

Item 9 Public Comments - Commission Meeting 10/15/2020

From: Bob Wilson <bobw2654@gmail.com>
Sent: Wednesday, October 14, 2020 11:34 AM
To: Zeppetello, Marc@BCDC <marc.zeppetello@bcdc.ca.gov>
Cc: Dave Pine <dpine@smcgov.org>; Peter Blackmore <Peter@pblackmore.com>; Office of the Secretary CNRA <secretary@resources.ca.gov>; Mario Rendon <Mario.Rendon@asm.ca.gov>; Malan, Margie@BCDC <margie.malan@bcdc.ca.gov>; Zachary Wasserman <zwasserman@wendel.com>; Navi Dhillon <Navi.Dhillon@bakerbotts.com>
Subject: Public Comment on Meeting Agenda Item #9 for the October 15, 2020 commission Meeting.

Marc, please confirm the attached letter will be included with the Commissioners package ahead of tomorrow's meeting. It relates to Agenda Item #9. Many thanks!

Bob Wilson
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October 14, 2020 BCDC Commissioners

By Email

RE: October 15, 2020 Commission Meeting Agenda Item 9 - Possible Vote to Commence the Rulemaking Process on Proposed Amendments to the Commission's Enforcement Regulations

Commissioners:

In tomorrow's meeting, you will consider a staff report recommending changes to the BCDC's enforcement regulations. While we are encouraged you are being responsive to the findings of the California State Auditor, we oppose adoption of these recommended enforcement changes at this time.

There are major issues regarding BCDC permitting processes that we and others, including the Bay Planning Coalition, have continually pointed out to this Commission. To date, we are not aware of any effort by BCDC staff to address the shortcomings of their permitting process. Adding new and far more onerous enforcement procedures, including substantially higher enforcement penalties, cannot be justified before the BCDC permitting process is reformed. Further, the arbitrary way enforcement has been applied in the past by current BCDC executive leadership, calls into question whether any new regulations would be applied fairly.

This agency is long overdue for a major review and overhaul of BCDC's permitting process. BCDC executive leadership has known this is a major issue for many years, but has done little or nothing to reform permitting. It's a

further example of poor leadership and execution at the BCDC. Commissioners we need your leadership to force action.

The Bay Planning Coalition issued a well-thought-out report on BCDC permitting practices almost three years ago. To date this commission has held no hearings on this set of thoughtful findings and recommendations.

The BCDC's own Enforcement Staff are quoted in their workshop on enforcement practices held in November 2016 that permits are poorly written and are often unenforceable. Clearly permit reform is long overdue.

In our observation of BCDC enforcement practices, many alleged enforcement "violations" are often the result of poorly drafted language and conflicting requirements that cannot be resolved without costly and protracted enforcement or legal proceedings.

Further, BCDC insists it must be the last agency to review any project where they claim jurisdiction. Candidly, the BCDC staff are rewriting permits already well-structured by more qualified agencies. This practice creates unjustifiable delays and inefficiencies and leads to many problems and conflicts with applicants and other agencies.

Do you ever wonder why you have hundreds open enforcement actions? Certainly, improvements can be made in enforcement practices. However, our view is the bigger culprit is the BCDC permit process. It needs urgent reform.

There is a much better model for permit issuance. Some commissioners are participating in a better practice already in another SF Bay agency. In fact, Brad McCrae and his staff are supporting a much better permitting process. They have agreed to work jointly with the SF Bay Restoration Authority headed by BCDC Commissioner Dave Pine, using a process where all the agencies involved in restoration projects sit in the same room from day one and work cooperatively on permit issuance.

Earlier this year in an open forum hosted by the Bay Planning Coalition Wade Crowfoot California Secretary for Natural Resources, whose agency is responsible for the BCDC, endorsed this innovative permitting process implemented by Dave Pine and the Bay Restoration Authority. Why not use this model for all projects at the BCDC?

We in California and the BCDC face massive budget challenges ahead. BCDC ought to be acting aggressively today to reform the permitting process to help both streamline and accelerate these programs once they are initiated. This is not a tradeoff against environmental needs or public access. Just the opposite.

