

# San Francisco Bay Conservation and Development Commission

375 Beale Street, Suite 510, San Francisco, California 94105 tel 415 352 3600 fax 888 348 5190

State of California | Gavin Newsom – Governor | [info@bcdc.ca.gov](mailto:info@bcdc.ca.gov) | [www.bcdc.ca.gov](http://www.bcdc.ca.gov)

## DRAFT MINUTES

**TO:** Enforcement Committee Members

**FROM:** Karen Donovan, Staff Counsel (415/352-3628; [karen.donovan@bcdc.ca.gov](mailto:karen.donovan@bcdc.ca.gov))

**SUBJECT: Draft Minutes of October 10, 2019 Enforcement Committee Meeting**

**1. Call to Order.** The meeting was called to order by Chair Scharff at the Bay Area Metro Center, 375 Beale Street, Board Room, First Floor, San Francisco, California at 9:35 a.m.

**2. Roll Call.** Present were Chair Scharff and Members Gilmore and Vasquez. Not present were Members Ranchod and Techel.

Staff in attendance were Executive Director Larry Goldzband, Regulatory Director Brad McCrea, Chief Counsel Marc Zeppetello, Staff Counsel Karen Donovan, Chief of Enforcement Adrienne Klein, Enforcement Analyst Schuyler Olsson and Legal Secretary Jaidev Kalra.

Also in attendance was Shari Posner on behalf of the Office of the Attorney General.

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

No members of the public addressed the Committee.

**4. Approval of Draft Minutes for the September 25, 2019 Meeting.** Chair Scharff asked for a motion and second to adopt the minutes of September 25, 2019.

**MOTION:** Commissioner Vasquez moved approval of the September 25, 2019 meeting minutes, seconded by Commissioner Gilmore. The motion carried unanimously with a vote of 3-0-0 with Members Gilmore, Vasquez and Chair Scharff voting “YES”, no “NO” votes, and no “ABSTAIN” votes.

**5. Enforcement Report.** Ms. Donovan gave the report as follows.

The present meeting was the seventh post-audit meeting. Ms. Donovan suggested holding meeting #10 in the morning before the full Commission meeting in the afternoon. She recommended against moving the December 12 meeting to be combined with the full Commission meeting. That Committee meeting will be substantial in its briefing on procedural improvements, and in addition, the Commission meeting will include a briefing on the enforcement efforts.

Chair Scharff and Member Gilmore stated that they did not want to move the November 20 meeting to November 21. Ms. Donovan affirmed the scheduled date as November 20.

Ms. Donovan stated that staff has been moving forward on getting cases resolved.



ENFORCEMENT COMMITTEE MINUTES  
FOR OCTOBER 10, 2019

She noted that the next meeting will be held October 23. As it will be held upstairs in the same building, Ms. Donovan said that she would check with Security that the Committee Members have appropriate ID to get in.

**8. Update on Union Point Park** (*out of Agenda order*). Mr. McCrea updated the Committee as follows.

On October 1 staff met with the City of Oakland staff and the Unity Council.

Mr. McCrea compared slides showing the appearance of Union Point Park at its opening and its present degraded state. The parking lot has now been cleared although its condition is not what it originally was. The south shoreline is now largely open and available for the public. The homeless encampment persists at the north end of the Park.

The attendees at the October 1 meeting discussed several topics.

- Geographically, Union Point Park is relatively isolated with limited access.
- The Oakland City Council is looking at new ordinances.
- The cost of moving people into the cabin communities would be about \$850,000 per year and would accommodate about 80 people.
- Alternatives to housing in the park include St. Vincent de Paul.
- The City of Oakland has four levels of intervention for encampments:
  1. Picking up garbage.
  2. Focusing on health and hygiene.
  3. Cleaning and clearing the encampment.
  4. A form of permanent closure of the encampment; prior to this a census would first be conducted.
- The City of Oakland wished to know if state funds are available for ongoing stewardship of the park.

**Public Comment**

Brock de Lappe, Oakland Harbormaster and Marina Manager, stated that operations of the five marinas are heavily impacted by the quality of the park on the shore side of Union Point Marina. The Port of Oakland owns the park property. Mr. de Lappe read a term in the lease stating that the City must maintain the property at its own expense. He stated that the City is clearly in breach of the lease. There has been heavy vandalism: lighting has been damaged; fires have started; trash has piled up, attracting rats; violence has occurred; tenants have been threatened; water has been stolen from standpipes. People in the encampments have no source of water. The lawn is not being watered and has turned brown. No member of the public would ever use this facility for recreation.

