San Francisco Bay Conservation and Development Commission

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March 12, 2020

TO: Enforcement Committee Members

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

SUBJECT: Draft Minutes of March 12, 2020 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 9:36 a.m.

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

Not present were Member Commissioners Ranchod and Techel.

Staff in attendance included Chief Deputy Director Steve Goldbeck, Regulatory Director Brad McCrea, Staff Counsel Karen Donovan, Enforcement Program Manager Priscilla Njuguna, and Enforcement Analyst Schuyler Olsson.

Also present was Shari Posner from the Office of the Attorney General.

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

Ashley LaBass of Bay Planning Coalition read a statement expressing their concern regarding a statement made at the prior Commission meeting that requiring permittees to identify Operation & Maintenance (O&M) funds could set a precedent and delay projects of regional importance to the Bay Area. Specifically, projects to meet housing, environmental, and transportation goals in the region for which upfront provision or indication of funding sources for O&M costs could prove detrimental.

4. **Approval of Draft Minutes for the November 14, 2019 and December 12, 2019 Meetings.** Chair Scharff asked for a motion and second to adopt the minutes of the November 14, 2019, and December 12, 2019 meetings.

MOTION: Commissioner Vasquez moved for approval of the November 14, 2019, and December 12, 2019, meeting minutes seconded by Commissioner Gilmore. The motion carried unanimously with a vote of 3-0-0 with Commissioners Gilmore, Vasquez and Chair Scharff voting “YES”, no “NO” votes, and no “ABSTAIN” votes.

5. **Enforcement Report.** Ms. Njuguna informed the Commissioners that Ms. Posner had confirmed that Commissioners who have not attended a meeting can review the minutes and be part of the vote to approve them.

Ms. Njuguna also confirmed that three Committee members constitute a quorum for business matters and public hearings.

Commissioner Vasquez asked for confirmation that with a quorum of three, the vote must be unanimous to stand. Ms. Njuguna confirmed that to be the case.

Ms. Njuguna highlighted a few items from the Enforcement Report.

a. To enhance clarity, she provided enforcement term definitions which will be using going forward:

1. Caseload describing all cases including active cases and pending cases (those in various stages of resolution).

2. Old cases describing cases opened in 2016 or earlier. This term is to be used instead of the term backlog.

3. Closed cases meaning all cases that have been closed.

b. Ms. Njuguna noted that there has been a trend towards closing more cases in recent years referring to a graph showing that cases from 2017-19 were progressing from being old cases that staff has not been able to review, to being pending cases that staff are reviewing for resolution.

c. Four cases opened in 2000 or before were closed in 2019, which staff considered great progress because of how old the cases were.

d. She reported that to improve case resolution timeframes, BCDC has been issuing Initial Contact Violation Notice letters for newly opened cases – a pilot practice that will continue until the end of March.

e. She explained that despite 41 active cases, time and staff constraints limit the level of resolution effort going into each case.

f. She informed the committee that after the day's presentation of the proposed Cease and Desist Order to remedy alleged violations at Union Point Park, a presentation to the full Commission would occur in April.

g. She then requested that the Committee consider holding the March 25 meeting on the management of vessels in Richardson's Bay in the Sausalito City Council offices. The location would enable the vulnerable population that lives in Richardson's Bay to be able to attend the public hearing by BCDC making the meeting geographically accessible.

Chair Scharff asked for discussion on this potential location to occur offline and expressed no concerns about going to Sausalito. Commissioner Vasquez stated that the committee could poll the members and get back to staff.

6. **2020 Committee Meeting Schedule.** Ms. Njuguna noted that for the 2020 meetings scheduled to date, there have been challenges achieving a quorum.

Commissioner Vasquez stated that fourth Tuesday meetings as an alternative to Wednesday committee meetings did not work for him.

Chair Scharff felt that meeting dates would depend on the unfolding coronavirus observing that the committee may be unable to meet in person.

Ms. Donovan stated that for the second meeting of the month, Tuesdays did not seem feasible.

Chair Scharff stated that the fourth Thursdays do not work for him.

Commissioner Gilmore observed that the discussion was difficult given Commissioner Techel's absence.

Chair Scharff suggested discussing this topic offline.

