

# San Francisco Bay Conservation and Development Commission

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June 24, 2020

**TO:** Enforcement Committee Members

**FROM:** Priscilla Njuguna, Enforcement Policy Manager (415-352-3640;  
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**SUBJECT:** Approved Minutes of June 24, 2020 Enforcement Committee Meeting

**1. Call to Order.** The meeting was called to order by Chair Scharff at 9:30 A.M. It was held online via Zoom.

**2. Roll Call.** Present were Chair Scharff and Commissioners Gilmore, Techel and Vasquez.

Not present was Commissioner Ranchod.

Staff in attendance included Executive Director, Larry Goldzband; Chief Deputy Director, Steve Goldbeck; Regulatory Director, Brad McCrea; Staff Counsel, Karen Donovan; Staff Counsel, Michael Ng; Legal Secretary, Margie Malan; Principal Enforcement Analyst, Adrienne Klein; Enforcement Analyst, Matthew Trujillo, 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.

One written comment from a representative of the Marin Conservation League was received and posted on the website.

Alden Bevington, cofounder of the Richardson Bay Special Anchorage Association, spoke. He sought to ensure no discrimination in the implementation of BCDC's policies. He stated that the 4,000 boats on the Sausalito shore are dumping vastly more amounts of pollution and sewage into the Bay, and destroying eelgrass when compared to the pollution by members of the anchorage who feel that the Richardson's Bay Special Area plan as it is being implemented is very hypocritical. Mr. Bevington stated that the members of the anchorage feel targeted because of their socioeconomic status or cultural characteristics. He stated that there has been a grave insensitivity to the rights of these mariners in the steady closing down of the public access points, especially during a pandemic.

**MOTION:** After Mr. Bevington finished, Commissioner Gilmore moved to close public comment, 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 June 11, 2020 Meeting.** Chair Scharff asked for a motion and second to adopt the minutes of the June 11, 2020 meeting.

**MOTION:** Commissioner Gilmore moved for approval of the June 11, 2020 meeting minutes and 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.

**5. Enforcement Report.** Ms. Njuguna gave the Enforcement Report which covered the developments within Enforcement including staff progress in resolving enforcement cases for the period of June 11-23, 2020. She noted that a written report on staff progress for the entire quarter will be made available at the first meeting in July.

She explained that as part of the one-year audit response, staff shared samples of the Aged Case Report and the Closed Case Report with the State Auditor. Staff received some positive feedback with the understanding that additional progress in closing the oldest cases is needed to demonstrate effectiveness of the newly implemented procedures on preventing case stagnation.

Ms. Njuguna then informed the Committee that at the RBRA’s June meeting, their Board adopted a tentative transition plan which they will present to the Enforcement Committee on July 9.

She then reported that staff opened one new case during the period of June 11-23, closed eight cases and had a total caseload of 248 as of June 22 noting that staff continue to work on the resolution of the oldest cases. She concluded by noting that staff continue to refine the management and case review procedures.

**6. Enforcement Case Management Procedure.** Chair Scharff stated that the Enforcement Committee had received two previous briefings on the newly implemented Case Management Procedures. Ms. Njuguna used a hypothetical case to illustrate and explain the case milestone process using a PowerPoint presentation.

She reiterated the enforcement program goals of deterrence, fairness, transparency, and building consistency in process. She then explained deterrence and transparency, the first and last goals, in terms of ensuring that the regulated community will know when BCDC is aware of violations resolutions will be timely. The regulated community will also know that similarly situated people will be treated similarly.

Ms. Njuguna explained that staff-level resolution is the most common

option for resolving cases and is linked to standardized fines. She noted that Regulation §11386(e) lists the different circumstances in which BCDC can use standardized fines. She noted that one tool used in staff-level resolution is 35-day Notices which contain a timeline framework that impact the case fines depending on the timeframe within which a case is resolved. She explained that Regulation §11386(e) also specifies the amount of fines depending on the type of violation.

Ms. Njuguna noted that if respondents are repeat violators within the preceding five years their fines can be doubled. She also noted that if no good faith efforts are made to resolve a case within 125 days, BCDC can move to have the case resolved through a formal enforcement proceeding by the Committee and the Commission. She explained that this is one of the ways that staff-level resolution shifts to formal Commission-level resolution.