Jim Hayes, COO of Almar Marinas, requested a schedule of fixes for the park.

ENFORCEMENT COMMITTEE MINUTES  
FOR OCTOBER 10, 2019

The marinas have been dealing with the City for two years, and information has not been forthcoming – this is one of the hardest parts. They also requested to know the occupancies of the other relocation areas. Communication is key. They can help disseminate information to local people.

Dan Westerland, Alameda resident, spoke of the flies, filth, urine, and feces at the park and also along Alameda Avenue blocking the Bay Trail and contaminating the estuary. He stated that this is not about homelessness – it is about lawlessness: stolen items, illegal dumping, health and safety. BCDC can promote a solution by fining those responsible. The City of Oakland has abandoned the park after the Port of Oakland spent millions of dollars to create it. The public cannot go there.

Joe DeVries, Assistant to the City Administrator of Oakland, affirmed that what the speakers and Mr. McCrea had said about conditions was absolutely true. The city has a crisis. Oakland has 3200 unsheltered people on the street on any given night, a huge recent increase. The crisis is well beyond Oakland's ability to solve. They do not believe that parks are an acceptable place for human habitation. They would like to close Union Point Park to habitation. They had been delayed in taking any action because of a federal court case, and during that time huge damage was done to the park.

The City is looking into a cost estimate for replacement of the lights. They are looking into the cost of securing the parking lot so that it is not taken over by cars at night. They do not have a timeline for closing this encampment in part because of the number of encampments in the city and the limited shelter space. For every one person they can move into emergency shelter, two new people show up on the street; and not all are from Oakland. Ongoing enforcement in this park – keeping it clean and maintained – is going to be a serious challenge. The City is hoping to partner with all of its public agencies in coming up with a solution.

There are voices at the City Council urging the Council not to take more assertive action regarding homeless encampments. Although the City's practices have been found constitutional, they must use great care when they close down an encampment because of pressure from elected officials and the advocacy community. They are in a tough spot.

Member Gilmore asked what is being done with the sanitation issues – is County Health involved? Mr. DeVries answered that Vector Control is part of their Encampment Management team, which meets every other Friday. They would like to add the Union Point encampment to their weekly garbage pickup. Putting out porta potties or wash stations becomes more of a liability if the City does not identify leadership at the encampment who can maintain them. The City is encouraging the County to do more in terms of direct action at encampments. They would like help with needles as medical waste, but the County does not agree with that perspective.

ENFORCEMENT COMMITTEE MINUTES  
FOR OCTOBER 10, 2019

The City is engaged with Supervisor Miley around a hygiene pilot.

Member Gilmore emphasized that it is frustrating for the people who live and work at the marina, as well as the public which has no access to this park, to see how slowly improvement comes.

She asked who the permittee is: the Port of Oakland or the City of Oakland. Mr. Olsson answered that there are two permittees: the City of Oakland and the Unity Council (a local nonprofit). The Port of Oakland is the property owner and has a lease with the City of Oakland.

Marsha Murrington, Unity Council and FUSE Fellow with the City of Oakland, stated that she was involved with the initial development of the park and the community process. It was a gem when it was built, and it is very distressing to see it now. The original job creation idea had been to have people from the community doing ongoing maintenance at the park. We need to go back and revisit that concept. The Unity Council is committed to this park and would like to do a job creation program with the City.

Member Gilmore asked about the Unity Council. Ms. Murrington answered that it is a 55-year old community development corporation based in the Fruitvale. The Unity Council had gone for many of the grants that built the park and was actively involved in its design. Their goal had been getting more open space for the community. They knew that the location was not ideal but it was available.

Member Gilmore recognized that often grant money is available to build things but not to maintain them. Ms. Murrington mentioned the Unity Council's Peralta Service Corporation, a public space maintenance social enterprise. The Unity Council had wanted them to be trained on park maintenance and vegetation, but the City at that time wanted to maintain the park. The City may now be more open to having the social enterprise be involved.

