

San Francisco Bay Conservation and Development Commission

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June 11, 2020

TO: Enforcement Committee Members

FROM: Priscilla Njuguna, Enforcement Policy Manager (415-352-3640);
priscilla.njuguna@bcdc.ca.gov)

SUBJECT: Approved Minutes of June 11, 2020 Enforcement Committee Meeting

1. Call to Order. The meeting was called to order by Chair Scharff at 9:31 A.M. It was held online via Zoom.

2. Roll Call. Present were Chair Scharff and Commissioners Gilmore, Techel and Vasquez (who joined during Item 3).

Not present was Commissioner Ranchod.

Chair Scharff stated that a quorum was present.

Staff in attendance included Executive Director, Larry Goldzband; Chief Deputy Director, Steve Goldbeck; Regulatory Director, Brad McCrea; Chief Counsel, Marc Zeppetello; Staff Counsel, Karen Donovan; Legal Secretary, Margie Malan; Principal Enforcement Analyst, Adrienne Klein; and Enforcement Policy Manager, Priscilla Njuguna.

Shari Posner, Deputy Attorney General, also attended the meeting.

3. Public Comment. Chair Scharff called for public comment on subjects not on the agenda.

No members of the public addressed the Committee.

MOTION: Commissioner Gilmore moved to close Public Comment the motion was seconded by Commissioner Techel. The motion carried unanimously with a vote of 4-0-0 with Commissioners Gilmore, Techel, Vasquez, and Chair Scharff voting “YES”, no “NO” votes, and no “ABSTAIN” votes.

4. Approval of Draft Minutes from the May 14, 2020 Meeting. Chair Scharff asked for a motion and second to adopt the minutes of the May 14, 2020 meeting.

MOTION: Commissioner Techel moved for approval of the May 14, 2020 meeting minutes, and the motion was seconded by Commissioner Gilmore. The motion carried unanimously with a vote of 4-0-0 with Commissioners Gilmore, Techel, Vasquez, and Chair Scharff voting “YES”, no “NO” votes, and no “ABSTAIN” votes.

5. Enforcement Report. Ms. Njuguna gave the Enforcement Report as follows.

In July, staff may be able to backfill the vacant position formerly held by

Schuyler Olsson. She informed the Commissioners that earlier in June Enforcement Analyst Matthew Trujillo volunteered and was selected to participate in the State's work on contact tracing for COVID-19. He received training for this temporary role and will begin that work at an undetermined future date, resulting in another gap in Enforcement staffing. The Commissioners were then informed that the assignment would last six to nine months and that the Regulatory Division is working with other divisions to determine the best way to meet this staffing shortfall with other staff in the interim. She informed the Commissioners that the main impact of Mr. Trujillo's departure will be some reduced pace in the resolution of the old cases that staff has systematically been working through.

Ms. Njuguna reported that since May 12, 2020, staff have closed a total of 13 cases and that as of June 10, the total caseload was 262. She also noted that staff continue to work on the resolution of the oldest cases. She also reported that staff are continuing to refine the case management and case review procedures and that the process of integrating simplified case status codes onto the enforcement database is ongoing.

6. Briefing on Penalty Policy Development. Chair Scharff summarized the previous related Enforcement Committee briefings on various elements for consideration in developing a penalty policy.

- In the first briefing on July 11, 2019, Ms. Donovan provided an overview of approaches other agencies have taken in developing penalty policies.
- In the second briefing on August 8, 2019, the Committee discussed approaches that could be used to determine initial gravity-based penalty amounts as part of deriving a civil penalty.
- At two subsequent meetings on August 14, and September 25, 2019, the Committee discussed the adjustment factors which are listed in Section 66641.9 of the McAteer-Petris Act with an emphasis on economic benefit, ability to pay, violator culpability, and violator conduct and the manner in which those factors would be applied.
- During the briefing the Committee was presented with options for development of a penalty policy based on the input previously provided by the Committee, and provided input, particularly the direction that a penalty matrix and policy should be easy to understand and use for both the regulated public and the Commission, consistent with the goals of the Enforcement Program.

