

Chapter 2
COMPLIANCE WITH THE SAN FRANCISCO BAY CONSERVATION
AND DEVELOPMENT COMMISSION'S PERMIT AND
CEASE-AND-DESIST ORDER CONDITIONS

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Introduction

The San Francisco Bay Conservation and Development Commission (BCDC) was created in 1965 by the California Legislature in response to widespread concern about the detrimental effects that the increasing rate of fill was inflicting upon San Francisco Bay (the Bay). Initially BCDC was a temporary commission. After three years of research, planning and public hearings, BCDC adopted the San Francisco Bay Plan (the Bay Plan). The Bay Plan was incorporated into the McAteer-Petris Act (the Act) of 1969, which gave BCDC permanent status. As a result of amendments to the Act, the commission has jurisdiction over all Bay lands subject to tidal action, including all sloughs and marshlands up to 5 feet above mean sea level. BCDC also has jurisdiction over the shoreline band 100 feet inland from the point of highest tidal action, over salt ponds, and over certain managed wetlands and tributary waterways (The Act, 1974). The Act also gave BCDC the authority to regulate filling and dredging by permit and further stated that any additional filling of the Bay should proceed only when the public benefits of the project exceed the public detriments from the loss of Bay waters and then only for water-oriented uses. The amount of fill utilized must be the minimum amount necessary and filling should occur only when no alternative upland location is available (The Act, 1982).

Although BCDC's laws for regulating development are well-known in the development community, the agency's laws, permits and cease-and-desist orders continue to be violated. The purpose of this report is to evaluate the effectiveness of BCDC's enforcement proceedings to determine if the agency's current method of responding to violations of BCDC directives is sufficient to ensure compliance with its permits and cease-and-desist orders. Although current legislation gives BCDC broad powers to protect San Francisco Bay, additional regulatory powers and increased staffing are required to improve the drawn-out or ineffective enforcement proceedings that now occur.

Methodology

All data provided on BCDC's non-compliance problems come from BCDC documents and personal communications with the agency's staff. The next section of this report, Permit Procedures, describes the regulatory process that must be followed before a proposed project within BCDC's jurisdiction may be

granted a permit. It summarizes the commission's authority to impose specific permit conditions. The Enforcement Procedures section provides information on the regulatory procedures BCDC uses to resolve violations of BCDC directives. This section also describes the various powers BCDC possesses to gain compliance from violators.

This general background information is followed by statistics on BCDC's annual enforcement actions, compiled from BCDC's Annual Reports. Although the contents of these reports are generally consistent from year to year, information on the number of minor permits denied, the number of formal investigations carried over from previous years, and the actual annual change in the surface area of the Bay was not available in the reports in some years. In the discussion of the annual data, an attempt is made to show that the commission's enforcement mechanisms are sometimes time-consuming and ineffective in resolving enforcement problems. Reasons are proposed for these trends, based in part on these data. The report concludes with recommendations that will increase the efficiency of BCDC enforcement proceedings and lead to a higher level of compliance with BCDC's laws and directives.

Permit Procedures

The Act states that any person or governmental agency that wants to place fill, extract materials, or make any substantial change in the use of any water, land or structure within the commission's jurisdiction must apply to the commission for a major permit. Usually, any necessary city or county permits are applied for first. The city council or the county board of supervisors conducts an investigation of the project and files a report with BCDC. The commission sends a copy of the permit application to the San Francisco Bay Regional Water Quality Control Board, which files a report on the water quality effects of the proposed project. Within 90 days after receiving these reports, the commission must take action on the permit application or the permit is automatically granted. A major permit is granted by a simple majority of the 25 voting commission members when the commission finds that the project is necessary to the health, safety or welfare of the public or is consistent with the provisions of the Act and the Bay Plan (The Act, 1969).

