

San Francisco Bay Conservation and Development Commission

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February 11, 2021

TO: Enforcement Committee Members

FROM: Priscilla Njuguna, Enforcement Policy Manager (415/352-3640;
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SUBJECT: Draft Minutes of February 11, 2021 Enforcement Committee Meeting

1. Call to Order. The meeting, held remotely via Zoom, was called to order by Chair Scharff at 9:30 a.m. He welcomed new Commissioner Brad Wagenknecht.

2. Roll Call. Present were Chair Scharff and Commissioners Gilmore, Ranchod, Vasquez, and Wagenknecht.

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

3. Public Comment. There was no public comment.

4. Approval of Draft Minutes from the December 16, 2020 Meeting

MOTION: Commissioner Gilmore moved for approval of the December 16, 2020 meeting minutes. Commissioner Vasquez seconded. The motion carried unanimously with a roll call vote of 5-0-0 with Commissioners Gilmore, Vasquez, Ranchod, Wagenknecht, and Chair Scharff voting “YES”, no “NO” votes, and no “ABSTAIN” votes.

5. 2021 Committee Meeting Schedule. Chair Scharff stated that the Enforcement Committee meetings are currently scheduled for the second Tuesday and the fourth Wednesday of every month, except for November for which dates were shifted to the 4th and 17th to accommodate the Veterans Day and Thanksgiving holidays. He requested that Commissioners with scheduling conflicts that prevent them from attending meetings on the scheduled dates send an email to Margie Malan.

Chair Scharff noted that in the long term, the Committee hoped to bring back in-person meetings.

6. Enforcement Report. Ms. Njuguna highlighted portions of the Enforcement Report which the Commissioners had received via email and is posted on the website and explained some recent developments.

She stated that every quarter, staff provides a summary of cases open and closed as well as noteworthy events. For the fourth quarter of 2020, staff closed 40 cases and opened 13. They issued one after-the-fact permit. Importantly, BCDC received some of the penalty amount owing from the Order issued to Salt River Construction Corporation, which was issued in 2019.

Ms. Njuguna referred to pie charts comparing the differences between quarters and explained the progress staff was making. The fourth quarter, she noted, reflected continued progress from the first quarter documented by a decrease in active cases (those being investigated that then become pending cases), an increase in pending cases, and a decrease in old cases (those opened in 2016 or before).

Ms. Njuguna explained the final pie chart, which illustrated the progression of cases in status codes beginning with new case reports received and ending with case being closed. Staff anticipates that at the end of 2021, a much larger portion of the cases will be in the *Resolution Imminent* status codes which is the final step before a case is closed.

Ms. Njuguna then pointed out that of the 40 cases closed during the fourth quarter of 2020, only one was outside of BCDC jurisdiction; 24 were resolved after staff received or obtained documentation that the violations were resolved or no longer valid. Staff had received a number of duplicate reports as people were at home because of the pandemic and were using public access spaces, leading them to notice violations.

Ms. Njuguna also reported that in 2020 staff fully integrated their simplified case status codes, which makes for a clearer picture of where cases are in the progression from when reported toward resolution. She noted that of the 15 grouped cases staff worked on during 2020, only three remain open – reflecting significant progress for the year.

Ms. Njuguna concluded her report by giving a brief compliance update on the Union Point Park matter for which a Cease and Desist Order was issued in 2020. She reminded the Commissioners that the order included a requirement that the encampment on the property be closed by Friday February 12, 2021. City of Oakland representatives reported that their plan was to work from Tuesday to Thursday of that week to close down the encampment. No updates had been received since Monday February 8, 2021, about their progress. She then informed the Commissioners that in October 2020 the Oakland City Council adopted an encampment management policy requiring that encampments in high sensitivity areas (i.e., near protected waterways such as the Oakland Estuary) be closed. Union Point Park meets this criteria which provides a way to target resolution of any future issues that may occur in that

area. In accordance with the Order, staff also received a Park Management Plan and a Park Activation Plan from the City which were required as part of the Cease and Desist Order.

