps. She stated that the matter involves the failure of the Army Corps of Engineers and the Port of Stockton to fully comply

with the requirements of the 1985 Consistency Determination, which allowed for disposal within BCDC's jurisdiction of dredged material from the Stockton ship channel located east of the jurisdictions of the BCDC McAteer-Petris Act and Suisun Marsh Protection Act.

The Port of Stockton retained the environmental consulting firm Anchor QEA to prepare the plan for beneficial re-use of the dredged material located in their jurisdiction. It was placed at the Rich Island Duck Club. The Suisun Resource Conservation District provides support to the duck clubs.

The 1985 consistency determination authorized placement of dredged material at the club to improve habitat, fill borrow ditches, and maintain levees. While some of the material was used for these purposes, it was sandier than expected and as a result was not entirely used as required.

Ms. Klein provided historical context by showing an aerial image of the club location, as well as images taken before and after the fill material was placed. She discussed the vegetation shown in a 2018 photograph including dense pickleweed habitat that had begun to establish as early as 1993 and remains important within the fill placement area. She pointed out a channel which distributes water onsite during the winter flood season.

In authorizing the material placement at the club, BCDC required that if any of the material was not reused as required within 10 years of project completion (which was July 1996), it had to be removed from the site. In anticipation of a compliance problem, BCDC staff notified the three parties of the requirement to use or remove the material by July 1996 to avoid a violation. Subsequently the material was not entirely used as required, and the Port then hired a consultant to prepare a beneficial reuse plan. This was presented to the Enforcement Committee in November 2006 and again in a more refined form in May 2007. The club then hired a consultant and presented an alternate beneficial reuse plan. Negotiations collapsed when the two parties were unable to synchronize the two plans.

Last year, Enforcement Committee directed staff to initiate dialogue to achieve voluntary compliance, and if that failed, to pursue litigation. Five productive meetings have since been held to review the site conditions, the past beneficial reuse plans, and a new plan developed by Anchor QEA that proposes relocation of approximately 30,000 cubic yards of material.

Ms. Klein listed the six objectives of the current conceptual design, which emphasize stability of the levee, conservation and expansion of habitat, and attraction of migratory waterfowl.

Ms. Klein explained diagrams of the existing conditions and the preliminary conceptual design plan. She then discussed the merits of the preliminary concept design and informed the Committee that staff hoped to secure the Committee's support to pursue regulatory approval of the

conceptual design plan. She informed the Committee that Anchor QEA would initiate communication with the federal and state agencies needed to authorize the project, including identifying the allowable work windows and obtaining all required permits including CEQA determination to that end. This would include issuance of an amended consistency determination by BCDC; staff also recommend that the Port and the Corps enter into a new letter of agreement. Ms. Klein concluded her presentation by informing the Committee that through Ms. Njuguna's enforcement reports to the Committee, staff would provide ongoing updates on permitting, implementation, and compliance phases of the project.

Chair Scharff, Commissioner Vasquez, and Commissioner Gilmore expressed support for the approach as presented by staff.

Public Comment

James Waters of Rich Island Duck Club commented that the collaboration on this issue has been fantastic. He informed the Committee that he has been involved from the beginning of the beneficial reuse plan and had not seen this level of cooperation before. He stated that the parties involved have a great resolution that will keep everyone happy. He concluded his comments by stating that the bottom line is that they are going to enhance wetland habitat in the marsh.

7. Briefing and Public Hearing on Proposed Amendments to BCDC Chapter 13 Enforcement Regulations. Chair Scharff stated that the Committee would receive an overview of proposed amendments to the BCDC Chapter 13 Enforcement Regulations, which set forth the enforcement procedures. These include the addition of a new penalty policy, which has been discussed in prior meetings.

Mr. Zeppetello provided a briefing on the most significant of the proposed changes. He stated that after the meeting, staff plans to consider public and Commissioner input. Staff has scheduled a similar briefing and hearing before the full Commission on October 15, at which point they will ask for authorization to initiate a rulemaking process under the Administrative Procedure Act to adopt the proposed amendments. Once the Notice of Proposed Rulemaking is issued, there will be a 45-day public comment period and a public hearing. Staff will then prepare a response to public comments and bring the matter back to the Commission for a vote. Assuming that the Commission adopts the amendments, the entire rulemaking package will then go to the Office of Administrative Law.