Member Vasquez noted that since the park has been leased to the City and the Unity Council, they are responsible for it. We need to have a plan in place to get the cleanup done. Mr. DeVries stated that they had not come up with a plan because they were stuck in court for several months. Member Vasquez felt that a parallel process could have been in place waiting to move forward. Mr. DeVries stated that their team is small and their challenge is huge; they have other high-priority encampments that they have been addressing as well. They are doing triage. For Union Point Park, they are working in partnership with BCDC Enforcement staff to put together a plan. To be realistic, he could not say that they could empty out the park by the end of the year. He described public safety crises around the City that his crew has been dealing with. He appreciated that BCDC is holding the City accountable, but he did not think fines were going to help them. They have sent outreach teams to conduct a full census of the park, to gain an understanding of how

ENFORCEMENT COMMITTEE MINUTES  
FOR OCTOBER 10, 2019

long it will take to provide these people with adequate shelter.

Chair Scharff stated that everyone in the room wanted the same thing; the questions were how we get there and the best approach. He asked what caused the huge spike in homelessness. Mr. DeVries answered that rents in Oakland have doubled during the last five years. All over the Bay, smaller cities are not building housing fast enough as they create tens of thousands of jobs. The opioid and drug epidemics are also responsible. There are currently more needles at the encampments than Mr. DeVries has ever seen before. Rents doubling, the lack of housing, and the opioid epidemic have created a perfect storm.

Chair Scharff asked about the political situation in Oakland; are elected officials avoiding dealing with the homeless encampments? Mr. DeVries stated that the loudest voices at the City Council meetings on the policy end are suggesting that the City be less aggressive in cleaning out encampments and holding people to standards at encampments. Mr. DeVries expressed the contrasting viewpoint of the need to hold people accountable.

Chair Scharff stated that with Oakland and the Unity Council in violation of their permit, we must take some kind of action. How do we get them in compliance with their permit? The concern is that if BCDC does not start issuing fines and so on, nothing will change. What is the deliverable here? Mr. DeVries responded that the deliverable is a clean, maintained park, free of homeless encampments, that people can enjoy again. We must start with more aggressive weekly sanitation. The completion of the census will drive this effort: it will tell how many beds we need, where we need them, and what the individuals qualify for – HUD vouchers or slots, or flex funds to try to get rental subsidies. This can be done in the next two to three weeks.

Chair Scharff asked how to stop this from happening in other parks. BCDC needs a plan for reacting quickly and fining people quickly. Clearly Oakland is overstressed and is triaging, so BCDC needs to be more of a squeaky wheel in protecting the Bay in Oakland. He expressed the need for a plan from the City of Oakland that prevents homeless encampments from happening along the Bay. That is BCDC's charter.

Mr. McCrea clarified that at the City Council meeting mentioned by Mr. DeVries that Mr. McCrea attended, Mr. McCrea had made comments as a resident of the city rather than as BCDC staff. However, Commissioners or the Executive Director can request staff to attend City Council meetings to speak for BCDC. He also stated that it would be helpful for BCDC to understand from the City whether there are other state, federal, or county agencies that have permits or regulatory controls on these parks. Mr. DeVries replied that a portion of Grove Shafter Park two years ago had been taken over briefly by a political group; per Caltrans, the City had to

ENFORCEMENT COMMITTEE MINUTES  
FOR OCTOBER 10, 2019

shut it down because they were in violation of their lease. Other parks with homeless encampments are owned outright by Oakland. An official statement from BCDC to the City would be helpful to present to the City Council when they are having policy conversations.

Member Gilmore suggested sending a staff member to the City of Oakland when this topic comes up, and making BCDC's enforcement position very clear. She also felt the need to impose fines: nothing gets the attention of elected officials like money. It will show that BCDC is very serious about the charge of protecting public access.

Mr. de Lappe pointed out that further up the estuary at the Jack London Aquatic Center, the City of Oakland is proposing development of a park with an allocation of \$10 million. There are already homeless encampments there that are growing in size. He stated that BCDC should be involved.

Chair Scharff asked when the City could come back to report to BCDC. Mr. DeVries requested to return on November 14. Prior to that, the Committee will receive a written plan from the City for review at that meeting. Mr. DeVries asked the Committee to avoid assessing a fine until then.