Questions and Comments

Commissioner Gilmore commented that assuming the City of Oakland succeeds in its efforts the following day, the Enforcement Committee may see much public comment at the Commission meeting next week. Chair Scharff agreed.

Commissioner Wagenknecht asked if cases ever get so old that they are just closed. Ms. Njuguna responded that staff usually link case closures to something specific findings, for example, ensuring previously reported circumstances are no longer true before closing the case. Ms. Donovan noted that there is no statute of limitations for the resolution of cases; however, if cases have been on the books for a very long time, the facts may have changed and there may be better ways of resolving them. Ms. Donovan stated that Ms. Njuguna has been examining the older cases to discern whether they are still valid or should be considered resolved.

Chair Scharff commented that he was pleased with the City of Oakland's response of closing encampments in sensitive areas which he thought was a huge win for BCDC in preventing repeats of these issues within Oakland.

7. Briefing on Enforcement Case Resolution Process. Ms. Njuguna provided the briefing for the Committee which she began by reiterating the *Enforcement Program Goals* of deterrence, transparency, consistency, and fairness.

Staff always looks through the lens of these goals in resolving cases.

She then discussed the enforcement *procedures*. She noted that the procedures are now in writing and described them as follows:

- Staff created template *Initial Contact Letters* sent to Respondents when phone calls are unsuccessful in enabling timely case resolution. These letters have facilitated case resolution efficiency by enabling cases to be closed sooner.
- Staff developed the *Case Review Procedure* to ensure timely case resolutions and to facilitate case tracking.
- The *Case Review Procedures* addresses the five w's of a case: Who, What, Where, When, and How. The procedure also defines how and when to escalate complex cases. Case status codes are also defined as follows:
 - New Report
 - Active Case
 - Pending Case

- Investigation
- Eminent Resolution
- Closed/Closed No Violation
- Compliance Monitoring

The Case Review Procedure also includes three reports namely:

- Aged Case report (to prevent case stagnation)
 - Grouped Case report (combines 15 cases for similar violations by the same Respondent for efficient resolution)
 - Paired Case report (combines up to 3 cases by the same Respondent even when the violations are not similar for efficient resolution)
- Commissioner Wagenknecht asked if cases are ever grouped by type. Ms. Njuguna replied that they are not. She noted that for resolution purposes grouping by type is not as effective as grouping by Respondent in building efficiency in case resolution.

Ms. Njuguna stated that Standardized Fines enable staff to solve specific types of cases that are specified in the BCDC regulation. She contrasted the Civil Penalty process used to resolve significant harm cases which are considered complex cases.

She then explained that Enforcement Committee public hearings enable staff to bring cases to the Committee for discussion and vote prior to presentation to the Commission for a vote.

Ms. Njuguna then showed the distribution of cases by case status code as of February 5, 2021. The majority (63%) are in Pending status code as staff work to bring cases to resolution.

- Ms. Njuguna then explained the *Case Management Procedure with Milestones* which she noted is responsive to AB 2809, which was part of the response to the state auditor's 2019 enforcement report and required timelines for the resolution of cases. The milestone progression is as follows: Assignment → Investigation → Negotiation → Resolution.
- The *Milestone timelines* for case resolution are as follows and enable staff to prevent case stagnation:
 1. Assignment: 45 days from the date a report is received.
 2. Investigation: Within 100 days from assignment.

3. Negotiation: Within 240 days from assignment.
4. Resolution: Within 90 days from completing negotiations.

The total milestone timeframe from beginning to end is a year and a half as an outer limit. However, Ms. Njuguna hastened to add that sometimes extraneous circumstances may cause the timeline to be extended as would be illustrated during Ms. Klein's presentation on factors resulting in delays in the resolution of complex cases.