Mr. Zeppetello began with some context regarding the process thus far. Beginning in in 2016 and 2017, he had started to identify a need to look at the enforcement regulations, which had not been comprehensively done since

1987. In addition, the Enforcement audit in the spring of 2019 included recommendations for specific changes to the regulations.

Beginning in January 2020, staff has conducted a comprehensive review of the existing regulations and looked at the audit recommendations. That has resulted in the package distributed at the end of August which is before the Committee today.

Mr. Zeppetello reviewed some of the key proposed changes. He noted that there are a number of other detailed changes including nomenclature changes for consistency and clarity in terminology. In addition, staff has substantively reviewed the statute citations for each regulation and cross-referenced the citations where two different regulations deal with the same topic. Staff has also suggested numerous changes across the set of the regulations stating that notice of various kinds can be provided by email as well as postal mail.

Mr. Zeppetello then proceeded to summarize the more substantial proposed changes. The first was additions and expansions in **§11310 Definitions**.

- Staff has incorporated language from a BCDC resolution that established the Enforcement Committee in 1993; the added language addresses membership, the number of members, the quorum requirement, selection of a Chair, and some of the duties of the Committee and the Chair.
- The other change relates to the audit recommendation. Staff has added the definition of *"…significant harm to the Bay's resources or to existing or future public access."*

Mr. Zeppetello discussed additions to **§11322 Respondent's Required Response to the Violation Report**, which is basically a statement of defense.

- A change to Subsection (f) provides that the extension for responding needs to be tied to a waiver or consent to extending the statutory hearing deadline applicable to civil penalty actions.
- A change to Subsection (i) acknowledges that once an enforcement proceeding is initiated, the Executive Director has the discretion, with the consent of the other party, to enter into either a stipulated order or a settlement agreement to resolve violations. The matter still needs to come before the Enforcement Committee and to the Commission for approval. If the Commission fails to adopt the order or settlement agreement, a timeframe is provided for moving forward depending on whether or not the respondent has previously submitted a statement of defense.

The next discussed change was to **§11326 Contents of an Executive Director's Recommended Enforcement Decision**.

- The new Subsection (b)(2) clarifies that staff can respond to any

defenses, mitigating factors, or arguments raised by the respondent in the statement of defense.

- Subsection (b)(4) addresses an issue raised by the audit regarding the need for greater transparency; it gives more detail as to the information to be provided in support of the proposed penalty.

§11327 Enforcement Hearing Procedures contains clarifications.

- Subsection (f) clarifies that rebuttal witnesses should not be allowed since they would be surprise witnesses not previously identified.
- More importantly, Subsection (g) clarifies that cross-examination is not allowed of persons who have and have not submitted declarations.
- Subsection (i) states that the Committee shall rule on any objections to the admissibility of evidence or the acceptance of late evidence.

At this point Chair Scharff expressed the desire for a rule that after the Enforcement Committee hears a matter, unless the Commission conducts a de novo review, no additional evidence can be submitted to the Commission. All the evidence should have been heard at that point. Mr. Zeppetello thought that this was in the existing regulations and said he would confirm this. The existing rules provide that if a matter is heard by the Enforcement Committee, that is the proceeding the evidence comes in. There is a regulation on the admissibility of late evidence – there is a very high bar. Ms. Donovan noted that there had been a case in which the respondent had tried to submit new evidence to the Commission after the Enforcement Committee had made its decision, and that the Commission had remanded the matter.

§11330 Adoption of an Enforcement Committee or a Hearing Officer Recommended Enforcement Decision has some changes.

- Subsection (a)(1) specifies the contents of the Committee's recommended decision.
- Subsection (a)(2) requires a statement of rulings by the Committee.
- Subsection (a)(3) details the amount of penalties and explains how the penalties are consistent with the statute and the Civil Penalty Policy.
- Subsection (b) addresses the issue of how to go from an Executive Director-recommended decision to an Enforcement Committee-recommended decision. The proposed change makes explicit that the Committee or the Chair of the Committee can direct BCDC counsel to prepare the recommendation, and would require BCDC counsel to provide the recommended decision to the respondent in advance of mailing it, in order to allow the respondent to review it and provide any comments. The Executive Director could make any revisions and

would provide the Committee's recommendation and the respondent's comments to the full Commission.