Chair Scharff preferred the November 20 meeting; Mr. DeVries concurred. Staff will have a Cease and Desist Order prepared for that meeting.

Executive Director Goldzband acknowledged that the Committee would like BCDC to be represented at an Oakland City Council meeting, as part of the path discussion or public comment, to apprise the City Council of BCDC's position and Enforcement Action under development.

**6. Briefing on Consideration of Violations Resulting in Significant Harm to the Bay or Public Access.** Ms. Donovan briefed the Committee as follows.

The way BCDC's regulations are drafted, Subsection 11386(e) for standardized fines has six delineated types of violations, most of them of a relatively minor character.

The audit recommended that staff create and implement regulations that define substantial harm.

Ms. Donovan displayed a flowchart showing that if the violation is not in the Subsection(e) list, it moves to a formal enforcement process. If the violation has not resulted in significant harm to the Bay or to existing/future public access, and can be corrected consistent with policies, the violator receives a 35-day notice. If it is not corrected within 35 days, the standardized fines begin to accrue. After 125 days, staff makes a determination of whether it is appropriate to terminate the standardized fine process and take it to a formal enforcement proceeding.

Ms. Donovan reviewed the CEQA regulations regarding of "Mandatory Findings of Significance" and "Significant Effect on the Environment."

ENFORCEMENT COMMITTEE MINUTES  
FOR OCTOBER 10, 2019

In NEPA, the definition of significance requires considerations of both “context” and “intensity.”

Staff proposed that once we have a package of proposed changes to the enforcement regulations, we would add this definition to Section 11386 possibly as a new Subsection(b).

In considering “context” and “intensity,” “context” refers to the location of the violation and the characteristics of the area where it occurred. Harm to public access would focus on highly visible and frequently used areas which are considered more significant than isolated, low-visibility, and infrequently used areas.

“Intensity” refers to the severity of the impact and the degree to which it affects the environment or public access.

Ms. Donovan proposed to add a recognition that when looking at multiple violations on a site, a single violation could result in harm that is individually limited but cumulatively significant when added to the other violations.

Ms. Donovan posed the following questions for Committee discussion:

- *Is it appropriate to include this new definition in Section 11386?*
- *Is it appropriate for the definition to be focused on context and intensity?*
- *Should we develop a definition that includes cumulatively significant impacts as well?*

Member Vasquez noted that behind this definition one could put the photos of Union Point Park – it is a perfect example of all the components coming together.

Chair Scharff asked for an example of not applying the standardized fines of Section 11386 but moving to the formal enforcement process, and Ms. Donovan responded.

Ms. Donovan gave an example in which a single violation does not meet the intensity criteria but there are multiple violations – scattered individually limited violations throughout a site that result in cumulatively significant damage to the site.

Mr. Zeppetello offered the example of Westpoint Harbor. Individually the violations were minor but cumulatively they added up to significant harm. Another example was Marina Village in San Rafael. One of the violations was a mud wave that caused a slope failure, resulting in unauthorized fill in the Bay; this would have individually escalated it to substantial harm. There were also a series of violations of blocked public access, structures, failure to provide notices, etc. that were relatively small. For this, staff should have been allowed to go directly to formal enforcement.

Chair Scharff brought up the question of staff discretion; people might commence litigation with BCDC, saying that they were indeed eligible for the standardized fines process, or formal enforcement should have been used instead of standardized fines. Ms. Donovan replied that staff expertise determines whether the violations added together are cumulatively significant. The standardized fines

ENFORCEMENT COMMITTEE MINUTES  
FOR OCTOBER 10, 2019

regulations are drafted such that even when you start accruing fines, as long as you fix the violation fairly promptly, the fines should be limited. If you do not fix the violation, you have already started to accumulate significant fines. With standardized fines, you get 35 days to correct. As a practical matter, if an action moves to formal enforcement, this essentially gives the same period of time to correct. While someone could raise an argument about the process used, the practical benefits are not significantly different.

Member Gilmore felt that the cumulatively significant designation would work well for intractable, repeat violators.

Member Vasquez viewed it as another tool in the toolbox – a way of motivating someone quickly.

Chair Scharff summarized that the three Committee Members were all in support of doing this.

