

San Francisco Bay Conservation and Development Commission

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Audit Frequently Asked Questions

What prompted the audit?

The Joint Legislative Audit Committee requested that the State Auditor review BCDC's enforcement program after receiving a letter from four Bay Area legislators requesting such an assessment. The legislators' letter stated that BCDC permit holders had raised concerns about BCDC and its enforcement program and enforcement processes. The letter also requested an examination of how BCDC uses the Bay Fill Clean-Up and Abatement Fund (Fund).

What did the audit seek to discover?

The State Auditor's objectives were to review BCDC's enforcement program, including its policies and procedures for opening, prioritizing, tracking, investigating, and closing alleged violations of BCDC permits. In response to comments from permit holders regarding perceived bias on the part of staff and staff changing requirements for permittees after they had satisfied previously established requirements, the legislators also requested that the audit include an examination of BCDC's cases over the past five years to identify unusual trends in the volume and types of violations, as well as an examination of the extent to which staff currently work with violators to resolve confirmed violations short of a formal hearing process. The scope also included an analysis of the role and function of the Commission's Enforcement Committee and an assessment of the Commission process for reviewing staff-recommended enforcement decisions and conducting enforcement hearings. Finally, the scope included an examination of whether BCDC has adequate resources and staffing levels to meet current and anticipated permit and enforcement workload demands, and a review BCDC's use of the Fund.

What are the audit's primary findings?

In general, the audit concludes that BCDC should increase its enforcement efforts and improve its enforcement policies and procedures.

The audit report lists eight recommendations for the State Legislature, and BCDC generally supports these recommendations in concept. For a few of the recommendations, however, BCDC believes that legislation is neither necessary nor appropriate to accomplish the objectives, and that action by the agency is more suited to the goal. For example, BCDC disagrees that legislative action is necessary on timelines for enforcement cases. Legislatively-enacted timelines could actually enable violators to continue harming the Bay, and instead, BCDC believes that formally establishing and diligently maintaining milestones for each case is the best way to ensure that cases are not allowed to linger, and that the Bay's resources are protected. The audit also sets forth 17 recommendations for procedural actions that BCDC should take to make its enforcement program more formal, transparent, and consistent (several of these recommendations overlap the recommendations for the Legislature). BCDC generally agrees with most of these recommendations.

Notably, the audit did not make any findings that suggest that any of the cases reviewed by the auditors involved improper motives (i.e., bias, “moving the goalposts”, etc.) by BCDC staff.

Among the report’s most important findings is that BCDC’s enforcement program is limited by its current resources – the report explicitly recognizes BCDC’s limited staff and it includes a recommendation that BCDC conduct a workforce study to evaluate its personnel needs. The report also recommends that, at a minimum, BCDC should seek additional funding for a permit compliance position to help resolve issues before these matters require formal enforcement. BCDC agrees with this recommendation.

Related to that lack of resources, the report also recommends that BCDC make process changes to increase its efficiency and decrease BCDC’s backlog of enforcement cases. BCDC generally agrees with the substance of these recommendations. The report highlights the time that staff spend trying to resolve cases amicably and voluntarily before commencing formal enforcement processes, but finds that this approach takes an extraordinarily long time given the potential for violations to harm the Bay or limit public access. Among other recommendations related to BCDC’s current processes, the report recommends that BCDC simplify its system for prioritizing cases, noting that the complexities in the existing system may be making it more difficult to resolve cases quickly. The audit report also recommends that BCDC develop a system to settle stale cases, while ensuring that the agency preserves the State’s legal rights to levy penalties and take action for violations.

The audit report also found that BCDC lacks formal policies and guidance to govern various staff actions, including the assessment of civil penalties, use of standardized fines, and timelines and procedures for resolving violations and closing cases. BCDC agrees that it should develop additional guidance and procedures. However, BCDC does not agree that a lack of formal policies or guidance on the identified topics has resulted in the Commission acting inappropriately or improperly delegating its authority to staff. The report’s statements regarding a lack of policies and guidance and delegation of authority are not linked to any findings of biased or selective enforcement. Also, the Commission has developed detailed regulations that address fines and penalties, all of which implement provisions of its governing statutes. Nonetheless, BCDC agrees that formal policies and guidance to supplement these regulations and address aspects of the enforcement process would be beneficial.

The report also found that BCDC should do more to implement more successfully the Suisun Marsh Preservation Act and provide more oversight regarding Suisun Marsh local protection efforts.

What is the Commission doing in reaction to the audit report?

The report essentially recommends that BCDC do more enforcement more efficiently and more consistently, and that is BCDC’s goal moving forward. Staff expects that the Commission will agree with much of the substance of the recommendations regarding how BCDC can and should improve its enforcement processes, and will use the audit as a roadmap to improve the program. The Enforcement Committee will meet on Thursday, May 16, to review the audit report, and a briefing on the report is also on the full Commission’s agenda that afternoon.

