

San Francisco Bay Conservation and Development Commission

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June 23, 2021

TO: Enforcement Committee Members

FROM: Priscilla Njuguna, Enforcement Policy Manager (415/352-3640;
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SUBJECT: Draft Summary Minutes of June 23, 2021, Enforcement Committee Meeting

1. Call to Order. The meeting, held remotely via Zoom, was called to order by Chair Gilmore at 10:00 A.M. when a quorum was present.

2. Roll Call. Present were Chair Gilmore and Commissioners Ranchod, Vasquez, and Wagenknecht.

Staff in attendance included Executive Director, Larry Goldzband; Regulatory Director, Brad McCrea; Staff Counsel, Brent Plater; Legal Secretary, Margie Malan; Enforcement Analyst, John Creech; Principal Enforcement Analyst, Adrienne Klein; and Enforcement Policy Manager, Priscilla Njuguna. Shari Posner, Deputy Attorney General, was also in attendance.

3. Public Comment. Chris McKay, representing Embarcadero Neighborhood Association provided general comment about an encampment on the bay trail at the intersection of Dennison and Livingston Streets in Oakland at Union Point Park. He informed the Commissioners that the City of Oakland did a deep cleaning a few weeks prior but did not address the encampment. He emphasized the impact the encampment was having on people using the bay trail, and also on the oars rowing club and the whale boat rowing club. He asked if there were any other areas of the bay trail impacted by encampments.

4. Approval of Minutes. Commissioner Vasquez moved to approve the draft minutes from the March 24, 2021, meeting Commissioner Wagenknecht seconded the motion. The motion carried unanimously with a roll call vote of 4-0-0 with Commissioners Ranchod, Vasquez, Wagenknecht, and Chair Gilmore voting "YES", no "NO" votes, and no "ABSTAIN" votes.

5. Enforcement Report. Ms. Njuguna provided an update on case resolution in 2021 highlighting achievements made during the first quarter included in a written report to the Commissioners. She noted \$92,186 had been recovered which was two of the four payments expected from the \$132,279 settlement reached with Lind Marine for unpermitted oyster mining in March 2021 as well as \$2,000 from Chevron and \$1,000 from Lind Marine both for dredging case settlements. She noted that enforcement had seen a 25 case decrease in the overall caseload from December 31, 2020, to March 31, 2021, when the enforcement caseload was 211 to 185 cases. She informed the Commissioners

that further progress had been made toward reducing the caseload such that as of June 22, 2021, the enforcement caseload was 149 cases a 36 case decrease from the caseload at the end of the previous year.

Ms. Njuguna noted that the resolution of cases was in large part accomplished by consolidating and closing related cases, having more staff to review cases as they are received and thereby immediately getting cases investigated in real time which was not always possible when there were less staff. She also highlighted the closure of 60 cases in the first quarter and an additional 60 cases through June 22, 2021, in the second quarter which she attributed to immediately closing duplicative related reports for the same location and consolidating and closing old cases.

Ms. Njuguna then clarified the general comment provided and informed the Commissioners that there were no new homeless encampments in Union Point Park. She explained that the encampment on the bay trail described was at the intersection of Dennison and Livingston Streets in Oakland within close proximity of the park but not in the park. She reminded the Commissioners of the written report received from the City of Oakland provided to them that indicated there were no encampments in Union Point Park. She further explained that the City of Oakland had completed a deep clean adjacent to the encampment on the bay trail noting that the area with the encampment belongs to the Port of Oakland which is working with the City of Oakland to get the encampment addressed.

Ms. Njuguna then noted that the proposed amendments to the Enforcement Regulation were submitted to the Office of Administrative Law and changes to the regulation are anticipated to be forthcoming. She then reported on the progress made in case resolution in the second quarter including having opened 23 new cases and she reiterated as previously stated that the 60 cases were closed noting that in 18 of those cases there was no violation, in 9 cases they were duplicative reports, in 3 cases local or other state agencies were better placed to resolve the matters reported and in 30 cases respondents submitted or staff independently obtained documentation through research to indicate the matters reported have been resolved. She emphasized the ongoing work to close the oldest cases so that case stagnation of newly reported cases is prevented. She specifically mentioned and thanked Megan Delaporta for their work in enabling the resolution of enforcement cases.