- The *Aged Case Status Report* tracks how long a case has been in the Assignment, Investigation, Negotiation, or Resolution milestones. If case resolution has taken longer than it should, this case status report triggers management action to push the case forward towards resolution.
- The *Closed Case Report* is a monthly check of the database that all cases that have been resolved are closed in the database.

Ms. Njuguna then explained the simplified *Case Prioritization*. She noted that the Enforcement Committee has directed staff to pursue cases using the following order of precedence:

1. Significant harm
2. Most harm to the bay
3. Limits on maximum feasible public access
4. Unpermitted work that is permissible
5. Ethical considerations (such as changed site conditions)

Ms. Njuguna then summarized the resources at Staff's disposal including:

- Database for tracking cases. Staff can sort the data by address enabling staff to determine if a new report is duplicative of a previously received report.
- Electronic record keeping databases enable staff to search for permits, document the progress toward the resolution of cases, and determine requirements to resolve cases.
- Template letters in addition to the Initial Contact Letter include a 35-day notice template letter (a tool used in the standardized fine process).
- Certification of Terms and Conditions Compliance Forms are an updated version of a previously used compliance form that specifies the section/condition in a permit that was addressed and the documentation staff received to verify compliance as of a date certain as well as who to contact to address subsequent concerns.

- Technical team consists of Bay Development Design Analysts and a Staff Engineer. They assist staff, particularly with the most complex cases.

Ms. Njuguna concluded the process briefing by noting that the next steps would include Staff providing ongoing briefings to the Enforcement Committee and the Commission on complex cases, and to the Enforcement Committee on old cases. Staff would also continue resolving cases. She also noted that the Administrative Civil Penalty Policy, developed by the Enforcement Committee and reviewed by the Commission, are now in the rulemaking process as are the proposed amendments to Chapter 13.

Questions and Discussion

Commissioner Wagenknecht asked how often Enforcement Committee public hearings occur. Ms. Njuguna answered that it depends on the nature and number of cases Staff are handling. Ms. Donovan added that a contested hearing happens when a case is not being resolved through standardized fines and an amicable resolution has not been reached. Currently there are two cases that staff hopes to settle through a stipulated order or some type of settlement agreement. Staff brief the Committee on such situations so they can have oversight on the resolution, but the cases do not go through a formal adjudicatory hearing.

Commissioner Wagenknecht commented that the clearer and more consistent the Enforcement process is, the fewer hearings we will have. Ms. Donovan concurred.

Public Comment

Brock de Lappe, Harbormaster of the Oakland Marinas, commented on the situation at Union Point Park. He noted that the Cease and Desist Order issued to the City of Oakland on October 15, 2020, which he explained was months ago, has not yet resulted the City entirely complying with the order to move all encampments out of the central and eastern portions of the park by November 15, 2020. He stated that the consolidation of the encampment was not enforced, new encampments have been started and people are driving their cars into the park. The amount of trash at the west encampment is phenomenal. Mr. de Lappe also commented on a long-term encampment on the Bay Trail, right next to the water close to Union Point Park. In addition, the block between Dennison and Livingston streets, also close to Union Point Park, is totally packed with RVs. These people are taking water and power from the nearby shell dock and dumping their waste into the storm drain. These problems have been reported but nothing has happened. Mr. de Lappe stated that the businesses along the Embarcadero are up in arms about this situation.

Chair Scharff informed Mr. de Lappe that staff would follow up and report back. Mr. McCrea stated that he had been to Union Point Park on the

morning of February 11, 2021 and observed the problems Mr. de Lappe was speaking about. He stated that staff would follow up.

8. Briefing on Complex Enforcement Cases. Ms. Klein gave the briefing and begun by stating that the nature of the violations that the Enforcement program addresses range from very minor to large-scale unauthorized development. She noted that each hypothetical case example used was illustrative of different complicating factors.

