



San Francisco Bay Conservation and Development Commission

Its Failure to Perform Key Responsibilities Has Allowed
Ongoing Harm to the San Francisco Bay

May 2019

REPORT 2018-120





CALIFORNIA STATE AUDITOR

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May 14, 2019
2018-120

The Governor of California
President pro Tempore of the Senate
Speaker of the Assembly
State Capitol
Sacramento, California 95814

Dear Governor and Legislative Leaders:

As requested by the Joint Legislative Audit Committee, the California State Auditor presents this audit report regarding the San Francisco Bay Conservation and Development Commission's (commission) enforcement program. This report concludes that the commission has neglected its responsibility to protect the San Francisco Bay (Bay) and the Suisun Marsh.

The Legislature created the commission to regulate development in and around the Bay by issuing permits to ensure that activities do not harm the Bay and protect public access. However, the commission has struggled to enforce permit requirements and has a backlog of 230 enforcement cases. The commission is considering amnesty for some of the violators in these cases, even though cases may represent ongoing harm to the Bay. Moreover, the commissioners have not provided staff sufficient guidance for the enforcement process, resulting in the improper delegation of certain enforcement decisions to staff. In fact, the commission's enforcement committee never met from October 2011 through June 2016, and during this period staff handled all enforcement cases. Some of these cases involved violations that could cause significant harm to the Bay, even though regulations do not generally authorize staff to process cases causing significant harm to the Bay.

We reviewed a selection of the commission's enforcement case files and identified multiple instances where staff failed to follow requirements when imposing fines. Although a single case may include multiple violations, each with a \$30,000 maximum fine, neither state law nor commission regulations provide specific guidance for what constitutes a *single violation*. This absence of guidance increases the risk of staff inconsistently applying fines to comparable cases, as it did in two enforcement cases that involved substantially similar dredging activities. In these cases, staff identified differing numbers of individual violations within each case, which resulted in assessment of significantly different fine amounts for, essentially, the same actions. Finally, it is unclear whether the commission's recent creation and implementation of a complex system to prioritize its cases will help the commission identify and close cases more efficiently, and the system may not effectively identify cases that the commission should give high priority.

Respectfully submitted,

A handwritten signature in black ink that reads 'Elaine M. Howle'. The signature is written in a cursive, flowing style.

ELAINE M. HOWLE, CPA
California State Auditor

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Summary

Results in Brief

The San Francisco Bay Conservation and Development Commission (commission) has neglected its responsibility to protect the San Francisco Bay (Bay) and the Suisun Marsh. The Legislature created the commission in 1965 to regulate development in and around the Bay in order to protect the Bay's health and ensure public access. To this end, state law authorizes the commission—which consists of 27 commissioners and 48 staff members—to issue permits for certain actions, including placing material in the Bay or removing material from it.¹ The commission is also responsible for ensuring that permit holders comply with the terms of their permits and with state law, and it has the ability to enforce compliance through a system of fines and penalties. However, as we discuss throughout the report, the commission has consistently struggled to perform key responsibilities related to enforcement and has therefore allowed ongoing harm to the Bay.

Although enforcing state law and the terms of its permits is critical to the commission's ability to protect the Bay, it has a backlog of 230 enforcement cases, some of which are more than a decade old. Moreover, its annual reports suggest that the backlog will continue to expand, as staff opened 14 more cases on average than they closed annually from 2012 through 2017. Some of the potential violations of state law and permit requirements contained in the backlog may represent ongoing harm to the Bay or its shoreline. For example, one case opened in 2010 involves 200 vessels anchored illegally in Richardson Bay, a shallow, ecologically rich arm of the San Francisco Bay. Commission staff have indicated that many of these boats are in a state of disrepair and that they frequently sink, resulting in the release of harmful chemicals into the Bay. Although the illegally moored boats in Richardson Bay have harmed a delicate ecosystem, the commission has done little to resolve the situation. Further, to address its backlog, the commissioners are currently considering proposals to grant amnesty to certain categories of enforcement cases, which could lead to the commission dismissing the cases without the violators taking corrective actions. This approach could allow the activities that caused the violations to continue, potentially indefinitely, as well as create future litigation risks from both environmental groups and alleged violators who do not receive amnesty.

¹ To ensure clarity throughout this report, we use the word *commission* to refer to the agency as a whole—both the governing body and staff. We use *commissioners* to refer to the appointed, governing body. We use *staff* to refer to the employees who perform the commission's administrative work.

Audit Highlights . . .

Our audit of the commission revealed the following:

- » *The commission has struggled to perform key responsibilities related to the protection of the Bay and the Suisun Marsh.*
- » *Staff spend years attempting to resolve violations before referring them to the commissioners for enforcement action, amassing a backlog of 230 cases.*
 - *The commissioners are considering amnesty for some of the violators in these cases, even though they may represent ongoing harm to the Bay.*
- » *The commissioners have not provided sufficient leadership and guidance for their enforcement process and have improperly delegated their enforcement authority to staff.*
- » *The commission has not assessed the implementation of a plan to safeguard the Suisun Marsh, as state law requires, increasing the possibility of harm to the marsh.*
- » *The commission's approach to identifying individual violations has led to inconsistencies in its imposition of fines.*
- » *The commission's recent creation and implementation of a system for scoring and prioritizing cases is too complex to accomplish this goal effectively.*

Moreover, unless the commissioners take action to address the causes of the backlog, they risk having it continue to grow or to reoccur, despite the outcome of the various amnesty proposals. In particular, staff's willingness to expend significant time attempting to settle enforcement cases before referring them to the commissioners has led to some cases remaining open for many years. When we reviewed seven cases for which the commission had initiated formal enforcement, we found that the cases had been open between one and 17 years—or seven and a half years on average—before staff referred them to the commissioners. During these years, the commission essentially allowed the harm resulting from the violations to continue unresolved.

The commissioners have also not provided sufficient leadership and guidance for their enforcement process. Commission regulations do not authorize staff to process enforcement cases representing significant harm to the Bay without formal enforcement, which includes an enforcement hearing before the commissioners, referral from the commissioners to the Office of the Attorney General, or a temporary cease-and-desist order issued by the executive director. However, the regulations lack a specific definition of significant harm that would guide staff in knowing when to forward such cases. As a result, the commissioners have improperly delegated their enforcement authority by allowing staff to decide which cases represent significant harm. In one instance, commission staff decided to close a case involving a beached tugboat and allowed it to decay in the Bay for years—a clear violation of law—without taking any action to resolve it or referring it to the commissioners. The boat remained in the Bay, corroding and deteriorating, as of April 2019. Further, from October 2011 through June 2016, the commissioners were not hearing enforcement cases, as the commission's enforcement committee did not meet. As a result, staff handled all cases, including some that could cause significant harm to the Bay, during that period of time.

Since 1987 the commission has also not fulfilled its role as the primary state agency responsible for implementing the Suisun Marsh Preservation Act and overseeing the implementation of the Suisun Marsh local protection program (marsh program). The commission indicated in 1976 that protection of the marsh was of paramount importance because it makes up almost 10 percent of the remaining natural wetlands in California and forms a critical habitat for endangered California wildlife. State law requires the commission to ensure that local agencies are effectively implementing the marsh program that the agencies created and the commission certified in 1982. The marsh program was intended to protect the Suisun Marsh, and the commission was to issue recommendations for corrective action as necessary. However, according to the commission, it has never issued such

recommendations. The commission has conducted limited work related to the marsh, such as working with participating agencies to update their parts of the marsh program, and in March 2019 the commissioners approved a staff recommendation to conduct a comprehensive review of the marsh program. Nonetheless, the commission has not conducted a review of the marsh program every five years, as state law requires. This increased the risk that elements of the marsh program were not current or were not working as intended to protect the marsh.

Further, the commission's approach to identifying individual violations has led to inconsistencies in its imposition of fines. The commission issues fines up to a maximum of \$30,000 per violation, but a single case may involve multiple violations and thus incur multiple fines. Consequently, clearly identifying what constitutes a single violation is critical to the enforcement process; however, neither state law nor commission regulations give guidance on this issue. Without such clarity, staff have been inconsistent in deciding how many violations specific cases involve. For example, in one instance, staff treated dredging and dumping as a single violation and sought a maximum penalty of \$30,000, but in another case involving dredging and dumping staff treated them as two separate violations, subjecting the violator to a penalty of \$60,000. Until the commissioners provide sufficient guidance to staff regarding what constitutes an individual violation, they risk resolving cases in an inconsistent and unfair manner that could cost some violators thousands of dollars more than others who commit similar violations.

Finally, although the commission indicated that it recently attempted to resolve certain enforcement issues by creating a system for scoring and prioritizing the cases it handles, the system is too complex to accomplish this goal effectively. Staff told us they have spent hundreds of hours refining the system, which is in use but still under development. Moreover, our review of the system indicated that it might not be effective in its fundamental goal of identifying cases that should be a high priority. For example, we found an open case in South San Francisco that did not meet the commission's high-priority threshold even though it included multiple alleged violations involving illegal boats used as residences, abandoned vessels, discharge of wastewater, and debris from wrecked boats on the shoreline.

Selected Recommendations

Legislature

To improve the efficiency of the commission's current enforcement process, the Legislature should require that the commission create and use timelines by fiscal year 2020–21 for resolving its enforcement cases.

To ensure that the commission performs its duties under state law related to the Suisun Marsh, the Legislature should require a report from the commission upon completion of its comprehensive review of the marsh program every five years, beginning with a review in fiscal year 2020–21.

Commission

The commission should conduct a comprehensive review of local agency compliance with the marsh program and issue recommendations as necessary to implement the protections outlined in the Suisun Marsh Preservation Act.

To ensure that it maximizes the efficiency and effectiveness of its enforcement and permitting programs, the commission should take the following actions:

- Create and implement regulations by January 2021 that define significant harm, provide explicit criteria for calculating the number of violations present in individual enforcement cases, and specify a process for handling any necessary exceptions to the criteria.
- Create and implement regulations by January 2021 detailing required milestones and time frames for enforcement cases.
- Simplify its system for prioritizing enforcement cases by January 2020 to help it focus its enforcement efforts on cases with the greatest potential for harming the Bay.

Agency Comments

The commission generally agreed with our recommendations but took issue with some of the discussion surrounding those recommendations. Further, it did not believe most of our legislative recommendations were necessary.

Introduction

Background

In 1965 the Legislature created the San Francisco Bay Conservation and Development Commission (commission) to regulate development in and around the San Francisco Bay (Bay). In forming the commission, the Legislature noted the importance of the Bay to the region and stated that future development should minimize the placement of materials in the Bay while ensuring the greatest degree of public access. The commission is responsible for permitting projects within its jurisdiction based on its stated goal of protecting the Bay while encouraging its responsible and productive use. State law establishes the commission's jurisdiction, which includes the Bay, various waterways, certain salt ponds in the region, and land within 100 feet of the Bay's shore. State law also designates the commission as the primary state agency responsible for the Suisun Marsh—a unique wetland resource to the northeast of the Bay that serves as a valuable habitat to rare and endangered wildlife and is a critical component of the Pacific Flyway used by migratory birds. Figure 1 illustrates the commission's jurisdiction.

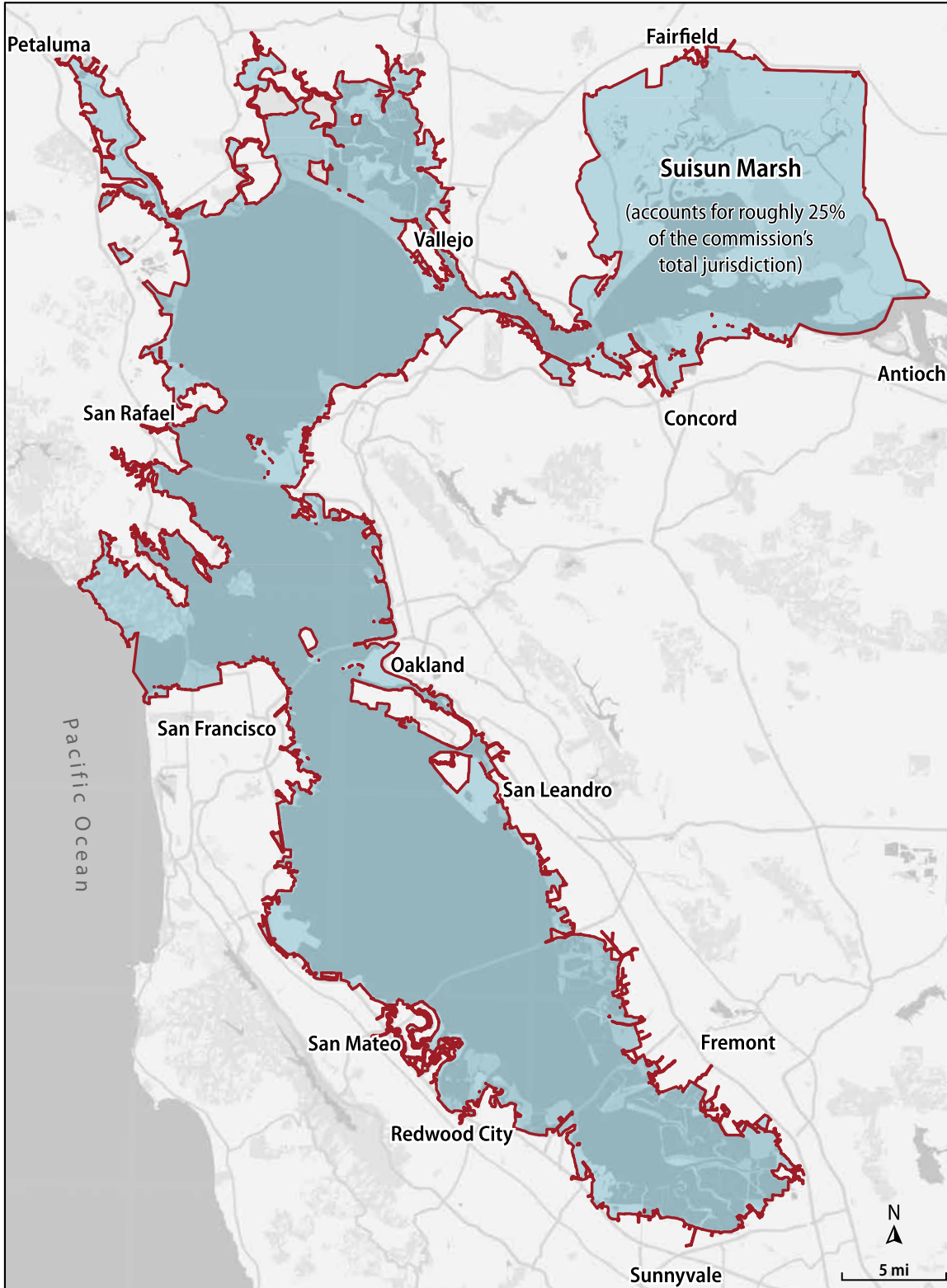
State law sets the commission's size at 27 members and authorizes the commissioners to appoint an executive director.² Local governments, state agencies, federal agencies, the Legislature, and the Governor appoint the commissioners, who—as Figure 2 shows—represent different Bay Area interests. In addition, state law allows commissioners to select alternates to serve when the commissioners are not available. As of December 2018, 22 commissioners had appointed alternates. According to several commissioners, the number of commissioners and the composition of the commission are helpful in capturing the wide range of perspectives and interests of the communities around the Bay. The executive director and 47 staff members assist the commissioners in carrying out the responsibilities of the commission.

The Commission's Responsibilities

One of the commission's primary responsibilities is to issue or deny permits for projects that involve placing materials in or removing materials from the Bay or otherwise changing the use of land or buildings within its jurisdiction. State law authorizes the commission to approve projects—which may range from residential

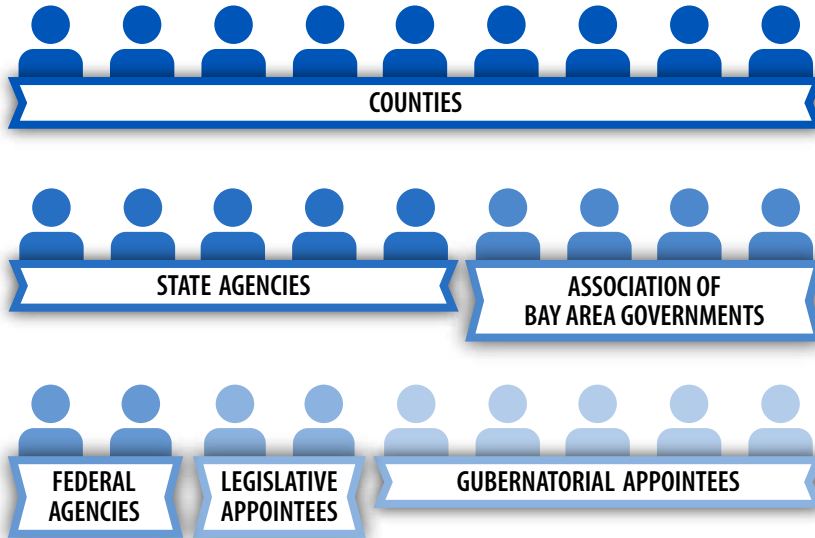
² To ensure clarity throughout this report, we use the word *commission* to refer to the agency as a whole—both the governing body and staff. We use *commissioners* to refer to the appointed, governing body. We use *staff* to refer to the employees who perform the commission's administrative work.

Figure 1
The Commission's Jurisdiction Includes Both the Bay and Its Shoreline



Source: Commission maps and planning data.

Figure 2
The 27 Commissioners Represent Varied Bay Area Interests



Source: State law.

Note: The commissioners include representatives from the nine Bay Area counties: Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, and Sonoma. The commissioners also include representatives from the Association of Bay Area Governments, the California State Lands Commission, the San Francisco Bay Regional Water Quality Control Board, the California Department of Transportation, the Department of Finance, the California Natural Resources Agency, the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, as well as appointees from the Speaker of the Assembly, the Senate Rules Committee, and the Governor.

and commercial endeavors to piers and ports—throughout the Bay and its shoreline. Although staff administratively process permit applications related to minor repairs or improvements, the commissioners regularly hold formal hearings to approve or reject permits for major developments in and around the Bay. The commission reported that it approved 630 permits for major projects and almost 3,900 administrative permits for minor projects from 1970 through 2018.

The commission also engages in long-term planning activities. State law empowers the commission to amend and enforce the San Francisco Bay Plan (Bay Plan) it created, which details policies for the development and preservation of the Bay and surrounding areas. For example, the Bay Plan policies include design guidelines and information on how developers should provide public access to the Bay. In addition, the commission manages the Adapting to Rising Tides program (ART), which identifies how current and future flooding may affect communities, infrastructure, ecosystems, and the economy. ART works to address sea-level rise through a collaborative process involving multiple agencies. According to the commission, ART consists of different local, regional, and

Selected Projects Under the ART Program

Using a collaborative approach, the commission leads and supports projects to understand risks from sea-level rise.

- *Local*
 - Assessed Alameda County's vulnerability and risk concerning sea-level rise and storm events.
 - Conducted a climate adaptation effort to address sea-level rise in Contra Costa County.
- *Regional*
 - Developed Bay Area sea-level rise and shoreline analysis maps.
 - Identified housing and communities vulnerable to flooding in the Bay Area.
- *Sector*
 - Evaluated sea-level rise and storm event flooding vulnerabilities facing the Bay Area's transportation infrastructure.
 - Studied nature-based solutions for improving shoreline resilience.

Source: ART program's website and the commission's website.

sector-specific projects, as the text box describes.³ In addition to managing ART, staff indicated that the commission seeks to address sea-level rise through its regulatory process by, for example, ensuring that public access is located, designed, and managed to avoid flood impacts, or requiring permit holders in the Suisun Marsh to monitor flooding vulnerability.

The commission also administers the Bay Fill Clean-Up and Abatement Fund (abatement fund), which the Legislature established to pay for clean-up projects in the Bay. State law specifically requires that the abatement fund be available for fill removal, resource enhancement, and any other remedial clean-up or abatement actions. The abatement fund receives its revenue from regulatory penalties that the commission levies against entities that violate state law or commission permits. In June 2018, the abatement fund totaled more than \$1.4 million, having received over \$280,000 in fine revenue during the previous fiscal year.

The Commission's Enforcement Duties and Procedures

The commission is responsible for enforcing state law related to its mandate and permits it grants within its jurisdiction. To this end, the commission has adopted regulations that allow staff to resolve many violations through a standardized fines process. The commission's enforcement unit consists of three staff members who investigate allegations related to unauthorized Bay fill or construction, obstruction or misuse of public access amenities, and other permit or statutory violations. To resolve certain violations, enforcement staff may issue new permits or amend existing permits.

Staff may also fine violators who do not correct violations within a grace period, with the amount of the fine increasing over time until the violator corrects the problem or the fine reaches the \$30,000 maximum for individual violations.⁴ Because a single enforcement case often contains multiple violations, a violator may accrue fines well beyond the \$30,000 individual maximum. A violator may appeal

³ Sector-level projects range from transportation assessments to developing strategies for protecting the shoreline from rising sea levels, and include projects such as those related to the Capitol Corridor passenger rail line and the East Bay Regional Park District.

⁴ The commission's standardized fines regulations establish fixed rates depending on the type of violation and the number of days the violator takes to correct it. Violations persisting for more than 35 days and up to 65 days are subject to a fine of up to \$3,000. If they persist for more than 65 days and up to 95 days, violators are subject to a fine of up to \$8,000. If they persist for more than 95 days, violators are subject to a fine of up to \$8,000, plus \$100 for each subsequent day until they correct the violation or the fines reach the \$30,000 maximum per violation.

a staff-level fine by requesting a hearing with the commissioners or by submitting a request for fine reduction to the executive director and commission chair. Staff do not collect fines until violators have corrected the violations, and if a violator refuses to take corrective action, staff may refer the case to the commissioners for a hearing or for the commissioners to consider forwarding the case directly to the Office of the Attorney General for litigation.