Chair Gilmore commended all enforcement staff their great effort indicating that she thought the enforcement caseload had dropped by about 50% which was good progress.

Commissioner Vasquez agreed with Chair Gilmore's comments and noted that the addition of staff was important in addressing the caseload which he thought was mentioned in the audit and also noted that the audit recognized that enforcement needed additional resources and three staff members could

not address the caseload. He also noted that the realignment for the process of resolving cases has also helped. He asked Executive Director Goldzband if BCDC needs to report progress quarterly to the state auditor. Executive Director Goldzband indicated there would be a second progress update to the state auditor in the fall.

Executive Director Goldzband responded that progress on the audit is not reported quarterly but typically in the fall. Ms. Njuguna agreed with Executive Director Goldzband on the timing of updates to the auditor. Executive Director Goldzband indicated there would be a second progress update to the state auditor in the fall.

Executive Director Goldzband reminded the Commissioners that there were 19 recommendations in the audit noting that there were some recommendations that BCDC enforcement is not compliant with such as the citizens advisory committee which the Commission determined was an outdated requirement. He emphasized that enforcement has accomplished the recommendation of resolving enforcement cases noting that with the process improvements developed by former Staff Counsel Karen Donovan and Enforcement Policy Manager Priscilla Njuguna over the past couple of years mean that the new Lead Enforcement Attorney Brent Plater can assist with staff actual resolution rather than working on process and legal infrastructure development.

Commissioner Wagenknecht stated that he thought the model currently in use by the Enforcement Committee and staff for enforcement is a much better one than the model that was previously in use. He noted that he was interested in using a similar model for Napa County matters and appreciated the opportunity to see the model in use at BCDC as learning opportunity. He also noted that the Enforcement Committee's process adds value through the general public comments getting citizen voices heard and elected voices heard through Commissioners on enforcement cases. He considered the unintended consequences for the people who initially requested the audit and thanked the staff and Commissioners for their work.

Executive Director Goldzband asked Ms. Njuguna if it was conceptually accurate to recognize that some enforcement case reports received, including those that were duplicative reports may not have had sufficient details in the allegations to be considered a real case for investigation. Ms. Njuguna agreed with that conceptual approach noting that in cases where the location was in question and what the complaint was really about was in questions those cases were closed and when multiple reports were made about the same location those cases were closed for resolution under one case. She emphasized the impact that additional staff has had in resolving cases including identifying and closing related cases.

Executive Director Goldzband then asked Ms. Njuguna if staff have worked through all the cases that are unsubstantiated and if BCDC was likely to see a recurrence of case stagnation. Ms. Njuguna indicated that the staff have not worked through all duplicative cases and/or cases where no violation has occurred. While working remotely staff have not had easy access to some old paper files which need to be scanned for staff to verify what was originally reported is still an issue of concern today. These are the cases that staff are systematically working through. She explained that the case prioritization criteria that the enforcement committee came up with which emphasizes prioritizing relative harm to the bay and impacts on maximum feasible public access helped streamline the case resolution process which in combination with the scoring system developed in 2017 helped staff begin resolving the cases with the highest scores as well as those that were the oldest to systematically reduce the old cases while keeping up with incoming cases. Staff now focus on the cases that will provide to get the caseload to the 70 to 100 or so cases that are typical for any given year so that as cases come in and they are resolved and cases are not being carried forward from previous years without resolution.

Regulatory Director, Brad McCrea, while recognizing that there was no agenzized public hearing for the public hearing for the enforcement report asked the Chair to consider seeing if there were any public comments. There were no hands raised.

