

San Francisco Bay Conservation and Development Commission

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ENFORCEMENT PROGRAM IMPROVEMENT PROGRESS REPORT

PROJECT SUMMARY

REPORT DATE	PROJECT NAME	PREPARED BY
August 13, 2021	Enforcement Program Improvements	Priscilla Njuguna, Enforcement Policy Manager

OVERVIEW

This document summarizes the efforts of BCDC’s Enforcement Committee and staff to improve the Commission’s Enforcement Program over the past three years. These efforts were substantially increased when, in 2019, BCDC added an Enforcement Attorney and an Enforcement Policy Manager to the enforcement staff to assist in the program improvements that were initiated in 2017. Adding a dedicated manager and an attorney to BCDC’s small three-person enforcement team created an opportunity for real advancements in resolving violations of existing BCDC permits and BCDC’s laws.

Recent program improvements rely on a structural framework built on achieving four defined program goals: Deterrence, Consistency, Transparency, and Fairness. How enforcement cases are reviewed and managed by the BCDC staff, as well as the enforcement policies that are applied to those cases, determine whether cases are successfully resolved as described in the procedures referenced below. When used appropriately, BCDC’s procedures serve to **deter** non-compliant behavior, enhance

transparency in the enforcement process, promote **fairness** in the application of BCDC laws, policies and regulations; and define a **consistent** process to set expectations for the regulated community as well as define internal guidelines.

Case Management. The Case Management Procedure defines individual staff roles and responsibilities and sets case resolution milestones, namely: *Assignment* within 45 days of the enforcement case report; *Investigation* within 100 days of assignment; *Negotiation* within 240 days of assignment; and *Resolution* within 90 days of negotiation completion. This procedure also uses an Aged Case Status Report and a Closed Case Report to prevent case stagnation and promote timely resolution by verifying that the milestone requirements are timely and that cases are being closed as promptly as possible. This procedure is responsive to the requirement in AB2809 for timelines in resolving enforcement cases.

Case Review. Similarly, the Case Review Procedure defines individual staff roles and responsibilities, provides step-by-step instructions on the staff-level resolution process and the Commission-level resolution process, and defines how cases are prioritized based on relative potential or actual harm to the Bay and/or restrictions on shoreline public access. In addition, the Case Review Procedure defines when cases are escalated to the Regulatory Division Director, the Executive Director, the Enforcement Committee, and the Commission. Cases are escalated when the case management milestones are not being met because of lack of good faith efforts by the violator or because the violator opts to go to the Commission instead of pursuing a negotiated resolution at the staff level. This procedure is distinguishable from the previously discussed procedure in that it includes case status codes that track the progress of a case through phases including: *New Report*; *Active Case*; *Pending Case*; *Investigation*; *Resolution Imminent*; and *Closed Case*. Cases that are resolved using an order or agreement are managed using the *Compliance Monitoring* status code. Closed cases are either simply in a *Closed* status or a *Closed-No Violation* status when staff determines that another federal, state, or local government agency is better suited to resolve the case and/or the reported conduct does not violate BCDC laws, regulations or policies.

The case review procedure also includes a Grouped Case Report and a Paired Case Report, both of which enable staff to build efficiency by combining cases when possible, for group resolution when the types of violations are similar and/or related. The distinction between the Grouped Case Report and the Paired Case Report is that the former combines 10 or more cases whereas the latter combines two or more cases. In simplifying case prioritization, Staff used Enforcement Committee guidance to determine that cases that represent significant harm to the Bay take precedence followed by cases that represent most harm to the Bay then cases that represent limits on maximum feasible public access, then violations that are unpermitted but permissible while integrating ethical considerations including but not limited to changes in site conditions. To consistently assess administrative civil penalties, the procedure integrates the newly developed administrative civil penalty policy which includes specific guidance of assessing penalties

when multiple violations are involved. This procedure is responsive to the requirements in AB2809 including a procedure to ensure that managers perform a documented review of staff decisions in enforcement cases, a penalty matrix for assessing fines and civil penalties including how penalties are assessed when multiple violations are involved.