Mr. McCrea stated that BCDC was adapting day by day to the situation with COVID 19, following the guidance of the San Francisco Public Health Department, the California National Resources Agency, the California Office of Emergency Services, etc. He reported that Senior staff had been meeting and discussing options such as webcast BCDC meetings, using remote locations other than San Francisco, and having Commissioners participate remotely from various satellite locations. He explained that staff were handling these concerns in real time.

7. **Briefing on Proposed Legislation.** Mr. Goldbeck briefed the Committee on AB 2809, introduced by Assemblymember Kevin Mullin. The bill implements the recommendations for legislative action that were contained in the State Auditor's May 2019 report on BCDC's Enforcement Program.

The bill addresses:

a. Creation and implementation of procedures to ensure managers perform documented review of staff decisions in enforcement cases.

b. Creation and implementation of timelines for resolving enforcement cases and a penalty matrix for assessing fines and civil penalties.

c. Authorization for the Commission, beginning July 1, 2022, to record Notices of Violation on the titles of properties that are subject to enforcement action. As an amendment to this provision, Staff are discussing an approach similar to the Coastal Commission's Notice of Violation authority with the with Assemblymember Mullin's staff. This would allow for expunging of the Notices when the violation is resolved.

d. Prohibiting the use of the Bay Fill Clean-up and Abatement Fund to pay Enforcement staff salaries after June 30, 2021.

e. Amending the Suisun Marsh Preservation Act to require the Commission to review the Suisun Marsh local protection plan by July 1, 2021 and every five years thereafter.

f. Commission staff is discussing with Assemblymember Mullin's staff an additional, final state audit recommendation for the Legislature that would direct BCDC to adopt regulations for delineating violations and resolving minor violations through fines.

Mr. Goldbeck indicated that there have been ongoing discussions with the Assembly member. He informed the Committee that the bill has not yet been set for a Committee hearing and cannot be heard for 30 days after it is introduced. He stated that Staff intended to brief the full Commission on the legislation at the meeting on March 19.

Commissioner Vasquez asked what Assemblymember Mullin is looking to fix. Mr. Goldbeck replied that his sole approach is to implement the state audit recommendations for legislative action.

Commissioner Vasquez asked why Assemblymember Mullin had called out the Suisun Marsh. Mr. Goldbeck replied that it had been addressed in the audit, which pointed out that the five-year review of the local protection program had not been done.

Ms. Donovan explained that the audit contains seven discrete recommendations for the Legislature and that many of these overlap the other 17 distinct recommendations directed at BCDC. She stated that staff are already implementing several the measures directed at the commission.

Commissioner Vasquez felt that if someone took the time to look at the work the Enforcement Committee is doing, they would consider this legislation unnecessary. He stated that he had not heard any complaints from the Assembly or Senate members who represent the Suisun Marsh and that work on the review of the Suisun Marsh local protection plan is underway.

8. **Public Hearing and Vote on a Recommended Enforcement Decision and Proposed Cease and Desist Order No. CCD2020.001.00.** Ms. Donovan stated that this is an enforcement action against the City of Oakland related to the situation at Union Point Park. Staff were seeking injunctive relief against only the City of Oakland as lessee, with the Port of Oakland as property owner, to ensure that the park is restored to meet permit requirements and that the area is maintained.

Mr. Olsson talked the Committee through the nature of the violations, the measures to resolve them, the proposed order, and the staff recommendation.

a. He explained that in 2004, BCDC issued the permit to the City of

Oakland and the Unity Council for the construction of Union Point Park. It was funded by a broad range of community groups, agencies, and individuals in a collective effort.

b. He informed the Commissioners that the park is situated along the Oakland Estuary on trust lands owned by the Port of Oakland and leased to the City of Oakland. It is a long-term lease that obligates the City to maintain the site. He described park features including children's play structures, expansive lawns and gardens, and several amenities. He also informed the Commissioners that the Bay Trail runs along the Bay side of the Park.

c. He then informed the Commissioners that in 2010 BCDC issued a permit for the City of Oakland and the Port of Oakland to establish the Cryer Site Park to the north that the City considers part of Union Point Park.

d. He explained that both permits have various public access requirements, including areas meant exclusively for public use. He then explained that bother permits require maintenance of the public access area improvements in perpetuity.

e. Mr. Olsson described the historical evolution leading to the enforcement action.