She noted other tools within the realm of staff-level resolution are stipulated orders and settlement agreements.

In explaining Commission-level resolution Ms. Njuguna began by explaining that the Enforcement Committee approved a *significant harm* definition in October 2019 which has not yet been integrated into the enforcement regulation. The goal in adopting a formal definition, she noted, is to create transparency, allowing the public to see explicitly when a violation cannot be resolved through the staff-level resolution using standardized fine.

Ms. Njuguna explained that the options for resolving cases involving significant harm are not mutually exclusive and include Executive Director issued Cease and Desist Orders (valid for 90 days), Commission issued Cease and Desist Orders and/or a referral to the Office of the Attorney General. She reiterated that some cases that begin at a staff-level resolution can end up in Commission-level resolution if the staff-level process stalls and no progress has been made within 125 days or prior.

Ms. Njuguna listed some of the penalties associated with Commission-level resolution and noted that violation reports are the main tool used in this process.

She explained the Enforcement Committee role in conducting a hearing and then recommending adoption of an Order by the Commission. She then explained that the Commission's options are to approve, disapprove, or remand back to the Committee to modify the order.

Thereafter Ms. Njuguna presented the following hypothetical example that involved limits on public access as well as harm to the Bay (such as impacts on endangered species). "Wiley Respondent" (WR) had done construction without a BCDC permit, and he had done the work during spawning season of a protected endangered species. He also built an unpermitted fence that blocked public access. He was fined by BCDC six years

ago for building a gate on a different property that blocked public access.”

Ms. Njuguna included dates to show how the dates link to procedure milestones.

Having noted that milestones do not apply to cases in litigation she described the milestones as defined in the Case Management Procedures.

- *Assignment* must occur within 45 days of the report. It ends when the Initial Contact Letter is mailed.
- *Investigation* must occur within 100 days of the Assignment milestone deadline based on when the Initial Contact Letter is mailed. It ends when a 35-day notice is mailed, or a violation report is issued – these are the markers that would inform an outside reviewer if the case underwent staff-level resolution or Commission-level resolution.
- *Negotiation* must occur within 240 days of the Assignment milestone deadline because it is an ongoing process that occurs simultaneously while investigation is being completed. It ends when an order is issued, a settlement agreement is signed, or the Commission remands the enforcement case to the Committee for a modification or some other action.
- *Resolution* must occur within 90 days of the completion of the Negotiation milestone. It ends when fines or penalties are received, or a permit application is filed. The 90-day marker was set because it has to cover all cases including those that are easy to resolve and those that are harder to resolve.

Ms. Njuguna then explained how the Aged Case Reports and the Closed Case Reports work within the Case Management Procedure to ensure that cases are under constant review. She noted that specific data fields in the Aged Case Report are examined every 45 days beginning January 2, 2020. Staff focus on the date a case was reported, the case review status code since the last review, and if the case includes a case resolution date.

Similarly, she noted that the Closed Case Report is pulled at the end of every month. Staff look at the number of cases closed, focus on when cases were opened and when cases were resolved. Further, to ensure the improvement of proactive compliance, staff ask for respondent contact information in case another case occurs. Verifying the resolution description is also important as staff builds consistency in process. She explained that staff want to know that a case is closed when the violation has been resolved, or the case is referred to another agency or entity that may be better positioned to resolve the case reported. Staff also want to verify that required data fields in the Closed Case Report have been completed to improve record keeping.

In establishing the milestone timeframes, staff was trying to ensure that

where possible, cases will be resolved within a year or a year and a half at the most. Nonetheless, staff recognize that there are some outlier cases with delays in case resolution that are outside BCDC control.

The milestone timeframes are still under evaluation for effectiveness, as they have been in place for only six months. In building the milestones, staff reviewed historical resolution, compared easier cases with more difficult cases that had sticking points delaying their case resolution progress. Staffing limitations will impact the effectiveness of the milestone timeframes as envisioned.