Enforcement Policies and Guidelines. Work has been initiated in developing the following policies and guidelines: The Administrative Civil Penalty Policy, Criteria for Aggregating Violations, and Supplemental Environmental Project Guidelines. The concepts that are included in these policies and guidelines have been presented to the Enforcement Committee and based on the Committee’s input, staff has developed draft policies for inclusion in a proposed rulemaking package that the Commission agreed to commence in October 2020. The amendment to the regulations, will, in part, address the concerns that were raised in the Audit. Among the recommendations that will be addressed is the recommendation that that BCDC develop a definition of “significant harm” a term that appears in section 11386 of the regulations and that BCDC develop a penalty calculation worksheet. Draft regulatory language was presented to the Committee on September 10, 2020 for discussion following a public workshop on July 29, 2020 to enable the public to provide initial input on changes including potentially raising the amount of standardized fines collected consistent with the procedure set forth in the existing regulation in section 11386. Following Commission meeting October 15, 2020 rulemaking was initiated, and public comment was solicited for draft regulation amendment language in the first quarter of 2021 and the amendments were submitted to the Office of Administrative Law in May 2021. In calendar year 2021 \$97,186 has been collected in fines and penalties by June 30, 2021 \$5,000 of which was a civil penalty from a 2019 cease and desist order civil penalty compared to \$2,000 collected in standardized fines for the same period in 2020.

STATUS OF PROGRAM IMPROVEMENTS

TASK	% ACCOMPLISHED	DUE DATE	DRIVER	NOTES
Case Management and Case Review procedures	100%	09/30/2020	Audit recommendations: internal need to build efficiency, promote prompt case resolution, and reduce unresolved case numbers. Updated to integrate Administrative Civil Penalty Policy and Supplemental Environmental Project guidelines.	Enforcement Committee meetings 7/1/19, 9/25/19, 11/14/19, 12/12/19, 4/9/20, 4/22/20, 6/24/20. Discussed prioritizing cases, resolving the oldest cases, and preventing case stagnation. Presented to Commission 2/6/20, 5/7/20, 8/20/20, 9/17/20.

Guidance on aggregating violations	100%	9/30/2020	Audit recommendation; achieving goals of fairness, consistency, and transparency.	Enforcement Committee meetings 10/1/19, 3/12/20, 5/14/20. Presented to Commission 5/7/20.
TASK	% ACCOMPLISHED	DUE DATE	DRIVER	NOTES
New staff position dedicated to permit compliance	25%	TBD	Audit recommendation; internal understanding that 50% of caseload is attributable to failure to fully implement and comply with permit requirements.	Because funding shortfalls limit ability to implement the Audit recommendation to hire one or more compliance officers, staff have been working on process improvements to further compliance. An internal tracker for permit status was initiated in 2014, is in use, and is being updated. When enforcement cases are closed respondents sign a Certification of Terms and Conditions Compliance Form and a responsible contact person is designated to enable prompt resolution of future concerns.
Oldest case resolution	80%	6/30/2021	Audit recommendation; need to deter violators by swiftly resolving most cases.	Enforcement Committee briefing on the progress being made to resolve cases opened before 2000. Eight cases reported 8/14/19, reduced to 6 unresolved cases for 3/12/20 report, reduced to 5 cases for 7/9/20, 10/28/20, 2/24/2021 updates, reduced to 4 cases . Monthly meetings to track

				progress when cases have multi-agency involvement.
Administrative Civil Penalty Policy development	100%	9/30/2020	Audit recommendation; regulation update; will advance transparency in process.	Enforcement Committee meetings 8/8/19, 8/14/19, 9/25/19, 6/11/20, 7/29/20. Presented to the Commission 10/15/20 where Commission voted to initiate rulemaking.
TASK	% ACCOMPLISHED	DUE DATE	DRIVER	NOTES
Supplemental Environmental Projects Policy development	100%	9/30/2020	To enhance transparency and consistency in process, articulate principles for use of SEPs in negotiating the resolution of cases. Related guidelines presented to Commission October 15, 2020 that approved initiation of the rule making process.	Enforcement Committee first discussion 11/14/19 with direction to limit use to specific cases that warrant the potential use of SEPs. Subsequent discussions 6/24/20 and 7/29/20. Presented to the Commission 10/15/20.
Standardized fine process improvements	100%	12/31/2020	Audit recommendation; examination of the existing regulation for opportunities to improve the effectiveness of the regulation as applied and to pursue regulatory changes. Rule making process initiated with clarifying amendments to Chapter 13 regulation.	Enforcement Committee briefing on 7/24/19. Templates for 35-day letter and Case Management Procedures have timelines for case resolution. Presented to the Commission 10/15/20 where the Commission voted to initiate rulemaking.
Significant harm definition	100%	12/31/2020	Audit recommendation; rule making process initiated by unanimous Commission vote October 15, 2020.	Enforcement Committee discussion on 8/8/2019 and approval of proposed definition 10/10/2019. Subsequent discussion 7/29/20 as part of proposed Chapter 13

