

San Francisco Bay Conservation and Development Commission

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May 26, 2017

TO: All Commissioners and Alternates

FROM: Lawrence J. Goldzband, Executive Director (415/352-3653; larry.goldzband@bcdc.ca.gov)

Sharon Louie, Director, Administrative & Technology Services (415/352-3638; sharon.louie@bcdc.ca.gov)

SUBJECT: Draft Minutes of May 18, 2017 Commission Meeting

1. **Call to Order.** The meeting was called to order by Chair Wasserman at the Bay Area Metro Center, 375 Beale Street, Yerba Buena Room, First Floor, San Francisco, California at 1:09 p.m.

2. **Roll Call.** Present were: Chair Wasserman, Vice Chair Halsted, Commissioners Addiego, Butt (Arrived at 1:26 p.m.), Cortese (represented by Alternate Scharff), DeLaRosa, McGrath, Nelson, Peskin, Pine, Ranchod, Randolph, Sears, Showalter, Techel (represented by Alternate Hillmer) Wagenknecht and Zwissler (Arrived at 1:26 p.m.)

Chair Wasserman announced that a quorum was present.

Not present were Commissioners: Association of Bay Area Governments (Bates), Alameda County (Chan), Santa Clara County (Cortese), Department of Finance (Finn), Speaker of the Assembly (Gibbs), Contra Costa County (Gioia), Sonoma County (Gorin), U.S. Army Corps of Engineers (Hicks), State Lands Commission (Lucchesi), Department of Business Transportation & Housing (Sartipi), Solano County (Spering) and U.S. Environmental Protection Agency (Ziegler).

3. **Public Comment Period.** Chair Wasserman called for public comment on subjects that were not on the agenda.

There were no public speakers present to comment.

Chair Wasserman moved to Approval of the Minutes.

4. **Approval of Minutes of the May 4, 2017 Meeting.** Chair Wasserman asked for a motion and a second to adopt the minutes of May 4, 2017.

MOTION: Commissioner Wagenknecht moved approval of the Minutes, seconded by Commissioner Scharff.

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BCDC MINUTES
May 18, 2017

VOTE: The motion carried with a vote of 14-0-1 with Commissioners Addiego, Scharff, DeLaRosa, Peskin, McGrath, Nelson, Pine, Ranchod, Randolph, Sears, Showalter, Techel, Wagenknecht and Chair Wasserman voting, "YES", no "NO", votes and Vice-Chair Halsted abstaining.

5. **Report of the Chair.** Chair Wasserman reported on the following:

a. **New Business.** I think I am going to drop the New Business request. I don't think I've ever gotten any. We are going to take it off routinely. Commissioner McGrath stated off mic that the Chair had received a request once in the past.

b. **Commissioner Appointments.** I am pleased to let the Commission know that the State Senate has appointed Senator Nancy Skinner as its ex officio representative on the Commission. She has appointed Michael McCree as her alternate. I think she will be a good addition. Commissioner Peskin has been made an actual Commissioner. Welcome again.

c. **Next BCDC Meeting.** At our June 1st meeting:

(1) We will consider adoption of our Strategic Plan.

(2) We will consider a contract for graphics support.

(3) We will have a briefing on Caltrans' Bay Bridge implosions.

There is an article in today's New York Time based on a reporter flying over the Arctic Ice and talking to scientists about it. The Arctic Ice is at a record low for the third straight year. It is the lowest that it has been in four decades. The temperature there continues to rise and mean temperatures in November were 23 degrees above normal. The ice is viewed as very thin. One of our jobs is to scare people while also giving them hope. This is scary and it is the Arctic Ice that will significantly change the predictions that have been made by the scientific community because they had not taken that fully into consideration.

The problem that we are dealing with and addressing in in our next workshop is increasing and increasing at an accelerated pace. The subject of the workshops is the other half of that equation and it does lead to some hope and hopefully to and adaptation plan for the Bay Area that will give us a path forward for protection.

That completes my report.

d. **Ex-Parte Communications.** I will give you the opportunity to put any ex-parte communications on the record. We have no hearings today. (No comments were voiced)

Larry is in Sacramento today successfully working on getting us money for our move to this building. Steve Goldbeck will make the Executive Director's Report.

e. **Executive Director's Report.** Chief Deputy Director Steve Goldbeck will now present the Executive Director's Report.

6. Report of the Executive Director

a. **Budget and Staff.** I want to introduce Chenee Williams, our new Budget Officer, who joined our team on Monday (stood and was recognized). She already has started to engage with her colleagues and we'll keep you up to date as we move forward and we will use her to help us with our financial footing.

I want to let you know of three interns who will be with us throughout the summer. The first has started – his name is Eli Braunstein, a native San Franciscan who graduated from the University of British Columbia. Eli is about to finish his undergraduate work in Environmental Science and is working primarily with the regulatory and GIS staffs to update and add permit layers to BCDC's online mapping service, BayRAT.

We have two new legal interns starting this month. Eric Hagle is a second year law student at Santa Clara University School of Law where he is the Vice President of the Environmental Law Society. He earned his undergraduate degree from Emory University in Atlanta.

Sarah Lucey also starts with us later this month. Sarah is a first year law student at U.C. Berkeley. She also earned both her BA and her MA in English Literature. Sarah worked as a litigation paralegal for three law firms in San Francisco for a number of years prior to starting law school.

b. **Policy.** We received some good news from Ohio recently – I'd like Marc Zeppetello to spend a couple minutes talking about the recent court decision there in relationship to our court proceeding.