In addition to major permit applications processed by the commission, BCDC's executive director may grant minor (administrative) permits for minor repairs or improvements including maintenance dredging of Bay channels, repairs to piers and pilings and other minor modifications. The executive director may also issue emergency permits to applicants when emergency repairs are necessary to protect the health, safety and welfare of the public. Minor and emergency permits do not require public hearings or commission approval (The Act, 1969). In addition to the activities, a project sponsor is authorized to perform under the permit, mitigation measures may be required to reduce, avoid or offset the adverse environmental impacts the project will have on the Bay. "The commission may grant a permit subject to reasonable terms and conditions including the uses of land or structures, intensity of uses, construction methods and methods for dredging or placing fill" (The Act, 1969). Thus, instead

of exercising its right to deny a project on the grounds of public detriment, BCDC can incorporate mitigation measures, which usually provide additional public access and restoration of former tidelands to tidal action.

Enforcement Procedures

Since 1973, BCDC has been empowered to issue a cease-and-desist order (CD) to any party that violates provisions of the Act or permit conditions. An activity initiated without a BCDC permit, that may require such a permit, is a violation of the McAteer-Petris Act. CDs contain terms and conditions necessary to ensure compliance with provisions of the Act or with permit conditions; CDs may include orders to remove fill or other materials and usually include time schedules within which actions necessary to comply with the CD must be accomplished. The executive director can issue an executive cease-and-desist order (ECD) without commission or public review when it is necessary to stop quickly actions that produce irreparable injury to an area or threaten the health or safety of the public. ECDs are temporary orders, expiring in 30 days, and can be reissued if necessary to allow the commission time to issue a commission cease-and-desist order (CCD). After commission review and a public hearing, a CCD may also be issued to the offending party. CCDs have no expiration date (The Act, 1978).

At the request of the commission, the Attorney General may file suit against anyone who violates a CD and the court may enforce the CD with a restraining order. The party may be civilly liable for up to \$6,000 per day for each day that the CD violation persists (The Act, 1978). Even if a party is in violation of the terms and conditions of the Act or a permit and has been issued a CD, he may still apply for after-the-fact permits or amendments to previously issued permits. The commission must evaluate after-the-fact permit applications and permit amendment requests as if the work had not taken place (BCDC Resolution No. 78, 1980). Thus, the party may obtain a permit authorizing the work already performed and effectively nullify the violations.

Until 1977, BCDC had no full-time enforcement staff. Today the Enforcement Office has four full-time personnel--one head enforcement officer, a staff of two under him, and one clerical worker--to deal with all violations and maintain permit files. This staff devises and reviews permit and CD conditions and produces numerous staff reports. BCDC possesses no ongoing monitoring program to detect unauthorized activities in locations under its jurisdiction. BCDC mainly relies on reports of possible violations from other agencies and concerned citizens and then conducts an investigation (Hickman, 1986, pers. comm.). If a violation is discovered during a site inspection, the enforcement staff prepares a report and makes recommendations on how to rectify the matter. After commission review of the report, a CD may be issued. Many violations are resolved by consultation between the staff and the offender, usually through a minor correction at the site.