§11332 Commission Action on Recommended Enforcement Decision adds a provision to allow, in cases where the Executive Director and the respondent agree with the Enforcement Committee's recommendation, having a matter placed on the Commission calendar on a consent basis. If there are no objections and no desire by the Commission to hear the matter, it would be adopted on consent.

Chair Scharff asked about the phrase "…or a hearing officer…" Mr. Zeppetello answered that a number of provisions in the existing regulations refer to the possibility of a hearing officer being appointed to hear an enforcement matter. He suggested that, given the role of the Enforcement Committee in recent years, an option would be to delete all the references in Chapter 13 to a hearing officer; staff could also clarify that a hearing officer would be appointed in limited circumstances. An option would be a proposal in the rulemaking to eliminate references to a hearing officer throughout the chapter. Chair Scharff suggested an option where if the Commission wants a hearing officer, that starts at the beginning of the process; references to a hearing officer only apply to that situation. He said he would also be amenable to deleting the whole hearing officer concept. Mr. Zeppetello replied that staff would discuss it internally. As part of the Administrative Procedures Act, during the rulemaking the law requires consideration of alternatives. Deleting the references to a hearing office could be one alternative.

Mr. Zeppetello addressed the **Standardized Fines** regulation. It is long, and staff is proposing to add details, and they are also proposing to make the provisions an Article and break them into a number of sections.

- The first section would be **Applicability of Article**. Subsection (b) would cross-reference the definition of *significant harm* referenced earlier.
- Subsection (c) would be added to clarify how the Executive Director can proceed with enforcement actions involving violations with both significant harm and no significant harm. This situation has come up a number of times.
- The nomenclature in existing Subsection (e) would be modified. This Subsection identifies the various violations, and one of the proposed changes is to increase the amount of some of the fines as a way of creating a greater incentive for responsible parties to take corrective action promptly. The fines have not been adjusted in a considerable amount of time. Another proposed change is to allow tolling of the accrual of fines while a respondent's report or permit application is under review by staff.

§11391 Notice of Liability for Standardized Fines and Opportunity to Appeal or to Resolve Violations through Commission Enforcement Proceedings would be another new section. It would state that staff is required to give notice of the amount of fines after the violations have been resolved, and that an appeal must be filed within a certain time period.

- Subsection (b) would modify existing language to make clear that respondents can appeal for an extension of the 35-day time limit to fix a violation without being fined. This amendment also establishes a timeframe for that appeal.
- Another amendment establishes a timeframe for when standardized fine payments are due, both with and without appeal. If a respondent wants to waive the opportunity for a standardized fine and wants to request formal enforcement proceedings
- Staff also proposed to add a provision that if the respondent fails to pay fines when due and does not waive and request formal proceedings, the Executive Director can refer the matter to the Attorney General to recover the fine amounts or commence enforcement proceedings at his or her discretion. If the matter is referred to the Attorney General's Office, the respondent cannot contest liability but only the proper determination of the fines.

Appendix I, **Statement of Defense Form**, has editorial changes for clarity and consistency and to reduce redundancy.

The Violation Report form makes it clear that the documents upon which staff is relying need to be identified and either provided or made available electronically.

The Statement of Defense form adds a provision that is also in the proposed Administrative Civil Penalty Policy: if violators are going to raise an issue of inability to pay or adverse effect on business, they need to raise that in the Statement of Defense and provide supporting documentation. The text identifies relevant supporting documentation and advises the party to redact sensitive personal information.

Administrative Civil Penalty Policy would be added as a new appendix. Because the Enforcement Committee has gone over it a number of times, Mr. Zeppetello stated that he would not discuss the policy in detail at this time.

- The policy includes a section on **Supplemental Environmental Projects**, which are voluntary projects that a violator is not required to perform and does voluntarily as an offset to a portion of a penalty.
- Staff has added a number of guidelines and requirements for SEPs based on the SEP guidance adopted by other agencies, including the State Water Resource Control Board and the Department of Toxic

Substances Control.

Mr. Zeppetello highlighted a few of the guidelines.