Ms. Njuguna felt that other effective tools for preventing case stagnation are the weekly Monday enforcement meetings in which each analyst reports on the progress in resolving specific cases. Looking at the Aged Report, Ms. Njuguna can ask specific questions about cases that have been in a particular case review status code for a long time; staff also escalate a case that is stalled in the staff-level resolution process and move it to the Commission-level resolution process.

### **Questions and Discussion**

Commissioner Gilmore asked about the hypothetical example used in the presentation. The respondent did not obtain a permit from either BCDC or the local jurisdiction she asked whether BCDC would contact the local jurisdiction. Commissioner Gilmore observed that some individuals are amenable to working with BCDC and that it might be helpful to bring in the local jurisdiction as another level of authority in seeking compliance. Commissioner Gilmore also noted that the respondent had built something within BCDC's jurisdiction but had not gotten a permit from the local Planning Department. She recognized that normally BCDC does not get involved until the individual has all their local permits in place; she noted that the hypothetical example has the potential to become an outlier because conceivably the individual could not come into compliance with BCDC without first coming into compliance with the local jurisdiction.

Ms. Njuguna responded that BCDC is always coordinating with local code enforcement who know what is going on locally. She conceded that BCDC is usually the last step after people have gone to all other local permitting authorities. While acknowledging that the hypothetical case could be an outlier, she noted it was written to create awareness of what builds into outliers and show that sometimes the case is an easy fix although initially it looks like it may become an outlier. She further explained that part of the time covered in the 240-day *Negotiation* milestone timeframe is work that the respondent would be completing with the local jurisdiction to get permits and approvals.

Chair Scharff noted that the hypothetical respondent had unpermitted

work from both BCDC and the local jurisdiction, plus a fence blocking access to the Bay Trail. He asked how fines accrue in that timeframe. He asked whether if the respondent removed the fence right away it would show good faith effort compared to leaving the fence up during negotiations. Ms. Njuguna responded that because the case was in staff-level resolution, staff would have mailed an Initial Contact Letter and then a 35-Day Notice (which is when the clock starts ticking for fine payment). If the respondent takes down the fence before 35 days elapse, then no fines accrue, and the case is closed. If the fence is removed within 125 days, then the amount of the fine is linked to the regulation in terms of the amount of the fine; the fine would be \$2,000 at the most under these facts based on when the case was resolved. She further explained that if the respondent made no effort to resolve then absent a request for a time extension the case would move into Commission-level resolution.

Chair Scharff asked for confirmation that because the respondent had resolved the violation after 35 days but before 125 days, the fine of \$2,000 would be the maximum. Ms. Njuguna confirmed the accuracy of the Chair's conclusion. She noted that the date that a violation is ultimately resolved determines the fine amount paid. Ms. Donovan added that these are standardized fines per Regulation §11386, which sets forth the fine amounts in steps tied to the time period for resolution. The time it takes to resolve the violation and the fine that accrues is owed step upward. For example, if 95 days went by without the case being resolved, it would move to a new level and the violator would be assessed a \$5,000 fine. If it is resolved within 65 days, as in the hypothetical example, then the figure is \$2,000. She noted that standardized fines are not charged by the day unless the violation remains unresolved for a significant amount of time.

Chair Scharff asked what resolution occurs for unpermitted work. He asked if respondents have to go back and remove the unpermitted structure, for example, or apply for a permit. Ms. Njuguna confirmed that those are usually the options.

Chair Scharff noted that if the respondent must apply for permits from the local jurisdiction before coming to BCDC, the case could clearly take more than the set timeframes. Mr. McCrea commented that once a structure is built, there may be no incentive to actually get the permit. Chair Scharff asked how we deal with that issue. Ms. Njuguna replied that the statute is written in a way to make additional options available to staff – if staff is making no progress in the staff-level resolution process, the case goes to Commission-level resolution where the civil penalties are larger. She noted that this shift might motivate someone to act faster. Mr. McCrea commented that Ms. Njuguna and the team had acted on the auditor's recommendation to escalate cases sooner.

Chair Scharff observed that it seemed that it would take a lot of staff time to follow a respondent through the process of getting a permit – determining whether the respondent is doing nothing or if the regulatory agency is being slow. Ms. Njuguna responded that BCDC has built relationships with local government agencies; further, the agencies are very good at posting the status of permit applications on their websites. Staff can do much of their application progress tracking online.