BCDC expects that the report’s recommendations will form much of the enforcement program’s workplan during the next two years.

Has BCDC started to implement any of the recommendations in the audit report?

On March 7, 2019, the Commission adopted a staff recommendation to undertake a comprehensive review of the Suisun Marsh Preservation Act, Suisun Marsh Protection Plan, and local protection plans, starting with a collaborative meeting of interested stakeholders that will include various public agencies. BCDC will seek additional funding to undertake this large and comprehensive review to ensure that it can be accomplished successfully within a reasonable period.

BCDC staff already have used the productive discussions with audit staff to analyze possible procedural changes to resolve enforcement cases and reduce its existing backlog. In addition to reviewing its prioritization process, staff is determining how best to establish timelines and milestones as each new case that is opened, review backlogged cases in light of the prioritization process, and identify better database tools to help track and manage cases and identify compliance issues. In addition, as recommended by the audit, BCDC staff are exploring new policies and procedures to address how penalties are assessed and other elements of enforcement actions. The Enforcement Committee will analyze options proposed by staff during 2019 and 2020 in its public meetings and recommend courses of actions to the full Commission.

The Commission has also commenced a formal public regulatory process to review and update its permit fees. Following this, consistent with the recommendations in the report, the Commission will conduct regular reviews of its fees.

Staff expect that the Commission will seek funding to conduct the recommended workforce study and to establish a dedicated permit compliance position to further the efforts of the enforcement program.

In December, staff also presented the Enforcement Committee with a briefing on proposals that could assist in reducing the backlog of enforcement cases, including various forms of amnesty similar to what has been used or discussed by other resource agencies and local governments. The Committee did not endorse any of the 18 proposals that were discussed. Instead, there was a discussion of the benefits and issues with these proposals, which included three proposals that did not include any form of exoneration but instead proposed pursuing only the highest priority cases.

Did the audit report find that BCDC has mishandled enforcement cases to the detriment of permit holders or alleged violators?

The report cites issues with BCDC's handling of approximately 10 cases out of the hundreds of case files (typically, more than 50 case files for each year from 2012 through 2017) reviewed by the State Auditor staff.

Notably, the audit did not find that any of the identified cases involved improper motives (e.g., bias, "moving the goalposts," etc.) by BCDC staff. Overall, for each of the identified actions, BCDC recognizes the importance of ensuring fair, firm, consistent, and transparent enforcement, and BCDC will continue to ensure that all cases are handled consistently and in accordance with BCDC's regulations.

For one of the identified cases – a case involving a tugboat that ran aground on land under the jurisdiction of the State Lands Commission -- BCDC disagrees with the auditor's statements

suggesting that the case was mishandled. BCDC has noted the complex history of the case and the fact that State Lands Commission and local law enforcement requested that BCDC cease its active involvement in the case, because of their efforts in finding a resolution. Several of the other identified cases involve questions about how BCDC used its standardized fines process to resolve various violations, including dredging violations. Others are specific to the facts involved. BCDC does not believe that the selected examples show any systemic mishandling of cases. Rather, these examples show the complexity and variation in the cases that BCDC handles.

Did the audit report identify any issues regarding how the Enforcement Committee conducts enforcement hearings?

No. The audit included an examination of the Enforcement Committee's process and the procedures for enforcement hearings, but included no findings regarding BCDC's hearing process. The report did not find that there are any issues or unwarranted delays with cases that are brought before the Enforcement Committee and Commission for decision. The report also did not find that the procedures for enforcement hearings are either unfair or insufficient to protect the rights of violators. The report supports the conclusion that cases resolved through formal enforcement hearings are resolved in an appropriate and timely manner.

Did the audit report identify any issues with BCDC's permitting process?

No. The audit report found that BCDC generally drafts reasonable permit conditions that comply with applicable state laws and established deadlines. The report notes, in particular, that the State Auditor staff reviewed a number of selected permits and found no instances in which BCDC included a condition that appeared unreasonable or outside its legal authority. The audit report notes that additional guidance from the Commission may be needed to more explicitly delineate the types of projects that may be approved through administrative permits versus those that require a major permit and hearing before the Commission. Otherwise, the audit report found no issues with BCDC's permitting process and the auditors found no evidence that this lack of delineation affected the permit approval process.

Are the Commission and its Enforcement Committee complying with public meeting requirements?

Yes. The report found that the Commission generally conducted its hearings in compliance with open meeting laws. The auditors did find that, in the past, the Commission did not consistently record and keep minutes of closed sessions to enable judicial review to find that the Commission conducts its closed sessions consistently with the law. However, the report recognizes that the Commission has resolved this issue.

Why does BCDC have a large backlog of cases and what is it doing to resolve the backlog?

