

San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

DRAFT MINUTES

TO: All Commissioners and Alternates

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

SUBJECT: Draft Minutes of May 16, 2019 Enforcement Committee Meeting

1. Call to Order. The meeting was called to order by Acting Chair Gilmore at the Bay Area Metro Center, 375 Beale Street, Yerba Buena Room, First Floor, San Francisco, California at 9:31 a.m.

2. Roll Call. Present were: Acting Chair Gilmore and Commissioners Techel and Vasquez.

Not present were Commissioners Ranchod and Scharff.

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

No members of the public addressed the Committee.

Chair Gilmore moved to Approval of the Minutes.

4. Approval of Draft Minutes and Transcripts for the

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February 21, 2019 Meeting.

Chair Gilmore asked for a motion and a second to adopt the Minutes and Transcript of February 21, 2019.

MOTION: Committee Member Vasquez moved approval of the Minutes and Transcript, seconded by Committee Member Techel.

VOTE: The motion carried with a vote of 3-0-0 with Members Techel, Vasquez, and Chair Gilmore voting, "YES", no "NO", votes and no abstentions.

5. Briefing on the BCDC Audit Report 2018-120. Regulatory Director Brad McCrea introduced the item.

Mr. McCrea stated upon release of the audit staff worked on ensuring that their understanding of the audit was clear and prepared a series of responses that have been posted on the website. All the materials can be found on the BCDC website as well as the State Auditor's website.

Staff worked over the course of about 48 hours to make sure they went through the audit and understood it and then prepared the Frequently Asked Questions, a Fact Sheet and other information they could distribute to the public through the press as needed.

Staff Counsel Karen Donovan made a presentation, by way of a PowerPoint, explaining this was a performance audit conducted by the California State Auditor, not a financial audit as many people are familiar with.

The purpose of the audit was to measure performance,

assess efficiency and effectiveness, test some key management and administrative controls and offer some insights and solutions for approaches or some improvements the Auditor thought that BCDC could make to help BCDC do enforcement better and do it more efficiently.

Ms. Donovan explained the State Auditor's access to BCDC staff and files during the audit process concluding in a report. The report makes findings and provides some recommendations.

Findings were:

BCDC has a significant backlog of cases. The report identified a number of factors that caused this including the time staff are taking to try to resolve cases, the lack of staff and resources and the lack of any formal procedures to establish timelines or milestones to govern case management.

The report also finds that the Commission needs to develop more formal policies, guidelines and regulations.

The report also recommends the development of a penalty matrix to detail the weighing of the factors which are set forth in the McAteer-Petris Act. BCDC's governing statute already addresses the factors that should be considered in setting a penalty but BCDC does not have a matrix or policy that discusses how these are weighed.

The report also finds that the Enforcement Committee and the Commission need to be more active and provide guidance to

staff.

The report also finds that BCDC needs more enforcement staff and recommends a workforce study to determine that need.

The report finds that staff should be conducting regular site visits and doing regular patrols of the areas within BCDC's jurisdiction.

The report finds staff should not be resolving dredging violations using the standardized fine process and this is primarily because this is not explicitly spelled out in BCDC's standardized fines regulations.

The report also finds that the prioritization process that was developed recently is not reducing the inefficiencies and is too complex.

The report also finds that BCDC's database is lacking information.

Additional findings were that more needs to be done to protect Suisun Marsh.

The State Auditor also disagrees with BCDC's use of the Bay Fill Cleanup and Abatement Fund for enforcement staff salaries. They do acknowledge that the Department of Finance and Legislature have both authorized this practice, they simply disagree with it.

Finally, the report finds that BCDC generally drafts reasonable permit conditions that comply with applicable law

and that staff meets deadlines for issuing decisions.

Overall the report does find that BCDC is performing their job and perform an important function in protecting the Bay.

The major takeaways from this report are that the Commission needs to develop policies and possibly regulatory changes to provide more direction to staff. And secondly, that without these formal policies there is a risk of harm to the Bay and denial of public access as a result of unchecked violations, as well as a risk of inconsistencies.

Ms. Donovan noted a few items of importance.

The tugboat Polaris is discussed in multiple places in the report as an example to support some of the findings: On page 2 this beached tugboat is discussed as an example of the things that can happen when staff has no clear guidance on handling cases. On page 23 the report again cites this to support the statement that a lack of clear guidance from the Commission creates a risk that staff may make decisions that are not consistent with the law.