### **Public Comment**

Barbara Salzman, representing Marin Audubon, applauded the Commission for this long overdue effort. She asked about motivation for people to remove a structure – it seems that there is more motivation to build the structure without getting permits. Ms. Njuguna responded that staff is considering this in terms of the proposed regulation changes: having a notice attached to the property so that when the owner tries to sell it, potential buyers know that there is an unresolved violation that runs with the property. This will impede the ability to transfer the title to the property. Another motivator is having a Cease and Desist Order with civil penalty issued by the Commission. Staff is looking to make changes to the regulations so that BCDC potentially has other tools.

Ms. Donovan noted that if a structure is unauthorized but could be permitted by both the local jurisdiction and BCDC, we act to deter unauthorized conduct. In many situations the solution has been issuing an after-the-fact permit but with a penalty sufficient to deter similar conduct in the future. In the future, similarly situated parties will not be motivated to also circumvent the permitting process when they construct something that is able to be authorized when they can see that there will be fines associated with their conduct.

Mr. McCrea stated that BCDC has reformed its enforcement. Generally, when people get to use their unpermitted structure and no one is bothering them, they do not worry that their fines are increasing. That is why BCDC is pivoting to escalation to the Enforcement Committee and on to the Commission – it is proving to be far more useful. It increases the urgency to tear down the structure, get the permits, or do something else. He noted that this is why staffing is so important; as we continue to escalate projects, we need people to push these case resolution actions through.

Commissioner Vasquez commented that the cities and counties have an occupancy requirement and asked whether BCDC could require one as well for supplemental work and new projects. He noted that in the future BCDC could look for a compliance inspection with a fee that goes along with it, so that we routinely check all our permittees. When property transfers, for example, there should be a re-inspection to ensure that it is within permit guidelines.

He noted that proactive tasks could lessen the workload of having to go after people.

Mr. McCrea responded that BCDC has a Notice of Completion that we integrated into permits. The Bay Design Analysts do a lot of the inspection work (and there are only two of them). BCDC does not have a compliance program or compliance officers and inspectors; we rely on the people who do design review, plan checking, and sometimes complete site inspections. He asserted that staffing is critical here; BCDC needs compliance officers to perform this work.

Commissioner Vasquez asked if we could build this into the permit fee and not have to rely on other people to finalize the work we are requiring. The permit fee could be increased to pay for the compliance officers. Chair Scharff noted that cities and counties get to keep their permit fees while at the state level BCDC does not.

Executive Director Goldzband noted that all permit fees go to the State of California's General Fund. As Commissioner Vasquez has previously pointed out, local regulatory programs are paid through permit fees but that is not the case with BCDC. He explained that the question of whether permit fees should be directed toward the Enforcement Program would be appropriate for the regulatory workshop and discussion that the Committee will end up having this year.

**7. Briefing on Eelgrass Habitat Restoration.** Chair Scharff stated that the Committee had previously asked for information on eelgrass restoration, including how pilot projects are undertaken, when test plots are used, and how long it takes for their success to be measured. He explained that BCDC policy recognizes the significance of eelgrass and that habitat restoration can be a consideration in plans to resolve enforcement cases.

Ms. Klein gave a brief overview of the San Francisco Bay Plan policies regarding subtidal habitats to inform the Committee of the baseline for considering any type of project or proposals, as well as restoration that may be related to enforcement cases.

She explained that the San Francisco Bay Plan has five parts and focused on relevant excerpt policies from the *Bay as a Resource* section. Ms. Klein highlighted policies from two of the chapters, listed below.

*Fish, Other Aquatic Organisms and Wildlife.*

- Policy 1: To the greatest extent feasible, subtidal habitat should be conserved, restored and increased.
- Policy 2: Native species as well as specific habitats that are needed to conserve, increase, or prevent the extinction of these species, should be protected.

- Policy 3: The Commission should be guided by the best available science, and the projects should provide for a diversity of habitats for associated native aquatic and terrestrial plant and animal species.
- Policy 6: Allowable fill should minimize adverse impacts to existing Bay habitat, provide substantial net benefits for Bay habitats, and be scaled appropriately for the project and necessary sea level rise adaptation measures.

