

San Francisco Bay Conservation and Development Commission

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August 7, 2019

TO: Enforcement Committee Members

FROM: Karen Donovan, Attorney (karen.donovan@bcdc.ca.gov)

SUBJECT: **Penalty Policy Development – Calculating Initial Base Penalty (Agenda Item 7)
(For Committee consideration on August 8, 2019)**

Summary

This memorandum includes a brief description of the processes used by different agencies in their enforcement policies to determine the initial or base liability amount to which they then apply designated adjustment factors to determine a final proposed penalty amount for a particular case.

All agency policies that we examined include the principle that civil penalties should bear a reasonable relationship to the gravity of the harm or potential harm resulting from the violation. This is coupled with the principle that, to deter future violations, it is important to fully eliminate any economic advantage or unfair competitive advantage derived from the noncompliance. This focus of this memorandum is the first principle and the manner in which the varying agency penalty policies or enforcement policies calculate the base penalty amount. Each policy does this in a different manner, although the factors considered are generally the same.

We will be discussing this at the Enforcement Committee meeting on August 8, 2019. At that meeting, staff will seek the Committee's input on the following questions:

1. Should staff develop a scoring system to rank or score the gravity of violations as part of the development of a penalty policy or penalty matrix?
2. If so, what criteria or factors should be used for the ranking or scoring of violations based on gravity?
3. What should be the possible ranges employed in a ranking or scoring system?
4. Should staff develop two different scoring or ranking methods to apply separately to public access violations and violations involving fill of the Bay?
5. Should staff attempt to set a specific gravity score or ranking level for certain violation types, rather than using several factors and employing an individualized calculation in each case?



Description of Agency Penalty Policies

Virginia Department of Environmental Quality Civil Enforcement Manual

The Virginia Department of Environmental Quality (VA DEQ) Civil Enforcement Manual (Manual) includes a chapter on calculating civil charges and civil penalties. The Manual establishes integrated policies and procedures across all media and programs, including air, oil discharges, water, and other media, although it includes separate worksheets for each program (e.g., Air, Animal Feeding Operations, Pollutant Discharge Elimination System) which incorporate the authorized penalties for violations of the statute at issue.

As a first step in calculating a penalty, the Manual directs staff to place the violations into one of three “potential for harm” classifications – serious, moderate, or marginal. These classifications are determined based on: (1) the severity of the violation and whether the violation is fundamental to the integrity of the regulatory program and DEQ’s ability to monitor and protect human health and the environment; (2) harm, including the potential harm, as well as the actual effect the violation had on human health or the environment.

The classifications are generally described as follows:

Serious Classification:

A violation is classified as Serious if (1) the severity of the violation presents a *substantial risk* or an actual harm to the integrity of the regulatory program or (2) has or may have a *substantial adverse effect* to human health or the environment

Moderate Classification:

A violation is classified moderate if (1) the severity of the violation presents *some risk* or actual harm to the integrity of the regulatory program or (2) has or may have *some adverse effect* to human health or the environment.

Marginal Classification:

A violation is classified as marginal if (1) the severity of the violation presents *little or no risk* of actual harm to the integrity of the regulatory program or (2) has or may have *little or no adverse effect* to human health or the environment.

The worksheets for each of the various specific programs provide further guidance to determine potential for harm. For violations involving the water quality-related Pollutant Discharge Elimination System Program, for example, the Manual states that violations would be given the “Serious” classification if they involved fish kills, effluent violations resulting in loss of beneficial uses, or chronic refusal to apply for a permit or perform a Toxics Management Plan. The “Marginal” classification is used for improperly completed Discharge Monitoring Reports and minor exceedances of permit effluent limits.

For certain discharges to wetlands and streams, the Manual also provides the following chart for classifying violations involving failure to obtain coverage under an Individual Permit or General Permit prior to commencing an activity:

Description	Serious	Moderate	Marginal
Impacts to more than two (2) acres of wetlands or open water or more than 1,500 linear feet (LF) of stream	X		
Impacts from 1/10 to two (2) acres of wetlands or open water or from 301 to 1,500 LF of stream		X	
Impact to less than 1/10 acre of wetlands or open water or up to 300 LF of stream			X

The manual also includes charts for classifying certain other violations.

