

## APPENDIX O

### ADMINISTRATIVE CIVIL PENALTY POLICY

#### I. INTRODUCTION

This policy addresses the assessment of administrative civil penalties. Government Code section 66641.5(e) authorizes BCDC to impose on any person or entity an administrative civil penalty of between ten dollars (\$10) and two thousand dollars (\$2000), for each day in which the violation occurs or persists, up to a maximum of thirty thousand dollars (\$30,000) for a single violation. Government Code section 66641.9 sets forth the factors to be used by the commission in determining the amount of administrative civil liability.

Administrative civil penalties are an important part of BCDC's enforcement authority. Civil penalties deter noncompliance and help to ensure a level playing field so that violators do not obtain an economic advantage over others who have made the investments necessary to comply.

The goal of this policy is to promote the enforcement goals of consistency, transparency, and fairness. By using the matrix and formula set forth in this policy, staff and the Commission will be able to fairly establish civil penalties in accordance with the statutory criteria in Government Code section 66641.9.

While the consistent application of this policy is important in ensuring fairness, it is equally important that the policy allow for adjustments as appropriate to reflect legitimate differences among similar violations. In establishing penalties, comparisons to prior cases could be relevant but are not required and there is no need to analyze why the penalty amounts in other actions may differ.

This policy does not apply to violations that are resolved using the standardized fine process set forth in Section 11386 of BCDC's regulations. Standardized fine amounts are established in that regulation based on the type of violation and are determined based on the time that it takes to correct the violation.

#### II. PENALTY CALCULATION METHODOLOGY

Penalties are calculated by first establishing a base penalty amount, calculated by determining:

- (1) The gravity of the violation and the degree of deviation from the requirement at issue, and
- (2) Whether an adjustment is warranted based the susceptibility of the violation to removal or resolution.

Next, upward or downward adjustments to the base penalty amount may be made to reflect the particular circumstances of the violation and actions by the violator. Finally, the penalty will be adjusted to ensure that the amount is no less than the amount necessary to recoup any

proceeds gained from the unauthorized activity or any economic benefit derived from noncompliance.

## **PART 1 – Determine the Base Penalty for Each Violation**

### Step 1 – Calculate the initial base penalty

The initial base penalty is determined by evaluating the gravity of the actual or potential harm to the Bay's resources or public access and the extent of deviation from the applicable requirements of the law or permit at issue.

The gravity of harm categories are as follows:

- (1) **Major** – This category is for violations involving a high level of actual harm or high level of potential for harm to the Bay or public access. Violations will first be evaluated using the following six impact criteria: (a) habitat value (violation location); (b) durability (violation duration); (c) toxicity (destructiveness); (d) size (scope, volume, or square footage); (e) nature of violation (whether the activity or action constituting the violation could be authorized); and (f) visibility. Based on these criteria, a score will be calculated using the formula developed to prioritize enforcement cases. Physical violations involving fill that receive an impact score above the established threshold score of 60 are considered major, and violations involving public access limitations that receive an impact score above the established threshold score of 55 are considered major.
- (2) **Moderate** – This category is for violations involving a moderate potential for harm or moderate level of actual harm to the Bay or public access. Physical violations involving fill that receive an impact score between the established thresholds of 40 – 60, inclusive, are considered moderate. Violations involving public access limitations that receive an impact score between the established thresholds of 35 – 55, inclusive, are considered moderate.
- (3) **Minor** – This category is for violations involving minor or minimal threats to the Bay and public access. Physical violations involving fill that receive an impact score below the established threshold of 40 are considered minor. Violations involving public access limitations that receive an impact score below the established threshold of 35 are considered minor.

The impact of violations involving a failure to submit required documentation will be categorized as moderate or minor in accordance with the definitions set forth below. No violations of this nature will be categorized as major.

The failure to submit the following will generally be considered to be **Moderate** violations: (1) Property interest; (2) Post-dredge surveys; (3) Owners' association Conditions, Covenants and Restrictions; (4) Monitoring plans and reports; (5) Descriptive material concerning emergency work authorized by an emergency permit; (6) Construction plans for plan review; (7) Incomplete construction plans; (8) Recorded legal instruments to dedicate public access, open

space, or view corridor areas; (9) Special event reports; (10) Flood reports and adaptation plans; (11) Executed originals of permits.

The failure to submit any of the following will generally be considered **Minor** violations: (1) Foundation layout inspections; (2) Annual live-aboard documentation; (3) Permit assignments; (4) Certificates of contractor review; (5) Notices of completion; (6) Recorded permits.

For any documentation that is not listed above, staff and the Commission will refer to the list and reference the category used for similar documents.