*Subtidal Areas.*

- Policy 1: In a subtidal area, an evaluation should occur to determine the local and Bay-wide effects of the project on aquatic plants.
- Policy 2: Subtidal areas that are scarce in the Bay (e.g., eelgrass beds) should be conserved.
- Policy 3: Design and evaluation should include an analysis of the ecological need for the project, the effects of relative sea level rise, rates of colonization by vegetation, and expected use of the site by fish, other aquatic organisms and wildlife.
- Policy 4: If substantial adverse impacts to native or commercially important species have occurred, the project should be modified to reduce its impacts.
- Policy 6: The Commission should encourage monitoring for habitat restoration projects, coordinating with other agencies and regional efforts.
- Policy 7: Subtidal restoration projects should be designed to promote an abundance and diversity of fish and other aquatic organisms and restore rare subtidal areas.
- Policy 8: Fill may be authorized for habitat enhancement, restoration, or sea level rise adaptation of habitat.
- Policy 9: The Commission should encourage and authorize pilot and demonstration projects that address sea level rise adaptation of Bay habitats.
- Policy 10: The Commission should continue to support and encourage expansion of scientific information on the Bay's subtidal areas, including where and how habitat restoration, enhancement, and creation should occur; and if, where, and what type of habitat conversion may be acceptable.

Ms. Klein noted that the *Richardson's Bay Special Area Plan* contains a chapter entitled *Aquatic and Wildlife Resources*. She listed the following excerpts.

- Policy 1: Eelgrass beds, important to herring spawning and production of detritus, should receive maximum protection.
- Policy 5: Any development within Richardson Bay should avoid destruction of eelgrass beds. If losses are unavoidable, the project should be authorized only if the minimum amount of habitat disturbance necessary to accomplish the purpose of the project occurs and the habitat loss is fully mitigated.

Ms. Klein displayed two historical maps showing the locations of eelgrass beds and their overlay with herring spawn, and the Mt. Tamalpais Game Refuge and Audubon Society Wildlife Sanctuary.

Ms. Klein introduced Dr. Katharyn Boyer, San Francisco State University Professor of Biology at the Estuary & Ocean Science Center, who gave a presentation on eelgrass restoration in the Bay, as summarized below.

Dr. Boyer began by noting that eelgrass is found in bays and estuaries throughout the world in the northern hemisphere but is subject to losses in many regions, largely due to human activities. She explained that eelgrass provides habitat both above and below ground. She noted that locally it is an important habitat for Pacific herring spawning, that Juvenile Dungeness crab use it, and a number of species are only found in the eelgrass including the Bay pipefish.

Dr. Boyer explained the significance of eelgrass by noting that it has roots and rhizomes that stabilize sediment, and its blades help to slow water flow. As the plant photosynthesizes it takes up carbon dioxide and releases oxygen. In the growth process it takes up nutrients through its roots and leaves, as well as carbon dioxide which is stored as carbon. It also creates a localized increase in pH which can be beneficial to other species including native oysters.

She then explained some of the causes of losses to eelgrass beds.

Dr. Boyer then explained that in 2014 there were about 2800 acres of eelgrass, 500 of which are in Richardson Bay. She noted that more eelgrass acreage could be possible at sites along the Bay. Dr. Boyer explained that although eelgrass is a native species; we do not know exactly where it occurred in the past, and researchers do restoration where it is currently suitable.

Dr. Boyer informed that Committee that in the *San Francisco Bay Subtidal Habitat Goals Report*, a Baywide goal was set for about 8000 acres of restoration in the 50 years after 2010. The other major motivation for restoration in recent years has been to mitigate the Cosco Busan oil spill, with funding from that matter tied to restoration intended to create 36 acres in nine years starting in 2014 which is in progress.

Dr. Boyer also noted that there has been a recent shift in motivation

toward shoreline protection and ameliorating ocean acidification.

She noted that most of the funding for eelgrass restoration presently comes through grants and bonds and listed some funding sources.

Dr. Boyer explained that the first step in eelgrass restoration is site selection. She noted that the consulting firm Merkel & Associates developed a biophysical model in 2005 that showed 23,440 acres of available eelgrass habitat in the Bay. An effort is underway to update the model to enable better site selection.