For each of the various programs, a worksheet is used to determine the initial penalty amount after the potential for harm classification is determined. The tables sets forth a range in amounts based on the authorized statutory penalties for the particular violation. For penalties related to wetland activities, for example, the upper portion of the worksheet appears as follows:

	Data		Potential for Harm			
			Serious	Moderate	Marginal	Amt
Violations and Frequency			\$ (x) occurrences	\$ (x) occurrences	\$ (x) occurrences	
a. Failure to obtain coverage under an Individual Permit (IP) or a General Permit (GP) prior to commencing an activity	Y	N	6,500 (x) _____	2,600 (x) _____	1,300 (x) _____	
b. Exceeding coverage authorized under an IP or GP	Y	N	6,500 (x) _____	2,600 (x) _____	1,300 (x) _____	
c. Failure to perform or complete compensatory mitigation	Y	N	26,000 (x) _____	13,000 (x) _____	6,500 (x) _____	

d. Failure to perform or complete corrective action relative to unsuccessful compensation	Y	N	13,000 (x) ____	6,500 (x) ____	2,600 (x) ____	
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After calculating the initial base penalty, the matrix has a subsequent set of inputs for adjustments. Adjustment factors include compliance history, degree of culpability, economic benefit, ability to pay, and other documented, case-specific factors, including the cooperation of a responsible party in resolving a case quickly.

Using the Manual, the calculation of the initial base penalty for a project that involved one occurrence of unauthorized wetland fill (violation type 1.a.) involving one acre of impact would be $\$2,600 \times 1 = \$2,600$.¹

Connecticut Department of Environmental Protection Civil Penalty Policy

The State of Connecticut has developed a Civil Penalty Policy with a civil penalty calculation matrix that has some similarities to the Virginia DEQ.

The basic gravity-based penalty component is calculated by assessing: (1) the extent of deviation from legal requirements; and (2) the potential for harm posed by the violation.

There are three categories for the extent of deviation from legal requirements:

- (1) Major, encompassing substantial noncompliance, in that the violator deviates from the requirement to such an extent that most (or most of the important aspects) of the components of the requirement are not met, or are met after excessive delay;
- (2) Moderate, encompassing significant noncompliance, in that the violator significantly deviates from the requirement but some of the components of the requirement are implemented as intended; or requirements are met after significant delay; and
- (3) Minor, encompassing minimal noncompliance, in that the violator deviates somewhat from the requirement but most (or all important aspects) of the components of the requirement are met, or are met after minimal delay.

The assessment of potential for harm posed by the violation considers both harm to the environment and harm to the regulatory program. The harm to the environment evaluation considers: (i) the population at risk; (ii) the environment at risk; (iii) the quantity of the

¹The Manual allows for the penalties for different wetland fill violation types to be combined. This penalty amount would likely be assessed in conjunction with a penalty amount of \$13,000 for unauthorized impacts to wetlands resulting in a total base penalty of \$18,200.



discharge, emission, waste, fill or other material, dredging, removal of material, or alteration of or encroachment into natural resources; (iv) the nature and the physical, chemical, biological, and thermal characteristics of the discharge, emission, waste, fill, or other material involved; and (v) the quality of the natural resources that were or could have been effected. The first four factors are assigned a score of 0 to 3, with 3 representing the highest risk. The fifth factor also receives a score of 0 to 3, with 3 representing a severe degradation of the resource. The harm to the environment score for violations thus can range from 0 to 15.

Harm to the regulatory program includes the effect that noncompliance could have on the Department’s ability, through its regulatory programs, to prevent or monitor potential harm to public health or the environment. Each violation is evaluated in terms of its degree of regulatory harm and categorized as either Major, Moderate, or Minor. The Major category is for violations that have or could have a substantial effect on the Department’s ability to prevent or monitor potential harm to public health or the environment. The Minor category is for violations that have or could have a small effect on the Department’s ability to prevent or monitor potential harm to public health or the environment.