Executive Director Goldzband interjected and mentioned CalOsha's guidance for returning to the office buildings which he thought would have particular significance for Commissioners Vasquez and Wagenknecht who are also County Supervisors. He noted that while staff being able to return to work, from his perspective in a voluntary way, to have easy access to paper files, for example, has been discussed no final return date has been determined. He estimated that it may occur in the late summer but is more likely to occur in the fall. Executive Director Goldzband committed to keeping the Commission informed as more information is determined on a hybrid workplace.

6. Oldest Case Update. Adrienne Klein reported on the oldest cases having provided a written update to the Commissioners prior to the meeting. She began by noting that three of the oldest cases closed fairly quickly then described Enforcement Case ER1988.024 which involves a collapsed seawall which resulted in the closure of a required public access stairway. She explained that the property owner retained an engineer who is working on a plan for staff to amend the permit to authorize the repair work. BCDC's staff engineer had some concerns about the materials proposed given sea level rise impacts; nevertheless, Ms. Klein expressed optimism that the case would be closed by the end of the year.

Commissioner Ranchod interjected and having recognized and stated that the written report was detailed and comprehensive enabling him to answer the questions he would otherwise have had he asked, given the meeting began a bit late as Commissioners were waiting for a quorum, if there were particular cases that Ms. Klein wanted to highlight from the written oldest case update.

Ms. Klein responded that she did not have particular items to highlight. She stated that she appreciated the cooperation of the property owners and BCDC management support. Ms. Klein indicated a willingness to respond to any other questions from Commissioners.

Chair Gilmore asked if any of the Commissioners had any questions.

Commissioner Ranchod observed that Ms. Klein is making good progress in the resolution of the oldest cases and asked for confirmation that the five matters were the only ones remaining that were opened prior to 2000. Ms. Klein confirmed that these five were the only remaining cases opened prior to 2000.

Chair Gilmore echoed Commissioner Ranchod's observation that great progress is being made. She asked if there were any additional questions.

Commissioner Vasquez asked if the Committee would hear anything on the Point Buckler matter involving Mr. Sweeney again or if that matter was now in the hands of the courts. Ms. Njuguna stated that Deputy Attorney General Shari Posner could respond. Executive Director Goldzband recommended that Deputy Attorney General Shari Posner and Lead Enforcement Attorney Brent Plater respond to which Chair Gilmore agreed.

Brent Plater informed the Committee that he is working on a separate matter at Spinner Island where a project was built without a BCDC permit and Mr. Sweeney is a co-owner and noted that the Committee may hear from Mr. Sweeney on that case. Mr. Plater deferred to others about whether the existing litigation in the Point Buckler matter is complete, or what could be expected in terms of a petition for the Supreme Court or anything else.

Gilmore asked if Deputy Attorney General Shari Posner wanted to comment.

Deputy Attorney General Shari Posner answered in the affirmative and informed the Committee that she could not predict what would happen on a petition to the Supreme Court but knew that the Solano County Superior Court reassigned a judge to the case on June 22, 2021, and the trial court was able to reassert jurisdiction after the Court of Appeal case was final. A hearing date has been set for the trial court to do what the Court of Appeal directed the trial court to do. She stated that the next step would be to try and enforce the cease-and-desist order and to try and collect the civil penalty. She also noted that it is possible there would be further litigation. She explained that the Attorney General's office would continue to work with Mr. Plater and with BCDC Chief Counsel Greg Scharff on the Point Buckler matter.

Regulatory Director Brad McCrea asked Deputy Attorney General Shari Posner if the BCDC enforcement order in the Point Buckler matter stands.

Deputy Attorney General Shari Posner responds that the Court of Appeal did not state if that way but in essence that is the case.

There were no more questions from the Commissioners.

Chair Gilmore solicited public comment. There were no public comments.

7. Future agenda items. Ms. Njuguna stated that in the upcoming meetings, staff anticipates bringing complex cases to the Committee including a proposed resolution on the Richardson Bay matter which may occur in late summer or in the fall. There were no other matters raised.

8. Adjournment. Chair Gilmore requested a motion and a second motion to adjourn the meeting. Commissioner Ranchod moved for adjournment seconded by Commissioner Vasquez.

The meeting was adjourned at 10:35 AM.