He asked about bifurcation: could some of the violations be done as standardized fines and some as formal enforcement? Ms. Donovan stated that formal enforcement is actually under the control of violators. They control whether they will have a hearing because they can fix the violation. They can reach a settlement. Staff preference is not to take them to a formal enforcement hearing.

Ms. Donovan raised the possibility of having official communication with the violator is a hybrid 35-day notice/violation report.

She stated that staff would consider the definition in the presentation preliminarily approved.

Mr. Olsson added the example of Middle Harbor Shoreline Park in Oakland. Staff will be meeting with the Port of Oakland in the next two weeks. There are lots of little issues: disabled parking spaces are not adequate, lawns are not being watered effectively, public signs are missing, certain parts of the park are blocked off, the observation tower elevators are not working. When taken cumulatively, the many small issues rise to the level of significant harm.

Member Gilmore commented on the number of maintenance issues. She suggested the possibility of having staff come up with a method to deal with maintenance issues on their own. Ms. Donovan stated that at the next meeting, staff will discuss the conditions people must complete after at the issuance of the permit and maintenance will be a part of this.

Member Vasquez commented that we have talked in the past about how to help clients to be compliant, and the possibility of having a compliance officer go out and check permits.

Executive Director Goldzband noted that in various permits approved by staff, there are conditions about maintenance and triggers with regard to adaptation and the like. For example, the Treasure Island permit had an arrangement that the HOA

ENFORCEMENT COMMITTEE MINUTES  
FOR OCTOBER 10, 2019

would be in charge of a sinking fund. He also mentioned the Bay Plan Amendment which requires a funding strategy as opposed to a funding plan for applicants to demonstrate as part of filling the Bay for habitat restoration purposes.

Member Gilmore stated that addressing funding would be a great idea as part of the permit rather than the enforcement toolchest: you are trying not to have the violator become part of the enforcement process. She stated that BCDC should look to the permitting side of the house for a “sinking” fund, a strategy, and so on to ensure funding for ongoing maintenance in the hopes of cutting down on these issues that eventually make it to the enforcement side.

Chair Scharff felt that BCDC should move forward on the permitting side and to be more aggressive in having a funding plan instead of a funding strategy for many of these items. The funding plan should be put in the permit. Ms. Donovan stated that they could look at this at the staff level.

Chair Scharff was in favor of the idea of having a settlement agreement whereby someone who is not maintaining certain aspects of a park, open space, and so on, must have a funding mechanism in place – otherwise they cannot settle a case with BCDC.

Chair Scharff stated his view that a lack of funding mechanisms for future maintenance of a proposed project should possibly be grounds to deny the permit.

**7. Briefing on Calculation of Violations.** Ms. Donovan briefed the Committee as follows.

The audit recommended providing explicit criteria for calculating the number of violations present in individual enforcement actions, and specifying a process to handle any necessary exceptions to those criteria.

BCDC’s overarching mission is to protect the Bay and to ensure maximum feasible public access.

The mission and goals of Enforcement include the following:

- Fairness and consistency
- Efficient and effective deterrence
- Transparency
- Swift and timely action

She reviewed the McAteer-Petris Act and the Suisun Marsh Preservation Act.

BCDC’s regulations are written such that when you commence a Commission enforcement proceeding, you issue a violation report that complies with Appendix H. This format includes separate descriptions of the illegal activities and of the violations.

Ms. Klein gave an example of how staff currently addresses these things. She showed an example where two signs at opposite ends of a small public access area limit the hours of use, and the permit does not provide for that limitation. Ms. Klein

ENFORCEMENT COMMITTEE MINUTES  
FOR OCTOBER 10, 2019

explained that in the example, five unauthorized actions were involved. Ms. Donovan and Ms. Klein then explained that because all the requirements that were violated served the same purpose, staff treated it as a single violation.

Chair Scharff questioned why the two signs constituted "fill." Mr. Zeppetello explained that Section 66632 has a definition of fill as the placement of any structure within the Commission's jurisdiction. It is broadly defined. It was suggested that this issue warrants further noticed discussion.

Mr. Olsson described an example in which a marina was dredged, and the post-dredge survey showed significant over-dredging. The violator dredged in unauthorized areas outside of the footprint. Further, they dredged too deep in the authorized areas. These were two distinct violations. The third violation was disposal of the illegally dredged material off Alcatraz Island. The unauthorized disposal violations were combined into one.