1. In 2005 the Park was actively used by the public.

2. In recent years, however, the Park seriously degraded. He explained that in March 2018, BCDC received an initial report from the Harbormaster of the nearby marina of encampments and violence in the Park. Additional reports were received of vandalism, threats to tenants of the neighboring Union Point Marina, and of arson at the Marina shower facility.

3. In June 2018, BCDC received a report of encampments in the Cryer Site portion of the park and the adjacent beach area.

4. In May and June 2018, the City conducted cleanup operations in the park. The encampments returned, many moving to the Cryer site northern portion of the park.

5. In July 2018, BCDC contacted the City of Oakland on the issue. The City said that it had cleaned up the park 18-19 times. City representatives explained that they were unable to maintain the park because of threats to park workers from some of the inhabitants. Park rangers were no longer operating in the park. The City's Encampment Management Team was working to address the issue at Union Point Park and various other parks in the city.

6. From August 2018-January 2019, BCDC continued to receive reports from the public regarding accumulated trash and debris, damaged and poorly maintained amenities, dumping of waste, graffiti, prostitution, rats, and vandalism. Members of the public did not feel safe using the park.

7. In January 2019 there was a fire in one of the encampments. Reports began of a growing Recreational Vehicle (RV) camp in the southern portion.

8. In February 2019, BCDC, the Bay Trail, and the Coastal Conservancy sent a joint letter expressing their concerns to the City, the Unity Council, and the Port of Oakland. BCDC promptly received a response that the City was working to address the concerns through the Encampment Management Team. The City was looking into emergency shelter measures to rehouse inhabitants.

9. In March 2019, when the City was planning a large-scale cleanup operation, encampment inhabitants filed a Temporary Restraining Order. A federal judge in San Francisco enjoined the City cleanup efforts for a few months.

10. From May-August 2019, BCDC continued to receive complaints from the public. Tragically, in June a report said a seven-year-old boy was accidentally shot in the park.

11. In August 2019, the injunction was lifted. The City conducted a clean-and-clear operation declaring a formal closure in the parking lot areas of the encampments. However, substantial numbers of inhabitants remained in the park.

f. Mr. Olsson highlighted the past Enforcement Committee meetings and the negotiations with the City of Oakland.

1. In July and October 2019, staff briefed the Committee on Union Point Park.

2. In October the City of Oakland presented information on their work to the Committee. The Committee directed staff to begin working on a Cease and Desist Order.

3. In November 2019 the City presented its draft Encampment Closure and Park Restoration Plan to staff.

4. In December 2019, staff issued two violation reports – one for the Union Point Park permit the other for the Cryer Site Park.

5. From October 2019 through February 2020, BCDC and City of Oakland staff met multiple times to negotiate the City's plan and the terms of the proposed order.

g. Mr. Olsson showed recent photos of the park.

h. He then explained the violation reports that were issued.

1. The first, for the City of Oakland and the Unity Council, alleged three violations in the larger portion of the Park:

a. Failure to make the designated area available exclusively to the public.

b. Failure to maintain public access area improvements.

c. Failure to provide all required improvements (differentiated from the maintenance),

2. The second violation report, for the City of Oakland and the Port of Oakland, alleged the same three violations. In addition, it alleged unauthorized fill in the Commission's shoreline band consisting of unauthorized encampments and associated debris.

i. Ms. Donovan discussed the responses from the permittees to the violation reports. The City and the Port submitted statements of defense. She explained that the City does not contest the basic facts and allegations asserted; they have acknowledged that there are serious maintenance issues. The Port was not named in the proposed Cease and Desist order because park maintenance was a City responsibility. Many of the defenses asserted by the Port also would apply primarily if BCDC were seeking civil penalties; however, BCDC is only seeking injunctive relief.

j. Mr. Olsson then summarized the provisions in the Cease and Desist Order. Because BCDC understands the magnitude of the homelessness crisis, no civil penalties were assessed.

1. The key condition is that the City will implement the measures described in the City's Encampment Closure and Park Restoration Plan.