Furthermore, we oppose the practice of directing enforcement fines, and especially any increased fines, to pay for BCDC and staff overhead. These funds by statute are to be used to improve and remediate SF Bay environmental issues. BCDC by its actions have shown they care more about collecting fees and increasing unnecessary staff and overhead costs (as evidenced by last year's wasteful and costly move to a new building) than improving the health of SF Bay.

For these reasons, we oppose adoption of the enforcement changes staff is recommending for your consideration.

Thank you in advance for your consideration. Peter Blackmore
Co-Founder

SF Bay Stewardship Alliance

Bob Wilson Co-Founder

SF Bay Stewardship Alliance

To: Zeppetello, Marc@BCDC <marc.zeppetello@bcdca.gov>

Subject: Re: Citizens Committee to Complete the Refuge comments regarding BCDC proposed amendments to enforcement regulations

Hopefully this works. We usually "secure" the document when signatures are included, but in this instance since it is only my signature I've gone ahead and attached a pdf version that is not secure.

Carin

On Wed, Oct 14, 2020 at 2:51 PM Zeppetello, Marc@BCDC <marc.zeppetello@bccdc.ca.gov> wrote:

Carin,

We cannot open the pdf of CCCR's comment letter. I get an error message saying something like "nothing to see here." My secretary also got an error message. My secretary also commented that the pdf is "secure" which means we can't copy, add or paste to our public comments.

Please resend. Thanks. (Also, FYI, there was a typo in the spelling of my name in your first message, which is why it did not go through.)

Regards, Marc



Citizens Committee to Complete the Refuge

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Comments sent via electronic mail only

Lawrence J. Goldzband, Executive Director

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14 October 2020

Attn: larry.goldzband@bcdc.ca.gov

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Re: Proposed Amendments to Chapter 13 Regulations (Enforcement Procedures)

Dear Executive Director Goldzband and Commissioners,

The Citizens Committee to Complete the Refuge (CCCR) would like to thank staff for their consideration of our comments. The Citizens Committee to Complete the Refuge has an ongoing history of interest in wetlands protection, wetlands restoration and wetlands acquisition and we have worked for decades to protect Bay Area wetlands and the species that inhabit them. We have participated in San Francisco Bay Conservation and Development Commission's (BCDC) public comment processes – for individual permits, planning processes and amendments to the Bay Plan. We have also notified BCDC staff of instances of potential unauthorized fills and permit non-compliance.

Our comments are based upon a review of the proposed amendments to BCDC's enforcement regulations, the May 2019 State Audit of BCDC's enforcement program and the October 2, 2020 BCDC staff report and are based upon our concerns of how unauthorized activities are resolved on the ground.

The Staff Report states, "The most significant proposed amendments, along with certain changes that are proposed throughout Chapter 13 to improve the clarity and consistency of the regulations..."

We fully support changes that provide the clarity of the regulations and consistency in the manner in which the regulations are applied.

The Staff Report goes on to say, "The proposed amendments would add a definition of the term "significant harm to the Bay's resources or to existing or future public access." This term currently is used in the standardized fines regulation to identify violations that are not suitable for resolution through the standardized fines process." Defining what BCDC considers "significant harm to the Bay's resources or to existing or future public access" was a recommendation of the State Audit. "Significant harm" would be "determined based on both the "context" and "intensity" of the violation.

Under Section 11310 of Chapter 13, “context”:

“...refers to the location of the violation and the characteristics of the area where it occurs. Areas with important environmental or ecological significance (e.g. habitat or refugia for sensitive species) are generally considered to be more significant than previously degraded habitat or areas with limited habitat value, and highly visible and/or frequently used areas are generally considered to be more significant than isolated areas with low visibility or infrequent usage.” [emphasis added]

And “intensity”:

“...refers to the severity of the impact and the degree to which it affects the environment or public access. Violations presenting significant ecosystem hazards (e.g. toxic or biohazardous fill) or involving large portions of a particular site may generally be considered to be more severe. In addition, violations that substantially interfere with the ability to use designated public access or encompass large portions of a designated public access area will be considered to be more significant.” [emphasis added]

We have concerns with the proposed definitions for several reasons. Most significantly, while the reason for including these definitions in Chapter 13 is to provide criteria for determining whether or not a violation/non-compliance could be resolved with the standardized fines process, CCCR is, as was noted above, equally concerned with the on-the-ground resolution of violations or non-compliance. By placing these terms into the “Definitions” section of the enforcement regulations, there could be negative ramifications when determining appropriate on-the-ground resolutions to violations or instances of permit non-compliance.