The categories of potential extent of deviation from an applicable requirement, are as follows:

- (1) Major – This category is for violations that deviate from the requirement to such an extent that the requirement is completely ignored and none of its provisions are complied with.
- (2) Moderate – This category is for violations that deviate from the requirement but still comply with some of the most important requirements.
- (3) Minor – This category is for violations that deviate to a minor degree from the requirement, in circumstances where the requirement functions nearly as intended, but not as well as if the entirety of the requirement had been met.

Using the matrix shown below, which is based on the statutory range of between \$10 and \$2,000 per day per violation, a penalty amount will be determined from the range provided in the matrix, based on the circumstances of the individual violation. After selecting the amount, the amount will be multiplied by the number of days that the violation has persisted to determine the total initial base penalty per violation. Consistent with Government Code section 66641.5(e), the penalty for a single violation may not exceed \$30,000.

*Extent of deviation from legal requirement*

		<b>MAJOR</b>	<b>MODERATE</b>	<b>MNOR</b>
<i>Potential</i>	<b>MAJOR</b>	\$1600-2000	\$1200-1599	\$500-1199
<i>For</i>	<b>MODERATE</b>	\$1200-1600	\$800-1199	\$250-799
<i>Harm</i>	<b>MINOR</b>	\$800-1200	\$250-799	\$10-249

#### Step 2 – Adjustment based on the nature of the violation

After the initial base penalty amount is determined using the matrix, that amount may be adjusted downward for violations that are susceptible to removal or resolution. The downward adjustment is discretionary and may not exceed 10% of the initial base penalty amount. No adjustment will be made if it would reduce the amount below \$10 per day.

### **PART II – Adjustments Specific to the Violator**

#### Step 1 – Degree of culpability

The base penalty amount may be adjusted upward or downward by 25% based on the violator's degree of culpability prior to or when engaging in the violation. In assessing degree of culpability, staff and the Commission shall consider:

- (1) Whether the violator knew or should have known that the conduct violated a requirement;
- (2) Whether the violator knew or should have known of any hazards associated with the conduct; and
- (3) Whether the violator took precautions to avoid the event that led to the violation.

Upward adjustments, by as much as +25%, should be made for intentional or grossly negligent violations. An intentional violation exists when the violation is committed knowingly, deliberately or willfully, and intentional conduct, including situations where the violator intended to engage in the actions that constitute a violation, justifies a high adjustment. Gross negligence may arise when a violator acted with extreme carelessness and deliberate disregard for the harms involved.

Downward adjustments, by as much as -25%, may be made for accidental violations or situations where the violation was outside of the violator's control and the violator took measures to avoid or minimize a violation. Violations that are the result of accidents or inadvertent omissions may warrant a downward adjustment.

No adjustment will be made for the violator's degree of culpability, or for the considerations listed in Steps 2 – 4, below, if the adjustment would reduce the penalty amount below \$10 per day or increase it above \$2,000 per day. These adjustments specific to the violator are also cumulative, although they are discretionary unless otherwise noted.

#### Step 2 – History of violations

The base penalty may be adjusted upward, by as much as +10%, for a prior history of violations within the past five years. Upward adjustments are mandatory for prior violations of the same permit term or instances involving the same or substantially similar unauthorized activities within the past five years.

Because entities are expected to comply with the law, staff and the Commission will not adjust base liability downward where the violator has no prior history of violations.

#### Step 3 – Voluntary removal or resolution efforts and efforts to cooperate

Staff and Commission may adjust the base penalty upward or downward based on the violator's cooperation and resolution efforts.

Penalties may be adjusted downward, by as much as -25%, where a violator has taken extraordinary actions to cooperate with an investigation in a timely manner and has engaged in exceptional efforts to voluntarily resolve or mitigate the impacts of the unauthorized conduct.

Staff and the Commission may adjust liability upward, by as much as +25%, in situations where a violator has delayed compliance or created obstacles to achieving compliance, including interfering with the removal or resolution of the violation. Upward adjustments, up to +25% shall be appropriate where the violator's removal and resolution efforts have fallen below what would normally be expected as a response.

#### Step 4 – Other factors

- Cost to state in pursuing the enforcement action

BCDC may seek to recover the costs of investigating and pursuing an enforcement action as part of the civil penalty amount. When staff seeks to include the costs of pursuing an enforcement action, the costs will be itemized by documenting the work performed, the time spent on the task, and the hourly rate for each staff member involved. Attorney staff costs and other costs incurred in having staff prepare for and attend an enforcement hearing cannot be included in the civil penalty amount.

- Other factors as justice may require

BCDC may adjust the civil penalty amount for “such other matters as justice may require.” See Government Code § 66641.9(a).

If a violator identifies, and provides, information not previously included among the other criteria listed in this policy, this may be used for a further adjustment to the penalty amount.

Considerations of environmental justice may also justify an adjustment to the civil penalty in extraordinary circumstances. BCDC's Environmental Justice Policy may be consulted in determining the appropriate remedy for any violation.