2. The first step in the Cease and Desist Order was the establishment of a temporary reprieve zone, which has been accomplished. Inhabitants were moved into it with little to no resistance. The City is working with a local partner to provide social services to the residents to transition them to alternative safer housing situations.

3. The next step is that by May 1, after transitioning all remaining individuals to alternative housing, the City is required to close the reprieve zone, clean up the area, and remove temporary amenities. At that time the Park will be fully open to the public, before all amenities have been restored.

4. The City is required to conduct regular patrols of the park and prevent the establishment of new encampments.

5. The City is required to submit a formal Encampment Prevention Plan on April 15. They are also required to submit their concepts on how to reactivate the park.

6. Also, on April 15, the order requires submittal of some near-term restoration measures including temporary safety lighting in the parking

lot, installation of a missing bike rack, and signage.

7. An internal deliverable for the City is a Needs Assessment for full restoration of the park to be conducted by June 20 that will also be submitted to BCDC.

8. By August 31, the City will submit its long-term plans for fully restoring and maintaining the park.

9. By December 31, 2021, the park is required to be completely restored to a condition compliant with the permits.

10. The order includes provisions for time extensions for specific requirements.

k. Staff recommended that the Enforcement Committee adopt the proposed Cease and Desist Order.

Commissioner Gilmore commented that she was pleased that the proposed order does not include civil penalties. She felt uncomfortable for one public agency attempting to fine another given these circumstances.

Commissioner Gilmore asked how Measure Q fared on the ballot, and if it passed, how that affects the City's plans going forward. Joe DeVries, of the City Administrator's Office, responded that the vote on the measure is bouncing between 66.8% and 66.9%.

Mr. DeVries noted that the creation of the reprieve zone – a huge operation – had gone fairly well. However, he reported people have set up tents outside the reprieve zone. Police have gone out and engaged them without force to comply with the reprieve zone requirements. An operation had been scheduled for next week to bring in the Public Works crew, if police efforts are unsuccessful to bag and tag people's belongings and take them away if they are unwilling to move. However, the Encampment Management Team last night decided to shift its operations based on the COVID 19 virus. Its priorities are now garbage removal and sanitary services, closures and clearings are postponed based on public health recommendations, and staff safety. Moving encampments, he stated, is a bad idea right now because of potential spread of the virus.

Mr. DeVries stated that most of the restoration items in the permit can be replaced fairly quickly. He however recognized that the bigger picture of fixing the water system, irrigation, and major lighting are more of an unknown.

Chair Scharff asked if the City is still on track to meet the Cease and Desist Order. Mr. DeVries confirmed that the City is on track. Chair Scharff asked if the time extensions in the order would apply to any COVID 19 virus necessities.

Chair Scharff asked what BCDC would do (putting aside the virus concerns) if the City of Oakland does not meet the requirements. He asked if

BCDC would then look at civil penalties. Ms. Donovan responded that measures in the Cease and Desist Order enable the extension of timelines. There is a provision in the order specific to the City that addresses their concerns about their ability to fund the restoration measures.

Chair Scharff stated that given the issue of the virus and the encampments, we do not want to have new encampments outside the reprieve zone that we cannot move because of virus concerns. The City must make sure that those encampments do not morph out of that zone. He did not feel that Oakland's ballot measures should have anything to do with this ability to meet order terms. He noted that the City allowed this situation and is responsible for finding the money to restore the park. Ms. Donovan noted that this was part of the conversation staff had with the City during negotiations.

Public Comment: Mr. Brock deLappe, Oakland Harbormaster and Marina Manager for the Oakland Marinas, provided an update on the current status of the park. He showed current photos of scenes including accumulations of garbage and encampments encroaching on the Bay Trail. He stressed that it is important to maintain steady enforcement so that the community and City do not lose what they have gained. He noted the establishment of a police substation along the Embarcadero is a highlight because police presence can cause a dramatic positive impact on crime in that area.

Commissioner Gilmore asked Mr. DeVries his best estimate of the number of individuals in the reprieve encampment. Mr. DeVries estimated 25 people.

Commissioners and staff all expressed appreciation for the work the City is doing in addressing this difficult situation.

MOTION: Commissioner Vasquez moved to close the public hearing, seconded by Commissioner Gilmore. The motion carried unanimously by voice vote with no objections or abstentions.