				amendments. Commission voted to initiate rule making on 10/15/2020. Update on rule making process to Commission first quarter 2021. Amendments submitted to Office of Administrative law May 2021.
TASK	% ACCOMPLISHED	DUE DATE	DRIVER	NOTES
Timely case resolution	ongoing	ongoing	Audit recommendation; achieving goals of deterrence, fairness, consistency.	Case discussions at Enforcement Committee: Union Point Park cease and desist order (4/22/20, 8/13/20, 10/1/20); Richardson's Bay periodic progress updates to track defined transition plan for vessel removal and eelgrass habitat restoration (11/20/19, 4/9/20, 7/9/20, 10/28/20); case resolution updates during enforcement reports. Periodic updates to the Commission and presentation of cease and desist orders and settlement agreements.
Workforce study	TBD	ongoing	Audit recommendation; internal goal of adequate enforcement personnel and software resources to help improve program efficiency.	Began 10/2019; the anticipated completion is to be determined given COVID-19 related delays which may be impacted by 2021 Mission Based Review of permitting process.

Bay Fill Cleanup and Abatement Fund spending for enforcement staff salaries	100%	7/15/2021	Audit recommendation; internal goal to fund adequate enforcement staff to prevent case stagnation.	BCDC received confirmation from the Department of Finance that enforcement staff will be funded from the general fund.
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ONGOING AND PENDING IMPROVEMENTS

ISSUE	ASSIGNED TO	DATE
Documented progress in the resolution of the old cases with detailed quarterly enforcement reports	Priscilla Njuguna, Enforcement Policy Manager	Ongoing until all the cases opened 2016 or earlier are closed.
Proposed regulation change discussions beginning July 2020 for subsequent rule making process	Greg Scharff, General Counsel	Rule making process initiated by unanimous Commission vote October 15, 2020. Update to Commission first quarter 2021, public comment occurred before Commission in February 2021. Amendments submitted to Office of Administrative law May 2021. Ongoing work to complete legislative process.
Workforce study outcome	Department of Finance	TBD final report delayed by COVID-19 and state budget cuts.

CONCLUSIONS

Over the past year and a half, BCDC has strategically and systematically improved its enforcement program evidenced by the 167 cases closed in calendar year 2020 compared to the 48 cases closed in calendar year 2019 when there were less enforcement Staff. The total enforcement caseload as of December 31, 2020, was 211 cases which is a substantial improvement from the 284 caseload at the end of 2019. This decrease is significant given that the reported cases in 2020 was 101 compared to 71 cases reported in 2019 which did not result in an increase in the caseload in a year over year comparison.

As of June 30, 2021, BCDC enforcement has a caseload of 134, 62 cases have been opened, 139 cases have been closed. For the same period in 2020 BCDC enforcement had a caseload of 259, 52 cases had been opened and 76 cases had been closed. The main difference in the number of cases opened in the year over year comparison was assigning case numbers to 16 duplicative reports in 2020 which was a departure from the practice in previous years including 2019 when case numbers were not assigned to duplicative reports of existing alleged violations. The implementation of permit amendments once approved will further streamline the enforcement process. In addition, written procedures have been developed to address reports of violations in a timely manner by focusing on the violations that represent the most harm to the Bay and/or limit maximum feasible public access, as well as through consistent outreach to the alleged violators. Work is ongoing to resolve the old cases that were opened in 2016 or earlier with 54 of those cases having been closed in 2021 compared to the 37 such cases closed in calendar year 2020.