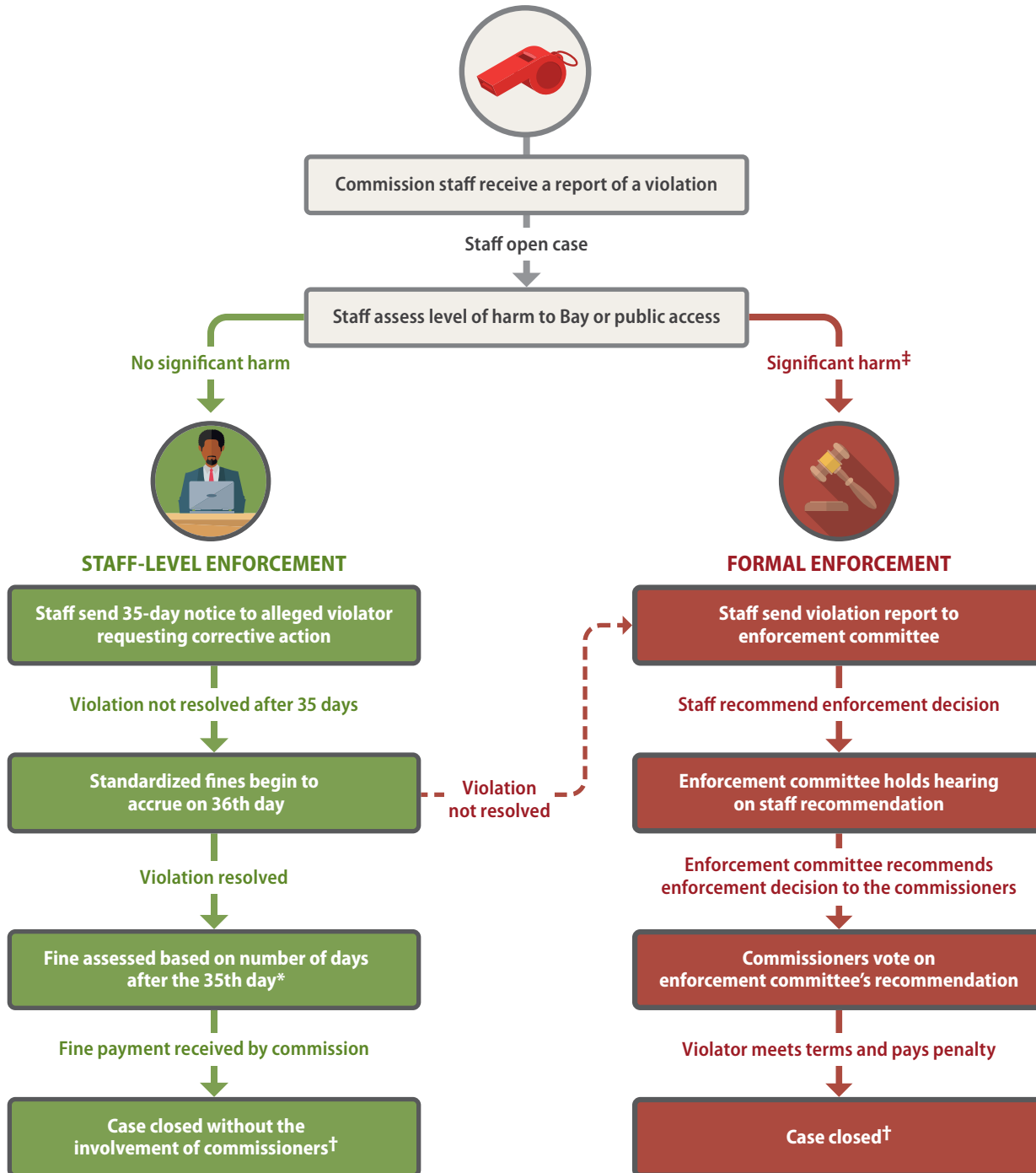
As Figure 3 shows, state regulations do not allow enforcement staff to process at the staff level violations that have caused significant harm to the Bay; instead, these cases may be presented to the commissioners at a formal enforcement hearing. Staff generally present formal enforcement cases to the enforcement committee, which consists of up to six commissioners and alternates. Before the enforcement committee hearing, staff prepare a violation report summarizing the case history and violations and recommending a course of action. The enforcement committee reviews the violation report and supporting documentation, holds hearings, and recommends a decision to the commissioners for a vote. The enforcement committee's recommendations may include civil penalties that, like standardized fines, have a maximum of \$30,000 per violation. The enforcement committee may also recommend that the commissioners issue a cease-and-desist order to stop the activity causing the violation.

When voting on an enforcement committee recommendation, the commissioners may take a number of different actions, including approving the recommendation, sending the issue back to the enforcement committee, or dismissing the entire case. Figure 4 shows the roles of the staff, enforcement committee, and commissioners in this process. Violators cannot appeal the commissioners' decisions, other than through litigation. The Office of the Attorney General litigates cases as necessary to collect penalties after the commissioners make a decision.

From 2016 through 2017, staff forwarded seven formal enforcement cases to the commissioners, who ultimately assessed penalties or approved settlements of more than \$100,000 in five of them. Because some of these cases involved prominent businesses in the Bay Area, public attention concerning the commission's actions and its enforcement program has increased. For example, a case involving the use and modification of a public pavilion at a restaurant in Oakland resulted in a penalty of over \$300,000. Alleged violators and outside groups have accused the commission of maintaining unreasonable standards and seeking to levy the largest fines possible. Two of the recent formal enforcement cases resulted in litigation against the commission.⁵

⁵ In December 2017, the Solano County Superior Court set aside a \$772,000 penalty that the commissioners levied against a Suisun Marsh development. The case is now being appealed. In December 2018, the commission settled a lawsuit with a marina by agreeing to settle its claims against the marina for \$150,000.

Figure 3
State Law Describes the Commission’s Enforcement Process



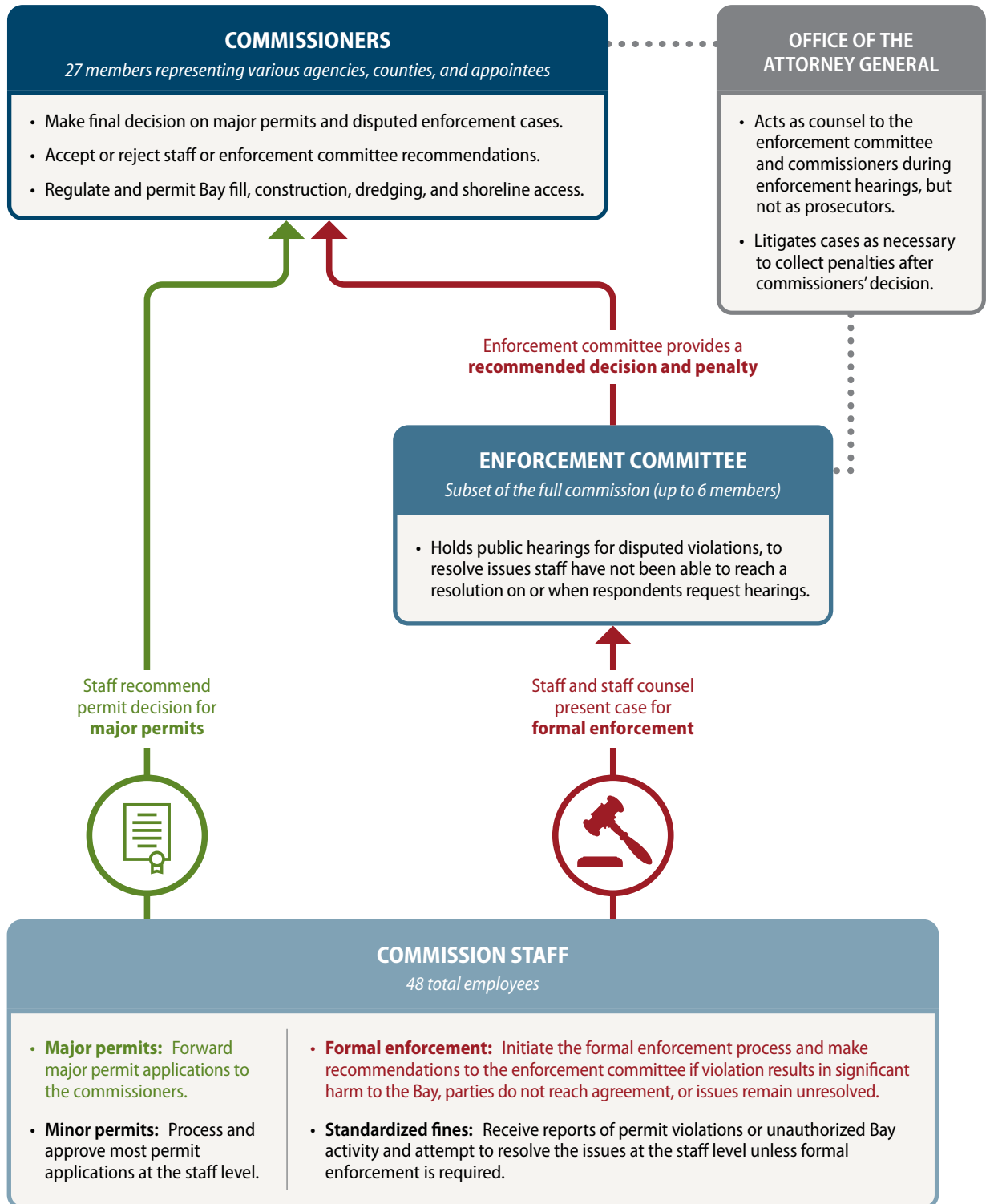
Source: State law and commission regulations.

* If the violator disagrees with the staff-imposed fine, the violator may appeal it to the executive director and commission chair. Further, the violator may request a formal enforcement hearing if the violator believes it is necessary to determine the appropriate penalty amounts.

† If the violator refuses to pay a standardized fine, the executive director may begin formal enforcement. If the violator refuses to pay a penalty approved by the commissioners, they may refer the case to the Office of the Attorney General.

‡ The executive director may also issue a temporary cease-and-desist order, or the commission may refer the case to the Office of the Attorney General.

Figure 4
 The Commissioners and Staff Have Roles in the Permitting and Enforcement Process

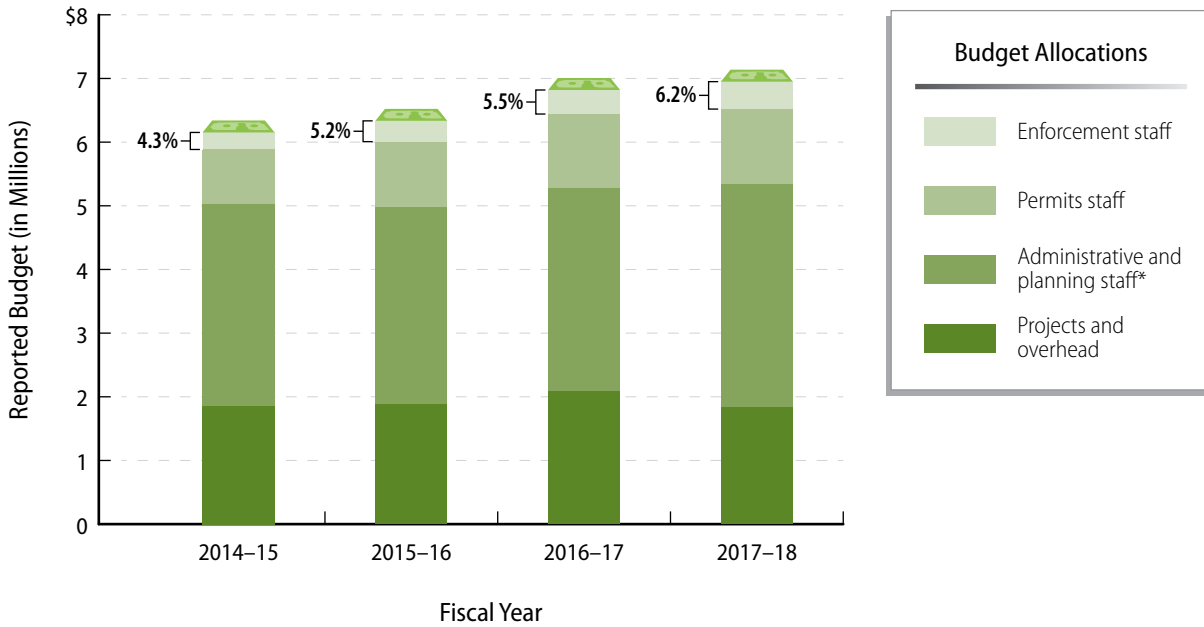


Source: The commission, state law, and commission regulations.

The Commission’s Budget and Staffing

In fiscal year 2017–18, the commission’s budget was \$6.95 million, \$5.11 million of which funded staff compensation. As Figure 5 shows, since fiscal year 2014–15, most of the commission’s compensation expenses are for permitting, administrative, and planning staff, which includes the commission’s executives, human resources staff, and ART program staff. The commission spent only a small amount of its budget—less than \$500,000—on enforcement staff. Figure 6 details the composition of the commission’s staff and demonstrates the small number of staff dedicated to enforcement. The commission used the portion of its budget that did not relate to compensation to fund its operational and overhead costs, such as rent.

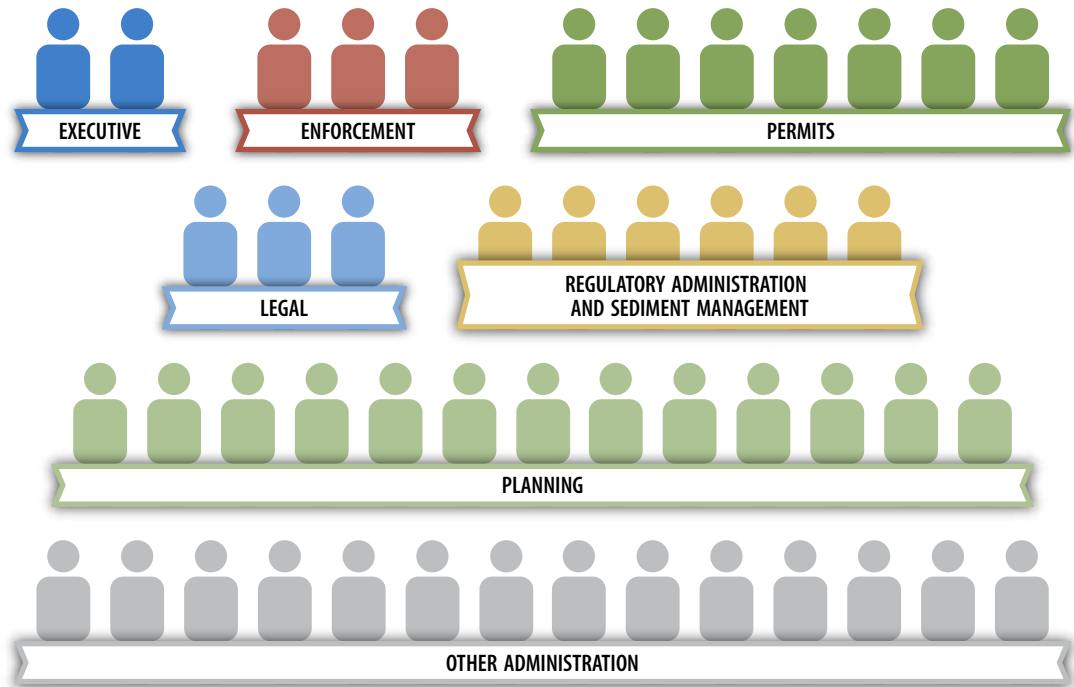
Figure 5
 Since 2014 the Commission Has Allocated Limited Resources to Enforcement Staff



Source: Data from the Department of Finance and the commission.

* Administrative and planning staff include the executive, legal, regulatory administration, sediment management, technical services, planning, and administration units.

Figure 6
The Commission Employs 48 Staff Members



Source: Commission staff data as of March 2019.

About 80 percent of the commission’s budget in fiscal year 2017–18 came from the State’s General Fund. The remainder came from the abatement fund; the Greenhouse Gas Reduction Fund; and reimbursements, which include grants. For example, the commission received a grant of \$121,000 from the National Oceanic and Atmospheric Administration. Revenue from the commission’s permit fees goes to the General Fund, while the fines that it collects from violators go to the abatement fund.

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Chapter 1

THE COMMISSION HAS NEGLECTED ITS MISSION TO PROTECT THE BAY AND THE SUISUN MARSH

Chapter Summary

One of the commission's primary responsibilities is enforcing state laws and regulations intended to protect the Bay. However, in part because staff often spend years attempting to resolve violations before initiating enforcement action, the commission has amassed a backlog of more than 230 enforcement cases. The commission's failure to resolve some of these cases has allowed significant, ongoing harm to the Bay. Further, because its backlog has become so unmanageable, the commissioners are now considering amnesty for certain categories of cases, which could result in these cases being closed without the violations being resolved. Even if it chooses to address its current backlog through amnesty, the commission has not created a strategy to resolve violations more efficiently in the future to prevent similar backlogs from occurring.

The commission has also not met two of its other responsibilities. Although under state law the commission is responsible for protecting the Suisun Marsh, it has not assessed the implementation of a plan to safeguard the marsh, as state law requires. Further, although state law created the abatement fund to pay for clean-up projects in the Bay, the commission has used very little of the fund for this purpose. Instead, the commission—with the Department of Finance's approval—has used a portion of the fund to pay staff salaries.

The Commission Has an Expanding Backlog of Enforcement Cases

The commission has a large backlog of enforcement cases that has been growing steadily. According to the commission, it considers all open cases on which staff are not currently working to be part of its backlog; using this standard, it calculated that it had about 30 active cases and a backlog of about 230 cases as of December 2018. We determined that as of November 2018, this backlog included about 170 cases that were at least 10 months old. Although the commission has been able to close more cases than it opened in some years, its total cases grew by an average of 14 per year from 2012 through 2017. The commission estimates that eliminating its backlog will take 20 years based on historical averages, but the backlog's recent growth suggests that the problem will likely get worse rather than better. One of the primary causes of the backlog is the amount of time staff take trying to resolve cases without initiating enforcement action—an issue we discuss in the next section.

The commission's failure to resolve cases promptly can result in considerable, ongoing damage to the Bay.

In some instances, the commission's failure to resolve cases promptly can result in considerable, ongoing damage to the Bay. For example, the commission has taken no enforcement action in a case begun in 2010 related to harmful activity in Richardson Bay. The commission's 1984 special area plan for Richardson Bay (Richardson plan) describes the area as a shallow, ecologically rich arm of the San Francisco Bay.⁶ Since at least 1984—35 years ago—unpermitted boats have illegally anchored in Richardson Bay outside of marinas, even though state law requires commission permits for boats moored in the Bay for extended periods and the Bay Plan does not allow residential use of boats anchored outside of marinas. Some of the boats moored in Richardson Bay are residential.

One component of the Richardson plan specifically requires the removal of illegally anchored boats. However, the commission has taken limited steps to address these boats: in 1997 it issued a cease-and-desist order to an individual boat owner, and it helped the Richardson Bay Regional Agency (Richardson agency)—the agency responsible for maintaining and implementing the policies of the Richardson plan—secure a grant to support a vessel removal program in 2013. However, according to the chief of enforcement, the commission has taken no action to enforce either state law or the Richardson plan since opening an enforcement case in 2010 to address the roughly 40 illegally anchored boats that were present at the time. Illegal anchoring and abandonment of vessels in Richardson Bay has continued over time, and despite removal efforts by the Richardson agency, more than 200 vessels were illegally anchored in Richardson Bay as of February 2018.

The lack of action on this issue has resulted in continued harm to this ecologically sensitive area, as well as risks to the public. According to the chief of enforcement, many of these boats are in a state of disrepair, and they often sink, resulting in the release of harmful chemicals. According to a 2018 Audubon Society study, the illegally anchored boats have damaged nearly 57 acres of the sea floor and caused a loss of eelgrass, which provides a critical habitat for commercially important sea life, such as Pacific herring. In addition, the San Francisco Bay Regional Water Quality Control Board stated in 2009 that vessel discharges are a source of sewage contamination in the area. Since that time, it has indicated on several occasions that the water quality of Richardson Bay is impaired, as noted in a water quality plan update in May 2017. Moreover, the city of Sausalito stated in a 2018 press release that these illegally anchored boats pose a grave danger to other boats of all sizes navigating through Richardson Bay.

⁶ To demonstrate how the Bay Plan applies to specific regions, the commission creates special area plans in partnership with local governments. These special area plans serve as amendments to the Bay Plan.

The chief of enforcement noted that the commission has been reluctant to pursue enforcement because the issue is highly political and involves concerns over displacement of residents. Staff presented their concerns about these anchored boats continuing to violate the law to the commissioners in a 2013 meeting; however, neither the commissioners nor staff proposed an enforcement action at that time. In February 2019, staff held a briefing during an enforcement committee meeting to discuss the anchored boats and the Richardson agency’s potential upcoming proposal for a permanent mooring system. Commission staff explained to the enforcement committee that the Richardson agency removed more than 1,000 vessels at a cost of more than \$2 million from 1997 to 2019. However, rather than increasing the commission’s involvement, the commissioners stated that they would continue to hold discussions and monitor the situation. We acknowledge that the issue involves several governmental entities, special interests, and vulnerable communities. However, because vessels continue to anchor there illegally, the Richardson agency’s actions have not reduced the overall number of illegal vessels. In addition, the work done by the Richardson agency does not absolve the commission of its statutory responsibilities. Given its mission to protect the Bay, and given that it represents the combined interests of multiple Bay Area jurisdictions, the commission is best positioned to lead in the resolution of this concern.

Although Richardson Bay may be one of the commission’s most significant cases, it is just one of many enforcement cases that the commission has yet to resolve. In fact, its backlog has now become so significant that the commission is considering granting amnesty for some violations. Violations of state law result in harm through either uncoordinated filling of the Bay, unauthorized dredging of the Bay, or interference with public access. At a December 2018 meeting of the enforcement committee, staff presented a number of proposals for eliminating cases in the commission’s backlog by granting mass amnesty to certain groups of violators. The text box presents a selection of these proposals. As of February 2019, the enforcement committee had not decided how to proceed, according to commission staff.

Although amnesty could significantly reduce or eliminate the commission’s current backlog, it could also perpetuate harm to the Bay and create problems for future enforcement. Were the commission to allow violations to persist, the damage from those violations might continue indefinitely. Staff have

Examples of Proposed Options for Granting Amnesty

- **Amnesty for low-priority cases:** Dismiss cases the commission has classified as low-priority under its prioritization matrix.
- **Amnesty based on age:** Dismiss all inactive cases that have been open for more than a certain length of time.
- **Amnesty for one-time offenders:** Dismiss all cases involving violations that were single occurrences.
- **Amnesty for resolution by a deadline*:** Offer an option for low-priority violators based on the prioritization matrix to either resolve their cases by a deadline with no fine or receive a predetermined fine.
- **Case-by-case amnesty*:** Present each case to the enforcement committee to decide.