### **PART III – Economic Benefit**

It is important that civil penalties be established in an amount that ensures that entities that voluntarily incur the costs of regulatory compliance are not placed at a competitive disadvantage in comparison to entities that fail to comply. It is also important that penalties be set at an amount that exceeds any economic benefit that the violator gains from such violation(s) so that fines and penalties are not viewed simply as a cost of doing business.

*Economic benefit* is any monetary savings or gain derived from the activity or failure to act that constitutes the violation. This includes costs that the violator has avoided through noncompliance, including for example, the savings derived from failing to provide public access improvements, prepare a required report, or complete a required study.

BCDC shall seek to recapture the economic benefit as part of the civil penalty. Civil penalties should never be set at an amount that is less than the economic benefit that the violator realized from the violation. The economic benefit should be compared to the civil penalty sum derived from engaging in the calculations set forth in Parts I and II, and if the amount derived from these calculations is less than the determined economic benefit, the penalty amount should be set at a sum that is at least 10% higher than the economic benefit amount to ensure that civil penalties are not construed as a cost of doing business and are assessed at an amount sufficient to deter future violations. Penalties may never be set at an amount that exceeds the statutory maximum of \$30,000 per violation.

In many cases, the precise economic benefit amount may be difficult to calculate. Where economic benefit is presumed to be smaller than the proposed penalty, the value of performing a calculation may be minimal. For cases where, at a minimum, an approximate calculation of economic benefit may be warranted, the calculation may include:

- (1) Deferred costs, representing savings from delaying expenditures that should have been made sooner (e.g., investments in public access amenities or studies);
- (2) Avoided costs, representing costs that the violator should have incurred, but did not incur, to avoid the unauthorized conduct or noncompliance.

The economic benefit calculation shall include periodic costs, including recurring costs that would be associated with operating and maintaining required improvements or equipment. The calculation shall also include capital costs for upgrades or improvements or equipment.

#### **PART IV – Addressing ability to pay/ability to continue in business**

In determining civil penalty amounts, BCDC must take into consideration a violator's ability to pay and the effect of the penalty on the violator's ability to continue in business. However, because information relevant to these considerations is exclusively in the possession and control of the violator, the potential inability to pay or a potential effect on the violator's ability to continue in business may be considered only if the violator raises these issues as a defense to a complaint for administrative imposition of civil penalties in the submitted statements of defense.

When ability to pay and/or ability to continue in business is raised as a defense, a violator must submit factual information and supporting documentation to enable staff and the Commission to evaluate the violator's financial condition and any reduction of the civil penalty amount that may be appropriate. Relevant supporting documentation that should be provided includes but may not be limited to audited financial statements and reports (or if not audited, then those that are the basis of tax returns or regulatory filings), balance sheets, profit and loss statements, statements of net worth, annual budgets, bond prospectuses, and tax returns including supporting forms and schedules as may be appropriate. Before submitting this information, the violator should redact (cover or blackout) all personal information including social security or tax-payer identification number, driver's license/state identification number,

financial account number and any other private, non-public personal information including a residential address, personal telephone number, or personal email address.

The assessment of ability to pay or effect on ability to continue in business may consider cash flow, real estate, personal property and other tangible assets, and other pertinent information.

When a violator demonstrates a limited ability to pay or that there would be a substantial adverse effect on ability to continue in business after payment of the calculated civil penalty amount, BCDC will consider whether a reduction in the civil penalty amount is warranted and whether an extended payment plan and/or installment payments may be appropriate.

### **III. SUPPLEMENTAL ENVIRONMENTAL PROJECTS**

#### **A. Introduction**

A Supplemental Environmental Project (SEP) is an environmentally beneficial project that a violator agrees to undertake and complete voluntarily in partial resolution of an enforcement action, which the violator is not otherwise legally required to perform and for which BCDC agrees to offset a portion of the monetary administrative civil penalty that would otherwise apply as a result of the violation(s). A SEP may be performed either directly by a violator or by a third-party other than the violator using funds provided by the violator.

BCDC has broad discretion to settle enforcement actions, including discretion to include a SEP as a part of a stipulated order setting administrative civil liability or a settlement agreement. While SEPs may be useful in the resolution of enforcement actions, the funding of SEPs is not a primary goal of BCDC's enforcement program, nor is it necessary that a SEP always be included in the resolution of an enforcement action that assesses a monetary administrative civil penalty. The decision to accept a proposed SEP is within BCDC's sole discretion and may depend on the specific facts of a particular case. Even though a project may appear to satisfy all provisions of this policy, BCDC may decide that a SEP is not appropriate for a particular enforcement matter.

This SEP policy is intended for use by BCDC's enforcement staff, Enforcement Committee, and the Commission in settling enforcement cases administratively and does not create any rights or benefits, substantive or procedural, enforceable by a party against BCDC, its staff, or any person. This SEP policy is not intended to be binding on BCDC or violators, or on courts in any judicial enforcement proceeding.