After the calculations are made, the Penalty Policy sets forth several matrices for calculating penalties, separated based on statutory programmatic penalty maximums of \$25,000, \$10,000 and \$1,000. For the \$10,000 maximum, the penalty matrix is as follows:

\$10,000 Basic Gravity-Based Penalty Matrix

Potential For Harm		Extent of Deviation		
Category	Total Score	Major	Moderate	Minor
Major	15	\$10,000	\$7,700	\$6,000
	14	\$9,300	\$7,200	\$5,700
	13	\$8,600	\$6,700	\$5,400
	12	\$7,900	\$6,200	\$5,100
	11	\$7,200	\$5,700	\$4,800
Moderate	10	\$4,800	\$2,880	\$1,800
	9	\$4,240	\$2,560	\$1,600

The Penalty Policy states that a separate chart should also be used for to determine an additional per day, per week, or per month penalty for violations that continue for more than one day. This chart provides a penalty range based on the same considerations, and the penalty chosen from the range is then multiplied by the appropriate number of days, months or other period that the violation continued after the first day (e.g. for a three-day violation with a “potential for harm” score of 11 that is determined to involve a major deviation, the continuing violation penalty would be $\$720 \times 3 = \$2,160$). The continuing violation sum is then added to the basic gravity-based penalty amount to determine the total gravity-based penalty (i.e. $\$7,200 + \$2,160 = \$9,360$).



The Penalty Policy also describes the manner in which the total gravity-based penalty may then be adjusted based on factors including the violator's good faith efforts to comply prior to the Department's discovery of the violation, degree of willfulness and/or negligence, and history of noncompliance, as well as the violator's ability to pay.

NOAA Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions

The NOAA Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions bases penalties on two criteria: (1) an initial base penalty and permit sanction amount calculated by determining (a) the gravity of the violation and (b) the culpability of the violator; and (2) adjustments to the initial base penalty and permit sanction upward or downward to reflect the particular circumstances of a specific violation; and (3) an additional amount added to the base penalty to recoup the proceeds of any unlawful activity and any additional economic benefit of noncompliance.

The Policy provides individual matrices for determining the appropriate gravity-of-offense penalty amount for different violations, including violations of the National Marine Sanctuaries Act (NMSA), Marine Mammal Protection Act (MMPA), Endangered Species Act (ESA), and Magnuson-Stevens Act. In addition, the Policy includes a Schedule of Offenses for many possible violations, assigning a specific level, I-V, for specific enumerated offenses. For example, MMPA taking violations involving unauthorized harassment or collection of parts of a marine mammal are assigned a Level II, while killing a marine mammal, or attempting to do so, is assigned a Level IV. For seabed-related violations of the NMSA, minor alteration of seabed that is easily fixed is assigned a Level of I, while anchoring in a prohibited manner or area is assigned a Level of II, and alteration or destruction of seabed, including dredging and drilling with moderate impact to the sanctuary is assigned a Level of III. With this system, there is no calculation involved in determining the appropriate gravity level for most violations, because this is set forth on the schedules of common violations. Staff must determine the appropriate offense gravity level by applying the delineated gravity-of-offense factors only if no similar violation can be identified on the schedules.

The second determination required to use the individual penalty matrices is the degree of mental culpability of the alleged violator. There are four levels of culpability: intentional, recklessness, negligence, and unintentional acts (including accident, mistake, and strict liability). An intentional violation is one that is committed deliberately, voluntarily, or willfully. Recklessness is a conscious disregard of a substantial risk of violation measures, and it involves a gross deviation from the standard a law-abiding person would observe in similar situations. Negligence is a failure to exercise the degree of care that a reasonably prudent person would exercise in similar situations.