Ms. Donovan started by reviewing the May 2019 audit recommendation that the Enforcement Committee create a penalty calculation worksheet as well as formal policies, procedures, and criteria for staff guidance on applying the worksheet.

Ms. Donovan reviewed the prior discussions held between staff and the Committee.

She displayed the language in Section 66641.9, which addresses the considerations that should be used in determining administrative civil liability. She reiterated the enforcement goals of deterrence, fairness, consistency, and transparency as the basis for the proposed approach in developing the penalty policy.

Consistent with the enforcement goal of consistency and transparency, the penalty policy will ensure that civil administrative penalties are assessed in accordance with BCDC's laws and regulations. Consistent with the goal of deterrence, the penalty policy will ensure that the penalties are set in a level appropriate to deter individuals and the regulated community from committing violations while also removing economic incentives for noncompliance. Finally, the penalty policy goal that aligns with fairness is ensuring that penalties are appropriate for the gravity of the violation.

Ms. Donovan explained that the policy will be used by staff, the Enforcement Committee, and the Commission during administrative civil penalty proceedings. During settlement negotiations, she clarified, the policy will guide staff in proposing penalties. She explained that the penalty policy will include the criteria for determining a monetary civil penalty amount and guidance on using the criteria to address the Section 66641.9 factors. She explained that the case prioritization, case management, supplemental environmental projects, and criteria for combining violations would be set forth separately but would work together with the penalty policy.

Ms. Donovan then explained the four-part process through which the penalty policy would work.

Part 1 – Determining the Base Penalty Amount

Step 1: Calculate the initial gravity-based penalty. For this step, staff would determine the potential for harm and the extent that a violation deviates from the requirements of statute or the requirements of a permit condition. The existing impact scoring framework would be used to derive the potential for harm, with cutoff points separating the categories of Major, Moderate, or Minor. The policy would also provide guidance on determining the extent to which a violation represents a deviation from legal requirements or the requirements of a permit. Staff would have some flexibility within the monetary ranges on the chart – between 80% and 100% of what the statute establishes as the maximum penalty per day.

Step 2: A downward adjustment can be made for violations that are susceptible to removal or resolution, for not more than 10%.

Commissioner Techel asked when staff contacts the violator and if this is a change from what was historically done. Ms. Donovan answered that the approach is not a significant change from the way staff has been implementing the statutory provisions. However, it drills down specifically in providing a range of dollar sums to get to the penalty number. She explained that staff has a new practice in which a violator first receives an Initial Contact letter informing them that staff has received a credible report of unauthorized conduct. The violator is instructed to get back to staff within a period; if they do not, staff attempt outreach. The upshot is that prior to ever issuing a Complaint for Civil Penalties, staff has had discussions with the violator about their conduct. There is a progression of enforcement strategy with the violator before staff gets to the point of proposing a civil penalty order; the detailed formula staff is going to use and the factors they are going to consider in arriving at a number provide a level of transparency.

Executive Director Goldzband asked staff to explain to the Committee the minor potential for harm with major deviation versus the major potential for harm with a minor deviation. He wanted to determine if the public could feel that it is worse off because penalties are greater if you do less harm to the Bay but are straying far from what is allowed – versus doing more harm to the Bay while remaining more in the scope of what is allowed. Ms. Donovan responded that the numbers were drafted with that consideration in mind and can be adjusted if the Committee prefers. She stressed that staff wanted to present ranges within the numbers so that based on the case, staff have some flexibility.

Mr. McCrea noted that violators often feel that when the harm is minor, even though it is a major permit violation, they ask why Enforcement contacts them at all. This type of minor harm can delay the negotiations when staff is trying to achieve resolution. Ms. Donovan agreed that it is always a matter of perception. Violators point out that nothing permanent happened. However, staff must look at the potential for harm rather than just considering whether actual harm occurred.

Chair Scharff asked how we are defining the categories Major, Moderate, and Minor. Ms. Donovan answered that this will be articulated with sufficient specificity in the policy. Last fall Ms. Klein and Mr. Schuyler had walked the Committee through the potential for harm scoring developed as part of the prioritization framework. Staff was now proposing to use that scoring and develop cutoff numbers for determining potential for harm. For example, for a high priority case, the cutoff number is 60 and it may make sense to use that for determining that a case has a Major potential for harm. The deviation from legal requirements would have a similar level of detail: staff would devise a description so that the categories are clear.