MOTION: Chair Scharff moved to adopt the proposed Cease and Desist order, seconded by Commissioner Vasquez. The motion carried unanimously with a vote of 3-0-0 with Commissioners Gilmore, Vasquez and Chair Scharff voting "YES", no "NO" votes, and no "ABSTAIN" votes.

9. **Briefing on Oldest Case Resolution.**

Ms. Njuguna stated that because of the number of active cases staff are working on – 41 – the level of effort going into each individual case is of necessity different.

She noted that three of the oldest cases (opened in 2016 or prior) were closed in 2019.

She highlighted progress made on five pending cases.

1. Enforcement Case No. ER1988.024: authorized subdivision and construction of 10 homes in Benicia, a concrete block gravity revetment and

public access from the street to the beach via wooden stairway. Current status is that staff has received a concept shoreline protection plan that is under review. The City of Benicia staff engineer is overseeing construction of the beach access stairway.

2. Enforcement Case No. ER1990.026: Rich Island Duck Club for the Port of Stockton and Suisun Resource Conservation District. Authorization issued to U.S. Army Corps of Engineers for one million cubic yards of dredging in the Stockton Ship Channel and disposal of the material at four locations. Current status is that a scheduled site visit for March 17 has been postponed for six weeks. Staff and interested parties will continue to use satellite imagery in different ways to assess the status of the site, as well as determine the path moving forward until a site visit can safely occur. Staff planned to have decision points ready for the Committee in May, but that date may shift to a June-July timeframe.

3. Enforcement Case No. ER1995.002: unpermitted work consisting of placing broken rock, concrete and fill around and under the residence in Corte Madera Creek; an illegal live-aboard; removal of marsh vegetation; repair of decks around the house; and residential expansion. Current status is that staff have received a copy of the current lease for the property from the State Lands Commission. Staff have not yet been successful contacting the property owner.

4. Enforcement Case No. ER1998.013: failure to submit public access instrument required by the original permit. Current status is that staff has contacted the San Francisco Department of Parks and Recreation (DP&R) and Public Works (DPW) to identify the appropriate party to determine the number of street lights and where they are located, and verify that public access areas have been vacated and transferred to DPW and DP&R for exclusive public use.

Chair Scharff asked why the City was unable to vacate the street right of way. Ms. Donovan answered that staff is still trying to sort out what happened – the original staff who worked on the case left BCDC and certain follow up work was not completed. She noted that the City has other plans for the adjacent areas, and BCDC and the City need to coordinate all efforts.

5. Enforcement Case No. ER1999.034: the current status is that staff is establishing who the new owner of the property in Alameda is. The previous owner passed away in 2011, and staff is determining who holds title.

Commissioner Gilmore gave historical context by commenting that the City of Alameda had been trying to work with the Army Corps of Engineers to get them to permit repair of docks, etc. in the estuary area. The two never came to an agreement, and this has lasted for a decade or more. Commissioner Gilmore felt that property owners desperate to keep their property from falling apart had done unauthorized repairs. There has been a definite lack of any

action by the parties that had jurisdiction. She felt that there may be many other properties on both sides of the estuary that are in violation of BCDC permits or have no permits.

Commissioner Vasquez asked how we handle transfer of title when a property owner passes away without a will or trust and there is an argument regarding ownership. Ms. Njuguna answered that based on property records, the property title here has not been transferred. This suggests that it might be in a trust or something similar, which is why we are trying to contact the previous owner's children. She informed the Commissioners that staff are still doing research to determine the next steps.

Chair Scharff asked how staff had gone about obtaining the title report. Ms. Njuguna explained that it was a title search company that staff search using the property address, and the property owner information is returned. Chair Scharff asked if we are using the best and most efficient ways of doing this research thinking BCDC may need to outsource the process. Ms. Njuguna answered that using the title search company is easy, but in finding that the owner is deceased, we are working through how to get more information. She confirmed that BCDC does not have the skip trace option. Ms. Donovan added that we are using the tools we have, including the telephone, because BCDC currently lacks some more sophisticated databases and paid search service access. She asserted that if this becomes a pattern, then BCDC will pursue getting additional tools.

Commissioner Gilmore agreed that we may need additional tools. She asked if we have looked at who is paying the property taxes or if they are being paid at all. Ms. Njuguna responded that those would be the next steps.