She noted that the second step is to do test plots which involve small-scale plantings and observing their success. She explained that eelgrass has two reproductive modes: clonal expansion and seed dispersal. Dr. Boyer further explained the two transplant methods. She noted that seeding can be valuable for increasing the genetic diversity of the restored site but is trickier to work with. Dr. Boyer also informed that Committee that her department is working to understand the distinct genetic structures of eelgrass. She noted that the donor material may matter in terms of resiliency to stresses such as heat, heavy rainfall that affect the time of year when restoration can occur and other man-made causes of eelgrass loss.

For illustration Dr. Boyer showed the planting map configuration for the Cosco Busan oil spill related eelgrass restoration project. She noted that while local plants sometimes establish best in a restoration, mixing the different donors also works well.

Dr. Boyer noted that the waters in eelgrass beds are turbid making monitoring from the surface of the water unreliable. She explained that her team uses interferometric side-scan sonar coupled with density and qualitative measures. She showed images from a series of years taken from the Marin Rod and Gun Club eelgrass restoration project.

Dr. Boyer then explained that success is defined by four desired results in the eelgrass bed: 1) they remain present after planting; 2) they expand clonally; 3) they self-seed; and 4) they plantings are resilient to disturbances. She noted that researchers do not expect to have the same amount of eelgrass in the beds from year to year or for eelgrass to thrive in all years. Researchers expect that some amount of maintenance will be necessary.

Dr. Boyer reiterated that eelgrass restoration is affected by rainfall amounts and climate change. She explained that increasingly frequent heat waves affect the success of newly planted eelgrass beds. She also noted that eelgrass prefers higher salinity water which makes the central portion of the Bay a better site. Dr. Boyer explained that her team is putting restoration projects in a variety of places in the Bay noting that some may get heat stress or salinity stress, but hopefully there will be some refuges that keep the plants doing well.

Dr. Boyer concluded her presentation by noting that it is important to continue to experiment and monitor these eelgrass restoration projects. The effort must be sustained, and some sites will take multiple years. Also, there is a need to react to climate changes and variability that it will bring. With the efforts since 2014, about 10 acres have been restored; it is not advancing at the rate necessary to reach 8000 acres in 50 years, and it may be important to revisit the goals and think about whether the expectations are reasonable.

#### **Public Comment**

Rebecca Schwartz-Lesberg of Coastal Policy Solutions commented on the complexity of restoring eelgrass. She noted that in 2019, Audubon California published a study demonstrating that between 50-85 acres of eelgrass have been lost in Richardson Bay. She asked Dr. Boyer to speak to the question of active restoration versus the possibility that the mooring scars will be able to fill in. Dr. Boyer responded that the three surveys that have been done show that Richardson Bay contains between 350-600 acres of eelgrass. The shallow region extending into the Audubon Sanctuary is subject to damage from high heat periods. The part of the bed that seems to be most consistently present is the deeper portion that starts beyond the Audubon Sanctuary. Dr. Boyer thought that this bed could be restored in the places that have been damaged by mooring tackle and crop circles. Dr. Boyer stated that if the boats and tackle are removed, she is not sure if the eelgrass can restore itself or if it will require some active restoration efforts. She noted that her team is looking at the depth and sediment conditions, and then doing some test plantings in areas that were previously affected by moorings.

Barbara Salzman stated that the Sausalito area is ideal for eelgrass. She asserted that the responsibility for restoration should fall not just on the anchorage and the users, but also on the City of Sausalito in not approving any more boat docks in areas with eelgrass. She then asserted that major restoration efforts should be located in the habitat area most suitable for this species, which is Sausalito. She concluded by stating that any restoration monies and requirements should focus on finding out the best way to restore the areas that have been so damaged by boat moorings.

Terri Thomas, a resident of the Sausalito shoreline and representative of the Marin Conservation League, raised a question about the impacts on eelgrass of shading from overwater structures and whether the shading applied to boats.

**8. Supplemental Environmental Projects Policy Development.** Chair Scharff stated that staff would present the critical provisions for the Committee to consider in developing a policy addressing supplemental environmental projects.