Interagency Regulatory Coordination. Parties who undertake work before obtaining permits can be less adept at navigating the interagency permitting processes and retaining the appropriate professionals to manage the permit processes. Many projects require multiple agency approvals. Further, if any portion of a project is located on publicly-owned property, the property owners need a legal interest such as a lease – an additional process for them to manage. Because each agency’s jurisdiction and regulatory purview does not entirely overlap, project proponents need to display on their plans their projects for each agency’s requirements and application processes. Some Respondents are better able to navigate this process than others.

Unforeseen Circumstances. Ms. Klein referred to the ongoing Rich Island Duck Club case in the Suisun Marsh. Prior to 2007, the four interested parties involved – the United States Army Corps of Engineers, the Port of Stockton, the Rich Island Duck Club owners, and BCDC – agreed that an onsite beneficial reuse plan should be developed and implemented for the dredged material on the managed wetland. In the past two years the parties have re-engaged with new party representatives, developing an updated concept plan to reuse the material to benefit the wildlife habitat.

Violations Not Retroactively Approvable. Ms. Klein used the illustration of a case involving a single-family residence where the Respondent placed rock and concrete fill along the shoreline without any agency approval and without following professionally-prepared plans. BCDC coordinates resolution in such cases with the Regional Water Quality Board, which incidentally does not issue after-the-fact approvals, and with the United States Army Corps of Engineers and other relevant resource agencies. At their direction, homeowners prepare and submit corrective action plans to remove the unauthorized fill. BCDC staff advise homeowners that if they wish to submit an application for new work in similar circumstances they should retain a coastal engineer to assess the site conditions and develop a proposal to resolve flooding issues.

Site Constraints and Multiple Violations. Ms. Klein used the illustration of circumstances involving a reconstruction of a collapsed sea wall – important to protect not only the residents, residents of the adjacent home, but also the public using the adjoining public access stairway which in the illustration needed to be closed due to safety concerns. When the homeowner and the city

are both willing to fix the sea wall, but the site design is problematic for the assigned engineer because of the narrow space to work with it results in delays in restoring public access.

Competing Interests and Work Windows. Ms. Klein used the illustration of a residence under construction in which work was not confined to the shoreline band as approved in a BCDC permit. In some instances, during the permit application process, property owners do not always clearly inform staff of restrictions in delivery of construction materials mandated by cities. When the bay is used for water delivery of construction material and equipment, for example, it can cause subtidal eelgrass habitat damage. To resolve competing interests between BCDC and a city in this example, the property owners would secure additional permission from the city to increase the use of in this illustration a narrow and curving road, and develop innovative efforts to move the materials from the road onto the site. Homeowners can also develop plans to reinstitute landing craft deliveries without further impacting the subtidal eelgrass habitat by only conducting work during the authorized work windows four months a year so as not to adversely impact Pacific Herring spawning.

Abandoned and Derelict Vessels. Ms. Klein explained that the State has a fund for the removal of abandoned recreational vessels but not one for removal of abandoned commercial vessels. California's Division of Boating and Waterways administers the Surrendered and Abandoned Vessel Exchange Program (SAVE) grant which makes funds available to city and county governments to abate abandoned recreational vessels. Both recreational and commercial vessels (including barges and tugs) can be sold at auctions at little cost to owners. A number of these vessels are abandoned in the state's waterways at tremendous cost to the environment, first responders, and public agencies. The National Oceanic and Atmospheric Administration (NOAA) administers a marine debris removal grant program which enables the removal of abandoned commercial vessels.

Site Condition Verification Constraints. Ms. Klein continued the briefing by stating that the Bay Plan Recreation Findings and Policies allow for up to 10% of recreational marina berths to be the occupants' place of residence. However, when staff receives reports that more than 10% of the berths are of being used as live-aboard slips staff face challenges in substantiating these allegations to get them corrected.