Commissioner Gilmore commented on older cases in general: staff and the Committee struggle with the problem of the amount of time it takes to track down the information in order to resolve the case versus where else our resources could be spent. She suggested that if we make a report to the Commission, this would be a good example of a staff time and effort intensive case.

10. **Briefing on Criteria for Delineation of Violations.** Ms. Posner stated that staff anticipate that the issue of the factors BCDC uses to combine multiple violations to assess a single administrative penalty will ultimately be addressed through a regulatory change. She explained that in advance of that, staff felt that it would be beneficial to discuss their current practice and get the Committee's input.

Ms. Donovan then started by explaining that one recommendation from the audit was for the Commission to create and implement regulations that provide explicit criteria for calculating the number of violations present in individual enforcement cases, and specify a process for exceptions to the

criteria they develop.

She began by defining the overarching goal of enforcement as furthering BCDC's mission of protecting the Bay and ensuring maximum feasible public access to the Bay and shoreline.

In keeping with the Enforcement programs goals are fairness, consistency; efficient and effective deterrence; transparency; and swift and timely action. These considerations, she stated, are important in how staff assesses violations and situations determining when it is appropriate to combine multiple violations or separate then to assess a penalty.

Ms. Donavan then reiterated that BCDC law defines violations as any violation of the McAteer-Petris Act or a term and condition of a permit. The Suisun Marsh Preservation Act contains language that is similar.

BCDC regulations state that any of the following actions constitute grounds for imposition of civil penalties:

a. The undertaking of any activity that requires a Commission permit without having obtained the Commission permit.

b. The violation of any term or condition of a Commission permit.

Ms. Donovan reminded the Committee of the manner that other agencies have articulated their approach, which is that every failure to comply with a requirement is a violation. They reminded the Committee of the simple way articulated by the Nuclear Regulatory Commission.

Staff has historically generally looked at violations similarly to how the Health & Safety Code works. Namely that a violation is any action that represents a failure to comply with the law or failure to comply with permit conditions.

She distinguished the Department of Toxic Substances Control as an agency that specifies in its regulations when the enforcement agency can combine multiple violations to assess a single initial penalty. This is a model that BCDC is examining.

Ms. Donovan explained the factors that BCDC would use in making the determination of when to combine multiple violations of the statutes, regulations, or any term or condition of a permit.

Commissioner Gilmore asked about the "shall" language with respect to civil penalties; specifically wanting to clarify whether in a case such as Union Point Park the language requires BCDC to impose civil penalties. Ms. Donovan clarified that penalties are at the discretion of the agency. She asserted that consistent with what other agencies do, BCDC always tries to come up with the most appropriate means of resolving any individual violation. The way BCDC's regulations are worded, a violation constitutes grounds for the imposition of civil penalties.

Ms. Donovan showed a slide with a list of the factors that staff are using, beginning with the reasons to keep multiple unauthorized activities as separate violations, then factors staff may look at in deciding to combine multiple violations for purposes of determining the appropriate penalty.

Regarding the first factor listed, "Distinguish activities that are substantially separate in time," Chair Scharff asked about activities that happen just days or hours apart. Ms. Donovan replied that these factors are never looked at in isolation. She explained, for example, that activities may be separate in time but serve the same purpose. Chair Scharff asked about the term "substantially." Ms. Donovan answered that staff uses their discretion and considers the context of the individual violations.

Chair Scharff stated that what we are trying to do is not to have so much discretion over everything that people will question our conclusions. Ms. Njuguna stated that in order to build consistency in process, if you have principles that are guiding your process all the time, you are more likely to reach the same conclusion. Chair Scharff agreed with the practice of consistency in approach.

Commissioner Gilmore commented on the example Ms. Donovan had given of habitat damage. Ms. Donovan explained that as a practical matter, staff would look at the harm done as a factor in considering whether to combine multiple violations. Moving forward with having a program based more on written procedures and regulatory language/policies, staff want to examine each of BCDC's cases to ensure consistency. Using the audit recommendation requirement, staff have started to written outline of the factors used to evaluate cases with multiple violations.