Ms. Donovan stated that the presentation was a follow-up on a briefing she provided November 2019, where the Committee was briefed on Supplemental Environmental Projects (SEPs). These are generally defined as environmentally beneficial; voluntarily undertaken; in settlement of an enforcement action; used to offset a portion of a civil penalty. She noted that in order to qualify, the respondent would have to do something above and beyond what is already required by law, and in exchange, be able to reduce the amount of money owed for a civil penalty. She reiterated that SEPs proposed to settle an action must have a nexus to the violation, meaning that the violator is proposing to do something that has some relation to the objectives of the statute that is the basis of the enforcement action, regulation, or permit condition involved.

Ms. Donovan explained the types of acceptable SEPs that staff is proposing:

- Environmental enhancement – enhancing or expanding public access or beneficial habitat.
- Environmental restoration – removal of fill, or restoration and protection of public areas or habitat.

She noted that another aspect of the SEP policies of most agencies (EPA, CalEPA, State Water Resources Control Board) is to generally establish monetary limitations on the amount of a civil penalty that can be offset by a SEP.

Ms. Donovan highlighted potential issues involved in implementing a SEP program.

- Ensure that the project is actually completed, and that the required monitoring and reporting is undertaken. This can be addressed by establishing deadlines and setting up the agreement so that the SEP cost is treated as either a suspended penalty or possibly as a set sum owed if the project is not completed.
- Have a means of evaluating the actual cost of the work completed. She noted that staff will work on this and will propose to include any administrative costs related the SEP.
- The SEP project may require additional regulatory approvals before it can be undertaken. BCDC may require that the violator absorb the cost of the additional regulatory requirements such as CEQA, etc.

Staff proposed to formalize a policy that, on a case-specific basis, enables them, when pursuing an enforcement action, to allow a respondent to propose to voluntarily undertake or agree to fund a SEP in lieu of paying a portion of the penalty that they would otherwise be required to pay for the violation.

She noted that a primary issue for the Committee to consider is a cap on the amount of the penalty that could be offset, as well as some limitations on the types of projects that can be undertaken.

Ms. Donovan posed questions for the Committee for discussion:

- Regarding limitations on the amount of the penalty that may be offset – whether it should be a numeric sum (50%) or, at a minimum, no less than the economic benefit that the violator had realized through engaging in the unauthorized conduct.
- Limitations on the categories of projects.
- Inclusion of community input and promotion of SEPs in communities with environmental justice concerns.

### **Questions and Discussion**

Commissioner Gilmore noted that Staff are looking at SEPs to add another tool to the toolbox – but recognized that this might be appropriate to address in changes to the regulation. She asked for some understanding of how frequently SEPs would be used. She noted that a SEP policy may be a lot of work for a small number of cases. Ms. Donovan responded that staff already has discretion in settling a case to accept and offset a portion of the civil penalty in return for someone doing good for the Bay. She explained that BCDC is not looking to obtain new authority but rather formalizing the parameters under which the existing discretion is used. Ms. Donovan offered to gather statistics on how often SEPs are used in settling cases.

Ms. Njuguna stated that staff considers SEPs a valuable tool because staff run into situations in which respondents are cash-poor but have resources to apply to a beneficial project. She noted that one of the enforcement program goals is building transparency in the process in pursuit of which enforcement to define the considerations and limitations in using SEPs. She observed that because SEPs are not specifically addressed in the regulations, unrepresented respondents may not know that it is an option for them.

Mr. McCrea noted that this will be a very popular policy. Westpoint Harbor – one of BCDC's most contentious cases in years – used what were essentially SEPs: they made financial contributions to the Marine Science Institute and the Coastal Conservancy. If it were written into the regulations, more and more people might seek to pursue this option. The goal here is to close more cases and become more streamlined – to have more ways to get through the morass of environmental caseload.

Executive Director Goldzband asked about the level of effort required by the regulatory team, permit team, etc. if a violator wants to do a SEP. Mr. McCrea responded that there may be extra work generated to evaluate a proposal to undertake a SEP. The enforcement team and the two permit teams

are all resource-strapped when it comes to staffing and are losing members. He noted that it is a difficult question that does not yet have an answer.