She stated the tugboat Polaris is not an example of a mishandled action, it is a case where certain information should have been clearly reflected in the file and it was not. It is also an example of the things that you see when you ride the train down from Sacramento coming to San Francisco repeatedly.

What happened is this tugboat ran aground on April 14. The US Coast Guard responded; the owner was unwilling to leave the vessel. It was reported to BCDC at the time and reported to other agencies. Several weeks later an enforcement case was opened. After weeks of negotiations the owner abandoned the vessel, the vessel was cleared of fuel and it was moved to a nearby marina. Repair efforts failed and the vessel did eventually sink in its location.

CalRecycle and the Contra Costa Sheriff were working with State Lands at the time and State Lands determined that it would exercise its authority to try to remove the vessel. During this time the vessel was confirmed as cleared of fuel and in early December, State Lands held a public meeting to authorize the remove of this vessel. With all of this information BCDC closed the case at the end of December.

How do we know this? We know this from doing a Google search of State Lands Commission and Polari, and it was pretty easy to pull up the public documents that were used in the State Lands Commission's hearing that confirmed the information she provided. Ms. Donovan acknowledged all of this information was not reflected in the BCDC file. The file did reflect the vessel was within State Lands' jurisdiction and that there were consultations with the Coast Guard and others prior to the closing of this case.

What this case represents is not a mishandling but the

failure to insert certain documents into the paper files that BCDC has.

Ms. Donovan stated additional cases were discussed in the report but she wanted to note the report recognizes for other cases, not just the tugboat Polaris, certain evidence was lacking in the files that the audit staff had leading to their conclusions. There is no finding that the fine in the case discussed on page 36, for example, was inappropriately assessed. The finding really is that without evidence in the file the State Auditor's staff cannot determine clearly whether it was appropriately assessed.

The report includes 17 separate recommendations and Ms. Donovan combined some in order to get through them quickly.

Most prominently, BCDC does need to create policies, procedures and/or regulations covering a number of areas in order to have more transparency and eliminate the risks of inconsistency.

BCDC should also update its database and its files and simplify the prioritization matrix.

BCDC should conduct a workforce study and seek the resources to hire a compliance position.

BCDC should review local agency compliance with the Marsh program.

BCDC should evaluate and update its permit fees.

BCDC should appoint a new Citizens Advisory Committee.

Ms. Donovan added BCDC is already moving forward with improvements to the Marsh Program and has started a process on updating its fees regularly as recommended in the report.

There are also recommendations to the Legislature and they overlap some of the recommendations to BCDC.

They want the Legislature to require BCDC to develop timelines, procedures for management review and a penalty matrix.

They want the Legislature to step in and promote the reporting on BCDC's Suisun Marsh responsibilities.

They recommend the Legislature clarify the use of the Bay Fill Cleanup and Abatement Fund and consider fully funding enforcement staff through the general fund, depending on their decision.

Only after all this is done they recommend the Legislature provide BCDC with a new and important tool, the ability to record Notices of Violation on title. Ms. Donovan stated BCDC's response recommends this does not wait several years until BCDC has completed all the recommendations in the report as this is important and is a tool that will assist BCDC in resolving their backlog of cases.

Ms. Donovan continued by presenting what staff is currently doing. Staff is currently working on moving cases. Staff is working on developing a process to establish a case

management plan so that when something comes in, milestones and timeframes will be in place to move that case along. Staff has weekly meetings where active cases are assessed and new violation reports are discussed in order to figure out how to move things.

Staff is also reviewing the best practices of other agencies as the report suggested and they are going to use this review to move forward with policies and guidance that we will bring to you for your approval. Staff is identifying actions including policies and changes in regulations. Staff is scheduling updates to the Enforcement Committee as they move forward.

And staff also is working on their tools, particularly their database. It is important to recognize that there are limitations. BCDC currently does not have a modernized, up to date database that gives staff a full ability to track compliance for permits and the progress of their enforcement cases. New, modern tools are needed and the reason BCDC does not have those is a lack of resources.

Ms. Donovan showed examples of some work plans staff would be bringing to the Enforcement Committee to help resolve some of the issues described and how they are setting timelines to do it.

Ms. Donovan then continued to next steps. She added further works needs to be done. Within 60 days BCDC has to

respond to the Auditor with an update on its efforts to implement the recommendations that are within its authority. Another update is due in six months and then within one year.