Source: The commission’s December 2018 meeting minutes.

* These options do not actually grant amnesty, as the commission would require violators to resolve violations in some way or decide each case on its own merits.

based certain amnesty proposals on the commission's prioritization matrix; we describe our concerns with this matrix in Chapter 2. Further, given that a single enforcement case may represent multiple violations, the commission would need to track the violations to which it granted amnesty carefully, because it would not be able to take action against those violations in the future. Amnesty could also significantly increase future litigation risks to the commission from both environmental groups and alleged violators who do not receive amnesty. Finally, if the commissioners decide to grant violators amnesty without resolving the causes of the backlog, they risk allowing the backlog to reoccur.

Staff Expend Significant Resources Attempting to Resolve Violations Before Referring Them to the Commissioners

One of the main reasons for the backlog is the significant amount of time staff spend trying to resolve cases before initiating enforcement action. State law requires that the commission grant or deny a permit within 90 days of receiving a completed application; however, neither state law nor the commission's regulations specify the amount of time the commission may take to determine whether to initiate either the standardized fines process or formal enforcement proceedings after identifying a potential violation.

The seven enforcement cases staff forwarded to the commissioners for formal enforcement in 2016 and 2017 had been open for between one and 17 years—an average of seven and a half years—before staff referred them to the commissioners. In five of these seven cases, staff had previously initiated the standardized fines process. When the standardized fines process did not succeed in resolving the violations, staff did not refer the cases to the commissioners for formal enforcement for an average of more than seven years after starting the standardized fines process. This represents an extraordinarily long time, given that the violations had been causing ongoing harm or limiting public access to the Bay. A lack of timelines and milestones for the commission's enforcement process contributed to these delays.

When staff do not take action to resolve enforcement cases in a timely manner, they also jeopardize the State's ability to resolve the violations in court if necessary, and risk allowing evidence to go stale. If the commission fails to bring claims to court within a reasonable amount of time, it risks having those claims rejected by the court in the interest of ensuring fairness and preventing undue harm to the defendant. As of December 2018, staff reported that the commission had 260 open enforcement cases, and we calculated that about 80 had been unresolved for at least five years. Of these, 30 were at least 10 years old. According to the regulatory

The seven enforcement cases staff forwarded to the commissioners for formal enforcement in 2016 and 2017 had been open for between one and 17 years—an average of seven and a half years—before staff referred them to the commissioners.

director, the enforcement unit did not have timelines or milestones to resolve cases at the staff level due to the small size of the enforcement unit, and instead staff relied on each other to remain apprised of ongoing resolution efforts. However, as an enforcement committee member noted in 2016, by allowing cases to go on for so long, the commission may hamper its ability to ensure a resolution through the legal process.

We reviewed documented policies and practices for governmental entities both in California and throughout the United States and identified a best practice related to establishing timelines at Virginia's Department of Environmental Quality (Virginia). Virginia serves as the lead agency for the Virginia Coastal Zone Management Program (Virginia program), which is a network of state agencies and governments that administers state law and policies to protect and enhance more than 5,000 miles of shoreline. The Virginia program's goals—protecting and restoring coastal resources, improving public access, and ensuring sustainable development—are similar to those of the commission.⁷ Virginia's enforcement process includes milestones related to what it refers to as its compliance and enforcement phases, as Figure 7 shows. During the compliance phase, Virginia works to resolve violations using the least adversarial methods appropriate, including issuing notices and letters that establish timelines for achieving compliance. Similarly, its enforcement phase uses milestones within certain time frames. Virginia's goal is to resolve all enforcement cases within a year of entering the enforcement phase. If it cannot resolve a case within 15 months, its management evaluates additional options, such as seeking assistance from the federal government, referring the case to the attorney general, or closing the case. Virginia's detailed milestones enable it to ensure a timely and consistent response to noncompliance. We believe the commission would benefit from having a similar process.

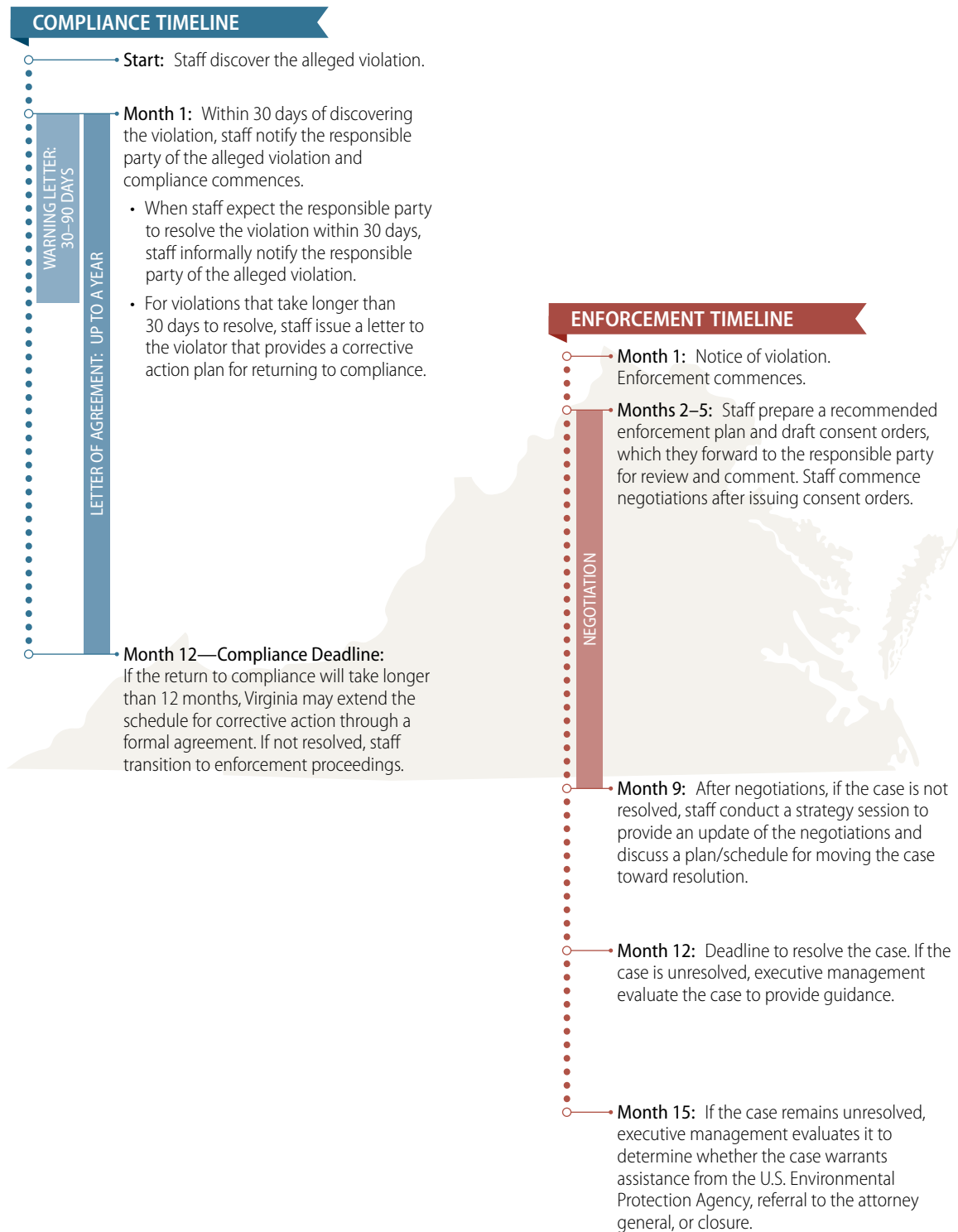
The Commission's Enforcement Program Lacks Sufficient Leadership

The commissioners have not provided sufficient leadership and guidance for the commission's enforcement process. Although the commissioners have taken some actions in recent years to improve enforcement, such as approving two strategic plans, reconvening the enforcement committee, and holding meetings on enforcement strategy, their guidance has fallen short of addressing the major concerns we identified with the enforcement program. Further, because certain commission regulations related to enforcement

Although the commissioners have taken some actions in recent years to improve enforcement, their guidance has fallen short of addressing the major concerns we identified with the enforcement program.

⁷ The National Oceanic and Atmospheric Administration concluded in its most recent assessment, issued in 2015, that Virginia had satisfactorily implemented and enforced its federally approved coastal program.

Figure 7
Virginia's Compliance and Enforcement Timelines Are an Example of a Best Practice for Processing Enforcement Cases



lack clarity, the commissioners have improperly delegated their authority to staff. Finally, a lack of management review and staffing challenges have exacerbated deficiencies in the commission's already troubled enforcement process. Collectively, these failings have allowed harm to the Bay.

The Commissioners Have Not Provided Sufficient Guidance to Staff

Although the commissioners have taken some steps to address weaknesses in the enforcement program, these steps have been insufficient. For example, although the commissioners approved two strategic plans in the last six years, the plans provide only limited guidance to the enforcement program. The first plan, which the commissioners approved in 2013, did not establish specific goals for the enforcement program. However, the executive director credits this plan for his decision to develop a data-driven enforcement strategy, which we discuss in Chapter 2. The second strategic plan, which the commissioners approved in 2017, set objectives for staff to develop and implement a permit compliance system and to consistently engage the commissioners on enforcement issues. However, neither strategic plan established measurable deliverables, such as setting milestones or goals for reducing the backlog of enforcement cases.

Similarly, the commission's decision to reconvene the enforcement committee in 2016 was a positive step, but only because it corrected a weakness in the enforcement program that the commissioners had allowed to persist for five years. The commissioners created the enforcement committee in part to fulfill their enforcement obligations. However, the enforcement committee did not meet from October 2011 through June 2016. According to the executive director, the commission's lack of legal resources and enforcement staff turnover prevented staff from forwarding longstanding, difficult cases to commissioners, which contributed to this lapse. Staff handled all enforcement cases during that time. Since the commissioners reconstituted the enforcement committee, the committee has held several strategy discussions with staff. For example, the committee heard a presentation by staff related to various amnesty options and informally requested that staff come back to the committee with a more detailed plan of action. The lapse in enforcement committee meetings deprived staff of guidance for the commission's enforcement program for nearly five years.

Further, the enforcement committee has held three enforcement strategy meetings since 2016; however, these meetings did not result in formal guidance on how staff should address issues such as the enforcement backlog. State law requires state government commissions with enforcement authority to provide clear

The enforcement committee has held three enforcement strategy meetings since 2016; however, these meetings did not result in formal guidance on how staff should address issues such as the enforcement backlog.

guidelines for staff to ensure that they perform the necessary functions to support the commission's mission. However, the commission has not provided such guidance to its staff. Moreover, although commissioners have been receiving regular reports on the enforcement caseload since at least 2000, and those reports demonstrated a growing backlog in recent years, they have not yet voted on any measures to resolve the backlog or establish clear strategic deliverables. Without additional leadership from the commissioners, this trend will likely continue.

The commissioners could also have provided guidance on the commission's enforcement program through resolutions, but they have not done so since 1993. In total, the commissioners have issued only three resolutions related to the enforcement process; however, these resolutions did not provide guidance for case handling or prioritization. Instead, they confirmed the establishment of the enforcement committee and indicated the commissioners' strong opposition to any violation of the commission's laws. Without guidance on prioritizing cases based on severity, staff could expend the commission's limited resources on violations that may be inconsequential. During the period from 2012 through 2017, we identified instances in which staff pursued seemingly insignificant concerns—such as traffic cone placement and slightly faded signs.

The commission has not convened its citizens' advisory committee since 2001, possibly depriving staff of an additional source of guidance and insight on addressing the enforcement backlog.

Finally, the commission has not convened its citizens' advisory committee since 2001, possibly depriving staff of an additional source of guidance and insight on addressing the enforcement backlog. State law requires the commissioners to appoint a committee of public agency representatives, scientists, architects, and other interested parties to assist and advise the commission in carrying out its functions, including enforcement. However, in December 2018, the executive director reported to the commissioners that staff had no record of the citizens' advisory committee holding meetings since 2001. The executive director stated that he was unaware of why the committee did not meet during the tenure of the previous executive director, and began the process to revive it recently when he realized it was legally required. By not convening the committee for 17 years, the commission has conducted its business without soliciting advice from the advisory committee as required by law and has missed an opportunity for staff to seek guidance on the enforcement program from professionals in relevant fields.

The Commissioners' Inaction Has Resulted in Improper Delegation of Their Authority to Staff

Commission regulations allow staff to use the standardized fines process only to resolve cases that do not result in significant harm; however, these regulations do not define what constitutes such harm. This lack of specificity in the commission's regulations allowed staff rather than the commissioners to direct the course of enforcement cases. As we discussed previously, from October 2011 through June 2016, the commission's enforcement committee did not hold hearings and staff handled all enforcement cases, including some involving violations that could cause significant harm to the Bay. Appendix B provides a breakdown of cases closed and enforcement actions taken from 2012 through 2017. Because of the lack of specificity in the commission's regulations, as well as the lack of other guidance to staff regarding enforcement, the commissioners in effect delegated their enforcement authority to staff for the majority of the six-year period we reviewed.

When the Legislature creates a governmental entity such as the commission, that entity has no authority to enact rules or procedures that alter or enlarge the terms of the legislative act that created it. Moreover, the entity cannot delegate to staff its ability to exercise judgment in the absence of statutory authorization. State law provides for the appointment of an executive director who is in charge of administering the affairs of the commission, subject to the direction and policies of the commission. The executive director may delegate those functions to the staff, but retains the responsibility to see that staff carry them out. Further, the extent to which the commission may delegate its authority depends on the degree to which it has provided clear guidelines to staff regarding how they may apply, administer, or enforce the authority granted.

Without clear guidance, the commission risks that staff will reach determinations that may not be consistent with the law. We identified one instance in which the chief of enforcement decided to close a case involving a clear violation of law without taking any action to resolve it. State law requires boats planning to moor in the Bay for extended periods to obtain permits from the commission. As Figure 8 shows, in 2013 the U.S. Coast Guard (Coast Guard) reached out to the commission for potential enforcement action against a tugboat grounded on the shoreline of Contra Costa County. The Coast Guard believed there was significant risk that the tugboat's hull would rupture and discharge fuel. However, almost a year later, commission staff closed the case, stating that the commission had no role to play, even though the tugboat was clearly in the commission's jurisdiction. The chief of enforcement indicated that she took this action because she thought it was unlikely that the commission would be able to hold the owner

The lack of specificity in the commission's regulations allowed staff rather than the commissioners to direct the course of enforcement cases.

accountable. As of April 2019, the boat remains on the shoreline, decaying in the water. The case file contains no evidence to suggest that the commission or any other agency has addressed the potential environmental hazards the Coast Guard identified.

Figure 8

The Commission Has Allowed Ongoing Harm to the Bay

In April 2013, the U.S. Coast Guard contacted the commission to report an abandoned tugboat in the commission's jurisdiction. Later that year, commission staff elected to close the case with no action and without addressing the Coast Guard's concerns.



"Our biggest concern at this time is that there is a large potential for pollution and it is likely that one of these intentional groundings may rupture the hull and discharge fuel into the environment."

-U.S. Coast Guard

*December 2018:
The tugboat remains
in the San Francisco Bay.*



In the absence of clear direction from the commissioners, we would have expected the commission's management to provide guidance as part of their involvement with enforcement cases. For example, state regulations require the executive director to determine whether a violation qualifies for handling under the standardized fines process based in large part on whether the violation will result in significant harm. However, as explained earlier, the commission has not defined significant harm. Moreover, the commission's management has not established a process to ensure that its management reviews staff decisions. According to staff members, they consider whether to pursue the standardized fines process in consultation with the regulatory director, who oversees the enforcement staff. However, the regulatory director said he does not typically review physical case files but stays in close communication with the enforcement team and relies on the chief of enforcement to monitor active cases.

Further, the executive director stated that he had not officially delegated his authority to determine whether cases qualify for the standardized fines process; however, he has informally given staff permission to make these determinations. In 15 of the 24 cases resolved with the standardized fines process from 2012 through 2017, we found no documentation of supervisory review. In the remaining nine cases, we identified some instances of supervisory review or approval but no evidence of systematic review, such as management signing off on staff decisions. For example, in one case we found a memo that indicated the chief of enforcement had spoken with the alleged violator and explained the enforcement action her staff had taken. In another, we found a note indicating that she had instructed her staff to revise and reissue a notice letter. However, examples such as these were present in only a minority of the cases we reviewed. Without adequate management review or clear direction and guidance, the commission risks staff reaching determinations that may not be consistent with law or that may not reflect the commission's wishes. We identify instances in which staff failed to follow regulations and applied inaccurate penalties in Chapter 2.

Without adequate management review or clear direction and guidance, the commission risks staff reaching determinations that may not be consistent with law.

The Commission Has Not Ensured That It Has Adequate Staff to Support Its Mission

The commission has not ensured that it has enough enforcement staff. Of the commission's 46 staff in November 2018, only three were assigned to enforcement. The executive director identified a lack of enforcement staff as a significant challenge and indicated that it had occurred in part due to a structural deficiency in the budget that existed when he arrived. In 2018 the commission requested and the Department of Finance approved funding to hire an enforcement manager and an attorney focusing on enforcement. As of February 2019, the commission had hired the attorney, and

its director of administrative services stated that it planned to hire an enforcement manager in July 2019. According to the executive director, he cannot increase enforcement staffing, other than adding these two positions, without receiving additional funding or shifting staff from other critical areas. For example, he explained that because state law requires the commission to process permit applications within 90 days, the commission has dedicated more staff to its permit unit than to its enforcement unit. However, the commission has not conducted a study to determine what level of staff it needs to be able to conduct enforcement or whether the mix of staff performing all responsibilities within the organization is reasonable and appropriate. The executive director said that the commission has lacked the resources and capacity to conduct such a study. Nonetheless, without a workforce study, the commission will not have the information necessary to present an adequate argument to the Legislature in support of increasing its enforcement staff allocation.

The Commission Could Do More to Protect the Suisun Marsh






The commission is the primary state agency responsible for implementing the Suisun Marsh Preservation Act (Preservation Act), but has not performed some of its statutory duties. State law directed the commission and the Department of Fish and Wildlife to develop a detailed plan for the Suisun Marsh to ensure long-range conservation. The Suisun Marsh Protection Plan (protection plan) was completed in 1976. A year later, the Legislature enacted the Preservation Act to establish protections for the Suisun Marsh and create a management program to protect plants and wildlife. To implement these protections, state law required the commission to certify a local protection program (marsh program) that Solano County and the Suisun Resource Conservation District (Conservation District) created and were to carry out at the local level. For example, state law requires the marsh program to include enforceable standards for diking, draining, and filling the marsh. The commission indicated in the protection plan that the marsh was of paramount importance because it makes up almost 10 percent of the remaining natural wetlands in California; provides an integral wintering habitat for waterfowl on the Pacific Flyway; and forms a critical habitat for endangered, rare, and unique California wildlife. Figure 9 lists several of the endangered species that live in the Suisun Marsh.

The commission has not conducted a periodic, comprehensive review of the marsh program as required by state law.

Although the commission has worked with the local agencies—Solano County and the Conservation District—to update components of the marsh program, it has not conducted a periodic, comprehensive review as required. State law requires the commission to conduct a review of the marsh program at least every five years to ensure the program's effective implementation by Solano County and the Conservation District. State law also allows the commission to make

Figure 9
 The Suisun Marsh Contains Numerous Endangered and Threatened Species



 <p>Bird species, including:</p> <ul style="list-style-type: none"> • California clapper rail ▲ California black rail ■ Suisun song sparrow ■ Salt marsh common yellowthroat 	 <p>Fish species, including:</p> <ul style="list-style-type: none"> • Delta smelt ▲ Longfin smelt ▲ Green sturgeon ■ Sacramento splittail 	 <p>Mammal species, including:</p> <ul style="list-style-type: none"> • Salt marsh harvest mouse ■ Suisun shrew 	 <p>Reptile species, including:</p> <ul style="list-style-type: none"> ■ Western pond turtle 	 <p>Plant species, including:</p> <ul style="list-style-type: none"> • Suisun thistle • Soft bird's-beak
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• ENDANGERED SPECIES ▲ THREATENED SPECIES ■ CALIFORNIA SPECIES OF CONCERN

Source: Auditor-generated using the commission's documents, the California Department of Fish and Wildlife's California Natural Diversity Database, U.S. Fish and Wildlife Service documents, and the *Suisun Habitat Management, Preservation and Restoration Plan*.

recommendations to local agencies to ensure implementation of the marsh program. However, commission staff noted in a March 2019 report to the commissioners that the commission has not undertaken a full review of the marsh program since certifying it in 1982. Further, according to the commission's planning manager, the commission has never issued recommendations for corrective action to the local agencies related to the marsh program. After we discussed this issue with the commission, commissioners approved a staff recommendation in March 2019 to conduct a comprehensive review of the Preservation Act, protection plan, and marsh program. Nonetheless, because the commission has not conducted a comprehensive review of the entire marsh program or issued recommendations to the local agencies to ensure implementation of the marsh program, the commission risks that parts of the program have not been kept current or have not been working as intended to protect the marsh.

The Commission Has Not Used the Abatement Fund to Clean Up the Bay

The commission has not used the Bay Fill Clean-Up and Abatement Fund (abatement fund) for physical clean-up activities in the Bay. The abatement fund receives funds from several sources, including from commission fines, for the purposes of removing fill, enhancing resources, and performing remedial clean-up or abatement actions within the Bay. State law authorizes the commission to transfer money from the abatement fund to other coastal trust funds for Bay cleanup. However, from fiscal years 2008–09 through 2017–18, the commission made only a single payment of \$20,000 to the California Coastal Conservancy trust fund, an allowable destination fund under state law.

According to the executive director, the commission has rarely used the abatement fund for clean-up efforts because the fund's balance has historically been too low for it to provide a significant contribution to conservation entities. However, the commission does not have any policies that set minimum disbursement amounts or allow it to identify and select projects to support. The executive director stated that he is currently waiting for the abatement fund's balance to reach \$1.5 million, at which point he intends to transfer \$1 million to the California Coastal Conservancy or a similar entity, while still keeping a significant reserve in the fund. However, such a transfer would be only the second instance in the last 10 fiscal years in which the abatement fund directly supported conservation activities.

The commission has used the abatement fund almost exclusively to support staff salaries and operational costs.