- A SEP should have an adequate nexus to BCDC statutory mandates to protect the Bay. There should be a nexus between the nature or location of the violation and the nature or location of the project.
- The guidelines identify four categories that may qualify as SEPs.
- The amount of the penalty to be offset by a SEP should not exceed 25%.
- With a SEP, BCDC is not compromising its regulatory authority.
- Violators cannot use a SEP to satisfy something they are legally obligated to do for BCDC or another government agency.
- A SEP must be enforceable pursuant to an order or settlement agreement.
- The policy establishes BCDC preferences for a SEP: a project located near the community where the violation occurred, and a project that would benefit a vulnerable or disadvantaged community.
- Examples of projects that would not qualify as SEPs are listed.

The policy includes a list of requirements for any order or settlement agreement authorizing a SEP.

- There needs to be an adequate project description with a budget and schedule.
- It must address how the SEP will comply with CEQA.
- The SEP should be conducted and completed within 36 months unless an extension of time is granted for a reasonable time period.
- The violator or third party performing the SEP must document that the funds will be spent for the project and provide an accounting upon request.
- The SEP penalty offset is a suspended administrative civil penalty, and if the SEP is not fully implemented as agreed, the penalty amount that has been suspended will become due and payable.
- There will be a requirement for periodic reporting.
- A final report certifying completion is required. BCDC will review the documentation.
- When a violator or third party publicizes the SEP, it shall state that the SEP is being undertaken as part of the settlement of a BCDC enforcement action.

Questions and Discussion

Commissioner Vasquez asked why BCDC would not just require the violator to agree to an audit of expenditures for a SEP. Mr. Zeppetello said that would be an option. Chair Scharff supported this idea.

Chair Scharff expressed concern that people would not finish a SEP – that they would complete milestones but leave the project site worse than when they found it. Mr. Zeppetello responded that this language was modeled after language in other agency policies. Staff can check with the other agencies on whether they have any experience with half-completed projects. Staff could also revise the policy to state that if the SEP is not completed, the violator or third party does not get any credit and the full amount of the suspended penalty becomes due. Chair Scharff said he was looking for something like that. He liked the idea of getting input from other agencies on lessons learned.

Commissioner Gilmore asked about the preferences for a SEP. The preference item lists a project with a community nexus and a project benefitting a vulnerable or disadvantaged community. She asked what would happen if you have one or the other but not both. Mr. Zeppetello answered that a SEP is project done only in a context where there is an agreement between the Executive Director and the respondent, and ultimately, the Committee and the Commission, that the project is appropriate. SEPs may not be easy to identify and agree upon. These preferences are meant to direct violators to projects to which BCDC would be favorably inclined. If a project is presented that seems to make sense, and it meets one of the preferences but not the other, and the Executive Director thought it had merit, that project would be brought to the Enforcement Committee and the Commission as part of the proposed order or settlement agreement. Mr. Zeppetello agreed it would be appropriate to change the "*and*" between the two preferences to "*or*."

Mr. Zeppetello explained for Chair Scharff that if a project would meet one of the four categories listed in the policy, but did not meet the preferences, although it still had some environmental benefit, it would be possible for the Executive Director, Committee, and Commission to accept it. The preferences highlight to violators what BCDC is looking for and what it prefers.

Executive Director Goldzband felt that it would be very helpful to allow the person in his position to have some flexibility when working with Enforcement staff to discern whether a SEP would fit the policy.

Commissioner Gilmore asked about adjustments to the penalty policy; she was looking at the staff recommendation on page 16 regarding BCDC seeking "*…to recover the cost of investigating and pursuing an enforcement action.*" She was not aware that BCDC routinely does this and asked under

what circumstances BCDC seeks to recover costs. Mr. Zeppetello answered that he had been involved in a few enforcement actions where staff estimated their hours and Accounting estimated the staff costs. However, the estimate was imprecise. In the context of the penalty policy, this was a recognition that cost to the State is one of the penalty factors which the statute provides for consideration. Ms. Donovan commented that staff's initial thought on this had been that in cases with an extraordinary level of staff effort, they would seek to document those costs. They want to make it clear, partly because of the transparency element, that they are able to document the costs.