TABLE 1. ANNUAL BCDC ENFORCEMENT ACTIONS

YEAR	MAJOR PERMITS			MINOR PERMITS			PERMIT TOTAL	INVESTIGATIONS		CEASE-&-DESIST ORDERS			LAWSUITS		NEW BAY FILL* (acres)	NEW BAY S.A.* (acres)	NET CHANGE IN S.A.* (acres)
	GRANT	DENY	SUBTOTAL	GRANT	DENY	SUBTOTAL		INIT	CAROV	ISSUED	COMPLD	PERMIT	DEFND	PLAIN			
1970	12	1	13	65	-	66	79	NA	NA	NA	NA	NA	0	0	72	-	-72
1971	26	4	30	61	-	61	91	NA	NA	NA	NA	NA	0	0	25.1	-	-25.1
1972	12	3	15	80	-	80	95	NA	NA	NA	NA	NA	0	0	7	-	-7
1973	17	1	18	71	-	71	89	NA	NA	NA	NA	NA	3	0	4.4	-	-4.4
1974	20	0	20	107	1	108	128	NA	NA	2	2	2	1	1	83	357	+274
1975	10	0	10	87	0	87	97	NA	NA	0	0	0	1	0	-	-	+5
1976	14	0	14	110	0	110	124	NA	NA	4	3	2	1	1	2.2	-	-2.2
1977	20	0	20	116	0	116	136	NA	NA	3	2	2	0	0	27.7	44.5	+16.8
1978	23	1	24	104	4	108	132	30	-	1	1	0	0	0	7.8	5.9	-1.9
1979	34	0	34	120	2	122	156	40	-	4	3	0	3	1	17.8	21.2	+3.4
1980	19	1	20	105	1	106	126	20	-	11	4	0	1	0	25.4	55.4	+30
1981	23	0	23	134	-	134	157	38	50	4	4	1	0	2	5.1	49.6	+44.5
1982	26	0	26	104	-	104	130	29	60	7	6	4	0	0	24	286	+262
1983	23	0	23	105	-	105	128	38	62	5	3	0	1	0	4	9	+5
1984	15	3	18	135	-	135	153	41	38	8	7	0	0	1	17	29	+12
TOTAL	294	14	308	1505	8	1513	1821	286	210	49	35	11	11	6	322.5	857.6	+540.1

KEY: INIT = initiated that year
 CAROV = carried over from previous years
 COMPLD = total complied with
 DEFND = cases in which BCDC is the defendant

PERMIT = complied by obtaining a permit
 amendment or after-the-fact permit
 PLAIN = cases in which BCDC is the plaintiff
 "*" = as a result of BCDC authorized actions

S.A. = surface area of the Bay
 "-" = no information available
 NA = not applicable
 SOURCE: BCDC Annual Reports

Annual Enforcement Actions

Statistics on BCDC's annual enforcement actions, derived from the agency's Annual Reports, are presented in Table 1. As shown in this table, the overwhelming majority of permit applications are approved. One probable reason for this situation is that many prospective applicants do not approach the commission on projects they suspect will not be approved. Also, permit conditions are becoming more specific and are incorporating stricter mitigation measures, as the statistics on the increasing size of the Bay in Table 1 attest. The principal reason for BCDC's high level of permit approval is the fact that the commission must approve projects that are consistent with the Act and the Bay Plan. BCDC was not intended to limit development, but rather it was meant to regulate the types and intensities of development allowed in certain locations. Although the large-scale Bay fill projects that occurred in the past are no longer permitted, evidently many other kinds of projects fulfill BCDC's criteria for permit approval.

As Table 1 displays, very few CDs have been issued relative to the number of permits granted. Although this fact suggests that few violations occur, BCDC's Enforcement Officer claims that most permits BCDC grants have some non-compliance problems (Hickman, 1985, pers. comm.). One reason for the small number of violations that proceed to CDs, as claimed repeatedly in the Annual Reports, is that 75 percent of enforcement problems are resolved, usually by a minor correction at the site. Many violations are satisfactorily restored through informal negotiations and minor adjustments. In addition, permit amendments and after-the-fact permits may be obtained to nullify the violations, thereby eliminating the need to proceed with a CD issuance. Also, the commission is somewhat reluctant to issue a CD promptly. They prefer to resolve matters without imposing unnecessary hardships on a developer. The commission prefers to resolve a violation in a way that is acceptable to all parties concerned. Sometimes resolution of a violation may involve the removal of unauthorized structures or fill, but in some cases mitigation measures may be utilized to offset the adverse impacts of the violation (Hickman, 1986, pers. comm.).

Finally, the enforcement office is understaffed and overworked. As Table 1 displays, many investigations are carried over from previous years. As permit conditions become more specific, there is more room for violations and consequently, additional enforcement actions must be initiated by the staff. The four-person enforcement staff is insufficient to ensure a comprehensive, efficient level of compliance with BCDC directives. Since the small staff is incapable of monitoring areas under BCDC's jurisdiction, some violations may go unnoticed. As the permit and CD loads have increased and as the complexity of the regulatory process has escalated, the enforcement staff's workload has become more time-consuming. Thus minor violations may be ignored to allow the staff more time to concentrate on more serious violations (Hickman, 1986, pers. comm.).