Instead, the commission has used the abatement fund almost exclusively to support staff salaries and operational costs. State law does not specify personnel expenses as an allowable use for the

abatement fund; however, on several occasions, the Legislature and the Department of Finance have approved such use. The executive director said that the commission has historically used it for enforcement staff salaries, likely based on informal guidance from the Department of Finance. The commission used a total of \$240,000 from the abatement fund to pay salaries in three of the past four fiscal years, including \$99,000 in fiscal year 2017–18.

According to the executive director, the salary expenditures were necessary both to avoid layoffs due to a lack of funding available from the State's General Fund and to indirectly support conservation because the enforcement unit makes the Bay cleaner and more accessible through its actions. However, as described above, state law authorizes money from the abatement fund to be used only for the purposes of removing fill, enhancing resources, and performing remedial clean-up or abatement actions. Enforcement staff do not perform these activities; therefore, expenditures for their salaries are not authorized from the fund. In 2018 the Department of Finance issued formal approval for the commission to use the abatement fund for two new enforcement positions that the Legislature subsequently approved. We disagree that enforcement staff salaries are an allowable use of the fund and suggest that the Legislature clarify its intent for use of the fund.

The abatement fund represents a missed opportunity for the commission to further its mission to protect and enhance the Bay. As of June 2018, the fund balance was \$1.4 million. Had the commission not used abatement fund dollars for enforcement staff, we estimate the balance could have been as high as \$1.7 million. Such a balance might have allowed the commission to address potentially harmful fill in the Bay or to take other actions to support Bay cleanup. We discuss recommendations related to this and other issues in the Conclusions and Recommendations section of this report.

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Chapter 2

THE COMMISSION'S LACK OF COHERENT PROCESSES HAS LED TO INCONSISTENT ENFORCEMENT DECISIONS

Chapter Summary

The commission's current enforcement practices have resulted in it inconsistently—and at times inappropriately—responding to violations. For example, because it does not proactively identify violations by regularly patrolling its jurisdiction, the commission relies primarily on either the public or other agencies to report potential violations. Additionally, commission staff have failed to follow the commission's regulations when taking enforcement actions, such as imposing fines. When we reviewed seven cases in which staff levied fines, we found that the staff had not followed requirements in five cases. Moreover, the commission's regulations do not specify how to identify distinct violations, which may cause inconsistencies in staff's processing of cases with similar violations. For example, because the commission levies fines based in part on the number of violations present, cases that are similar to one another but in which staff identify differing numbers of violations can result in different total fines. When staff fail to follow regulations, or when the regulations themselves do not provide sufficient guidance, staff may treat violators and permit applicants inconsistently and potentially unfairly.

Although the commission has attempted to improve its enforcement efforts by adopting a data-driven enforcement strategy, which includes a system to prioritize enforcement cases and a new database, we identified several problems with the prioritization system, including its unnecessary complexity. Similarly, staff indicated that the new database was unreliable, and we found that it lacked critical information.

The Commission Does Not Proactively Identify Violations of State Law and Permit Conditions

Given that the Legislature empowered the commission to conduct enforcement actions against violations that threaten the Bay, we would have expected it to be taking reasonable steps to identify such violations. However, the commission lacks policies or procedures requiring its staff to conduct site visits or patrols, or to take similar measures. Instead, according to the chief of enforcement, the commission waits for the public or other agencies to report potential problems. Although she explained that staff sometimes identify violations during the course of other work or their personal time, she stated that the commission does not do so proactively.

In a 2017 enforcement strategy presentation, staff indicated that the vast majority of the commission's enforcement cases stem from members of the public calling in complaints. For example, we found that the commission often receives complaints regarding maintenance of facilities within its jurisdiction from the public or other agency representatives. Figure 10 highlights one of these cases. The chief of enforcement explained that a lack of resources prevents the commission from taking a more proactive approach. However, the commission's current reliance on the public means that it cannot ensure that it is aware of violations across its jurisdiction. Although the commission faces enforcement staffing limitations, it should have developed a strategy using the resources available to supplement its reliance on public reporting. For example, it could dedicate a limited number of staff hours annually to active patrolling in order to identify violations within its jurisdiction.

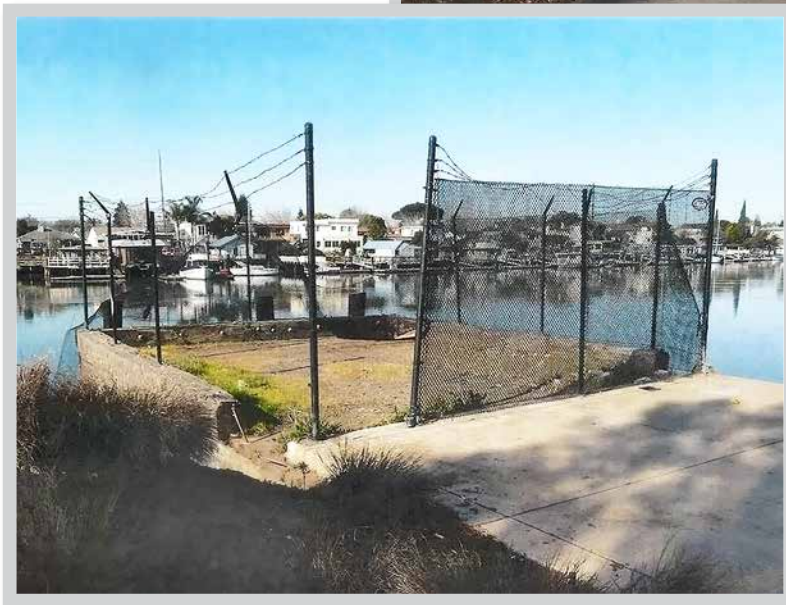
In addition, the commission lacks a systematic method to ensure that permit holders comply with the conditions of the permits it issues. State law authorizes the commission to include reasonable terms and conditions to ensure that its permits reflect the intent of the law and the Bay Plan. For example, the commission may place conditions on its permits requiring permit holders to record legal documents, submit annual reports, and conduct ongoing maintenance. However, according to the chief of enforcement, the commission lacks the resources to systematically track these requirements after issuing permits and instead generally relies on permit holders to comply. Given that the commission maintains more than 4,500 permits, the risk of noncompliance is high in the absence of a monitoring strategy. For example, in one case, staff opened an enforcement case to request missing annual reports related to the permittee's activities, but then stated that they considered the violation resolved after learning that the permit holder had sold the land about a decade earlier. Without a systematic method of ensuring compliance with the conditions it imposes, the commission risks that permit violations will go undetected.

Its enforcement case records indicate that the commission could prevent potential violations and decrease its enforcement workload if it created a staff position for permit compliance review.

Its enforcement case records indicate that the commission could prevent potential violations and decrease its enforcement workload if it created a staff position for permit compliance review. The chief of enforcement estimated that up to 50 percent of violations were related to noncompliance with permits. We found a similar percentage of permit compliance issues in our review of the commission's enforcement records from 2012 through 2017. Permit compliance violations that we noted included failing to provide required reports, blocking or failing to maintain public access, or neglecting to add required amenities. For example, in one enforcement case, staff noted that the permit holder failed to provide public access improvements such as chairs, tables, and umbrellas in a public access area.

Figure 10
Example of Permit Violations Staff May Have Identified With a Proactive Compliance Strategy

Commission staff primarily learn about trash and maintenance issues through public reports. The commission does not have a program to proactively ensure that permit holders meet their permit obligations, such as providing public access in accordance with state law.



In March 2013, staff received a report from a member of the public regarding trash (top) and an unauthorized fence (left) in a permit holder's public access area. Upon investigation, staff discovered general disrepair in the permitted area and closed the case two years later, after reporting that the permit holder remediated the issues and paid a \$17,500 fine.

Source: Commission enforcement records.

Although the commission's case files indicate that alleged violators often resolved issues without fines, the cases still required attention from enforcement staff to reach resolution—attention that the violators may not have received if someone had not complained. Two representatives of entities that hold permits from the commission suggested that permit holders would benefit from regular contact with staff to resolve compliance issues before enforcement is initiated. Allocating even one staff member to

conduct reviews of selected permits could help alleviate the pressure on the commission's enforcement staff and increase the public perception that the commission is consistently holding permit holders accountable for the conditions in their permits.

Staff Have Not Always Followed Requirements Related to Imposing Fines

Requirements for Imposing Standardized Fines

Commission staff may apply a fine if the commission's executive director determines that an alleged violation meets all of the requirements listed below.

1. It involves one of the following:
 - Failure to finalize a permit before commencing work.
 - Failure to submit any document in the form, manner, or time required.
 - Failure to comply with any permit condition.
 - Failure to obtain a permit for activity that can be authorized by a minor permit or by a region-wide permit.
 - The placement of fill, the extraction of materials, or a change in use that could not be authorized but could be considered minor in nature.
2. It has not resulted in significant harm to the Bay's resources or to existing or future public access.
3. It can be corrected in a manner that is consistent with the commission's laws and policies.

Source: Commission regulations.

Staff did not always follow regulations related to fines. According to state regulations, staff may initiate the standardized fines process when the executive director determines that a violation meets certain requirements, which the text box describes. To initiate the standardized fines process, staff must send an alleged violator a letter describing the nature of the violation, specifying corrective action that the permit holder must take, and providing a 35-day grace period for the responsible party to correct the violation before fines begin to accrue. If the alleged violator does not resolve the matter within the grace period, staff may levy a fine based on the type of violation and the number of days the responsible party takes to correct the violation after the grace period expires. From January 2012 through December 2017, staff used the standardized fines process to close 24 of the 172 cases they closed. However, when we reviewed seven of these 24 cases, we observed errors in five.

In one 2013 case, staff inappropriately applied a standardized fine even though they had determined that the responsible party could not correct the violation. Based on state law and regulations, violations that alleged violators

cannot correct either must proceed through formal enforcement—which generally involves a review by the commissioners—or be resolved through a settlement agreement. In the 2013 case, we found that staff levied a \$30,000 fine for a dredging violation despite determining that the party could not correct the violation because the dredging—or excavation of mud from the bottom of the Bay—had already taken place. To determine whether the staff's breach of regulations represented a one-time error or a normal practice, we reviewed three similar dredging cases. In 2009 and 2018, staff took similar action in two other cases, levying fines of \$30,000 for each dredging-related violation. However, in a fourth case that—like the first—occurred in 2013, staff complied with state law by negotiating a settlement agreement for \$20,000, suggesting that they were aware of the correct process but had

chosen not to apply it in the other instances. According to the chief of enforcement, staff often used the standardized fines process for dredging violations because it is more efficient than taking the cases to the commission and they feel it results in equitable resolutions. Nevertheless, their decisions contradict state regulations, leading to an inconsistent application of penalties.

In another case based on an allegation to the commission, staff used the standardized fines process in 2013 to inform a permit holder that it had violated its permit conditions, even though the commission could not demonstrate that it had verified the allegation. To withstand legal scrutiny, staff should document sufficient evidence in the case file to justify their findings. Further, state regulations require staff to notify alleged violators of the corrective actions they must take. However, in this instance, which involved a restaurant refusing public access seating, staff did neither. Instead, staff sent a notice letter informing the permit holder that the commission had begun its standardized fines process, and they considered the issue automatically resolved within the 35-day grace period. Moreover, although the commission's regulations require violators to take corrective action before the commission resolves the violation, staff stated in the letter that they would consider this violation automatically corrected without requiring action from the violator.

In later enforcement cases against the same permit holder, staff treated the permit holder as a repeat offender. Commission regulations require subsequent penalties for repeat offenders to increase to \$100 per day but do not require staff to require corrective actions. Ultimately, staff applied the \$100-per-day fine against the permit holder to levy a total of \$8,000 in fines for the same type of violation across three cases. Staff cited the transitory nature of the offense as the reason they did not initially provide the permit holder with a corrective action plan; however, in the final and largest case, staff required corrective action in the form of documented employee training. Given that the commission ultimately substantiated the later violation and prescribed corrective action, we find its reasoning for not taking the required actions in the earliest case problematic. When we discussed this with the commission, staff explained that no fewer than three analysts handled the related cases over the years and that the most recent case demonstrated the current staff's desire to follow the regulations.

We expected the commission to have developed sufficient guidance to ensure that its staff apply its regulations consistently. However, as we note in Chapter 1, our review of the commission's enforcement program found that it has no formal guidance for staff on critical aspects of the enforcement process, including calculating

In one case, staff used the standardized fines process in 2013 to inform a permit holder that it had violated its permit conditions, even though the commission could not demonstrate that it had verified the allegation.

Without formal policies and procedures, the commission risks imposing fines on permit holders in an inconsistent and unfair manner.

and imposing fines. Its chief of enforcement explained that the commission has passed only three enforcement-related resolutions and developed two flowcharts to assist in the training of new enforcement staff. She stated that the commission is in the process of creating new policies and procedures but that its effort has been delayed by several time-consuming enforcement cases. Without formal policies and procedures, the commission risks imposing fines on permit holders in an inconsistent and unfair manner.

We also identified multiple cases in which staff misapplied fines. Commission regulations prescribe fines based on the type of violation and the number of days that a violator takes to resolve issues. In one example, staff identified a violation of a maintenance-related permit condition and sent a 35-day notice letter to the permit holder. However, the conditions of the violator's permit allowed it an additional 30 days to resolve maintenance violations before fines accrued, for a total of 65 days overall. The evidence in the case file shows that the permit holder resolved the violation within 50 days. However, staff still fined the permit holder \$1,000. Staff failed to document any evidence that they instructed the permit holder to fix this specific violation during the visit. Thus, we concluded that staff inappropriately levied the \$1,000 fine.

Finally, we also identified miscalculations of fines in two cases. In one, staff undercharged a permit holder by \$300 when they miscalculated the number of days that the permit holder took to resolve two violations. In another, staff inconsistently calculated penalties associated with a permit holder's five violations by including the date of resolution in the penalty for some violations but not for others. The regulatory director stated that these miscalculations—as well as the misapplied penalties we discuss above—might have been the result of oversights on the part of staff. However, the fact that staff made multiple distinct penalty errors in three of the seven cases we reviewed indicates that the commission has not established adequate processes to prevent the inappropriate application or miscalculation of penalties.

The Commission's Approach to Imposing Fines Has Led to Inequities

The commission's structures for its standardized fines and formal enforcement processes have resulted in disproportionate penalty amounts. Under the formal enforcement process, state law allows commissioners to impose a penalty ranging from \$10 to \$2,000 for each day in which a violation occurred or persisted, up to a maximum of \$30,000. Under the standardized fines process, regulations allow staff to impose penalties up to the same maximum for violations that do not cause significant harm, starting on the 36th day after staff mail written notice of a violation to the

violation and depending on the total number of days the violation persists. This approach has led to even relatively minor violations receiving the same fines as more significant violations because both structures rely primarily on the number of days it takes the violator to resolve the violation.

When we reviewed the commission's enforcement cases, we found several instances that demonstrate the types of inequities that can result from the commission's fine structure. For example, in a formal enforcement case that went before the commissioners in 2017, staff proposed a \$30,000 fine for a minor violation that had persisted since 1998 involving public access signage. Even if commissioners had levied the lowest penalty available to them, the violation still would have reached the maximum amount by the time the commissioners heard the case. In another instance, commission staff initiated standardized fines for a case involving designated parking spaces in 2011. This violation reached the \$30,000 maximum under the standardized fines process. When staff subsequently could not resolve the violation using standardized fines, they forwarded it for formal enforcement. They proposed the same maximum penalty—\$30,000—to the commissioners, based on the length of time the violation had persisted, in this case since 2008. In a more serious case involving unauthorized construction of a pier and dock, staff imposed the same maximum penalty. Because of the commission's fine structure, some minor violations may result in penalties that are too high to be reasonable, and the commission is in essence penalizing major and minor violations equally.

Further, the commission has not provided clarity on what constitutes an individual violation, creating a significant risk that it will treat permit holders and the public unfairly. Because the commission levies its fines per violation, the number of violations in a case can significantly affect the total amount the violator owes. However, neither state law nor commission regulations give guidance on what constitutes a single violation. According to the chief of enforcement, staff have some discretion regarding these decisions; however, we noted that this approach could lead to differing—and possibly unfair—results.

In fact, we identified several instances in which staff were inconsistent in their identification of the number of violations in particular cases. For example, when an entity removes material from the Bay through a dredging process, the entity needs to dispose of that material somewhere else; per state law, both dredging and dumping require permits. In one instance, staff treated dredging and dumping as a single violation and sought a single maximum penalty of \$30,000. In other instances, they counted dredging and dumping as separate violations, subjecting

Because of the commission's fine structure, some minor violations may result in penalties that are too high to be reasonable, and the commission is in essence penalizing major and minor violations equally.

violators to a maximum fine of \$60,000. Similarly, staff told one violator that although in the past they treated the permit holder's violations related to multiple cars improperly parked in a public access spot as a single violation, they would in the future treat each improperly parked car as an individual violation. Without additional regulations detailing how staff should determine whether an activity constitutes one or more violations, the commission risks resolving cases in an inconsistent and unfair manner that could cost some violators thousands of dollars more than others who commit similar violations.

Although state regulations allow violators to appeal standardized fines, this option does not correct the problems with the commission's fine structure or the inequities that can occur when staff inconsistently identify violations. Violators, who would likely not be aware of the outcome of cases similar to their own, must initiate the appeal process. In the period from 2012 through 2017, violators could have appealed their fines in 18 cases. Of those 18 cases, 12 violators, or about 67 percent, appealed. The commission chair and executive director granted 10 of the 12 appeals—or 83 percent—with an average fine reduction of about 40 percent. Although these decisions resulted in penalty reductions for some, they were dependent on requests from violators rather than a fine structure that produces proportionate and consistent penalties.

The use of a penalty matrix to assess fines could assist the commission in ensuring that it treats violators fairly and consistently. Virginia's enforcement program sets out specific procedures and criteria for staff to calculate the appropriate penalty amounts using its penalty worksheet. When generating a penalty amount, this penalty worksheet takes into consideration specific criteria, such as the frequency and severity of the violation, as well as aggravating factors, such as history of noncompliance and degree of culpability. Moreover, Virginia also considers the responsible parties' ability to pay. According to Virginia's enforcement manual, a consistent enforcement program allows members of the regulated community to expect similar responses for comparable violations.

After the commission has implemented the regulatory recommendations noted in our Conclusions and Recommendations section—such as implementing the use of a penalty matrix and defining what a single violation constitutes—the Legislature should amend state law to provide the commissioners with the ability to record violations on the titles of properties. In 2002 the Legislature gave the California Coastal Commission—which performs a role that is similar to the commission's but for the coastline outside the Bay—the authority to record violations on the titles of properties,

The Legislature should amend state law to provide the commissioners with the ability to record violations on the titles of properties.

subject to certain requirements.⁸ This provides a less expensive enforcement mechanism than litigation, which can be costly for the State and the property owner. Not only does recording a violation on a property's title provide the property owner with an incentive to resolve the issue, it also protects future buyers from unwittingly purchasing a property with active violations. Since the commission has the authority to levy penalties of \$30,000 per violation, and because unresolved violations transfer to future owners, a lack of awareness on the part of a potential buyer could lead to significant costs. Allowing the commission to record violations on property titles would address these issues and give it an additional tool to negotiate the resolution of cases.

Because unresolved violations transfer to future owners, a lack of awareness on the part of a potential buyer could lead to significant costs.

The Commission's Recent Efforts to Improve Enforcement Have Failed to Address Inefficiencies

In 2015 the commission set a goal to develop a data-driven enforcement strategy in an attempt to use its resources more efficiently and increase the effectiveness of its enforcement program. According to the executive director's presentation to the commissioners at that time, this strategy consisted of three components: outreach efforts to assist permit holders with compliance, the development of a regulatory database, and the development of a system to prioritize enforcement cases. We previously discussed the commission's lack of a permit compliance strategy. Here we discuss our review of the commission's prioritization system and database.

According to the executive director, the commission's backlog necessitated the development of a system—which we refer to as a *prioritization matrix*—to enable staff to prioritize pursuit of the most potentially harmful cases. He stated that the commission's goal was to ensure that it could quickly identify high-priority cases. The prioritization matrix, which the commission began developing in 2015 but has not finalized, considers two overall aspects of an enforcement case: the impact the violation may have and, for cases that it designates as high impact, the effort necessary for staff to achieve resolution. Staff began using the matrix to generate impact scores in 2016. According to staff, they developed the effort-scoring aspect of the matrix in 2018 to identify those high-impact cases that would require the least effort to resolve. An enforcement analyst who worked on the project said that staff have spent hundreds of hours refining the matrix and using it to determine cases' priority levels.

⁸ After the California Coastal Commission has completed its hearing and finds that a violation has occurred, the executive director records the notice of violation in the office of each county recorder where all or part of the real property is located.

According to commission records, it has closed only eight of the 49 cases it has designated as high priority since it began scoring cases in 2016.

According to commission records, it has closed only eight of the 49 cases it has designated as high priority since it began scoring cases in 2016. When we reviewed information related to these cases to determine whether the prioritization matrix enabled staff to close these cases more quickly or effectively, we found that staff had either initiated enforcement action or received permit amendments to resolve six of the cases several months before scoring them. Thus, staff did not use the matrix to select these six cases for enforcement action. Staff scored the seventh case and then closed it without enforcement action after issuing a permit amendment. Staff closed the final case without action when the reporting party informed the commission that the violation had ceased. Consequently, we concluded that there is not sufficient evidence to show whether prioritization has resulted in the commission more effectively closing cases the matrix has identified as high priority.

Prioritizing cases based on this system—which the executive director intended to improve the commission’s effectiveness—has not addressed the issues we identified with its enforcement program, which we describe in Chapter 1. In fact, the commission reported that its total enforcement caseload, which includes the backlog and active cases, increased from 204 to 261—or 28 percent—from 2016 through 2018. Further, the commission’s annual reports showed a 27 percent decrease in the number of cases staff closed in 2017, followed by a steeper decline of 45 percent in 2018. Given that the commission opens an average of 55 cases a year and has suffered from declining closure rates since 2016, its reallocation of its enforcement resources to prioritized cases will likely increase its backlog in the future. Further, the commission does not yet have any evidence that the matrix will increase its effectiveness in handling prioritized cases. An approach that balances handling the most harmful cases with working in tandem on a number of more easily resolved cases may serve the commission better.

Moreover, our review of the matrix indicates that it has led to staff designating some cases as high priority or low priority when such scores may not be warranted. For example, one case concerning private use of a public access area scored significantly higher than a case that staff characterized as involving unpermitted fill, new construction, and the discharge of biohazardous waste along the shoreline. Given the presence of potentially hazardous waste, we expected the latter case to score higher than the former. In addition, we found an open case in South San Francisco that did not meet the commission’s high-priority threshold even though it included multiple alleged violations involving illegal boats used as residences, abandoned vessels, discharge of wastewater, and debris from wrecked boats on the shoreline. The commission’s regulatory director agreed that the score for this case was lower than it should have been.