Commissioner Gilmore asked at what point in time in the process a violator would know that this is one of those cases where staff costs would be imposed. Mr. Zeppetello answered that it would have to be in the violation report, which would document the costs incurred up until that time. Commissioner Gilmore expressed concern that someone may be taken by surprise by that. Executive Director Goldzband asked if Commissioner Gilmore was requesting BCDC to lay down a standard or process through an enforcement mechanism that would give people some kind of advance notice that if certain things happen, the Commission would seek to recoup costs. She responded that notice in the violation report would be enough because that happens fairly early in the process.

Mr. Zeppetello emphasized that the costs would pertain to the investigation phase, not the staff time spent with the Enforcement Committee, the hearing, or the Commission. Ms. Donovan pointed out that by the time the Complaint for Civil Penalties comes out, a violator would be aware that staff is spending a considerable amount of time on the case. Staff can ensure that it is made clear that they are going to try to recoup the cost of the incurred staff time.

Chair Scharff asked when staff had last done that. Mr. Zeppetello answered that they had done that in the Scott's Seafood case and perhaps the Westpoint Harbor case. Chair Scharff asked if there had been a recommended decision where BCDC would recover those costs. Mr. Zeppetello answered that in both those cases, the staff costs were a modest percentage of the total requested penalty (which was not broken down by penalty factors). The penalties in both cases exceeded the estimate of staff costs.

Chair Scharff stressed that BCDC needs to be transparent in denoting the penalty separately from the recovery of costs. Mr. Zeppetello did not view it as a separate penalty on top of the base penalty. Costs to the state is one of the penalty factors. Under the proposed policy, this would be one of the adjustment factors used to increase a penalty – but it is ultimately all one penalty.

Chair Scharff asked if there is something in the regulations encouraging

people to work with BCDC and that makes it clear that if they are responsive, they are likely to have a better outcome. Mr. Zeppetello responded that some of the factors considered in the penalty policy are cooperation and effort to resolve the violations with staff.

Chair Scharff asked about §11301 Grounds for Revocation of a Permit: he thought it was too harsh – it gives BCDC unfettered discretion to remove someone's permit for a violation of any term or condition of the permit, even a paper violation. Mr. Zeppetello commented that this is one of the regulations where staff is not proposing any change to existing language. He was not aware that BCDC has ever sought to revoke someone's permit. These introductory provisions in the chapter – grounds for issuance of a Cease and Desist Order, permit revocation order, and imposition of civil liability – provide various criteria or standards. Ultimately this may push up against due process issues and fairness issues. These regulations outline factors that could be grounds for issuance of an order. Chair Scharff requested a revision – it is much too broad for the reasons Mr. Zeppetello just stated. As drafted, it provides no guidance whatsoever for when someone's permit should be revoked. He encouraged staff to take a look at it. Mr. Zeppetello replied that staff would do so.

Commissioner Vasquez felt that a kinder and gentler statement should be in play for getting people to cooperate with BCDC. It does not need to be restated that BCDC can come after permittees who violate the law.

Public Comment

There was no public comment.

MOTION: Commissioner Gilmore moved to close the public hearing, seconded by Chair Scharff. The motion passed unanimously by a hand vote.

Commissioner Gilmore complimented Mr. Zeppetello and the rest of the staff she noted that going through regulations like this is a slow and tedious process. She felt that they had done a remarkable job harmonizing sections and carrying out the intent of the Committee based on all the discussions of the last year and more. Chair Scharff agreed.

Executive Director Goldzband noted that for the last several years Mr. Zeppetello has kept a growing list of regulatory changes that he wanted to propose. When Ms. Donovan and Ms. Njuguna joined BCDC, he was able to help lead the effort with them and the rest of the team to commence work on these changes.

Executive Director Goldzband also thanked the Committee for their active participation in getting through these issues during the last year and a half, which has led up to this day. It provides the Committee the ability to go to the full Commission and have skin in the game, as well as the ability to look

at permittees brought before the Committee with violations. It addresses transparency and consistency and ensures that the Enforcement Committee is seen as a body where justice is done.

Future Agenda Items

Ms. Njuguna stated that staff anticipated having a discussion on the impact of homeless encampments on Bay Trail public access in the context of environmental justice, as well as the impact of COVID-19 on the ability of local governments to address the encampments while balancing broader community interests in recreational use of parks and open spaces. Staff will likely hold the discussion in an environmental justice working group format.