Ms. Klein described an example of a restaurant where an unauthorized boat dock and pilings were built long before an unauthorized addition was built. The unauthorized dock and addition were considered to be two distinct violations because they occurred at different times; they served different purposes; and the regulatory approval process for each instance of construction is different.

The last example was a violation involving a multi-residential property in San Leandro. The rationale used for calculating the violations was that there were three distinct paper violations, one combined violation involving same area and purpose, and one distinct unauthorized activity.

Member Gilmore noted that in most cases, if the people come to us ahead of time asking for permission to post signs, we usually say yes. Ms. Donovan responded that we usually engage in a dialogue and come up with an acceptable restriction.

Member Gilmore observed that you can post signs in a way that makes the public feel generally unwelcome. Do we permit this type of sign? Ms. Klein answered that this is the balancing act of the Design Analyst's job in reviewing signage plans.

Ms. Donovan provided background in how other agencies treat this issue. The Nuclear Regulatory Commission's Enforcement Policy states, "Violation is the failure to comply with a requirement."

The California Coastal Commission's policy states, "Any development that is inconsistent with the terms and conditions of a previously issued permit or is undertaken without a permit is a violation."

The Department of Toxic Substances Control operates under a statute that defines Class I violations from the Health and Safety Code; all others are Class II.

The Virginia Department of Environmental Quality Enforcement Manual defines "enforceable environmental requirements" in their manual as all the statutes,

ENFORCEMENT COMMITTEE MINUTES  
FOR OCTOBER 10, 2019

regulations, decisions, orders, or decrees – similar to the McAteer-Petris Act. Multiple unauthorized discharges or releases rising out of a single act, or for other purposes, may justify consolidation.

The State Water Resources Control Board Water Quality Enforcement Policy also uses this approach including combining multiple violations.

Ms. Donovan offered the staff proposal, consistent with the way other agencies treat this and consistent with the way staff has been doing it in the past:

- *Any violation of the statutes, regulations, or any term or condition of a permit is a violation*
- *Unauthorized actions may be combined or consolidated at BCDC's discretion based on specified principles*

Staff proposed to articulate the principles in policies and guidance. Ms. Donovan asked the Committee if they would like to add principles or eliminate some of them.

Ms. Donovan emphasized that staff does not make decisions to either combine violations or to keep various unauthorized activities as separate violations, based on the penalty that may accrue. Staff makes decisions based on the appropriateness of treating the unauthorized activity as a single violation or as multiple violations.

Chair Scharff noted that the reason this is significant is the issue of multiple fine costs accumulating to high amounts. He sought for the Enforcement Committee to treat people the same in the fines it assigns. We need principles for assigning fines rather than discretion.

Ms. Donovan pointed out that the principles are not an exact science but must be case specific. We are trying to come up with the most equitable and transparent means of dealing with the situation of someone having chosen to engage in unauthorized activities.

Regarding revenue-generating activities, as part of principles, Chair Scharff felt that we need to have a policy: to charge for each one separately or not. Using discretion will lead to people being treated differently. Ms. Donovan agreed that we do not want unfettered or arbitrary discretion. She noted the focus on setting up goals to make it clear that there is something to govern the implementation of these principles when we must balance them. Chair Scharff and Ms. Donovan agreed that the concern is that people cannot be profiting off of a decision to engage in multiple violations. She said that we need to ensure that we have an effective deterrent.

Member Gilmore urged staff to review the case of Scott's – it is a separate revenue-generating activities example. She posed another example of someone not coming to BCDC for a permit to dredge, when they are making revenue off of their activity and they also are not paying for the BCDC permit.

Ms. Donovan stated that this principle of economic benefit is the most prone

ENFORCEMENT COMMITTEE MINUTES  
FOR OCTOBER 10, 2019

to slippage or overlap with other principles; staff will articulate it clearly in the guidance.

Chair Scharff asked for clarification on the principle of distinguishing dredging from disposal of dredged material. Mr. Olsson stated that we have separate requirements for how/where/how much you can dredge versus how/where/how much you can dispose of it. Dredging in unauthorized areas, dredging to unauthorized depths, and disposal are inherently very different activities although they relate to the same sediment.