Such questionable scoring may occur in part because of the matrix's overly complicated design. According to the chief of enforcement, when a new case comes in, staff review readily available information such as relevant permits and Internet research. Based on that information, staff assign numeric ratings to certain characteristics of a violation, such as its perceived toxicity, its potential effect on the ecosystem, and its visibility to the public. They then enter these values into the prioritization matrix, which uses a complex formula to derive the impact score estimating the potential harm the violation may inflict. When the impact score exceeds a certain threshold, the commission also assigns a score to assess how much effort a case might take to resolve, using criteria such as responsiveness of the alleged violator and external agency involvement. The commission combines the scores on a chart to determine which cases to address first. Overall, our analysis suggests that the commission's matrix is likely too complicated to effectively prioritize cases with the information staff have available before they begin actively investigating and addressing the alleged violations.

In addition to creating the prioritization matrix, commission staff began populating a new database in 2017 to track enforcement cases; however, the limited information in the database detracts from its potential value. State regulations require the commission to double the fine it imposes on a violator if the violator has resolved any previous violations using the standardized fines process within the previous five years.⁹ Further, if the violator repeats the same violation within five years, regulations require the commission to charge a daily fine of \$100 until the violator resolves the problem. For this reason, we would have expected the commission's database to document the cases in which staff had initiated the standardized fines process and to identify the individual violations in those cases. However, the database indicates that staff sent only two notice letters—which start the standardized fines process—from 2002 through 2018. This conflicts with our review of the commission's paper files, which show that staff issued 25 notice letters from 2012 through 2017.

Five of the 10 paper case files we reviewed did not have sufficient records of the number of specific violations the commission was investigating. In the other five files, staff did not record the number of specific violations until issuing a notice letter. Yet even after issuing these documents, staff did not update the database to reflect the number of individual violations. When we discussed this issue

The commission's matrix is likely too complicated to effectively prioritize cases with the information staff have available before they begin actively investigating and addressing the alleged violations.

⁹ The total fine levied in this instance would still be subject to the \$30,000 maximum cap.

with the commission, staff said that they still rely on paper files to conduct their work. This calls into question the usefulness of the database.

Because of these issues, we could not rely on the commission's database to review case information or trends in the commission's enforcement efforts. Instead, to draw valid conclusions from sufficient and appropriate evidence, as audit standards require, we created our own database covering the commission's cases from 2012 through 2017. The commission's chief of enforcement acknowledged in October 2018—shortly after we started the audit—that its enforcement database was missing an unknown number of enforcement records and that some records were missing important information. According to the staff member leading the database project, the commission plans to have all of its cases entered into the database by May 2019. He stated that as of February 2019 staff had reviewed all cases opened in 2018 to ensure that every field was complete and accurate. In addition, staff update fields for older cases as they begin actively investigating them. Until the commission ensures that its database contains complete and accurate information and has the necessary capabilities to track cases and violations in a useful manner, the database is unlikely to contribute to a data-driven enforcement strategy.

Collectively, the issues with the commission's prioritization matrix and database indicate that the commission's attempts at a data-driven enforcement strategy have not increased the effectiveness or efficiency of its enforcement program.

Collectively, the issues with the commission's prioritization matrix and database indicate that the commission's attempts at a data-driven enforcement strategy have not increased the effectiveness or efficiency of its enforcement program. In fact, when staff proposed amnesty options that would use scores based on the prioritization matrix to the enforcement committee, the chair of the enforcement committee said that he did not understand the framework of the matrix enough to determine whether the commission could use it to grant amnesty or dismiss cases. This is concerning, as it indicates that staff have not been able to adequately explain the prioritization matrix—a third of their data-driven strategy—to the enforcement committee, even after three years of development. Moreover, he indicated in the most recent enforcement strategy presentation that he did not see that staff had developed a systematic approach to resolving incoming violations. Rather than relying on an overly complex prioritization formula, an incomplete database, or potentially harmful amnesty options, the commission must resolve its backlog by creating and implementing an effective and efficient enforcement process, the requirements of which we describe in the Conclusions and Recommendations section of this report.

The Commission Did Not Keep Its Permit Fees Up to Date and May Need to Update Its Staff Guidelines for Permit Issuance

The commissioners have not updated permit application fees at regular intervals, which may have resulted in lost revenue. The commission charges permit fees ranging from \$100 to \$600,000, depending on the type and total cost of a project. For example, a permit for a minor repair or improvement costing \$5,000 requires a \$175 fee, whereas a permit for a project costing \$200,000 requires a \$900 fee. State regulations require the commission to review its fees every five years to calculate new fees using a formula based on its expenditures and fee revenue from the previous five years. Regulations specifically required the commission to recalculate its fees in 2013, but it waited until 2018 to perform the needed analysis.

We analyzed budgetary data provided by the commission and determined that had staff performed the fee calculation in 2013, the commission likely would have increased its fees, due to lower fee revenue in the preceding years. If it had done so, it would have collected an additional \$1 million since 2013. When the commission eventually did recalculate its fees in 2018, using the previous five years of budget data, it determined no fee increase was necessary, because its budget for permitting and enforcement had not increased enough relative to fees collected over those years to trigger an increase, according to regulations. By delaying its review of permitting fees, the commission missed an opportunity to raise them. In November 2018, the executive director reported to the commissioners that staff had delayed this calculation in part because of the lack of a chief counsel. However, it is unclear why a chief counsel was necessary for this process, as the commission had staff counsel available. By reviewing its permitting fees at regular five-year intervals, as state regulations require, the commission can ensure that its fees remain current and that it does not deny additional revenue to the State's General Fund.

Other than not adjusting its fees as required, the commission generally drafted reasonable permit conditions that complied with applicable state law. State laws and regulations set a 30-day deadline for the commission to respond to incomplete applications by notifying the requestor of the steps required to complete its submission and a 90-day deadline for issuing decisions on complete applications. We reviewed five permits and found no instances when the commission included a condition that appeared unreasonable or outside its legal authority. Further, we reviewed six other permit application files and found that staff generally responded by requesting additional information or approving the permits within the required time frames.

Had staff performed the fee calculation in 2013, the commission likely would have increased its fees due to lower fee revenue in the preceding years, and it would have collected an additional \$1 million since 2013.

State law requires that any proposed project to add or extract materials or to change the use of land, water, or structures within the commission's jurisdiction receive a public hearing.

However, we found that staff had used their discretion to issue permits in a manner that may be inconsistent with regulations. Citing the public's interest in the Bay as a natural resource, state law requires that any proposed project to add or extract materials or to change the use of land, water, or structures within the commission's jurisdiction receive a public hearing. Commission regulations list certain types of projects, such as boat docks below a certain size and routine repairs, as being exempt, meaning that staff can issue permits for these and similar projects without requiring a commissioner hearing. However, the regulations do not provide guidance for determining when a project is sufficiently similar to those on the list to be considered exempt. When we initially reviewed six applications, we identified an instance in which staff issued a permit for a building and connected deck on the Bay by declaring the project similar in size to a marina expansion, which regulations exempt from commissioner hearings. Staff provided a second instance in which they issued a permit for a bridge project by comparing its area to that of a multiple-boat dock, which the regulations also exempt. While these are not clear violations of regulations, they may represent another area in which the commissioners should provide additional guidance. Staff said they would prefer that the regulations have a more complete list of exempt projects but believe that as written they allow staff's current practices. The commission chair indicated that he supports the staff's interpretation of the regulations, but that the commission should review the flexibility staff have in permitting. Without such guidance, staff may use their discretion and the latitude provided by regulations to approve a broader range of projects than intended.

The Commission Did Not Always Comply With Public Meeting Requirements

Although the commissioners and enforcement committee generally conducted their hearings in compliance with open meeting laws, we noted some instances in which they failed to follow relevant requirements. State law requires the commission to take specific actions when the commissioners meet, including providing notice of their meetings in advance and allowing public comments on each item. In addition, regulations require staff to provide enforcement committee members with related documentation at least 10 days before each meeting and to summarize violation reports and recommended enforcement decisions during enforcement hearings. We reviewed three commissioner meetings and six enforcement committee meetings that occurred from 2016 through 2018 and found that the meetings generally met open meeting and enforcement hearing requirements. Although we identified

one enforcement committee hearing in which committee members expressed an intent to skip public comments for an agenda item, they allowed comments on advice from legal counsel.

However, we found that the commission did not consistently take minutes during closed sessions in public meetings. Although state open meeting laws allow the commissioners to hold sessions that are closed to the public to discuss pending litigation, personnel matters, or other confidential subjects, the laws require that the commissioners include descriptions of those sessions on a public agenda and designate a staff member to record minutes on the issues discussed and agreements reached. However, from 2016 through 2018, the commissioners did not ensure that staff took minutes during seven of the nine closed sessions we judgmentally selected for review. In the remaining two closed sessions, a member of the Office of the Attorney General took minutes, which satisfied the requirement.

When we notified staff of this issue, they indicated that they were unaware of the requirement to take minutes and would immediately address the issue for all future meetings. Although meeting minutes remain confidential, state law allows their review by courts if necessary to demonstrate that entities used closed sessions only for purposes allowed in law. Without this documentation, the commission lacks a tool to demonstrate that it complied with state laws regarding public meetings, and it could face legal action should a court require the minutes of closed meetings and those minutes do not exist. We reviewed documentation provided by the commission and verified that it has resolved this issue.

From 2016 through 2018, the commissioners did not ensure that staff took minutes during seven of the nine closed meetings we reviewed.

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Conclusions and Recommendations

The commission has consistently failed to execute its duties under state law and, as a result, has allowed ongoing harm to the Bay. This report identifies a number of concerns with the commission's efforts to protect the Bay, including its amassing of a backlog of about 230 enforcement cases, some of which are more than a decade old, and its failure to conduct site visits or actively protect its jurisdiction. Collectively, these concerns are the result of the commission's lack of a coherent enforcement process and insufficient guidance from the commissioners.

Although this report identifies multiple failings by the commission, it also highlights the importance of having a responsive body intent on protecting the Bay. The commission performs an important regulatory function when it issues permits for the Bay's hundreds of miles of shoreline, which in turn allow thousands of residents and visitors to enjoy public access. Moreover, as a regional entity, the commission is better positioned than local entities to ensure the consistency both of permits intended to protect the Bay and of enforcement efforts. Finally, through its involvement in the Adapting to Rising Tides program, the commission has taken recent actions to address sea-level rise in the Bay—an issue of growing importance that benefits from regional coordination.

However, to serve the purposes for which it was created, the commission will need to take action in tandem with the Legislature to correct the issues that we identify in this report, address past deficiencies, and create a robust enforcement program. The recommendations detailed here represent a suite of suggested actions for the Legislature and commission to implement, both immediately and as the commission makes progress toward revitalizing its enforcement efforts. Although full implementation of these recommendations will likely take several years, establishing an effective enforcement program is vital to the future health of the Bay.

Recommendations

Legislature

To improve the efficiency of the commission's current enforcement process, the Legislature should require the commission to create and implement the following by fiscal year 2020–21:

- A procedure to ensure that managers perform documented review of staff decisions in enforcement cases.

- Timelines for resolving enforcement cases.
- A penalty matrix for applying fines and civil penalties.

Further, the Legislature should direct the commission to begin developing regulations by fiscal year 2020–21 to define single violations and create a method of resolving minor violations through fines.

To ensure that the commission performs its duties under state law related to the Suisun Marsh, the Legislature should require a report from the commission upon completion of its comprehensive review of the marsh program every five years, beginning with a review in fiscal year 2020–21.

To ensure that the commission uses the abatement fund appropriately, the Legislature should clarify that the fund's intended use is for the physical cleanup of the Bay, rather than enforcement staff salaries. The Legislature should consider fully funding enforcement staff through the General Fund to align revenue sources with the commission's responsibilities.

After the commission implements the changes noted below, the Legislature should provide the commission with an additional tool to address violations by amending state law to allow the commission to record notices of violations on the titles of properties that have been subject to enforcement action.

Commission

To ensure that it maximizes the efficiency and effectiveness of its enforcement and permitting programs, the commission should take the following actions by January 2020:

- Develop and implement procedures to ensure that its management adequately reviews staff enforcement decisions. These procedures should include requirements detailing how staff should document and substantiate violations, case resolutions, and their rationale for imposing fines. Further, the procedures should require staff to conduct proactive enforcement, such as site visits, as resources allow.
- Develop and implement procedures to ensure that staff open, investigate, and close cases in a manner that is consistent with state law and that encourages the responsible use of staff time.

- Develop guidance that enumerates the violation types that the commissioners deem worthy of swift enforcement action, those that staff can defer for a specified amount of time, and those that do not warrant enforcement action or that can be resolved through fines.
- Simplify its system for prioritizing enforcement cases, to help it focus its enforcement efforts on cases with the greatest potential for harming the Bay.
- Create a penalty calculation worksheet. The commission should require the worksheet's use for all enforcement actions that will result in fines or penalties, and it should create formal policies, procedures, and criteria to provide staff with guidance on applying the worksheet.
- Develop a procedure to identify stale cases. After applying this procedure, the commission should seek appropriate settlements for such cases that preserve or exercise the State's legal rights to resolve violations and levy penalties.
- Evaluate and update permit fees every five years in accordance with its regulations.
- Conduct a comprehensive review of local agency compliance with the marsh program and issue recommendations as necessary to implement the protections outlined in the Suisun Marsh Preservation Act.
- Appoint a new citizens' advisory committee as required by law and determine a schedule for the committee to conduct regular meetings.

To ensure that it uses the abatement fund for the physical cleanup of the Bay, the commission should create a policy by January 2020 identifying the minimum amounts it will disburse and prioritizing the projects that it will support through disbursements to the appropriate entities.

To build on prior recommendations and ensure that it maximizes the effectiveness of its enforcement program, the commission should take the following actions by January 2021:

- Conduct a workforce study of all its permit and regulatory activities and determine whether it requires additional staff, including supervisors, to support its mission.
- Implement a permit compliance position to support the efforts of enforcement staff and the implementation of process changes. If necessary, it should seek additional funding for such a position.

- Update its existing database or create a new database to ensure that it can identify and track individual violations within each case, including the date staff initiate the standardized fines process for each violation. As part of this process, the commission should review its database and update it as necessary to ensure that it includes all necessary and accurate information, specifically whether staff initiated the standardized fines process for open case files and for those case files closed within the past five years.

To ensure consistency in its enforcement program, the commission should perform the following regulatory actions by January 2021:

- Create and implement regulations that identify required milestones and time frames for enforcement.
- Create and implement regulations that define substantial harm, provide explicit criteria for calculating the number of violations present in individual enforcement cases, and specify a process to handle any necessary exceptions to the criteria.
- Create and implement regulations to allow it to use limited monetary fines to resolve selected minor violations that do not involve substantial harm to the Bay.
- Update its regulations on permit issuance to offer greater clarity on the types of projects for which staff may issue permits without commissioners' hearings.

We conducted this audit under the authority vested in the California State Auditor by Government Code 8543 et seq. and according to generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives specified in the Scope and Methodology section of the report. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Respectfully submitted,



ELAINE M. HOWLE, CPA
California State Auditor

Date: May 14, 2019

Appendix A

SCOPE AND METHODOLOGY

The Joint Legislative Audit Committee (Audit Committee) directed the California State Auditor to examine the commission’s enforcement activities, funding, operational needs, and structure. Table A lists the objectives that the Audit Committee approved and the methods we used to address them.

Table A
Audit Objectives and the Methods Used to Address Them

AUDIT OBJECTIVE	METHOD
<p>1 Review and evaluate the laws, rules, and regulations significant to the audit objectives.</p>	<p>Reviewed relevant state laws and regulations related to the commission.</p>
<p>2 Review the commission’s enforcement program, including its policies and procedures for opening, prioritizing, investigating, and closing alleged violations of the commission’s permits. Determine the frequency and extent to which enforcement staff work with alleged violators to resolve confirmed violations or refer the violations to the enforcement committee or the Office of the Attorney General for prosecution.</p>	<ul style="list-style-type: none"> • Interviewed key enforcement staff and managers. • Because the commission’s own database is still in development, we created a database of commission enforcement activity from 2012 through 2017 to develop statistics related to that activity. • Reviewed a selection of 10 enforcement cases from that time period in detail, including seven that staff processed pursuant to the commission’s standardized fines regulations and three that they closed without enforcement action. • Reviewed the seven enforcement cases referred to the commissioners in 2016 and 2017. The commission did not refer cases to the Office of the Attorney General during our review period.
<p>3 Analyze the role and function of the enforcement committee and assess the enforcement committee’s process for reviewing staff-recommended enforcement decisions and penalties.</p>	<ul style="list-style-type: none"> • Reviewed regulations and procedures related to the enforcement committee. • Interviewed staff, management, enforcement committee members, and the deputy attorney general concerning their processes for reviewing enforcement case files.
<p>4 Determine whether the commission has adequate procedures in place to document and track the permits it issues and alleged violations. Identify the number of alleged violations for the most recent five years and identify any unusual trends in the volume and types of alleged violations and the reasons for these trends.</p>	<ul style="list-style-type: none"> • Reviewed regulations and procedures related to permitting and violations. • Developed statistics related to enforcement using the database we created for Objective 2.

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AUDIT OBJECTIVE	METHOD
<p>5 Review a selection of alleged violations, including those related to violation of unpermitted or unauthorized Bay fill, to determine the following:</p>	
<p>a. Whether enforcement staff consistently followed laws, regulations, and internal policies and appropriately documented their investigation and penalty assessment. Additionally, determine whether serious violations and minor violations are given proportional penalty assessments.</p>	<ul style="list-style-type: none"> • Reviewed a selection of 10 enforcement cases staff closed from 2012 through 2017, including seven cases in which staff initiated the standardized fines process and three that they closed with no enforcement action. • Reviewed seven enforcement cases in which the commission commenced formal enforcement. • Interviewed enforcement staff and managers.
<p>b. The frequency and extent to which the enforcement committee adopts, modifies, or rejects staff recommendations.</p>	<p>Reviewed the enforcement committee's enforcement decisions for seven enforcement cases in 2016 and 2017. For these cases, the enforcement committee modified the staff recommendation in three cases and adopted it in three cases. The seventh case went to the commissioners, who adopted the staff recommendation.</p>
<p>c. To the extent possible, whether the enforcement committee members and the full commission approve enforcement decisions and penalties after a comprehensive and thorough review of the complete record.</p>	<ul style="list-style-type: none"> • Reviewed the enforcement committee's decisions from 2012 through 2017. We reviewed the documents submitted to the commissioners in advance of hearings on these enforcement cases. • Surveyed commissioners and alternates to assess their level of comfort with the time given to review the record of enforcement actions.
<p>d. The length of time the enforcement committee and the full commission take to reach their final decisions and the reasonableness of the time frame.</p>	<ul style="list-style-type: none"> • Reviewed meeting minutes and the corresponding audio files to determine the amount of time the enforcement committee and commissioners spent on enforcement hearings. We determined that enforcement committee hearings average two hours per case and commission hearings average one hour. We did not identify significant concerns.
<p>e. Whether the commission has adopted and implemented procedures for enforcement hearings before the enforcement committee and before the commissioners that provide for notice, time limits, the admissibility of evidence, and other factors affecting the ability of a respondent to address the proposed enforcement action.</p>	<ul style="list-style-type: none"> • Reviewed the audio files and transcripts for the enforcement hearings related to the seven enforcement cases that commission staff referred for formal enforcement in 2016 and 2017. • Reviewed the commission's regulations and observed that they include the procedures of the enforcement committee.
<p>f. Whether the hearings comply with open meeting requirements.</p>	<p>Reviewed the commission's agendas, meeting minutes, and other meeting records to assess compliance with open meeting requirements.</p>
<p>g. For permit violations, whether the terms and conditions included in the permits are clear and reasonable and are consistent with the commission's authority under state law, regulations, and applicable court decisions. To the extent possible, identify best practices and opportunities that may help mitigate potential compliance issues.</p>	<ul style="list-style-type: none"> • Reviewed the terms and conditions in a selection of five permits to determine reasonableness and adherence to requirements. • Reviewed six permit applications to ensure that the commission adhered to required time frames. • Reviewed enforcement processes in other jurisdictions to identify best practices.
<p>6 Examine the policies and procedures the commission has established to prevent real or perceived conflicts of interest in the enforcement program.</p>	<ul style="list-style-type: none"> • Reviewed commission policies and procedures related to conflicts of interest. • Assessed the commission's compliance with state conflict-of-interest filing requirements and did not identify any significant issues.
<p>7 Review the commission's use of the abatement fund to determine whether its use of the fund is consistent with its duty and authority and whether such uses are allowable and consistent with applicable state law.</p>	<ul style="list-style-type: none"> • Interviewed commission management. • Identified how the commission used the abatement fund from fiscal years 2012–13 through 2017–18. • Reviewed information related to the abatement fund from the Department of Finance and the State Controller's Office.

AUDIT OBJECTIVE	METHOD
<p>8 Determine whether the commission has adequate resources and staffing levels to meet current and anticipated permit and enforcement workload demands and to address sea-level rise.</p>	<ul style="list-style-type: none"> • Interviewed the executive director, chief deputy director, and regulatory program director to determine whether the commission had conducted workforce studies. • Reviewed attendance records for the planning, permit, and enforcement units for fiscal years 2016–17 and 2017–18 to determine overtime levels.
<p>9 Review and assess the governance structure of the commission and, to the extent possible, compare it to similar organizations to determine whether other structures may lead to a more engaged commission with more effective oversight.</p>	<ul style="list-style-type: none"> • Assessed the size of the commission and noted similarities between it and the California Coastal Commission. • Conducted additional work related to commission governance in objectives 5f and 6.
<p>10 Review and assess any other issues that are significant to the audit.</p>	<ul style="list-style-type: none"> • Reviewed documents related to the <i>Suisun Marsh Habitat Management, Preservation, and Restoration Plan</i>. • Interviewed key personnel at the California Department of Fish and Wildlife and the Suisun Resource Conservation District regarding the <i>Suisun Marsh Habitat Management, Preservation, and Restoration Plan</i>.

Source: Analysis of the Audit Committee’s audit request number 2018-120, as well as information and documentation identified in the table column titled Method.