Long Term Monitoring Requirements. Habitat restoration and enhancement projects are conditioned to achieve specified success criteria that take time. These permits sometimes require annual submittal of monitoring reports for periods between five to ten years after project implementation. However, BCDC does not always receive the monitoring reports. To ensure

timely review of monitoring reports it does receive, BCDC has established a Wetland Habitat Assessment Team of staff members who review monitoring reports received.

Owner Capability Constraints. Among the inexhaustive list of constraints were the following:

- Respondents who cannot engage effective representation and retain experts. In such cases BCDC staff cannot obtain complete permit applications to enable them to grant after-the-fact approval when possible.
- Resolutions that require long-range planning as well as technical expertise necessary to design solutions that address site condition constraints.
- Parties may lack the financial means to pay for the development of the necessary information to enable submittal of fileable permit applications and/or to conduct necessary site restoration activities when they have multiple violations to resolve.
- There has been an increased frequency of unauthorized shoreline protection projects by homeowners to address flooding particularly at lower-lying properties.

Questions and Discussion

Commissioner Wagenknecht asked about the motivation for homeowners to come into compliance such as in the case illustration of the collapsed sea wall. Ms. Klein answered that in that case, it is presumed that the homeowner would be interested in protecting the shoreline and would find the means to pay for the engineering consultation to have the plans developed. She asserted that it is always easier for the property owners and staff when professionals of record can act as a go-between. Some homeowners, she noted, however, are uncomfortable with the existing public access requirements at their properties.

Commissioner Wagenknecht commented that defining who will pay for the work must be a significant issue. Ms. Njuguna responded that the case illustrated the complexities of the circumstances that staff encounter. In the majority of cases, staff are able to work through these challenges. People's willingness to adhere to the requirements nevertheless varies.

Commissioner Vasquez commented on frustration that the public can get stuck paying for abandoned vessel abatement. People should not be able to sell junked vessels and have the public pay for their abandonment. Ms. Donovan affirmed that it is a vexing problem and staff has been working with other agencies on it. Ms. Klein agreed that this subject is often discussed throughout the country; there are initiatives that have been implemented. California is a bit behind on abatement of commercial abandoned vessels. One

suggestion Commissioner Vasquez had was to include another fee at the time of purchase to create an end-of-life fund for disposal of commercial vessels. Ms. Klein informed the Commissioners that BCDC is part of a group comprised of marine operators, marine patrol units, and federal, state and local agency staff who deal with the waterways and the issues that vessels create; it includes the State Lands Commission which is a knowledgeable agency on abandoned vessel abatement. Ms. Klein felt that in the coming years there will be initiatives and legislation to improve end-of-life disposal of abandoned commercial vessels.

Chair Scharff introduced an idea of BCDC sponsoring legislation to address this problem – to discuss it in Enforcement Committee and then go forward with it finding some state representatives to sponsor a bill. He asserted that following up on the abatement of commercial vessels could be done first having observed that is the political low-hanging fruit. Selling a boat on a commercial basis to someone who is not responsible should revert the abandoned vessel to the seller to abate it when the subsequent owner abandons it. Mr. McCrea responded that staff would take this suggestion to Steve Goldbeck, who heads up BCDC legislative efforts and brings issues to the Commission's attention. Commissioner Vasquez noted that there are many state legislators representing the Delta who are interested in this issue.

Ms. Klein noted that legislation had been promoted by the State Lands Commission and enacted but not funded. The legislation was to address abandoned commercial vessels in the Delta jurisdiction. However, the majority of those vessels are located east of BCDC jurisdiction.

Commissioner Vasquez commented that assertive elected officials and their constituents tend to be the ones to get things done rather than agencies or commissions.

9. Future Agenda Items. Ms. Njuguna stated that the February 24 meeting will supply an update of the compliance by the City of Oakland with the terms of the Union Point Park cease and desist order.

10. Adjournment. Chair Scharff adjourned the meeting at 10:53 a.m.