Of note is that several of the recommended procedural changes are recommended to be done by January 2020 and BCDC will be working to meet these deadlines.

Ms. Donovan reiterated that staff would be having regular meetings and updates for the Enforcement Committee, they are going to be working on procedural changes as appropriate, and doing this through public processes and making sure they have input from affected stakeholders.

Member Vasquez stated unless the Legislature is going to provide resources for BCDC to have a strong team it appears as if there was more work than staff available and you will fall farther behind trying to comply. He asked if the State Auditor would come to the Legislature and help BCDC in advocating for additional resources.

Ms. Donovan stated she does not believe they will offer active support. She mentioned the recommendation to do the work force study so that BCDC has the information that the Legislature might expect in order to support these additional positions. She stated the State Auditor recommended separate from the work force study that as soon as possible BCDC seek the resources to have a compliance position.

Member Techel stated the Enforcement Committee is ready

to help with the recommendations made about prioritization and fines. She added that if as a board they had hired a consultant to show BCDC the things we ought to be working on that a lot of the results would have been these kinds of things. She stated, yes, it is more meetings but the Committee's experiences have prepared us to more fully participate when we come back to do that.

Ms. Gilmore had a question regarding using Abatement Fund monies to fund enforcement staff salaries. She stated she did not understand why the auditors would say we need clarification on that point because the Legislature and the Finance Department have already passed on that by saying, yes, you may do this.

Mr. McCrea stated: Our understanding is that the Auditor believes that the Legislature has approved the funds in an implied way; they have not explicitly declared one way or the other. So the recommendation is that the Legislature do just that, to explicitly state whether or not the funds are being used appropriately and consist with the McAteer-Petris Act.

Ms. Donovan added BCDC has always felt the McAteer-Petris Act does allow BCDC to use the funds the way they are using them.

Chair Gilmore echoed her colleagues, stating this would be a useful tool moving forward and everyone would embrace the spirit in which this was done. But at the end of the day

if BCDC does not get additional resources we will not be able to implement many of these recommendations. She did not know where that would leave BCDC other than to make a heartfelt plea to the Legislature to fund us out of the General Fund more fully so that we can have not only the personnel that we need but also the technology. The ability to go back and the ability to be able to have a tickler file is going to be very important to us.

Chair Gilmore stated she had one speaker card and called on John Zucker to address the Committee.

John Zucker stated: Good morning, everyone. I'm John Zucker, I'm with Friends of Westpoint Harbor. But what I have to say today is just my own opinion, mainly because, my bad, I didn't know about this meeting until yesterday and I didn't have a chance to run what I had to say by my friends, but I think they would probably agree with most of what I have to say.

I found the State Auditor's report to be fairly accurate based on my view. And they had to drill down and do a deep drill to come up with specific recommendations, because if you are going to make allegations against somebody you have to have some facts to back it up and that's what they did.

But I was a little disappointed that it focused primarily on the enforcement aspect of BCDC.

I think my view from the outside is you have a group

that does studies, a group that does planning and then a group that does permits. And the study group studies to see what they think is going to happen; once you have an idea of the prediction the planning group comes up with how to deal with it, so you come up with your strategy. Then that's handed off, I presume, to the permit group to create a structure around that strategy so that everyone can be issued permits that take into account what the study group predicted was going to happen. Okay.

The part I'm talking about is just the permit group within BCDC, not the planning group or the study group. And I was disappointed that in that permit group the study only focused on the enforcement aspect. Because I believe that the part of BCDC's organization that is responsible for permits, from the initial application all the way to compliance and sign-off, needs to be completely separated from the other two groups and that permit group needs a reinvented business process. So not just the enforcement part, the whole part, everything, the way you do inspections, the quality control, all the points that were made in the state audit, the consistency, et cetera. I think you need to reinvent your business process and then restructure the organization so that it can enable that business process.

And I think you have to revive your core values. Your core values are the part of the company that guide your

organization's internal conduct and the relationship that you have with the external world. And I know that maybe a decade ago was the last I pretty much saw of anything publicly that dealt with the core values of BCDC. You have core values but I really think they need to be revived and I figure business processes to be overhauled to reflect a customer-centric paradigm and a paradigm of compliance in which enforcement is rarely necessary.