Assessment of Data Reliability

As we note in Table A, we did not rely on electronic data that we obtained from the commission and instead created our own database of the commission’s enforcement activities to address certain audit objectives.

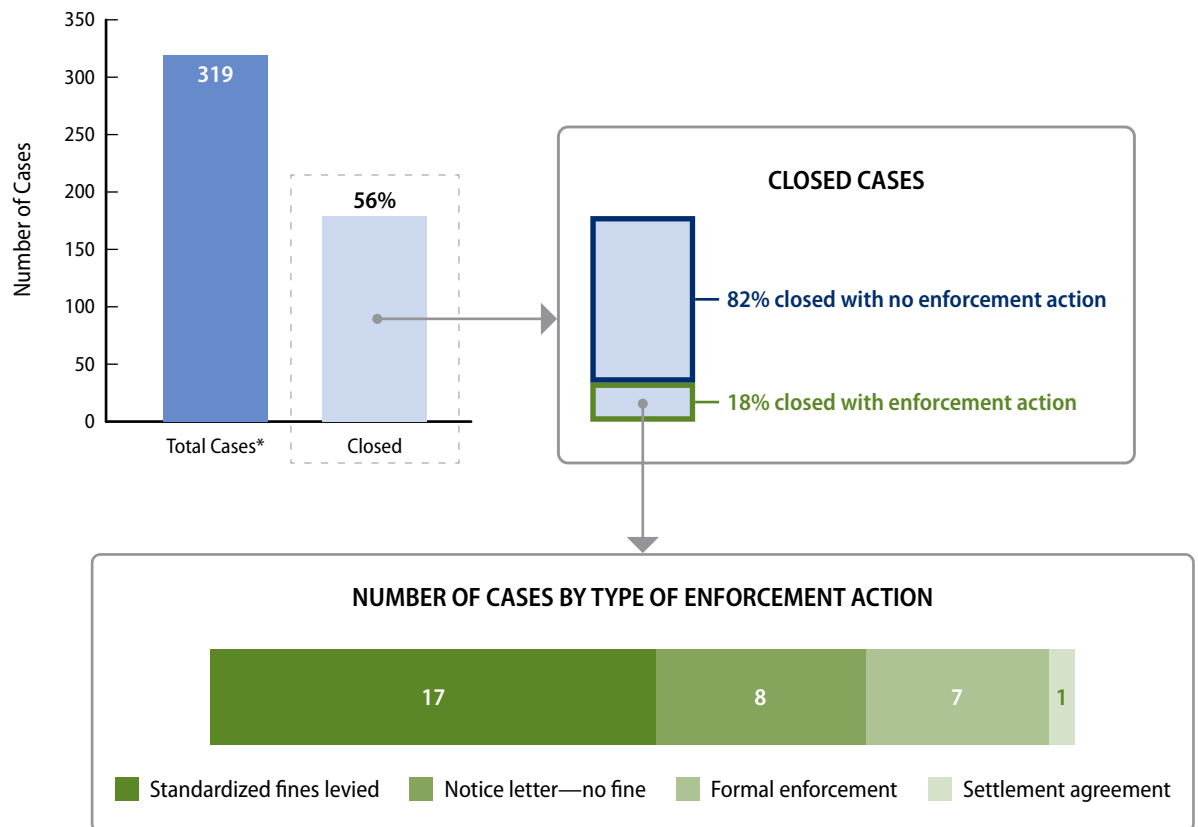
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Appendix B

ENFORCEMENT ACTIONS TAKEN BY THE COMMISSION FROM 2012 THROUGH 2017

In about 80 percent of the cases it closed from 2012 through 2017, the commission took no enforcement action. Staff closed cases without action for a variety of reasons, including merging the case with others, discovering there was no violation, issuing a permit amendment, or stating that the respondent fixed the violation before staff sent a notice letter. Of the 33 cases the commission closed after initiating enforcement, half were closed after staff levied a fine through the standardized fines process. Figure B shows the percentage of cases closed after the commission began enforcement and the types of enforcement actions taken.

Figure B
 The Commission Took Enforcement Actions in Less Than 20 Percent of the Cases It Closed From 2012 Through 2017



Source: Commission enforcement data.

* Case total does not include cases in the backlog that were opened before 2012.

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Appendix C

COMMISSIONERS’ AND ALTERNATES’ RESPONSES TO SELECTED SURVEY QUESTIONS

We surveyed all 26 commissioners and 22 alternates regarding the enforcement process. We received 22 verified responses—14 from commissioners and eight from alternates.¹⁰ In Table C, we present aggregated responses to selected questions. Most of the respondents indicated that they did not have any concerns with commission staff’s processes or performance. Additionally, most respondents indicated that they were satisfied with the rate at which staff have been resolving enforcement cases at the staff level.

Table C
Responses to Selected Survey Questions

QUESTION	
As it pertains to enforcement matters, do you have any concerns with commission staff processes or performance?	32% Yes
	68% No
Are you satisfied with the rate at which commission staff have been resolving enforcement cases at the staff level?	77% Satisfied
	23% Dissatisfied
As it pertains to the enforcement cases that the full commission will hear, what is your level of review for the staff-provided materials?	41% In-depth (substantially all documentation)
	59% Moderate (i.e., violation report and exhibits)
As it pertains to enforcement cases that the full commission has heard, did you generally receive sufficient time to review the related enforcement documentation before the enforcement hearing?	100% Yes
	0% No
Would you like commission staff to provide you with additional guidance or documentation concerning the enforcement process?	32% Yes
	68% No

Source: Survey responses from 14 of the 26 commissioners—one position was vacant—and eight of 22 alternates as of December 2018.

¹⁰ At the time we conducted our survey, 26 commissioners served on the commission.

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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

April 19, 2019

Ms. Elaine M. Howle, CPA*
California State Auditor
621 Capitol Mall, Suite 1200
Sacramento, CA 95814

RE: Confidential Draft SF BCDC Audit Report, 2018-120

Dear Ms. Howle:

The San Francisco Bay Conservation and Development Commission has reviewed the draft audit report addressing the Commission's enforcement program and appreciates the opportunity to submit this response.

We appreciate the professionalism of the State Auditor staff and the time they spent trying to understand BCDC's enforcement program. We also appreciate their recognition of the critical function that BCDC performs regulating development in and around the San Francisco Bay and protecting the Suisun Marsh. We are pleased with the staff's finding that BCDC generally drafts reasonable permit conditions in compliance with state law and that this is accomplished in a timely manner as required by state law. We are also pleased with the support for our mission and enforcement function that is reflected in the draft report.

Indeed, BCDC plans to use this report to advocate for more resources to allow us to make critical improvements and do more enforcement better. As discussed below, BCDC currently lacks adequate staff and resources to allow it to keep up with the enforcement caseload. We need more people and improved technology, and we intend to pursue these additional resources consistent with the recommendations in the draft report. ①


We are also pleased that the audit found no support for many of the concerns apparently expressed by some permittees, as reported in the June 29, 2018 letter from the members of the Legislature requesting the audit, including alleged bias on the part of BCDC staff, instances of staff allegedly "moving the goal posts" by changing requirements after permittees worked to satisfy requirements previously set by staff, or a perception of staff as motivated by personal considerations or a desire to add punitive enhancements to fines, rather than achieving the best result for the environment and the public. Similarly, we appreciate that the audit found no evidence that enforcement hearings before the Enforcement Committee and Commission are conducted in a manner that is inconsistent with the Commission's regulations and that the audit team made no findings that these procedures fail to allow for adequate due process or fail to comply with open-meeting requirements. ② ③

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The response that follows is organized into three sections. The first section sets forth BCDC's general comments on the draft audit report. The second section sets forth our responses to the recommendations. The third section sets forth identified issues and corrections to the content of the draft audit report.

Once again, we appreciate this opportunity to respond to Draft Audit Report No. 2018-120. If you have any questions, please contact me.

Sincerely,



LAWRENCE J. GOLDZBAND
Executive Director

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RESPONSE

PART I. GENERAL COMMENTS

BCDC has not neglected its mission to protect the Bay and the Suisun Marsh. BCDC acknowledges that it has a growing backlog of enforcement cases that needs to be reduced and that it should update and make more consistent its enforcement processes, and BCDC will use this report to do so. Nonetheless, it is important to emphasize that BCDC has not “neglected” its responsibilities or mission, and the draft report does not argue that BCDC has done so. The sensationalistic first sentence of the introduction and the title of Chapter 1 ignores BCDC’s successful implementation of a permitting process that has protected the San Francisco Bay and the Suisun Marsh since the creation of BCDC fifty years ago. The agency has issued thousands of permits and continuously updates its plans and policies to address the most pressing issues impacting the Bay, such as rising sea levels, habitat restoration, environmental justice, and development. BCDC has also been continuously engaged with the public to ensure that activities of varying types comply with state laws and policies and protect the Bay and the public’s access to it. As a result of these efforts, the Bay is now larger and healthier than it was fifty years ago and the public has benefitted from hundreds of miles of diverse and open access to the Bay and its unique resources. ④

In addition, BCDC has led the region – and the nation – in addressing rising sea level and climate change through its planning and permitting activities. In 2011, BCDC was the first coastal management agency in the nation to adopt climate change policies into its coastal management plan requiring projects to conduct a sea level rise risk assessment using the best available science so that projects can adapt to future sea level conditions. BCDC also leads the award-winning *Adapting to Rising Tides* (ART) program to lead and support multi-sector cross-jurisdictional projects that build local and regional capacity in the San Francisco Bay Area to plan for and implement adaptation responses. Currently BCDC is undertaking the first regional sea level rise vulnerability assessment of the entire Bay Area – *Adapting to Rising Tides* (ART) Bay Area – integrating transportation systems, vulnerable communities, growth areas, and natural areas into a single analysis. With this initiative, BCDC is poised to lead a collaborative regional effort to develop a regional shoreline adaptation plan.

BCDC is also continuously updating its policies and plans to better reflect and respond to the most important issues facing the Bay. The Commission currently has three major amendments underway: (1) the Fill for Habitat Bay Plan Amendment; (2) the Environmental Justice and Social Equity Bay Plan Amendment; and (3) a major update to the San Francisco Bay Area Seaport Plan. BCDC has expended considerable staff resources addressing the Suisun Marsh Local Protection Program components. This includes: (1) working with the Suisun Resource Conservation District (SRCD) on updating its *Suisun Marsh Local Protection Program* component, which covers the majority of the Marsh, (2) establishing a digital geo-referenced database of all of the Suisun Marsh duck clubs for use by the SRCD and BCDC; and (3) work to process amendments to Solano County’s *Suisun Marsh Local Protection Program* component. Added to this, BCDC operates other ongoing programs on important Bay-wide issues such as regional sediment management, dredging, oil spill prevention and geospatial data, in addition to handling multiple requests for amendments to the Bay Plan.

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- ⑤ In sum, protection is not synonymous with enforcement. Protecting the Bay is integral to everything BCDC does in service of the San Francisco Bay Area and the State at-large; and taking into account the thousands of hours that BCDC's Commissioners and staff dedicate to this important work every year, it is simply false to say otherwise. Therefore, a more accurate and fair opening sentence for the report is the last sentence in the first paragraph, which says "... the commission has consistently struggled to perform key responsibilities related to enforcement and has therefore allowed ongoing harm to the Bay."

It is difficult to comprehensively analyze the Commission's enforcement program and its challenges by focusing primarily on the actions that the Commission has taken since 2012.

- ① While BCDC agrees that the enforcement program can be improved and that enforcement should continue to receive greater attention within the agency, an examination of the history of BCDC's enforcement efforts shows that adequate funding for personnel and resources has been a decades-long struggle and that much-needed improvements will be difficult to implement and sustain without increased resources.

The McAteer-Petris Act was amended in the early 1970s to add the existing enforcement authorities, but it was not until 1977 that the Commission received funding to hire its first full-time enforcement analyst. Since then, BCDC's enforcement staff has varied between one and four analysts, with three analysts and a supervisor being the most staff devoted to enforcement in any time period.

It is important to understand BCDC's budget history because, while the report accurately notes that BCDC has a significant case backlog, this backlog was not created in the short time span from 2012 to the present. History also demonstrates that the backlog cannot be effectively eliminated consistent with BCDC's mission if the agency does not request and is not provided with the funds required to enforce the McAteer-Petris Act and the requirements of the permits that BCDC issues.

In 1995, when the Commission examined potential changes to the enforcement regulations as part of Governor Wilson's regulatory reform program, BCDC had one full-time enforcement staff person and approximately 50-70 open enforcement cases. A strategic plan developed in 1998 recommended enlarging the enforcement staff and making improvements to the program. Around this time, BCDC first started using the Bay Fill Clean-up and Abatement Fund to pay enforcement staff salaries, which allowed the Commission to increase the enforcement staff from one to two. Three years later, the Commission adopted a strategic plan that again included a goal of improving BCDC's compliance and enforcement program. After adopting the strategic plan, the Commission created a Compliance and Enforcement Task Force composed of staff and Commissioners charged with reviewing the current practices and regulations and developing proposals to improve the program. This resulted in a number of reforms to both the McAteer-Petris Act and the Commission's regulations, including, in particular, some revisions to the standardized fine regulations in section 11386 of BCDC's regulations.

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Around the time the Enforcement Task Force was completing its work, the State also began experiencing budget problems that worsened after September 11, 2001. State agencies were required to implement budget reductions, and these reductions impacted the enforcement staff at BCDC. Later, in 2008, just as BCDC began to increase enforcement staff, the Great Recession and state worker furloughs effectively limited the personnel hours devoted to enforcement.

Fortunately, the Governor and State Legislature approved BCDC's 2018 request to use the Bay Fill Clean-up and Abatement Fund to increase BCDC's enforcement staff. This is enabling the agency to hire both an additional attorney and an enforcement program manager. Under its current leadership, BCDC is making significant strides in prioritizing enforcement and increasing the resources devoted to enforcement. Nonetheless, absent a further increase in available resources, the agency cannot make the important improvements recommended in the report. BCDC estimates that increase to total about \$1.5 million annually.

BCDC's current lack of staff resources is hindering its ability to fully achieve its enforcement functions. The draft report states that staffing challenges and staff turnover have exacerbated issues with the enforcement process. A significant component of the recent issues with turnover is the growing market differences between California's coastal areas and the rest of the State. The Commission supports the establishment of a geographic pay compensation system that will allow BCDC to offer compensation that recognizes the difference in the cost of housing in the Bay Area in comparison to Sacramento and the rest of the State. The agency urges that support for this effort be included in the draft report.

The draft report also recommends that the Commission conduct a workforce study. This a valuable recommendation, but, even absent such a study, it is clear that BCDC lacks adequate staff and resources to allow it to eliminate the backlog and fully enforce state law and the conditions of the permits that it issues. As noted in the report, reassigning existing staff would jeopardize other equally important responsibilities. Simply put, improving the enforcement program requires additional personnel and resources totaling approximately \$850,000 annually.

Greater emphasis on compliance would be beneficial. The report recognizes the significant amount of time that staff spend attempting to resolve cases amicably and comprehensively before initiating a formal enforcement action. However, as the report notes, staff lack the tools to adequately monitor compliance with permit conditions and address permit violations proactively.

Permits generally require reporting, monitoring, and ongoing maintenance, but without the necessary resources, including both personnel and technology, it is difficult to ensure that all permittees are complying with permit requirements. The limited staff and resources also limit BCDC's ability to resolve issues before they become significant. As noted above, BCDC has recognized for many years that more emphasis on compliance would probably help control the backlog of cases. To do so, BCDC requires more funding to create a permit compliance position to support the enforcement efforts. It also needs the resources to develop a full-scale regulatory (permits, compliance, enforcement) tracking system.

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- ⑥ It is also not accurate to state that staff never conduct site visits or undertake patrols of permitted areas in advance of bringing an enforcement action. Site visits occur, but, due to limited time and resources, site visits are typically combined with other activities, such as inspections for developments that are undergoing permitting or visits to other nearby sites that are the subject of an enforcement action. With greater resources, staff could implement procedures to patrol areas and conduct proactive inspections more regularly.

Commissioners continue to provide leadership and guidance. The report states that a lack of management review and oversight by the Commission have contributed to enforcement process problems. BCDC agrees that Commission direction and management oversight are both key to an effective enforcement program. That is why BCDC re-invigorated the Enforcement Committee to resolve major cases and provide policy guidance. While the Commission agrees that the adoption of formal policies and guidance will improve the enforcement program and minimize the risk for error, the Commission does not agree with the

- ⑦ statement that it has improperly delegated enforcement duties to staff. It is important to recognize that the standardized fine process, and other processes used to resolve cases at the staff level, are intended to promote prompt and efficient resolution of violations without action by the Commission. BCDC staff will explore additional measures to ensure that the Commission is sufficiently informed of enforcement activities, but one of the objectives of the reforms that BCDC is developing is less, rather than more, burdensome enforcement procedures. It is thus important to ensure that staff are able to continue their work to resolve cases efficiently and short of formal Commission action.

Staff follow regularized procedures for pursuing enforcement and conducting management review but these have not been formalized and are not always documented in the case files. The draft report states in several places that BCDC lacks formal guidance, procedures, and policies that detail critical aspects of the enforcement process. BCDC agrees that several valuable process improvements could be undertaken, including the development of formal policies for describing violations and calculating penalties. Nonetheless, the failure to cite formal procedures should not be interpreted to mean that there are no regularized procedures for commencing and bringing cases forward and that all aspects of BCDC's enforcement efforts lack consistency. The lack of formal processes does not equate to a lack of coherent or regularized processes.

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- ⑩ Also, in general, management does review the enforcement cases that are pursued and oversee staff activities. The chief of enforcement and a member of the legal team and/or the regulatory director, as needed, review all letters sent to violators, although these internal staff communications are generally not documented in the case files. Case files are public-facing; therefore, it is inappropriate to include draft versions of documents with reviewer's notes and mark-ups in them. BCDC also has a records retention schedule specifying that these staff notes and internal draft edits should not be retained. Due to the scope of the audit, the auditors did not review cases being actively investigated, which would demonstrate the extensive level of management review that occurs throughout the enforcement process.

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BCDC's enforcement efforts are hindered by inadequate information and records management systems. Generally speaking, BCDC agrees with the audit staff's observation that the current enforcement database should be improved. Nonetheless, it is important to recognize the context in which this database exists. As explained to the audit team, largely as a result of resource limitations, BCDC currently relies on information and records management systems that create inefficiencies and reduce staff productivity. These inefficiencies include but are not limited to duplication of effort, lack of remote access to key systems, and a lack of current industry standard tools, forcing staff to spend excessive time on tasks such as filing and searching for records.

In recent years, BCDC has made important improvements to its information management systems. The draft report does not acknowledge that the current database was created in-house with very limited resources, and became operational just days before the audit started. It is a major improvement on the pre-2018 management tools and some limitations on the information in the database are the result of limited staff and time to input the information. Nevertheless, BCDC agrees that its systems should be improved, and these improvements include the acquisition of an industry standard platform that links permitting, compliance, and enforcement case management. Using data provided by other agencies, a preliminary estimated cost for a tool of this nature is, at minimum, \$225,000 to install and \$40,000 per year to operate. This also would not necessarily replace any costs currently incurred for existing tools, and this does not include various other needed improvements to BCDC's systems, including up to \$200,000 annually for additional staff to manage the system. Currently, staff is working with the IT Director of the California Natural Resources Agency to develop a three-year plan to address BCDC's highest priority information technology needs agency-wide.

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PART II. RESPONSE TO SPECIFIC RECOMMENDATIONS

I. Suggestions to the Legislature

Require the following by 2020-21:

- A. **Require BCDC to create and implement a procedure to ensure that managers perform documented review of staff decisions in enforcement cases.** BCDC agrees that oversight of staff enforcement is important but does not agree that legislative action on this is necessary or appropriate. As noted above, review is generally conducted for all enforcement cases, although this is not always documented in the public-facing enforcement case files. BCDC will explore how to develop more formal procedures and means of documenting review of staff decisions.
- B. **Create timelines for resolving enforcement cases.** BCDC agrees that resolving cases in a timely manner is important and that timelines can assist in achieving this objective, but does not agree that legislative action on this is necessary or appropriate. However, in the past, particularly during the regulatory review effort undertaken in the 1990s, the Commission and staff agreed that legislatively-established limitations periods or

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timelines could jeopardize the Commission's ability to enforce its laws and regulations and remedy violations. BCDC does not agree that legislative action on timelines is necessary, but BCDC is committed, as noted below, to developing policies and procedures to promote the resolution of enforcement cases within targeted timelines.

- ⑬ C. **Create and implement a penalty matrix for applying fines and penalties.** BCDC supports this recommendation but does not agree that legislative action is necessary to implement a penalty matrix. Through a public process, under the guidance of the Commission and Executive Director, staff will commence an effort to develop a matrix and/or policies or regulations to apply to fines and penalties.
- ⑬ D. **Direct the commission to begin developing regulations by fiscal year 2020-2021 to define single violations.** BCDC supports the recommendations for improvements to its enforcement program, but does not agree that a legislative directive to develop regulations is necessary or appropriate, absent a thorough evaluation of the required changes and the best means of implementing these changes. Through a public process, under the guidance of the Commission and the Executive Director, staff will commence an effort to develop regulations and/or policies and guidance that define violations.
- E. **Direct the commission to begin developing regulations to create a method of resolving minor violations through a fine.** BCDC supports the recommendation to evaluate regulatory changes that could assist in resolving minor violations more efficiently. Through a public process, with Commission oversight, BCDC will commence an examination of the standardized fines regulations and explore means of ensuring that there is an efficient process for resolving minor violations through a fine.
- F. **To ensure that the commission complies with its duties under the state law related to the Suisun Marsh, the Legislature should require the Commission to report to the Legislature and the public upon completion of its comprehensive review of the marsh plan every five years, beginning with FY 2020-21.** BCDC agrees with this recommendation and notes that the Commission adopted, on March 15, 2019, a staff recommendation to undertake a comprehensive review the Marsh Act, Suisun Marsh Protection Plan, and local protection plans, subject to availability of resources and starting with a collaborative meeting of interested agencies and groups. BCDC estimates that, initially, this will require about \$465,000 annually.
- ⑮ G. **To ensure that the commission uses the abatement fund appropriately, the Legislature should clarify that the Clean-up and Abatement Fund's intended use is for physical cleanup of the Bay, rather than enforcement staff salaries.** BCDC does not agree that the use of the Bay Fill Clean-up and Abatement Fund is currently limited by statute to physical cleanup actions in the Bay, but would welcome clarification by the Legislature if it is determined that actions to enforce the requirements of the McAteer-Petris Act and BCDC permits do not further the removal of fill or "other remedial cleanup or abatement actions" within the Bay consistent with Government Code § 66647(b). BCDC

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further notes it may only use funds from the Bay Fill Clean-up and Abatement Fund when appropriated by the Legislature, and thus, starting as early as FY 99-00, BCDC has used the Clean-up and Abatement Fund when necessary to fund all or a portion of enforcement staff salaries with the knowledge of both the Legislature and Department of Finance.