The definitions of “context” and “intensity” infer impacts based upon snapshots in time, which may or may not be appropriate for assessment of fines and penalties, but these definitions would certainly be inadequate for determining necessary remediation actions such as whether an unauthorized fill should be removed and the area restored, or whether an after-the-fact permit might be appropriate.

For example, BCDC and other regulatory and resource agencies and scientific institutions have spent considerable effort identifying the need to restore tidal marsh ecosystems within the Bay Area, setting the goal of restoring 100,000 acres of tidal marshes to protect the biodiversity of the Bay. Tens of thousands of acres of restoration are currently needed to achieve this goal. Degraded habitats provide ideal opportunities for such restoration, thus making them quite important for protection. During the past decade BCDC, other regulatory and resource agencies and scientific institutions have expanded their studies to assess the impacts of climate change on complete tidal marsh systems, and it has been acknowledged that one of the biggest threats to the long-term sustainability of tidal marsh ecosystems is the threat of inundation due to a scarcity of tidal marsh migration space as sea level rises. There are areas within BCDC’s regulatory authority that might currently be in degraded condition and currently have low habitat value, that could have significant value as tidal marsh migration space as well as for achieving the current restoration goal. Such areas are crucial to protect for tidal marsh migration as sea level rises and could provide tremendous restoration potential for species biodiversity, including rare or listed species.

With respect to the “intensity” of impacts, focusing on the size of area impacted may not be as important as the adjacency of a violation site to wildlife corridors, the creation of habitat fragmentation, or adverse impacts of unauthorized fills – regardless of the size of the fill footprint – on adjacent baylands habitat (e.g. introduction of non-native invasive species, erosion, etc.).

The threat of climate change, provision of future tidal marsh migration space, habitat fragmentation, adverse impacts to areas adjacent to unauthorized fills, etc. might not all be appropriate for the determination of whether

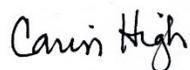
finest or civil penalties are assessed based upon current site conditions, but certainly should and must be considered when determining how BCDC will resolve unauthorized fills or instances of permit non-compliance.

CCCR has substantive concerns that the definitions "significant harm," "context," and "intensity" as currently worded could significantly and negatively constrain BCDC's ability to protect the biological resources of the San Francisco Bay ecosystem. BCDC could avoid this problem by including language in the amended regulations that these terms are defined only as a basis for determining whether or not a violation/non-compliance can be resolved through the standardized fines process. However, if BCDC wishes to include this terminology to the entirety of the enforcement regulations, including the process of determining whether or not unauthorized fills/non-compliance must be fully rectified on-the-ground or whether an after-the-fact permit process/permit amendment process is appropriate, then these definitions are completely inadequate and inconsistent with BCDC's Findings regarding Tidal Marshes and Tidal Flats, inconsistent with the 2015 Baylands Ecosystem Habitat Goals Update, and the U.S. Fish and Wildlife Service's Tidal Marsh Ecosystem Recovery Plan.

We urge BCDC to carefully consider the negative ramifications for tidal wetlands protection that would result for incorporating the current definitions of "significant harm," "context," and "intensity" under Section 11310 and either place these definitions into "Article 3. Standardized Fines, Section 11386. Fines Applicability of Article," or significantly revise the definitions to consider the threat of climate change (sea level rise), habitat fragmentation, adverse impacts to adjacent habitats, etc.

We thank you for the opportunity to provide comments and thank staff for their efforts.

Respectfully,

A handwritten signature in black ink that reads "Carin High". The signature is written in a cursive, slightly slanted style.

Carin High
CCCR Co-Chair