Of the total of 49 CDs issued by BCDC, approximately 70 percent (35) were complied with during the year of issuance. Permit amendments and after-the-fact permits were granted in approximately 20 percent (11) of the cases in which CDs had been issued. Thus, with cooperative developers, a CD is generally

successful in securing compliance with BCDC laws.

Although the majority of violators eventually comply with CDs, not all of them do so within the time limits specified. These time limits are set by the commission and in some cases have been extended by CD amendments. Sometimes this extension allows cooperative developers to comply without undue hardships. But in some instances, this extension permits uncooperative developers to continue receiving economic gains from the unauthorized activities. The only way for BCDC to enforce a CD and penalize a violator is to take him to court. But judging from the small number of court cases (6) initiated by BCDC, it appears that BCDC is reluctant to bring violators to court.

However, there are many problems with the court system that are out of BCDC's control; the agency has good reasons to avoid the courts. They are notoriously overburdened and consequently slow in resolving litigation; the average resolution time of the litigation cases listed in Table 1 was 1 1/2 years. The Attorney General is also overworked. Thus, BCDC tries to exhaust all other resolution methods available to it before it brings a violator to court. Usually the cases that proceed to the courts involve substantial violations.

BCDC has won all but one of the 17 cases listed on Table 1, and that decision was overturned in a higher court. Although the courts' decisions were favorable to BCDC, the Annual Reports mention only one case in which a violator was required to pay civil penalties. Considering the fact that BCDC usually initiates litigation against substantial violators, the courts appear somewhat reluctant to penalize violators. The courts' leniency may encourage some developers not to obey CDs. As a result, without the authority to fine offenders, BCDC has little power over uncooperative, intentional violators. If an uncooperative major developer is not threatened with penalties, the income he generates from unauthorized activities provides an economic incentive not to comply.

Conclusions

Overall, BCDC's enforcement record is very good. The majority of developers cooperate. BCDC's current practice of resolving violations through informal negotiations with a violator is an effective enforcement tool and should continue to be utilized. But in the case of uncooperative developers, the enforcement procedures must be improved.

In regulating development of various types, intensities and locations, BCDC is not able to follow a set framework for dealing with all violators; the enforcement procedure is somewhat of an ad hoc system. In spite of this wide range of situations, the commission should establish a general time limit, perhaps one or two months, within which it must issue a CD after a violation has occurred. Cooperative developers will achieve compliance sooner and the threat of civil penalties may encourage intentional violators to comply. At the very least, BCDC will appear to have more regulatory muscle.

The size of the enforcement staff needs to be increased to enable the staff to process quickly its many necessary documents, thereby allowing more time to monitor areas under BCDC's large jurisdiction

for regulatory compliance. A monitoring program would result in the detection of previously undiscovered violations. A larger staff would be able to enforce previously ignored minor violations.

To ensure efficient compliance, new legislation must be drafted that gives BCDC the authority to levy fines directly. Although the commission is successful in securing injunctions against CD violators, the courts have not supplied the economic incentive to ensure prompt compliance with a CD. If BCDC possessed the power and inclination to fine violators, more offenders would comply promptly with a CD. The assessment of penalties should also operate on an ad hoc basis depending on the circumstances surrounding the violation. The maximum fine should be large enough to provide an economic concern to larger developers. Although the great majority of the penalties should be levied after the violation of a CD, in cases where substantial damage occurs as a result of gross negligence or intentional violation, BCDC should possess the power to penalize violators prior to issuance of a CD.

While previous bills aimed at giving BCDC the power to levy fines have died in session because of an unfavorable political climate, that climate may be changing. The California Legislature gave the Regional Water Quality Control Board the authority to levy its own penalties commencing January 1, 1985. The same powers should be given to BCDC. If measures such as these are followed, BCDC will be able to ensure a more complete level of compliance with the McAteer-Petris Act and with BCDC permit and cease-and-desist order conditions.

REFERENCES CITED

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