Commissioner Gilmore stated that for overriding considerations, she would return to our overall goals namely: protecting the Bay and providing maximum public access. Whether or not to combine or separate violations should depend on whether the violations affect BCDC's overriding goals.

Chair Scharff agreed and took it a step further. He asserted that it should be a separate offense when the successive offense causes harm. He used examples of pouring poison in the Bay and removing signs. Ms. Donovan stressed that staff looks at harm created by violations. She emphasized that none of these factors operate exclusively. Staff looks at whether the violations generate revenue, block public access, violate separate special conditions written into the permit, are separate in time, serve the same purpose, and are adjacent at the site. Staff then weighs all those factors.

Chair Scharff suggested that a better way to evaluate multiple violations would be to examine whether BCDC's overriding goals – protecting the Bay, maximizing public access, and not profiting off violations – are affected by the

violations to determine whether to separate or combine violations.

Commissioner Gilmore agreed and gave examples of a property owner in the shoreline band erecting two different structures for different purposes.

Chair Scharff stressed that profiting off a violation should be a separate violation.

Ms. Donovan stated that staff likely agreed, and just may not be articulating it in the same way. The factors she had listed are used to explain that staff have determined a separate harm. The Commissioners were beginning the evaluation with the principle of asking if the harm is separate.

Chair Scharff felt that the factors staff is using are confusing and they should not use them. Rather staff should use the three principles as factors. In the simpler form violators would be able to understand the concept that with the three violations, for example, were two of them the same harm to the Bay or were they all separate harms to the Bay. Ms. Njuguna agreed regarding the overarching goals but pointed out that given the different circumstances that go into different types of violations, staff considers nuance – the listed factors are the different things that inform the nuances. An example is a property where an original owner engaged in numerous unauthorized actions but by the time BCDC receives the report years later, the property has transferred title to a new owner: the level of accountability for the multiple violations could be different.

Chair Scharff strongly disagreed and felt that this example would demonstrate a fourth factor: equitable considerations. He stated that he did not view these as nuances but separate legal arguments. If there are just four factors: protecting the Bay, public access, not profiting, and equitable considerations, staff can consider what to do with those at their discretion.

Commissioner Gilmore stated that she would add another factor: whether the activity required a permit from BCDC. She asserted that BCDC wants its processes to be transparent. She found that the table of reasons supplied by Ms. Donovan is very difficult to establish transparency for the public to understand. Using the four or five factors would aid in transparency – making BCDC's reasoning much clearer. If staff really wants to use the language in the table, it would be as a result of the four or five factors.

Ms. Donovan stated that the discussion was extremely helpful. Staff had listed the reasons as their thought process; it does have consistency. Staff will work on the suggested simplification. She noted that Assemblymember Mullin wants to implement all the recommendations in the audit that were made to the Legislature. They are relying on BCDC to help them come up with language that makes clear that calculating the number of violations present in individual enforcement cases is not the accurate language. Rather, it is the concept of the factors used when assessing a single penalty for multiple violations.

At the next meeting, staff will simplify their presentation to focus on the factors discussed.

Commissioner Vasquez stated that staff needs to put a value on what harm means. He observed that staff are looking for things they can touch on for what they do when a case comes in. If someone takes a sign down, and three years later the other sign comes down, is that one violation or two separate ones? It is the gravity and the amount of harm. The goals each have a certain value, as do the four or five factors. Further, he recognized the need articulate the factors to the regulated community. He noted that despite each case having different circumstances staff must find consistency.

Ms. Donovan suggested that using the terminology "separate harms" is enough. She added that as discussed at a prior meeting, staff considers harm to the regulatory program. Permittees cannot pick and choose the special conditions they will comply with. She asserted that it is the reason staff spend so much time negotiating with the regulated public on permit term compliance.

Commissioner Gilmore observed that as staff works with this process on a daily basis, they internalize it and it makes sense to them. She recognized that staff has had the opportunity to explain it to the Committee – but they will not have that opportunity with the public. She reiterated that staff need to keep the language simple.

Commissioner Vasquez agreed that the Committee is the spokesperson for staff out in the community. The better the Committee is educated on staff's work, the better.

11. **Future Agenda Items.** No future agenda items were presented.

12. **Adjournment.** There being no further business, Chair Scharff adjourned the meeting at 11:47 a.m.