#### **B. SEP Guidelines**

The following guidelines apply to SEPs:

1. A SEP should have an adequate nexus to BCDC's statutory mandate to protect the Bay's resources and ensure public access to the Bay and its shoreline. There should also be an adequate nexus between the nature or location of the violation(s) at issue and the nature or the location of the SEP.

2. BCDC has identified the following four categories of projects which may qualify as a SEP: (1) Removal of Bay fill; (2) Enhancement of the Bay's resources, including habitat restoration; (3) Cleanup or abatement of pollution or contamination; and (4) Enhancement of existing public access to the Bay or its shoreline. A SEP may fall into more than one category.
3. The amount of the penalty to be offset by a SEP shall not exceed 25% of the total administrative civil penalty amount that the violator is required to pay for the violation(s).
4. BCDC may never compromise the stringency or timeliness of a regulatory requirement in exchange for a SEP. Performance of a SEP does not alter a violator's obligation to remedy a violation expeditiously and return to compliance or to comply with all applicable regulatory obligations.
5. A SEP cannot be used to satisfy BCDC's or another government agency's statutory or regulatory requirements, or to satisfy the violator's regulatory or permit obligation to perform a particular activity.
6. A SEP may not directly financially benefit BCDC's functions, its staff, or family members of BCDC staff.
7. A SEP must be enforceable against a violator pursuant to a stipulated order setting administrative civil liability or a settlement agreement.
8. BCDC establishes the following preferences for a SEP: (a) a project with a community nexus (*i.e.*, a project located in the same general area in which the violation(s) occurred); or (b) a project benefitting a vulnerable or disadvantaged community that is located in, adjacent to, or in close proximity to the same general area in which the violation(s) occurred.
9. The following are examples of projects that are not acceptable as SEPs: (a) projects that would benefit the violator or a property owned or controlled by the violator; (b) cash or in-kind donations to community groups, environmental organizations, state/local/federal entities, or any other third-party that are not directed towards a specific, approved project; (c) cash or in-kind contributions to environmental research, studies, assessments, or monitoring programs that are not directed toward a specific, approved project; and (d) general public educational or public environmental awareness projects.

**C. Requirements for Stipulated Orders or Settlement Agreements Authorizing a SEP.**

A SEP must be enforceable through a stipulated order setting administrative civil liability or a settlement agreement. The order or agreement shall:

1. Accurately and completely describe the SEP, including a project description or scope of work, budget, schedule, and any relevant supporting materials, and provide reliable, measurable, and objective means to verify timely completion.
2. Address how the SEP will comply with the California Environmental Quality Act (CEQA), and incorporate any CEQA requirements into the time schedule for the SEP.
3. Require that all SEP funds must be expended, and the SEP completed, within 36 months of Commission adoption of the order or agreement, unless the Executive Director grants an extension for good cause shown as to why the project has been delayed.

4. Require a written acknowledgment by either the violator or third-party performing the SEP that any funds intended for the SEP, including all funds received by any third-party from the violator, shall be spent in accordance with the terms of the order or agreement on the specific, defined project.
5. Require the violator or third-party performing the SEP to provide BCDC with a full accounting of project expenditures. The violator or third-party performing the SEP must agree to an audit of its SEP expenditures, if requested by BCDC.
6. State that the SEP penalty offset amount that will be satisfied by performing the SEP shall be treated as a suspended administrative civil penalty, and that if the SEP is not fully implemented in accordance with the terms of the order or agreement, BCDC shall be entitled to recover the full amount of the suspended administrative civil penalty. Upon written demand by or on behalf of the Commission, the violator shall within 60 days pay the suspended administrative civil penalty amount to the Bay Fill Clean-up and Abatement Fund. Full payment of the suspended administrative civil penalty amount shall be in addition to any other applicable remedies for noncompliance with the terms of the order or agreement.
7. Require periodic reporting (quarterly reporting at a minimum) on agreed upon SEP performance milestones by the violator or third-party performing the SEP so that BCDC is able to monitor the timely and successful completion of the SEP.
8. Require the violator or third-party performing the SEP to provide a final completion report to BCDC certifying completion of the SEP in accordance with the terms of the order or agreement. BCDC shall review the SEP documentation and if it concurs with the certification shall provide the violator with a statement indicating that the SEP has been completed in accordance with the terms of the order or agreement and that any remaining suspended administrative civil penalty amount is waived.
9. Require that whenever the violator or third-party performing the SEP publicizes the SEP or results of the SEP, it shall state in a prominent manner that the project is being (or has been) undertaken as part of the settlement of a BCDC enforcement action.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 11415.60, 66641.5(e) and 66641.6, Government Code; and Sections 29610-29611, Public Resources Code.