- H. **Consider fully funding enforcement through the General Fund to align revenue sources with the Commission's responsibilities.** BCDC supports this recommendation and hopes the Legislature would include additional funding to establish and maintain an effective compliance program. This additional funding should be sufficient to allow BCDC to hire additional people and acquire the technological resources that it needs.
- I. **After the Commission implements the changes noted below, the Legislature should provide the Commission with an additional tool to address violations by amending state law to allow the Commission to record notices of violation on the titles of properties that have been subject to enforcement action.** BCDC supports this recommendation and hopes the Legislature would provide the commensurate funding necessary to administer this change. Notably, however, BCDC does not believe that legislation to provide this tool should be delayed. BCDC is committed to improving the enforcement program, and this tool could result in significant improvements to BCDC's ability to manage its caseload. (17)

II. Suggestions to the Commission

The Commission should take the following actions by January 2020:

- A. **Develop and implement procedures to ensure that its management adequately reviews staff enforcement decisions.** These procedures should include requirements detailing how staff should document and substantiate violations, case resolutions, and their rationale for imposing fines. The procedures should also include requirements for staff to provide achievable levels of proactive enforcement and site visits. BCDC agrees with the recommendation to develop procedures to detail how violations are documented and substantiated and how cases are resolved and fines are imposed. Staff is exploring how to become more proactive in its enforcement efforts, recognizing, as noted above, that time and resources may limit the ability to engage in regular site visits or other proactive efforts. BCDC will also explore means of furthering management review of enforcement decisions and possibly better documenting the review that is occurring.
- B. **Develop and implement procedures to ensure that staff open, investigate, and close cases in a manner that is consistent with state law and that encourages the responsible use of staff time.** BCDC staff actions currently comply with state law. That being said, BCDC agrees with this recommendation. Staff has begun developing and will continue to develop formal procedures to govern the opening, investigation, and closure of cases and will report to the Commission on the development and finalization of these procedures as this process proceeds. The goal of this effort will be to use existing staff time and resources as effectively and efficiently as possible. (18)

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- C. **Develop guidance that enumerates the violation types that the commission deems worthy of swift enforcement action, those that staff can defer for a specified amount of time, and those that do not warrant enforcement action or that can be resolved through fines.** BCDC agrees with this recommendation and will work to improve its current processes and approach to enforcement case prioritization.
 - D. **To help it focus its enforcement efforts on cases with the greatest potential for harming the Bay, the commission should simplify its system for prioritizing its enforcement cases.** BCDC agrees with this recommendation in general. However, staff does not agree with the implication that the prioritization tools have been ineffective in assisting enforcement staff in managing their caseloads. Instead, the prioritization tool has provided the Commission with a defined list of the highest priority cases on which staff can focus their limited resources. In addition, staff now has an interactive, public-facing online enforcement report form that allows members of the public or outside organizations to directly input complaint data into BCDC's digital case management system, providing, to the extent the information is known, the location on a map of the Bay, as well as available details to assist in documenting the violation. These tools demonstrate the staff's desire to continue to improve upon the value of the services it delivers to the public, independent of the audit and its findings. As noted above, staff hopes that additional resources will be provided by the Legislature to purchase better tools that can be used to effectively and efficiently assist in case management and prioritization.
 - E. **Create a penalty calculation worksheet. The commission should require the worksheet's use for all enforcement actions that will result in fines or penalties, and it should create formal policies, procedures, and criteria to provide staff with guidance on the application of the worksheet.** BCDC agrees with this recommendation. Through a public process, with Commission oversight, staff will develop a penalty calculation matrix or similar kind of tool. Staff will also review the standardized fines regulations to determine whether improvements can be made to the regulations governing standardized fines.
 - F. **Develop a procedure to identify stale cases. Following the application of this procedure, the commission should seek appropriate settlements for such cases that preserve or exercise the State's legal rights to resolve violations and levy penalties.** BCDC agrees with this recommendation. Staff have started to review the current open cases and cases that BCDC is not actively pursuing, with the goal of resolving cases and reducing the backlog.
 - G. **Evaluate and update permit fees every five years in accordance with its regulations.** BCDC agrees with this recommendation, and BCDC has initiated a process to amend the fees.

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- H. **Conduct a comprehensive review of local agency compliance with the marsh plan and issue recommendations as necessary to implement the protections outlined in the Suisun Marsh Preservation Act and its component plans.** While BCDC agrees with this recommendation, completing this by January 2020 is not realistic and is inconsistent with the Auditor's recommendation to the Legislature on page 37 of the draft report. As described above, this review will be undertaken consistent with the Commission's direction as adopted at its March 7, 2019 meeting. BCDC recommends moving this recommendation to the list of commission actions required for 2021 and notes that this timeframe is more appropriate in light of the resources and time required to complete a comprehensive review. (20)
- I. **Appoint a new citizens' advisory committee as required by law and determine a schedule for the committee to conduct regular meetings.** The Commission recently considered appointing a new Citizens Advisory Committee and determined that doing so is likely unnecessary given the Commission's greatly expanded public outreach efforts during the past six years. The CAC was also never intended to focus on enforcement and likely would provide little benefit in implementing the recommendations in this draft report. While the CAC was an active and valuable voice in the development of the Bay Plan and other initial actions, the Commission recently determined that reactivating it is not a priority given the benefits provided by establishing real-time working groups that provide input on key initiatives. The Commission noted that BCDC has created five Commissioner working groups addressing rising sea level, bay fill, environmental justice and social equity, financing the future, and public education. These have met publicly and engaged both formally and informally with interested stakeholders and the public. The Planning Division has also expanded its public outreach to local governments, private sector interests, and neighborhood and community-based organizations. The Commission is also developing a robust engagement strategy for the Regional Sea Level Rise Adaptation Plan, including forming a multi-sector, cross-jurisdictional advisory committee, as well as a technical committee to advise and guide the Commission's activities. (21)
- J. **To ensure that it uses the abatement fund for the physical cleanup of the Bay, the commission should create a policy by January 2020 identifying the minimum amounts from the Bay Fill Cleanup and Abatement Fund that BCDC will disburse and prioritize the projects that BCDC will support through disbursements to the appropriate entities.** As noted above, BCDC does not agree that using the Clean-up and Abatement fund to pay enforcement staff salaries does not comply with the intent of section 66647(b) of the McAteer-Petris Act. Nonetheless, BCDC will explore how best to disburse funds, provided that such disbursement does not jeopardize the ability to staff and implement a robust enforcement effort. (16)

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To build on prior recommendations and ensure that it maximizes the effectiveness of its enforcement program, the commission should take the following actions by January 2021:

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- K. Conduct a workforce study of all its permit and regulatory activities and determine whether BCDC requires additional staff, including supervisors, to support its mission.** BCDC agrees with this recommendation. However, BCDC cannot do so without increased funding, and it is clear now that implementing this report's recommendations will require additions to staff. BCDC needs at least three analysts and additional legal support to undertake the level of enforcement necessary to eliminate the backlog and keep up with the ongoing caseload. In addition to this, staff enhancements for permitting and planning are also known to be necessary, given the current and necessary work associated with a changing climate and rising sea level. With over 7.5 million residents in the Bay Area, San Francisco Bay is the most urbanized estuary in California. As depicted in the attached graphic, BCDC is currently comprised of a total of 49 people who accomplish myriad functions, including Regulatory, Planning, and Administrative duties for the San Francisco Bay and the Suisun Marsh. Each of the three divisions are comprised of several small teams. Although the BCDC staff work collaboratively across teams to increase efficiencies, making one small team larger by making another small team smaller would severely compromise the agency's overall effectiveness.
 - L. Implement a permit compliance position to support the efforts of enforcement staff and the implementation of process changes. If necessary, the commission should seek additional funding for such a position.** BCDC agrees with this recommendation and BCDC will also request additional funding to acquire new tools to further compliance efforts.
 - M. Update its existing database or create a new database to ensure that it can identify and track individual violations within each case, including the date staff initiate the standardized fines process for each violation. As part of this process, the commission should review its database and update it as necessary to ensure that it includes all necessary and accurate information, specifically whether staff initiated the standardized fines process for open case files and for those case files closed within the past five years.** BCDC agrees with this recommendation to improve the database, although it also believes that a new and more encompassing holistic regulatory tool is required to implement the recommendations in the draft report. As discussed with the audit team and explained above, BCDC requires additional records management tools to track cases. BCDC has been engaged in an ongoing effort to improve its data management, but recognizes that this effort is limited by a lack of resources to obtain the technological tools that it needs to make critical improvements.

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- N. **Create and implement regulations that identify required milestones and timeframes for enforcement.** BCDC agrees with the recommendation to establish milestones and timeframes for enforcement cases, but does not agree that regulations are necessary to accomplish this. In pursuing this goal, BCDC intends to ensure that the milestones and timeframes can be appropriately tailored to the action to ensure that each action can be resolved efficiently and in the manner most appropriate to the violation. (22)
- O. **Create and implement regulations that define substantial harm, provide explicit criteria for calculating the number of violations present in individual enforcement cases, and specify a process to handle any necessary exceptions to the criteria.** BCDC agrees with the recommendation to develop explicit criteria for calculating the number of violations depending on the nature and the circumstances presented by enforcement cases, but does not agree that regulations are needed for this purpose. Staff will explore means of defining substantial harm, taking into account the types of violations and site-specific considerations that may be presented in a range of circumstances, but does not agree that this is necessarily best done through a regulation. (23)
- P. **Create and implement regulations to allow BCDC to use limited monetary fines to resolve selected minor violations that do not involve substantial harm to the Bay.** The existing standardized fine regulations are intended to address and resolve minor violations. BCDC will evaluate amendments or additional regulations that may facilitate the resolution of minor violations.
- Q. **Update its regulations on permit issuance to offer greater clarity on the types of projects for which staff may issue permits without commissioners' hearings.** Existing regulations specify the types of projects for which staff may issue administrative permits or permit amendments without Commission hearings. BCDC agrees that an update to the regulations to provide greater clarity on permitting may be beneficial and will explore means of providing greater clarity on such permitting issues and ensuring that the Commission has sufficient oversight of the issuance of minor permits.

PART III - IDENTIFIED ISSUES AND CORRECTIONS (24)

Title. The subtitle does not have any connection to the text of the document or the findings of the audit committee. This is an attention-grabbling phrase, but to adequately represent the content of the report, the subtitle should be changed to "It's Failure to Prioritize Enforcement and Compliance Has Jeopardized the San Francisco Bay." (25)

Page 5. We understand the audit staff's concerns with amnesty in the manner in which it is discussed in this section of the report, but it is important to note that there were many different concepts explored during the Commission's discussion of amnesty, along with many other alternatives, and this section of the report presents only a few of them. (26)

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- ②⑧ The report incorrectly states that Commission regulations require that enforcement cases “representing significant harm to the Bay go directly to the commissioners for enforcement.” In fact, at the discretion of the Executive Director, cases warranting the commencement of a commission enforcement proceeding include, but are not limited to, cases where the alleged violation has resulted in significant harm to the Bay’s resources. The text implies that only cases for which staff has determined that there is significant harm to the Bay are presented to the Commission, and this is not the case. Rather, significant harm is a consideration that can make a violation ineligible for resolution through the standardized fine regulations. There should be a recognition that Section 11321 of BCDC’s regulations governs decisions to commence Commission enforcement proceedings, and there are various considerations that are weighed prior to the issuance of a violation report, with the primary consideration being the best means of resolving the violation.
- ②⑨ The draft report also fails to identify the “beached ship” that was allowed to decay in the Bay, but, assuming that it is the tugboat discussed on Page 28, please see the discussion below. This is not an example that shows improper delegation or insufficient Commission oversight. It is an example of the complexity of many of the violations that arise within BCDC’s jurisdiction, and there are multiple state and local agencies that have been working to resolve the issue with this tugboat and other tugboats on state trust lands.
- ③① ②⑥ **Page 7.** It would be beneficial to note that the report cites one case that was not prioritized correctly out of hundreds of case files that were examined.
- ③① ②⑥ **Page 11.** The report would be more accurate if it cited the number of permits that were denied by the Commission in addition to the number of permits that were approved. The last sentence could be revised to state, “The commission reported that, from 1970 through 2018, it had approved 630 permits and denied 29 permits for major projects, and approved almost 3,900 administrative permits and denied 11 administrative permits for minor projects.”
- ③② The draft report also varies in reporting the number of staff. The correct number of existing staff is 49. Throughout the document, various numbers are used, including 47 staff on page 11, 46 staff on page 30, and 48 staff is used elsewhere in the document.
- ③③ ②⑥ **Page 12.** The San Francisco Bay Plan does not specify design requirements, nor does it indicate specifically how developers should provide public access. Instead, the Bay Plan outlines broad policy goals related to appearance and design of shoreline development and public access. Therefore, the sentence in the first paragraph should read: “For example, the Bay Plan specifies that developers should provide public access to the Bay and it directs developers to use BCDC’s Public Access Design Guidelines and take advantage of BCDC’s Design Review Board when designing those public access areas.”
- ③④ ②⑥ **Page 13.** The Commission is not solely responsible for enforcing state law. Responsibility is also shared by the Attorney General and the judiciary.

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In addition, in relation to the text in the second paragraph, enforcement staff may also enter into agreements with violators to resolve violations.

Page 14A. State law (the McAteer-Petris Act) does not describe the enforcement process as depicted. The standardized fine process is set forth in BCDC's regulations. Also, under the staff-level flow diagram, fines are assessed based on the number of days after the 35th day, not the 36th day. (35) (26)

Page 15. The report incorrectly states that two recent enforcement cases resulted in litigation against the Commission. Only one recent enforcement case resulted in litigation against the Commission. It is true, as acknowledged in footnote 4, that in December 2017, a Solano County Superior Court judge set aside a Commission cease and desist and civil penalty order against the responsible parties for numerous violations of the McAteer-Petris Act and the Suisun Marsh Preservation Act, and that the case is now on appeal. However, the report fails to note that: (1) the same Solano Superior Court judge also set aside the orders issued by the San Francisco Bay Regional Water Quality Control Board for unpermitted activities at the island, and that case is also on appeal; and (2) the United States Environmental Protection Agency has filed suit against the responsible parties in federal district court in Sacramento for unpermitted dredge and fill activities at the island in violation of Section 404 of the federal Clean Water Act, and that case is scheduled to go to trial in May 2019. Thus, this is not a case reflecting deficiencies in the Commission's enforcement program; every regulatory agency with jurisdiction has found that the responsible parties committed significant violations of applicable environmental laws warranting both remedial action and substantial penalties. The second enforcement case referred to in the report did not result in litigation challenging a commission enforcement order. That case was settled without litigation related to the violation. (36) (26)

Page 15B. Figure 6 does not fully reflect the existing staff allocations at BCDC. Please see Revised Figure 6 attached as Exhibit A to this Letter. (37) (26)

Page 17. The last sentence states that the Commission has used the Bay Fill Clean-up and Abatement Fund to pay for staff salaries. This (and all other similar references) should be corrected to note that it has been used only for *enforcement* staff salaries. (38) (26)

Pages 18-19. The statement that the Commission has been reluctant to pursue enforcement in Richardson's Bay because it is highly "political" is inaccurate and may have been taken out of context. BCDC does not decline to pursue an enforcement action based on political considerations. In fact, the Enforcement Committee recently held a briefing to receive an update and information on the Richardson's Bay situation from all parties involved and acknowledged the desire for continued engagement on the issue, thus demonstrating its position on this situation and the need for a resolution. BCDC has determined that a comprehensive public policy that involves all stakeholders in the solution, rather than imposing isolated enforcement, would best serve the situation. The text also fails to recognize the extensive process involved in removing even unoccupied boats from the Bay. (39) (26)

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- ④① ②⑥ **Page 21.** As noted above, the text should note that the examples are only a few of the many concepts that were explored by the Commission. The draft report also does not mention that staff had presented the negative implication of an amnesty initiative to the Enforcement Committee, including cautioning that adopting some level of amnesty program would not result in a permanent fix to the backlog.
- ④① ②⑥ **Page 28.** The tugboat involved in the case discussed is located on tidelands under the jurisdiction of the State Lands Commission, adding to the complexity of the situation, and this is reflected in the file that audit staff reviewed. There are also additional facts that led to the closure of this case. Although the case file may not reflect it, BCDC was informed that the vessel was cleared of fuel before the case was closed. While there could be disagreement over whether it was appropriate to close the case without any confirmation that this California state agency, which at the time appeared to be engaged in the process of remedying the situation, was able to resolve the violation, it is misleading to omit the fact that the violation involved another state agency, which was taking the lead in the matter. This is a factor in the determination that was made at the time. It should be noted that, while it may not be fully reflected in the file, the case was closed following a request from county law enforcement indicating that they were addressing the matter.
- ⑦ The Commission also disagrees with any implication that it has failed to provide adequate guidance to staff and that it has improperly delegated enforcement duties to staff. The Commission has adopted comprehensive regulations governing enforcement procedures which provided detailed guidance to staff. 14 C.C.R. §§ 11300-11386. Those regulations give the Executive Director substantial discretion to conduct enforcement investigations, commence commission enforcement proceedings, and administer standardized fines for specified violations under specified conditions.
- ④② ②⑥ **Page 29.** The text states that 24 cases were reviewed and the team found “no documentation of supervisor review in 15 cases.” As noted above, there is supervisor review of all communications, with legal review and/or review from management often conducted as well. These reviews are not documented in the case file, because there has not been a reason to retain marked-up, internal drafts. In fact, these are not records retained under the records retention schedule, and instead, the final communication is reflected in the file.
- ④③ ②⑥ **Page 31.** The discussion of Suisun Marsh governance should reflect that the *Suisun Marsh Preservation Act* provides for the *Suisun Marsh Protection Plan* that was prepared and adopted by BCDC. The local agencies then prepared their respective components of a *Suisun Marsh Local Protection Program* (not “a local protection plan”) that must be consistent with the Act and the Plan and that were approved by BCDC.
- ④③ ②⑥ **Pages 32-33.** The text cites a BCDC staff statement that “the commission has never issued recommendations to local agencies related to the marsh plan.” This quote is taken out of context and is misleading as it implies that BCDC has not made *any* recommendations to Suisun Marsh local agencies. As we have discussed with audit staff, while the Commission has not adopted formal recommendations pursuant to a comprehensive five-year review, which was the basis of the quote, BCDC has repeatedly made recommendations to local agencies

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regarding revisions to their *Suisun Marsh Local Protection Program* components. As noted above, BCDC intends to conduct a comprehensive review of the Marsh. We recommend that the text be revised to state: “the commission has never issued formal recommendations to local agencies related to the *Suisun Marsh Local Protection Program*.” While we appreciate the recognition that BCDC has assisted local agencies to update components of the *Suisun Marsh Local Protection Program*, we request that the text also note that as part of these efforts, BCDC also made recommendations to the agencies regarding updating their components.

Page 35. BCDC does not solely rely on the public or other agencies to report potential violations. The text should reflect that enforcement staff receive many reports from other BCDC staff (both permitting and enforcement), including reports through permitting staff while they are conducting site visits at nearby locations. (6) (26)

Page 43. Footnote 8 incorrectly describes the fines for only one of the six categories set forth in the standardized fine regulations – the placement of fill, the extraction of materials or a change in use that could not be authorized under the Commission’s regulations. The description in the draft report is incorrect in stating that: (1) if a violation persists for more than 66 days and up to 95 days, violations will accrue *an additional fine* of up to \$8,000, in addition to an initial fine of up to \$3,000 for the 35th through 65th day of violation; and (2) if a violation persists for more than 95 days, violations will accrue *an additional fine* of up to \$8,000 and \$100 per day for each day until they correct the violation. Contrary to the statements in the report, the fines established for a lengthy duration of time during which a violation persists are not cumulative. Footnote 8 does not attempt to describe the fines established for the other five categories of violations covered by the regulation. The schedules of standardized fines for each of the six categories of violations covered by the regulation are complex. Rather than summarize them in a footnote, we recommend a reference to the Commission regulations in 14 C.C.R. §§ 11386(e)(1)- (e)(6). (44) (26)

Page 47. The effort-scoring aspect of the matrix in 2018 only applies to the cases that have already been determined to be the highest priority cases. The effort score is meant to balance impact and effort to determine where the Bay and its shoreline will get the most benefit for staff’s efforts in a limited-resource environment. (45) (26)

Page 50. The draft report states that the audit staff would have expected the commission’s database to document the cases in which staff had initiated the standardized fine process and to identify the individual violations in those cases. While BCDC does not have a specific data field to automatically calculate this information, the database *is* sufficient to determine whether a violator has past violations. This information is easily found by checking the following fields in the database: location (i.e. x/y coordinates), permittee or respondent, permit number, description of the alleged violation, date of resolution, and resolution description. (46) (26)

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The draft report also states that “the database indicates that staff sent only two notice letters — which start the standardized fine process—from 2002 through 2018. This conflicts with our review of the commission’s paper files, which showed that staff had issued 25 notice letters from 2012 to 2017.” As staff explained previously, this is simply because staff have not had the time and resources to input all information for cases that were entered before this particular aspect of the database (i.e. “Date 35-day letter sent”) existed.

④⑦ ②⑥ **Page 51.** The database is highly useful to the enforcement team as a tool to intake and track the enforcement caseload. It is a major improvement compared to mid-2018. That said, BCDC does not dispute that improvements can be made and better tools should be obtained.

④⑧ ②⑥ **Page 52.** The report states that audit staff analyzed the budget data provided by the Commission and determined that, had Commission staff performed the fee calculation in 2013, the Commission likely would have increased its fees and collected for the General Fund by an additional \$1 million since 2013. While the audit staff discussed certain differences in the data they used, in comparison with the data used by commission staff in evaluating whether the fees should be adjusted in 2017, audit staff did not share their calculations and, therefore, BCDC staff cannot assess the accuracy of those calculations. However, audit staff incorrectly used only four years of permit fee and regulatory program costs data, rather than data for a five-year period as required by the regulations. Moreover, the audit staff used an unrealistic assumption that adjusted fees would become effective promptly on January 1, 2013, whereas if audit staff had used data for a five-year period and allowed time for all the data to be collected and analyzed, any adjusted fees clearly would not have become effective until January 1, 2015, at the earliest. Thus, the report substantially over estimates any additional permit fee revenue the commission might have collected had it evaluated whether to adjust permit fees at the earliest possible time under its regulations.