As noted in the report, BCDC has a backlog of more than 230 cases. From 1970 through 2018, BCDC approved 630 permits for large and complex major projects and almost 3900 permits for minor projects. Also, from 2012 to 2018, BCDC opened more than 45 enforcement cases each year. The two most important factors contributing to this backlog are that the agency has consistently lacked resources directed to enforcement and compliance for at least two decades, and that the staff attempts to resolve cases amicably and voluntarily prior to

issuing a formal enforcement process (which, in some cases, has taken years and has been unsuccessful).

BCDC currently has three enforcement staff – two analysts and a supervisor. BCDC received authorization in 2018 to hire its first enforcement attorney to supplement its small legal staff. Although BCDC’s enforcement caseload grew during the past twenty years, particularly as the economy improved, there were few efforts to increase the enforcement staff, which had suffered from budget restrictions during two major recessions. In effect, there were few resources available to handle the growing caseload until the current BCDC leadership started to reinvigorate the enforcement program. BCDC also only recently has hired enforcement staff with the experience to recommend how best the agency could improve its enforcement reporting and tracking system.

What is the Bay Fill Clean-up and Abatement Fund and how has BCDC been using this money?

The Bay Fill Clean-Up and Abatement Fund is the account into which BCDC deposits fines and penalties. The funds are available to BCDC when appropriated by the Legislature. In a fiscal environment in which BCDC had sufficient funds to pay all staff salaries, these funds would be used to remove fill in the Bay, perform cleanup actions, and enhance Bay resources. However, BCDC has requested and received approval from the Executive and Legislative branches consistently during the past twenty years to use these funds to pay enforcement staff due to BCDC’s tight budget constraints.

Do the auditors agree with BCDC’s use of the Fund?

The audit report states that using the Bay Fill Clean-up and Abatement Fund to pay enforcement staff salaries does not comply with the McAteer-Petris Act. BCDC does not agree with this conclusion given that enforcement staff actions remove illegally placed fill and abate other illegal actions within BCDC’s jurisdiction. That being the case, BCDC would prefer to use the funds to actually remove fill. BCDC supports the conclusion in the report that should the Legislature stop appropriating the Fund for enforcement program staff, it should fully fund BCDC’s enforcement program through the state General Fund.

What are the State Auditor’s recommendations?

For the Legislature, the audit report recommends:

- That the Legislature require BCDC to create and implement a procedure to ensure that managers perform documented review of staff decisions in enforcement cases
- That the Legislature require BCDC to create and implement timelines for resolving enforcement cases
- That the Legislature require BCDC to create and implement a penalty matrix for applying fines and civil penalties
- That the Legislature direct BCDC to begin developing regulations by fiscal year 2020-21 to define single violations and create a method of resolving minor violations through a fine
- That the Legislature require BCDC to report out on its comprehensive review of the Suisun Marsh Plan every five years, beginning with a review in fiscal year 2020-21

- That the Legislature clarify the use of the Bay Fill Clean-up and Abatement Fund for physical clean up of the Bay rather than enforcement staff salaries, and that the Legislature consider fully funding enforcement staff through the General Fund
- That, after BCDC implements the recommendations, the Legislature amend the McAteer-Petris Act to record notices of violation on the titles of properties that have been subject to enforcement action

To the Commission, the audit report recommends that BCDC:

- Develop and implement procedures to ensure management adequately reviews staff enforcement decisions and that the procedures include requirements for staff visits and other actions
- Develop and implement procedures to ensure that staff open, investigate, and close cases in a manner that is consistent with state law and that encourages the responsible use of staff time
- Develop guidance that enumerates the violation types that BCDC should be address swiftly, those that can be deferred for a specified period of time, and those that do not warrant enforcement action or can be resolved through fines.
- Simplify its system for prioritizing enforcement cases
- Create a standardized penalty calculation worksheet
- Develop a procedure to identify stale cases and seek appropriate settlements for these cases that preserve and exercise the State's legal rights to resolve violations and levy penalties
- Evaluate and update permit fees every five years
- Appoint a new citizens' advisory committee
- Conduct a comprehensive review of local agency compliance with the Suisun Marsh Plan.
- Create a policy to disburse monies from the Bay Fill Clean-up and Abatement Fund for projects that actually clean up the Bay.
- Conduct a workforce study to determine what staffing levels are necessary to support its mission.
- Implement a permit compliance position to support the efforts of enforcement staff and the implementation of process changes
- Update its existing database or create a new database to ensure that it can identify and track individual violations within each case
- Create and implement regulations that identify enforcement timelines and milestones
- Create and implement regulations that define substantial harm, provide explicit criteria for calculating the number of violations per case,

- Create and implement regulations to allow the use of monetary fines to resolve selected minor violations that do not involve substantial harm to the Bay,
- Update its regulations on permit issuance to provide greater clarity on the types of permitting projects that do not require a Commission hearing.