Chief Counsel Zeppetello addressed the Commission: The state of Ohio sued the U.S. Army Corps of Engineers a couple of years ago regarding dredge material disposal from a project in Cleveland, the Cleveland Harbor. There was a dispute between the state and the Corps of Engineers about the manner of dredge disposal. The state wanted the material to be placed in a confined disposal facility as it had been in the past on the shoreline.

The Corps decided that under its federal standard the material could be disposed of in the lake; open lake disposal. Ohio objected raising issues under the Clean Water Act and the CZMA. About a year and a half ago the Court granted a temporary restraining order, or a preliminary injunction, in favor of the State of Ohio.

In early May the Court came down with the decision on cross motions for summary judgment on the merits of the case. It ruled in favor of Ohio.

There are a number of issues in the case that go beyond issues that overlap with BCDC's lawsuit against the Corps, and there are some factual and legal distinctions. I will read a couple of sentences that will highlight the key aspects of the decision.

On the CZMA claim there was a dispute about the applicability of Ohio's anti-degradation policy; that was something that was incorporated as an enforceable policy under the CZMA, but the Corps of Engineers said that it did not have to comply with that under the federal standard. The Judge said, the Corps' position that open-lake placement satisfies the CZMA is unfounded – allowing its own federal standard determination to supersede its obligation under the CZMA is unlawful because it gives the agency power in excess of its congressional, delegated authority.

Its conclusion was, by treating its own determination under the federal standard as the ultimate authority on the state's water quality certification standards and elevating that regulation above its other statutory and regulatory obligations – the Corps exercised power in excess of its statutory jurisdiction, authority or limitations; thus the Corps' decision to rely solely on the federal standard when determining what disposal method was permitted and/or required is also reversed pursuant to the Administrative Procedures Act.

Ohio expects that the Corps of Engineers will appeal this decision to the Court of Appeals. That will likely take some time. We will see where we are in BCDC's case but it is possible that our case will be heard in the District Court in San Francisco prior to an appellate ruling in this case.

As I mentioned, there are some factual and legal distinctions between the Ohio case and BCDC's case. On balance the decision is very favorable for us.

We did not calendar a closed session on BCDC's litigation and so now would not be the time for discussion. I will take this opportunity to give a brief update based on information in the court filings with respect to our case.

A month or two ago BayKeeper moved to intervene in the case, and their position is that they were going to bring claims under the Clean Water Act and the (401) Water Quality Certification issued by the Regional Board as a distinct issue that was not being pursued by BCDC because our claims are based on the CZMA.

We filed a Statement of Non-Opposition. The Corps of Engineers filed a Statement of Oppositions and a brief. In the brief they argued that BayKeeper's claims were moot because the Corps of Engineers made a decision earlier this year that they were going to defer dredging of the Richmond Outer Harbor Channel this year and start a process of deferring Richmond and Pinole in alternating years.

This ties into one of the Commission's conditions and the Water Board's condition to reduce the use of hopper dredging to avoid impacts to delta smelt and longfin smelt.

The Corps of Engineer's decision was that they would comply with the Water Board's and BCDC's conditions by only dredging one channel with a hopper dredge and then instead of dredging annually the other channel; would defer dredging. They argued that this moots BayKeeper's claims and that it also partially moots BCDC's claims with respect to reduced hopper dredging.

We filed a short brief urging that the Court not get into the merits of this mootness argument on a motion to intervene, and if the Court did reach it that we disagreed and we did not think that the Corps' decision mooted anything; that it was just a further implementation of their federal standard and circumventing state requirements.

The Court granted BayKeeper's motion to intervene in a short one or two sentence order; it did not reach the merits at all. BayKeeper is now a party to the litigation.

The federal government shared with us a draft index of the administrative record. We are now in a meet-and-confer process to talk about the contents of the record and possibly supplementing the record. In addition, BCDC is proposing to supplement its complaint to add some factual allegations about this decision earlier this year and the impact or not as we see it of this deferring of dredging on our claims.

We were supposed to have a status conference today but the parties jointly requested a continuance for one month which the Court has granted. At that time we will be reporting on our efforts with respect to the record and the filing of BCDC's supplemental complaint.

Thank you very much. That is the update.

Mr. Goldbeck continued: Finally, I want to give you an update on ART Bay Area, the name we have given to the ART project to develop a regional adaptation planning process aimed at increasing the resilience of the region's transportation and community assets. You will remember that the Bay Area Toll Authority (BATA) has contributed \$400,000 to add to Caltrans' \$800,000 for this project, which will be concluded in winter 2019. Lindy is now interviewing consultants, sending out invitations to the regional working group for the project and beginning the early stages of the assessment. She'll give you an update on the project this fall.

That concludes my report, Chair Wasserman, and I'm happy to answer any questions. (No questions were voiced)

7. Consideration of Administrative Matters. Chair Wasserman stated Ethan Lavine was available if Commissioners had any questions or concerns regarding the listing that was distributed. (No questions were voiced)

8. Adjournment. Upon motion by Commissioner Scharff, seconded by Commissioner Zwissler, the Commission meeting was adjourned at 1:27 p.m.