As the draft report notes, when the Commission staff evaluated whether the fees should be adjusted, staff determined that no increase in fees was necessary based on its calculations using the most recent five years of budget data. The data used by staff and its analysis was presented to the Commission in a transparent public process which included a detailed staff report.

④⑨ Finally, the draft report states that it was unclear why the evaluation of whether the permit fees would be adjusted was delayed, noting that BCDC stated this was in part because the Commission lack of a chief counsel. The draft report fails to note that the Executive Director also attributed the delay to the commission’s lack of a chief budget officer. Without a chief budget officer, there was no staff available with the expertise to retrieve and analyze the budget data needed to perform the calculations called for by the regulations. Moreover, prior to bringing on its chief counsel to manage the legally-required regulatory process, the Commission’s one staff counsel was overburdened with the daily tasks of supporting permitting and other critical functions and lacked the capacity to evaluate whether the fees would be adjusted under the regulations.

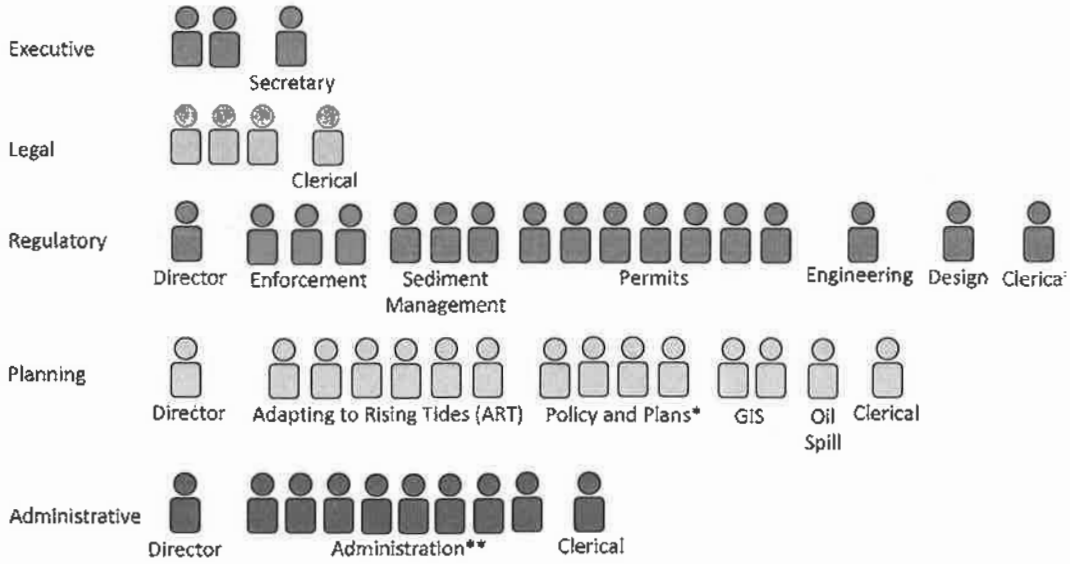
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Page 56 – Conclusions. The first sentence is unjustly broad, and, as discussed above, ignores the tremendous job done by BCDC in implementing a permitting process that has protected the San Francisco Bay and the Suisun Marsh and in leading the region in addressing sea level rise and climate change through planning and permitting processes. There are no findings in the draft report that BCDC has failed in any of its duties, aside from the identified issues with the enforcement program. This sentence should be revised to state “The commission has failed to fully and consistently execute its enforcement function, and, as a result, has allowed potential ongoing harm to the Bay.”

(50) (26)

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Exhibit A



* San Francisco Bay Plan, Suisun Marsh Protection Plan, San Francisco Bay Area Seaport Plan, Special Area Plans
 ** Human Resources, Finance, Contracts, Records Management, Information Technology

Comments

CALIFORNIA STATE AUDITOR'S COMMENTS ON THE RESPONSE FROM THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

To provide clarity and perspective, we are commenting on the San Francisco Bay Conservation and Development Commission's (commission) response to our audit. The numbers below correspond to numbers we have placed in the margin of the commission's response.

We note in our report on page 26 that the commission has not conducted a study to determine the level of staff it needs, and on page 49 we recommend that the commission conduct such a study. The results of such a study will help the commission make its case for more resources to the Legislature, as we state on page 26.

①

One of the objectives for this audit was to look at the extent to which the commission *prevents* real and perceived conflicts of interest. As we note on page 52 under objective 6, we did not identify any significant issues related to the commission's compliance with filing requirements related to conflict of interest. However, many of the objectives for this audit concerned the commission's enforcement process. In this area, we concluded beginning on page 21 that staff lack guidance regarding how to conduct enforcement and that the commission has not developed a process to ensure management review of staff decisions. Further, beginning on page 34, we conclude that staff do not always follow commission requirements related to imposing fines. This creates an atmosphere where staff may exercise discretion in an inappropriate manner. While our work did not identify specific instances of impropriety, without sufficient guidance and oversight, the risk exists.

②

The commission is incorrect that we made no findings that the commission failed to comply with open meeting requirements. On page 45 we describe a finding that the commission did not maintain minutes of closed sessions as required by law.

③

We stand by our conclusion that the commission has neglected its mission to protect the Bay and the Suisun Marsh. On pages 7, 26, and 47, we acknowledge the commission's management of the Adapting to Rising Tides program, its work with local agencies to update components of the marsh program, and its permitting efforts. Nevertheless, our findings in total show a neglect of duties. Specifically, the commission's backlog of enforcement cases has been growing in recent years, as we discuss on page 15. Also, the commission lacks sufficient guidance to ensure staff conduct enforcement activities consistently as we describe beginning on

④

page 21. Further, the commission has not conducted a periodic, comprehensive review of the Suisun Marsh program, as we state on page 26. Moreover, we note that the commission inconsistently applies its regulations beginning on page 34. We describe specific examples of harm to the Bay from the commission not fulfilling its duties on pages 16 and 23.

- ⑤ Enforcement is a key part of the commission's responsibilities that enables it to protect the Bay. The commission states in its response that "protecting the Bay is integral to everything [the commission] does." We agree. As such, when the commission does not perform certain enforcement-related duties well or at all, as we describe in our report, it neglects to protect the Bay.
- ⑥ The commission does not state our finding correctly. We acknowledge on pages 31–32 that site visits sometimes occur during the course of other work. However, the commission does not proactively conduct such visits, nor does it have policies to do so. We recommend on page 48 that the commission develop procedures to require staff to conduct proactive enforcement, such as site visits, as resources allow.
- ⑦ We stand by our finding that the commissioners improperly delegated their authority. As we say on page 23, "the extent to which the commission may delegate its authority depends on the degree to which it has provided clear guidelines to staff regarding how they may apply, administer, or enforce the authority granted." We discuss on page 23 that the commission's standardized fines process allows staff to use this process only to resolve cases that do not result in significant harm to the Bay. However, the commission's regulations do not define or provide guidance on how to define "significant harm." This gives staff broad discretion to determine which cases go to the commission and which do not, and we provide an example of a case commission staff closed that may have constituted significant harm. Later in the report we also note that commission regulations do not provide guidance on what constitutes a single violation, again giving staff broad discretion.
- ⑧ We question the commission's assertion that it needs fewer enforcement procedures given the issues we identify such as misapplication of regulations, as discussed beginning on page 34, and inconsistent treatment of alleged violators, as discussed beginning on page 36. Specifically, on page 35, we note that the commission has not developed formal guidance for staff regarding critical aspects of the enforcement process.
- ⑨ Undocumented procedures are not sufficient to ensure the consistent application of the commission's laws and regulations. For example, as we note on page 37, staff do not consistently calculate

the number of violations a case may have and have no guidance to identify what constitutes a single violation. In addition, in the section of the report beginning on page 34, we state that staff do not always follow regulations related to fines.

The commission misinterprets what we mean by evidence of management review. On page 25, we describe that in our examination of enforcement cases resolved using standardized fines, we expected to find evidence of management signing off on staff decisions. We did not expect or recommend that the commission maintain draft documents or other nonpublic information in its “public facing” case files. Instead, we expected to see that the commission maintained evidence that, prior to finalizing a decision, a manager or supervisor has reviewed and approved that decision. This could be as simple as a tracking sheet with a manager’s signature.

⑩

We appreciate the commission’s additional context and acknowledgement of the shortcomings of its new database, but we stand by our conclusion that it was missing critical information. The commission notes that its database became “operational” shortly before we began our audit. The issues we identify on pages 41–42 related to the recording of notice letters and the recording of individual violations are shortcomings that, in our judgment, limit the value of an operational database. In fact, to address certain audit objectives, we needed to create our own database of enforcement cases.

⑪

While we appreciate that the commission has begun to develop a plan to acquire a more functional database, it is unfortunate that the commission did not share this with us before its response to our report. We stand by our recommendation on page 50 that the commission ensure either its existing database or a new platform has the ability to track individual violations and whether staff have initiated standardized fines.

⑫

We disagree with the commission’s contention that legislative action, as reflected in several of our legislative recommendations, is not necessary to address several of our findings. Given the commission’s statements that it lacks resources and does not believe it needs to make regulatory changes in some cases, we are concerned that the commission will not implement needed reforms to its processes without legislative action.

⑬

The commission suggests we are recommending legislatively imposed timelines. Our recommendation on pages 47–48 is that the Legislature direct the commission to develop timelines for its enforcement activities.

⑭

- ⑮ We have updated the report text to reflect that the commissioners approved a comprehensive review of the marsh program in March 2019 after we had spoken to the commission about this issue. We look forward to evidence of the commission's implementation of our recommendation in its future responses to our audit.
- ⑯ We stand by our assessment that the commission is not authorized to use the abatement fund to support enforcement staff. As we state on page 29, the expenditures from the fund are restricted to the purposes of removing fill, enhancing resources, and performing remedial clean-up or abatement actions. Further, we note that the mechanism for the use of the fund is through transfer of moneys from the fund to other entities for Bay cleanup. Thus, there is not an expectation that the commission will use the fund to pay enforcement staff salaries.
- ⑰ In our judgment, before it obtains the use of additional enforcement tools, the commission should ensure it has a structured, documented, and consistent enforcement program based on our recommendations to the commission beginning on page 48.
- ⑱ We appreciate the commission's commitment to implementing our recommendation; however, the commission's statement that "staff actions currently comply with state law" is not accurate. For example, on page 34 we provide a specific example where staff pursued the standardized fines process in a case where state regulations did not allow staff to do so.
- ⑲ We stand by our conclusion that there is not sufficient evidence to demonstrate that the commission's prioritization tools have resulted in the commission more effectively closing cases it has identified as high priority. Six of the eight high-priority cases the commission closed since it began using its new tools in 2016 were in the process of reaching resolution several months before being prioritized by the new tools. We further note that the tools may not designate cases as high priority when they should.
- ⑳ Our dates are consistent. We recommend that the Legislature direct the commission to report on its review of the marsh program by fiscal year 2020–21, and our recommendation to the commission is that it complete one by January 2020, before that fiscal year begins. We discussed timelines for the implementation of our recommendation with the commission on several occasions during the audit but the commission did not inform us that it had determined a specific time frame within which it will be able to accomplish our recommendation. We look forward to its updates on its progress toward addressing our recommendation.

We stand by our recommendation that the commission comply with its statutory duty. State law requires that the commission appoint a citizens' advisory committee to assist and advise the commission in carrying out its functions, yet the commission insists it will not do so. Further, we disagree with the contention that such a committee is unnecessary and would not benefit the commission's enforcement efforts. According to state law, the committee should be composed of a variety of experts in conservation, science, architecture, and other areas. As the statutory charge for the advisory committee is to assist the commission "in carrying out its functions," the commission could use the committee to inform any or all of its efforts, including enforcement.

(21)

We recommend that the commission place its milestones and time frames in regulations because such policies are likely to affect parties external to the commission, including alleged violators and permittees. To avoid creating underground regulations, state agencies, with few exceptions, are required to adopt regulations following the process in the Administrative Procedure Act when they issue or enforce any rule of general application to govern their procedures.

(22)

We recommend that the commission place its definitions of substantial harm and of what constitutes a violation in regulations because such policies are likely to affect parties external to the commission, including alleged violators and permittees. To avoid creating underground regulations, state agencies, with few exceptions, are required to adopt regulations following the process in the Administrative Procedure Act when they issue or enforce any rule of general application to govern their procedures.

(23)

It is unfortunate that the commission did not take the opportunity to communicate to the audit team the concerns it expresses in its response on pages 59 through 78 before submitting its response to the audit report. We reminded the commission on many occasions that it should contact us during its five-day review period if it had any concerns with the draft report. Some of the issues and concerns the commission raises in this section could have been resolved, eliminating the need for the commission to include them in the response.

(24)

Our title is accurate and is a reasonable conclusion given the findings described in the audit report.

(25)

While preparing our draft report for publication, some page numbers shifted. Therefore, the page numbers the commission cites in its response may not correspond to the page numbers in our final report.

(26)

- ⑳ The commission raised concerns over our summary of its amnesty proposals in the Results in Brief section of this report. However, we present a representative selection of its amnesty proposals in detail on page 17 on the report. Moreover, we reviewed the transcripts or meeting minutes for each of the commission's enforcement strategy meetings to identify any additional proposals to reduce the backlog or alternatives to amnesty and found none. Thus, we are puzzled by the commission's assertion that it discussed many alternatives.
- ㉑ We have updated the sentence on page 2 to better reflect regulations. We intended, as we note on page 9, Figure 3 on page 10, and page 23, to highlight the fact that the commission's regulations do not allow staff to process cases representing significant harm using the staff-level standardized fines process. Accordingly, staff must process cases representing significant harm using formal enforcement, which with the exception of an executive director-issued cease-and-desist order, would involve commissioners. This report does not assert that staff only present cases containing significant harm to the commissioners.
- ㉒ The tugboat pictured on Figure 8 on page 24 illustrates our concern about improper delegation. As we discuss on pages 23–24 of the report, the commission's chief of enforcement stated that she closed the case because she thought it was unlikely that the commission would be able to hold the owner accountable. Moreover, the case file contained no evidence that the commission's executive director, legal counsel, or regulatory director were involved in her decision to close the case. This demonstrates improper delegation because the abandoned tugboat was a violation of state law that had the potential to cause harm to the surrounding area, yet staff appear to have closed the case without sufficient guidance from managers or the commissioners.
- ㉓ For this purpose, we reviewed 29 cases that the commission had prioritized. On pages 40–41, we describe two issues we identified during our review: two cases that seemed incorrectly prioritized relative to each other, and a third case to which staff may have assigned too low of a score.
- ㉔ We focused on the approved permits because they represent the majority of the commission's permit workload. The commission does not disagree with the permit approval numbers we cited.
- ㉕ The statements in our report concerning the number of commission staff is correct. We report that number as 48, which was provided to us by the commission's director of administration on March 11, 2019. The other numbers mentioned by the commission appear in our report, but in both cases they are part of discussions in which we do not reference them as the total number of staff.

We agree with the commission that our draft text describing the Bay Plan was unclear. We have modified the text on page 7 to read as follows: “Bay Plan policies include design guidelines and information on how developers should provide public access to the Bay.”

(33)

We do not assert that the commission has sole responsibility for enforcing state law. As we state on page 8, the commission is responsible for enforcing state law related to its mandate. Further, we note the participation of the Office of the Attorney General in Figure 3.

(34)

We corrected the reference in Figure 3 on page 10 to note that fines accrue after the 35th day. “State law” in the context of the title for Figure 3 on page 10 refers to both law and regulations; we cite both in the source for the figure.

(35)

Our statement on page 9 that both cases resulted in litigation against the commission is correct. The commission’s response, while offering background information on the first lawsuit, does not refute our statement that the first referenced case resulted in litigation against the commission. Meanwhile, the commission states that the second referenced case did not result in litigation challenging a commission enforcement order. That lawsuit arose out of a California Public Records Act (CPRA) request to the commission for records related to alleged violations or facts asserted in a report on an enforcement action. As part of a larger settlement agreement, the commission agreed to release the plaintiff from allegations set forth in the violation report or any related enforcement activities; in exchange, the plaintiff agreed to dismiss the lawsuit.

(36)

Figure 6 on page 13 provides a high-level overview of the commission staff as of March 2019 and includes several of staff’s primary functions. The additional specificity the commission provided in its Exhibit A is not necessary for this purpose.

(37)

While we agree that the commission has spent the abatement fund primarily on enforcement staff salaries, this specificity is irrelevant for the purposes of providing an overview of the commission’s budget practices. We discuss the commission’s specific use of the abatement fund to support the enforcement program on pages 28–29.

(38)

The statement that the case is “political” is a quote from the chief of enforcement. The commission did not raise its concern with us when we shared this text at our exit conference. On page 17, we discuss the enforcement committee briefing mentioned in the commission’s response to our report. We are concerned with the commission’s statement that this briefing demonstrated its

(39)

position on the situation and the need for resolution. Although the executive director shared with us a desire to work on a collaborative policy solution during this audit, the commission has not taken a formal position. Instead, its enforcement committee simply requested additional briefings on the matter, suggesting that it will continue to monitor and play a passive role in the resolution of this issue. Further, state law gives the commission broad discretion in prescribing corrective action to violations of its law. Thus, we did not believe an explanation of the Richardson agency's process for vessel removal was relevant or necessary.

- ④① We explain on page 17 of the report that staff presented these options with the goal of eliminating cases in the commission's backlog. This report does not assert that the commission or its staff believe amnesty will permanently fix the backlog. Rather, as we note on pages 2, 15, and 18, without a strategy to resolve the causes of the backlog, the commission risks allowing it to reoccur.
- ④① The tugboat is in the commission's jurisdiction. We would expect that collaboration with another state agency would assist the commission in reaching resolution, not absolve the commission of its responsibility to address a violation of state law within its jurisdiction. In fact, correspondence in the enforcement case file demonstrates staff knew that the State Lands Commission's attempt to remove the boat had failed. Thus, we focus on the commission's role in the case. Moreover, the case file does not indicate that another agency agreed to take the lead on the case, that a request from law enforcement contributed to case closure, or that anyone had cleared the abandoned vessel of fuel. Further, when we discussed our concerns with the staff member responsible for closing the case, she did not provide any of this additional information.
- ④② As a regulatory agency, we would expect the commission to take reasonable steps to ensure that its constituents receive consistent treatment. The case files we discuss on page 25 represent all cases within the audit period in which commission staff initiated the standardized fines process and closed the case at the staff level. Given that the standardized fines process subjects alleged violators to monetary penalties, we strongly disagree with the commission's assertion that there is no reason to retain evidence of review. In addition, as we note on page 51, we interviewed key enforcement staff and managers to identify relevant policies and procedures. None of the interviewees mentioned a document retention schedule that would prevent the storage of drafts. In fact, on page 25, we provide an example of a document that contained mark-ups demonstrating instruction to revise and reissue a notice letter. Further, we cite a discussion with the regulatory director in which he stated that he does not typically review physical case files.

Moreover, in Chapter 2 of this report, we provide several instances in which staff failed to follow requirements related to imposing fines. For these reasons, we are not convinced that the commission is conducting systematic review of its enforcement staff's decisions. As we state in comment 9, undocumented processes are not sufficient to ensure consistency.

We have updated the text on pages 26–28 to reflect the commission's concerns. We agree that our reference to the local protection program as a "plan" may have caused confusion. However, our concern is that the commission has never issued any recommendations for corrective action related to its review of the effective implementation of the marsh program, as defined on page 26. While we appreciate that the commission may have issued recommendations to local agencies related to updating their respective plans, this is not our focus.

The footnote on page 8 is a summary of the commission's standardized fines penalties. It very clearly states that the fixed rates depend on the type of violation and the number of days violators take to correct it. Moreover, all amounts are preceded by the words "up to" which indicates that they represent the maximum for each category, not a particular violation type. However, we agree that the fines are not cumulative and have updated our text in the footnote to reflect this.

Commission staff explained to us that they consider cases above a certain impact score as "high priority." However, we believe that this designation, which refers to cases staff have only assigned an impact score, is confusing given that the effort score is also a part of the whole prioritization tool. For this reason, we updated our text on pages 40 and 41 to clarify that the effort score is a second filter used by commission staff to prioritize cases.

Our testing of the database referenced on pages 41–42 did not identify individual violations in each case even with a review of all database fields. Therefore, although the commission asserts that staff can identify past violators, we concluded that staff cannot use the database to identify individual violations, which is necessary to apply standardized fines for repeat violations. Further, we state on page 42 that commission staff were aware that the database lacked important information and that they were making efforts to complete the database during the audit. However, until they complete the database, we stand by our criticism of the system's functionality.

④⑦ We acknowledge on page 42 that staff informed us about their progress in updating the database. However, we stand by our conclusion about the database's limited functionality.

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④8 Commission regulations state that the executive director should have commenced a fee review no later than October 1, 2013, and instituted new fees on January 1, 2014. We estimate on page 43 that, had the commission recalculated its fees in October 2013 and adjusted them on January 1, 2014, it would have collected an additional \$1 million in permit fee revenue. We question the commission's assertion that the fee recalculation would have required an additional year of analysis, given that regulations outline a three-month timetable for the fee recalculation and the commission's own budgetary data should have been readily available to staff.

The commission further states in its response that we only used four fiscal years' worth of data to conduct our analysis. This is correct; however, this was due to the commission's failure to maintain records and not to an error in the audit team's methodology. The commission's chief budget officer was unable to locate financial data for fiscal year 2008–09. Despite this, we believe the analysis we performed using the available four fiscal years of data is sufficient and appropriate evidence for our conclusion.

④9 Our statement is correct. We state on page 43 that the executive director attributed the commission's delay in adjusting fees only partly to the lack of a chief counsel. We acknowledge that in order to perform the adjustment in 2013, the commission may have had to reallocate staff from other projects to compensate for the lack of a chief counsel and chief budget officer. However, we would have expected the commission to do so in order to capture additional funding. As we state on page 43, adjusting the fees as regulations require will ensure that the fees remain current and that the commission does not deny the State revenue.

⑤0 The commission's response highlights its accomplishments with permitting and addressing sea-level rise, which we acknowledge on page 47. However, as we stated earlier, our findings in total demonstrate a neglect of duties.