Chair Scharff stated that he felt that Ms. Njuguna's point that the time to use the SEP is when the violator is cash-poor and has other resources, is not reflected in the staff recommendation of questions to consider. He noted considering cash-poor violators made more sense to him than having a strict limitation of 50% on the amount that could be offset. He thought staff should consider focusing the SEP option on violators who may have an inability to pay issuer. He stated that BCDC needs to carefully evaluate this, noting that it is going to require a lot of staff time and take money away from the monies that are paid into the Bay Fill Cleanup and Abatement Fund.

Commissioner Techel liked the SEP program and the way it has been developed – having something happen rather than just having someone pay a fine. She noted that if someone opts for a SEP, they are still spending the money. Executive Director Goldzband explained that fines go to the Bay Fill Cleanup and Abatement Fund, which, following appropriation from the legislature, has been used in part to pay staff.

#### **Public Comment**

Barbara Salzman, representing Marin Audubon, commented that her organization has been a recipient of SEP money and of the program that predated SEPs. She thought it a great program and urged the Committee to pursue it. She stated that SEPs provide an opportunity for damage to the Bay to be directly corrected through a beneficial project. She recommended that impacts and violations to public access be corrected by money directed to public access improvement projects, but that impacts to natural resources be corrected by money directed to natural resource projects.

Rebecca Schwartz-Lesberg stated that she is very supportive of BCDC pursuing a SEP policy to fix some of the impacts of violations. As the Committee develops the policy, she asked them to consider the question of nexus with the violation to determine the appropriate location and type of SEP. She encouraged development of a pre-approved project list that would give violators some starting points. She encouraged policy flexibility in the kind of projects that can be funded. Last, she encouraged BCDC not to adopt the 50% maximum limitation on a penalty reduction to enable flexibility. She noted that environmental justice concerns can be addressed through a SEP policy by prioritizing these communities particularly using a pre-approved project list.

Vicki Nichols stated that she was pleased to see this clarification of policy. She stated that including educational projects in SEPs does not advance the restoration of damage to the Bay; SEP benefits should be tangible. She also believed that mitigation should be done in proximity to the damage – not miles away and not construction projects. She wanted to know how the definition of

“environmental justice” applied and thought it needed to be defined to be a criterion.

### **Questions and Discussion**

Commissioner Gilmore thought that staff’s reasoning for having this policy was persuasive, and that this was true without statistics on the historical use. She was persuaded by the arguments regarding starting with violators who are cash poor. She also felt it important to set this up in regulations in order to have transparency. She felt that BCDC needs more discussion on mitigation specifically the “what” and the “where.” For example, if a violation is water-based, the remedy should be water-based and if the violation is land-based, the remedy should be land based. Commissioner Gilmore also sought an example and feedback from staff on the idea of a pre-approved project list.

Chair Scharff agreed with Commissioner Gilmore’s points. He wanted staff to come back to the Committee with the policy fleshed out more. He would like to understand better the component of violators raising inability to pay; this cannot be something that all violators start doing. He agreed that the policy needs the nexus explained. He questioned whether given staff workload this SEP policy is currently the highest priority. He expressed concern with not replenishing moneys in the Bay Fill Clean-Up and Abatement Fund by allowing violations to be resolved through SEPs.

Ms. Njuguna stated that part of the reason staff is discussing SEPs now is that we are considering other changes to the regulation. She noted that it is an opportune moment.

Ms. Donovan stated that the next step is to develop language as well as an explanation of where and how the language would be formalized. She noted that BCDC wants to establish limitations and guidance for SEPs. She states that staff will bring back the level of detail the Committee is requesting as well as a recommendation as to how it would be formalized.

**9. Future Agenda Items.** Ms. Njuguna reminded the group that at the end of July, staff anticipates starting public workshops to allow the Committee to receive input from the regulated community on proposed changes to BCDC’s enforcement regulations. She noted that it has been more than a decade since BCDC examined its regulations.

She also informed the Commissioners that staff anticipates that the Union Point Park case will be presented to the Committee on August 13.

**10. Adjournment.** There being no further business, upon motion by Commissioner Gilmore, seconded by Chair Scharff, and agreed upon by unanimous hand vote, the meeting was adjourned at 12:05 P.M.