And the numbers to me just don't add up when you have, what, two hundred-some active enforcement cases. To me that's a very large percentage. I think when you issue a permit there is a feeling that - a very good expectation that the permittee has the resources to conform to the requirements of the permit as well as the willingness and the desire to conform and that there is no expectation that there will be non-compliance. That's coming out of the gate, that you expect compliance. To me non-compliance should be very rare. I don't know. It's statistically improbably that you would have, what, 20, 30, 40 percent of your active permits be in a state of non-compliance. It tells me something is wrong.

I think once you take a look at your business process and you do a serious overhaul about the way things are done that the organization needs to be restructured to enable that process to happen very smoothly and seamlessly from the time

you receive the permit application until the time you finally sign it off.

I'm hesitant to say this but I have to say this. Some people are good at running a very stable organization and other people are good at trailblazing. And I think that the existing management that got BCDC to where it is today, they did a job. I'm not saying a good job, a bad job, and none of this is meant as criticism. But I think that the management that needs to bring BCDC from today into the future is different than the management that you have in place right now. And I intend to be part of the public that demands legislation to ensure that changes in BCDC's management will happen, so I'm going to be on that side of the line. And it's nothing personal, Larry. Thank you.

Member Techel had an additional question regarding page 10 of the report. It shows the Commission staff receives a report of violation, assesses the level of harm to the Bay and then it goes to staff-level enforcement and it also shows it going directly, if there is serious harm, to formal enforcement.

Chair Gilmore interjected, asking for a motion to close the public hearing.

MOTION: Member Techel moved to close the public hearing, seconded by Member Vasquez. The motion carried by a voice vote with no abstentions or objections.

Ms. Donovan referenced that Member Techel was speaking about Figure 3 on page 10. Ms. Donovan believes the intent of this figure is to describe the two options available when the amicable process starts to break down. She added the report actually criticized BCDC for the amount of time they spend trying to work with people to get them in compliance. When that starts to break down BCDC has two options depending on the nature of the violation. BCDC does have very detailed regulations as to how to assess standardized fines. Those are used for more minor violations and those regulations spell out exactly the types of violations that can be handled through the standardized fines. The other side are the ones not handled through standardized fines and that come to this Committee for a hearing and then ultimately for approval by the Commission.

Member Vasquez commented the work is very complex. The Enforcement Committee is going to hear an item they heard before and had a recommendation before the entire Commission and the Commission chose, because the individual had outstanding circumstances as to why they could not be there. So to argue that we are taking too much time, I would say we are providing a pretty good due process, that the parties that come before us get the time in which to prepare. As a policy we look to work with everyone before coming to this stage of the process. He added that working to bring the

situation to somewhat of a voluntary compliance is a goal the audit did not take into account.

Mr. McCrea stated one of the things the Auditor suggested and ultimately recommended was we move through the process in a more streamlined fashion, not taking as long to elevate matters. In the permit world the developers want to get things built and they are pushing staff to move projects forward. In the enforcement realm it is completely the opposite, staff is often following the permittee or the violator to bring something to resolution. So you combine that with this approach to work amicably and what you have is cases that went on far too long, and we recognize that and we are going to do better. We are going through process, we are going to give violators notices, we are going to elevate more quickly and use the Enforcement Committee to bring projects to resolution.

Chair Gilmore stated: When the auditors came in they were given access to every nook and cranny at BCDC, they went through everything, and their report came back the way their report did. They may have focused too much in one area for some people and not enough in another area for other people but the report is the way it came back, based on whatever matrix they ran through to give us the suggestions, both for us and the Legislature as to how we can improve how we do business.

As a very wise friend told me once, what gets measured is what gets done. So what we have here is an auditor's report with things that got measured. You may not like what got measured, you may wish something else had gotten measured, but this is what got measured. I can assure you that BCDC staff and the Commission are going to do all that we can to take these recommendations to heart and to streamline our processes, be as public-friendly as we can and get this done. But these are the things that were measured. And I will say once again, in order to do this we need resources from the Legislature.

6. Public Hearing and Possible Vote on a Recommended Enforcement Decision and Proposed Cease and Desist and Civil Penalty Order No. CCD2019.001.00, Salt River Construction Corporation. A verbatim transcript of Item 6 was prepared and is posted on the Commission's website.

7. Report of the Chief of Enforcement. The report of the Chief of Enforcement was deferred.

8. Adjournment. Upon motion by Member Vasquez, seconded by Member Techel, the Enforcement Committee meeting was adjourned at 10:54 a.m.