Chair Scharff felt that the category information should be attached as an Appendix so that anyone can calculate whether a violation is Major, Moderate, or Minor harm to the Bay. He also raised the topic of fairness. He asked for examples of Minor harm as contrasted to Major harm. Ms. Donovan stated that in 2017, staff had presented information on scoring paper violations. Staff talked about Minor, Major, and Medium level deviations. A Major deviation would be something like failing to record legal instruments such as the parameters of public access; Minor would be something like not returning required plans. Staff proposed refining this initial framework to set the considerations for paper violations. She states that more discussion is required on whether there is ever a Major potential for harm with a paper violation.

Chair Scharff mentioned the need to consider violator intent. Ms. Donovan concurred that it will be important to address. She also noted that the Committee and staff would not typically use this policy for violations that are wholly paper violations – we have standardized fine regulations that address such instances. However, a few violations involve multiple types of unauthorized activities that can include paper and physical violations.

Ms. Donovan pointed out that staff will always try to resolve as many violations as they can before initiating the formal enforcement process. Chair Scharff responded that one of the significant changes we are making is to not wait too long before going to the formal process – we do not want to negotiate for six months.

He requested staff to come up with examples of the more difficult cases; they are the ones BCDC is going to be called out on and the ones the public is going to consider unfair. Ms. Njuguna responded that staff would work on addressing outlier cases and share hypotheticals with the Committee. Chair Scharff commented that the ranges in the chart looked fair.

Part II: Adjustment Factors Specific to the Violator

Step 1: Examine the degree of culpability. Whether the violator should have known that they were violating the laws, regulations and policies; known of the hazards and risks they were creating; tried to avoid engaging in the violation. Staff is proposing an upward adjustment up to 25% for a high degree of culpability and a downward adjustment up to 25% for a low degree of culpability.

Step 2: Examine the history of violations. Staff is proposing an upward adjustment up to 10% of the base liability for a prior history of violations within the past five years. Staff proposed that if the violation is the same as a prior violation, the upward 10% adjustment would be mandatory.

Step 3: Examine voluntary removal or resolution efforts and efforts at cooperation. Staff is proposing an upward adjustment up to 25% if the violator has failed to cooperate, delayed compliance, or created obstacles to resolution.

Ms. Donovan clarified that staff would not penalize anyone for exercising their legal rights such as taking a case to the Enforcement Committee for resolution rather than having the case resolved through standardized fines or settlement.

Ms. Donovan stated that there could be a downward adjustment of as much as 25% for exceptional cooperation and efforts to remedy a violation.

She stated that one other factor listed in 66641.9 that staff would incorporate is the cost to the state in pursuing the enforcement action. In cases that involve an extraordinary effort on the part of staff, BCDC has the ability to recover that cost.

Ms. Donovan stated that other factors as justice may require include considerations of environmental justice (which staff will address when they bring the draft policy back to the Committee) and other equitable considerations. Chair Scharff commented that those considerations seemed related to the ability to pay factor, which the regulation already has; he asked that staff consider integrating the two broad considerations.

Part III: Economic Benefit

Ms. Donovan explained that the economic benefit to the violator will be considered the floor; the penalty will be set at a level that will, at a minimum, recover the economic benefit gained by the violator from the violations. She explained that this ensures an effective program that deters people from engaging in violations.

Ms. Donovan reviewed the reasons for including economic benefit, which were previously presented and are consistent with the practice of other agencies that staff has looked at. She explained that although staff does not always have the ability to obtain documentation and evaluate evidence to understand the violator's economic benefit, staff still feels that it is very important to articulate its inclusion in the policy. She stated staff's belief that this is a means for BCDC to make its expectations clear to the regulated community.

Part IV: Addressing Ability to Pay/Ability to Continue in Business

Staff discussed the defenses used to mitigate a potential civil liability. Staff would alert the violators that if they intend to raise this defense, they will need to do so in their statements of defense.