Executive Director Goldzband commented that if this discussion does occur through a working group on environmental justice issues, it will be important for the Enforcement Committee members to participate. He explained that understanding the subtle nature of what the Committee is dealing with regarding places such as Union Point Park will be valuable.

Ms. Njuguna explained that the reason staff was considering the environmental justice working group was that there are a number of areas where the Bay Trail is not accessible as a result of homeless encampments, particularly along the Oakland Estuary. The City of Oakland has had limitations in their ability to move unhoused residents away from the Bay Trail and other public access areas during the pandemic. They have shifted their approach to how they address homeless encampments.

Ms. Njuguna gave a detailed explanation of the issue, which is also occurring in other locations – homeless encampments are under bridges and in areas adjacent to waterways. Part of the reason for the amount of contention is that BCDC's goal of ensuring that the Bay is protected involves communities – both those living in the homeless encampments and those in the surrounding housed communities. The problem has recently been magnified because with the pandemic with people working from home regularly trying to use their local green space and noticing when those spaces are not available. The public needs to have a level of understanding for why BCDC is not issuing executive orders to immediately clear the encampments.

Chair Scharff stated that during this pandemic we have an approach of basically following the public health orders. He noted, however, that in the long run we need to resolve these issues. He did not see why BCDC would take a different approach. He asked what the purpose of the workshop would be whether it was explaining what staff are doing during COVID, discussing BCDC's long-term approach, or a broader discussion about the cause of limits on public access which are very contentious issues.

Ms. Donovan clarified that BCDC is not backing off from pursuing enforcement cases to accomplish BCDC's enforcement program objectives,

including making sure public access areas are open and available to the community. Rather, recognizing that in BCDC adopting its environmental justice policies, BCDC is looking at integrating and applying the opinions of historically underserved communities. She noted that BCDC is also getting a lot of complaints of homeless encampments blocking access to the Bay Trail and about Union Point Park. As people are sheltering in place, they are looking for places to recreate outdoors.

Ms. Donovan continued by stating that the environmental justice staff at BCDC is centered on addressing the dual approach at BCDC namely: the Bay Trail should be open and available for the public to utilize, while simultaneously we are looking at the impact of BCDC's actions on historically underserved communities. The idea for the workshop comes from the need to ensure that we have heard from the public and considered all perspectives. The Enforcement Committee is BCDC's adjudicatory body which might inhibit public discussion; it may be better to do this as a joint workshop with the Environmental Justice Working Group.

Chair Scharff supported having a joint workshop format. He asked about the scope of the meeting noting that the implications of the application of the matters to be discussed during COVID and post-COVID would need to be clear given the contentious nature of this issue, and given BCDC's core mission on much of it, BCDC's objective would need to be well thought-out.

Commissioner Vasquez felt it important for the Enforcement Committee members to hear about the work of the Environmental Justice Committee. He saw the workshop as a listening opportunity and agreed that the difficulty is finding the balance. He noted that the settings of during COVIDC and post-COVID require different mindsets to think about, as do the roles of enforcement versus environmental justice. He asserted that delivering the right message of enforcement with compassion will be BCDC's goal in having the discussion. He expected that strong voices would be expected to voice their opinions in attending such a workshop.

Commissioner Gilmore agreed that BCDC is between a rock and a hard place during COVID and post-COVID. She pointed out the distinction that finding the balance is much more difficult in areas where public access has already been developed (i.e., the Bay Trail) as opposed to new areas where development is being proposed. In the former, segments of the community feel as if something is being taken away from them depending on what BCDC does in a particular situation. In contrast, with a new project there is the potential that the community feels as if they are being given something that was not already there.

Ms. Njuguna stated that staff were thinking of potentially scheduling the workshop in October.

8. Adjournment. Chair Scharff called for a motion for adjournment.

MOTION: Commissioner Gilmore moved for adjournment, seconded by Commissioner Vasquez. The motion carried unanimously with a vote of 3-0-0 with Commissioners Gilmore, Vasquez, and Chair Scharff voting "YES", no "NO" votes, and no "ABSTAIN" votes.

The meeting was adjourned at 11:41 A.M.