Chair Scharff asked if someone can dredge without authorization and dispose of it without having two violations. Mr. Olsson replied that you cannot. You are having separate impacts at two different locations in the Bay.

Chair Scharff asked if three violations are always involved with dredging: vertical depth, footprint, and disposal. Mr. Olsson answered that the violator might not dredge out of their footprint but dredge to a different depth; that would be just one violation. He pointed out that standardized fines are not written clearly to deal with dredging. If this went to the Commission they would look at a daily rate of how many days the violator is dredging.

Ms. Donovan stated that BCDC should articulate in the penalty policy that providing equitable treatment does not always mean that two entities doing exactly the same thing will get exactly the same penalty. There will be legitimate differences in situations that justify coming to a different results in the cases. We are looking to be fair and consistent in the way we apply the principles, statute, regulation, policies and guidance under which we operate.

Chair Scharff asked if dredging violations normally go through a standardized fines process. Ms. Klein answered that in the past staff had advised the responsible parties that they had two unauthorized activities and neither one was fixable. For varying policy reasons including swift and timely enforcement, rather than taking violators to the Commission through an order, staff offered to settle the issue with a penalty in the maximum standardized fine amount (for deterrence in the future). They took an appeal memo through the Executive Director and the Chairman. In addition, staff has done some specific settlement agreements.

Ms. Donovan added that as a practical matter in seeking to resolve the cases, staff had essentially settled them with the standardized fines regulations as the backdrop to the action they took.

Chair Scharff asked about the practice in the future. Ms. Donovan replied that the auditor was of the opinion that (a)(3) would preclude BCDC from using standardized fines for most dredging violations. With dredging, you want to resolve swiftly to ensure that the action does not continue or occur elsewhere. Chair Scharff asked if we are going to use the same concept of discerning the number of violations

ENFORCEMENT COMMITTEE MINUTES  
FOR OCTOBER 10, 2019

in a non-standardized fines context. Ms. Donovan confirmed.

Mr. Olsson noted that when the dredgers come forward with dredge operation plans for us to approve, they need to work in the margin of error for dredging too deep or accidentally going outside the footprint. There is also an allowance in the permit that you can go one or two feet below the authorized depth.

Ms. Donovan stated that staff will ultimately have a formal policy or guidance that addresses these issues. The Committee will see this issue probably early in 2020.

Chair Scharff asked about the principle stating that staff “Distinguish activities that require separate filing requirements or approvals” – why should they not be combined? Ms. Donovan stated that if other agency authorizations are involved, staff was proposing that should be a factor in treating the violation as separate from the others.

Ms. Klein further explained that multiple infractions might serve the same purpose. For example, the impact of a boat dock or some structure built in the Bay may be completely different from that associated with an unauthorized structure in the shoreline band.

Ms. Donovan continued that a benefit to the violator may be that out of multiple unauthorized activities, four out of five of the activities (for example) could be resolved simply by BCDC. The activity that is going to take more time and require more process to resolve, because of the involvement of another entity, can be treated separately.

Chair Scharff commented that it would be up to the other agencies to enforce their own rules. He also asked if the five violations were combined and treated as one, wouldn't the violator be substantially better off financially with one ongoing violation as the fifth violation is resolved? Ms. Donovan answered that it might depend on which category of Subsection(e) they are using.

Member Vasquez commented that in terms of multi-agency involvement, Point Buckler has yet to be resolved. Every violation is unique in itself, and we should be striving to give staff the flexibility to resolve them. This is not driven by how many penalties we can assign but by getting the unauthorized activities compliant and resolved.

**9. Future Agenda Items.** Ms. Donovan addressed the item.

The October 23 meeting will include the topic of maintenance as a part of discussion.

Chair Scharff requested to include a discussion on the notion of what constitutes signs as fill, and an interpretation of fill in the Bay. Ms. Donovan stated that she would assign this topic for early 2020.

Ms. Donovan noted that for the November 14 meeting, she wanted to review the principles directing the policies and guidance that some agencies have developed as

ENFORCEMENT COMMITTEE MINUTES  
FOR OCTOBER 10, 2019

to when they do supplemental environmental projects – when they allow a violator to undertake activities in lieu of paying a portion of a penalty.

**10. Adjournment.** There being no further business, Chair Scharff adjourned the meeting at 12:37 p.m.