It is also the violator's responsibility to provide BCDC with sufficient evidence to support an argument that it lacks the ability to pay. She explained that if BCDC has evidence that there has been an economic gain from a violation that is equal at least to the penalty we are proposing, BCDC would expect that the violator is able to pay that penalty. She recognized that the ability to pay and economic benefit are related.

Commissioner Gilmore asked what kind of evidence BCDC would be looking for from an individual or entity that raises this defense. Mr. Zeppetello answered that it would be financial statements and profit and loss balance sheets – not only tax returns. He noted that in the Scott’s case, he had raised the option that their records be held confidential, but their counsel did not claim confidentiality.

Mr. McCrea agreed with Commissioner Gilmore that there is sometimes reluctance for private organizations to want to open their books.

Ms. Njuguna pointed out that most small businesses must have audited financial statements. These are typically considered private information depending on the type of business; however, audited financial statements would typically be requested to establish ability to pay. Chair Scharff felt that if violators choose to raise this defense, they should be required to provide the documents. He was not sure about the confidentiality provisions and thought confidentiality would take further discussion. He explained that the public deserves to know why BCDC suddenly reduces a fine. He asserted that BCDC should be tough with this provision and require that people present real evidence, i.e. audited financial statements or tax returns.

Ms. Donovan noted that in the penalty policy we have other means of addressing situations in which an entity does not have the cash on hand: installment payments, physical work that is beneficial to the Bay (such as removal of unauthorized fill), etc. When an entity enters negotiations with BCDC, we are generally willing to devise a way to resolve a violation in a way that will not put someone out of business.

Commissioner Gilmore felt that we should make explicit the type of evidence that BCDC is looking for. She also agreed with Chair Scharff that if someone chooses to use this defense, BCDC needs to be reasonably tough about documents we will accept. Further, she noted that BCDC needs a response for people who do not want a document to become public. Chair Scharff agreed.

Commissioner Vasquez raised the issue of how we treat public agencies who say they do not have the wherewithal to pay fines. He mentioned the City of Oakland as an example. Ms. Donovan agreed that having the money available is the result of the agency’s policy-level decisions. BCDC would use its authority – Cease and Desist orders and other injunctive relief – to put a public agency in a position to understand the need to properly budget the funds required to get them in compliance.

Mr. Zeppetello agreed with Commissioner Vasquez that many agencies are operating on tight budgets and it may be a matter of priority. He mentioned the case of the North Coast Railroad Authority in which the penalty

was suspended. Generally, Mr. Zeppetello noted that ability to pay may not be a factor that is applicable.

Commissioner Gilmore asked if we have ever actually levied penalties on a public agency to get them to shift their priorities. Ms. Donovan answered that BCDC has indeed assessed fines and civil penalties against public agencies. She explained that this is consistent with what the Water Boards, for example, do. She explained that deterrence is important for public entities as well as private entities. She noted that staff typically try to negotiate the most appropriate resolution to keep someone from future violations.

Ms. Njuguna noted that BCDC has recovered settlements from the Port of San Francisco and Foster City.

Mr. McCrea explained that the SFO case involved a private parking garage and co-permittees in the City of South San Francisco that had public right-of-way improvements they were responsible for implementing. He felt that public agencies are fairly responsive regarding initiating and engaging the case resolution process. He welcomed discussion from the Committee on whether there should be a difference between how private and public entity cases are resolved.

Commissioner Techel preferred to see the money spent on compliance rather than fines for public agencies. Ms. Donovan responded that fines and penalties are used when BCDC feels the need to deter future conduct.

Mr. Zeppetello commented that during a recent enforcement matter BCDC had received several comment letters regarding how BCDC only goes after private parties and does not treat other agencies the same.

Chair Scharff felt that we should treat public agencies similarly while recognizing that they are public agencies. He opined that getting their compliance is really the goal but recognized that without the threat of fines and so on, it is difficult. He concluded that just as with private entities, we need to be willing to follow through and impose the fine.

Commissioner Gilmore commented on the Enforcement Committee's commitment to trying to bring entities into compliance, whether public or private.

Chair Scharff noted that on the other side, the Committee had been criticized for allowing that kind of negotiation to go on too long. He noted that the Committee is trying to standardize the process to demonstrate transparency and fairness to the public. He concluded that BCDC cannot treat public agencies differently for their violations than private entities.

Commissioner Vasquez pointed out that if the Act had intended to treat anyone differently, it would have stated it.

Ms. Donovan stated that as next steps, staff will draft a penalty policy for the Committee to review and discuss. Staff anticipated then presenting it to the Commission. She noted that staff have also started discussing more comprehensive changes to the enforcement regulations which would be presented possibly for a public workshop or Committee discussion first.

Ms. Donovan posed some questions to the Committee. To guide the discussion, she wanted to ensure that they were comfortable with this approach of devising a policy focused on how to assess penalties. She asked whether the policy should be used by the Committee and the Commission when deciding whether to adopt a civil penalty order. She then asked if the Committee agreed with the chart approach for assessing the initial gravity-based penalty amount. She concluded by asking if the Commissioners agreed with how staff is applying the adjustment factors

Commissioner Techel felt that it would have been helpful to have a pre-statement of the process before coming to the penalty. She also asked about how the Commissioners can ensure that staff can be timely in their review of cases. In addition, she noted that determining the base penalty amount (page 11 of Ms. Donovan's slides) needed examples or more information to refresh the Committee on how the case resolution process works.

Commissioner Vasquez noted that the purpose of all this policy is to guide staff conduct. He hoped that the Commissioners can empower staff enough to have the ranges and flexibility to move violators into voluntary compliance (the carrot), ending up with enforcement compliance (the stick). The main question for him was what the harm is as the bottom line. He also noted the underlying consideration that speedy due process occurs with fairness and without malice.

Chair Scharff supported Commissioner Techel's concerns about what happens before the case is brought to the Commissioners, how long we negotiate, and quick movement of the cases. He agreed with the application of the adjustment factors, although he noted that the Commissioners need to see examples of how they work to reach a comfort level regarding fairness and completeness.

Commissioner Gilmore commented regarding the length of time for negotiations. She recalled that at a previous meeting during a discussion of tracking cases, Ms. Njuguna had stated that staff now can see how long a case remains in a particular stage. She noted a refresher on the stages would be helpful.

Ms. Njuguna clarified that the new Case Management Procedures and the milestones created by staff do specify the timeframe within which cases move from assignment through resolution and the time cases spend in each of those milestones. She committed to providing detailed information at the next

meeting on how much time that translates into for new cases in terms of getting them to resolution within approximately one year. She explained that even with the staff shortfalls, staff still have the Aged Case Report for determining how long a case has been on the books.

Commissioner Gilmore felt that the entire Commission is as concerned as this Committee with how cases move through the process, ensuring that none get left behind and noted that a presentation to the Commission regarding that process would be beneficial.

Mr. McCrea noted the staffing shortfalls, Matthew Trujillo's absence for six months while Schuyler Olsson's position is vacant and will remain so until the budget gets sorted out, underscored the importance not only of growing the Enforcement staff but also of acting swiftly on cases and not over-negotiating. He noted that it places increased responsibility on the very small staff to do what the Committee and the Commission are asking for in terms of timely resolving cases.

There was no public comment.

7. Future Agenda Items. Ms. Njuguna stated that at the July 9 meeting, the Committee will receive briefings from the RBRA and the City of Sausalito on the ongoing work to bring Richardson's Bay into compliance. The second meeting in July will include a discussion on proposed changes to the enforcement regulations – possibly the first of multiple meetings depending on the schedule and the progress of these discussions. As requested, a summary of program improvements will be made available to the Committee to enable easier tracking of the program changes and those that require additional steps for completion.

Ms. Njuguna stated that a date for the next meeting on Union Point Park has not yet been set. She explained that staff have developed proposed revisions to the Cease and Desist order and are waiting for confirmation from the City of Oakland that the changes are what they expected. Chair Scharff asked to schedule a Union Point Park meeting no later than August and requested staff to work with the City of Oakland towards that deadline.

8. Adjournment. There being no further business, upon motion by Commissioner Gilmore, seconded by Commissioner Techel, the meeting was adjourned at 11:17 A.M.