The following sets forth a portion of the Penalty Matrix for the National Marine Sanctuaries Act



Gravity of Offense Level	Level of Culpability			
	A Unintentional	B Negligent	C Reckless	D Intentional
I	Written warning - \$1,000	Written warning - \$2,000	\$1,000 - \$3,000	\$2,000 - \$4,000
II	\$1,000 - \$3,000	\$2,000 - \$4,000	\$3,000 - \$6,000	\$4,000 - \$8,000
III	\$3,000 - \$6,000	\$4,000 - \$8,000	\$6,000 - \$12,000	\$8,000 - \$16,000
IV	\$4,000 - \$8,000	\$6,000 - \$12,000	\$8,000 - \$16,000	\$16,000 - \$32,000

To show how the Matrix would be applied the Policy includes the following example. A recreational vessel owned and operated by Captain X grounds in seagrass habitat in the Florida Keys National Marine Sanctuary. When interviewed by law enforcement, Captain X advises that he lost his bearings. An assessment of the grounding reveals that over 80 square yards of habitat is impacted, including prop scars and a blowhole.

To determine the Initial Base Penalty the following calculations apply:

Offense Level: Level III. The NMSA schedule provides for a level range of III where, as in this example, the gravity of the offense is moderate

Degree of Culpability: Level B. The evidence indicates that although the grounding is unintentional, Captain X attempted to power off, thus creating a blowhole, which is negligent.

Initial Base Penalty: The penalty range as set forth on the matrix is III B, \$4,000 - \$8,000, with a midpoint of \$6,000.

After this calculation, the Policy also calls for the application of adjustment factors, including history of prior offenses and actions after the violation, as well as other considerations.

U.S. Environmental Protection Agency General Enforcement Policy

EPA's General Enforcement Policy, which was issued in 1984 and from which its program-specific policies derive, sets forth a two-step calculation process. The first step involves a calculation of a preliminary deterrence amount, comprised of both the benefit component and the gravity component. After the first step, a second step involves the application of adjustment factors, including the violator's willfulness and degree of cooperation in resolving the violation.

The calculation of the gravity component involves a ranking of the violation according to its seriousness, considering: (1) the actual or possible harm; (2) the importance of the requirement at issue to achieving the goal or the statute or regulation; (3) in the case of recordkeeping or reporting requirements, the availability of the data from other sources; and (4) where appropriate, a consideration of the size of the violator.



The EPA General Policy notes that the assessment of risk or harm resulting from a violation is complex and includes considerations of: (1) the amount of pollutant; (2) toxicity of the pollutant; (3) sensitivity of the environment; and (4) length of time the violation continues.

The Policy states that subsequent program-specific policies should address these factors and any additional relevant factors and then systemically prescribe dollar amounts to yield a gravity component for the penalty.

In 2001, EPA issued a revised Clean Water Act Section 404 Settlement Policy (CWA 404 Policy) that establishes appropriate penalties to be considered in settlement of violations involving discharges of dredged or fill material without a Section 404 permit authorization or in violation of a Section 404 permit. The intent of the guidance is to provide the lowest figure that the federal government should accept in settlement, and it states that the federal government reserves the right to seek any amount up to the statutory maximum where settlement is not possible, as well as where circumstances warrant application of a higher penalty than what would be provided for under the settlement policy.

The Policy includes the following calculation for calculating the preliminary gravity amount:

$$\text{Preliminary Gravity Amount} = (\text{sum of A factors} + \text{sum of B factors}) \times M$$

In this calculation, M(Multiplier) equals \$500 for minor violations with low overall environmental and compliance significance, \$1,500 for violations with moderate overall environmental and compliance significance, and \$3,000-\$10,000 for major violations with a high degree of either environmental or compliance significance.

The "A" Factors relate to environmental significance, and a value between 0 and 20 is assigned for each factor as follows:

1. Harm to Human Health or Welfare – This considers whether the discharge of dredged or fill material has adversely impacted drinking water supplies, resulted in flooding, impaired fisheries or shellfish beds, or otherwise has adverse affected recreational, aesthetic, and economic values. The Policy states that if the discharge has resulted in an imminent and substantial endangerment, the highest value for this factor should be used.
2. Extent of Aquatic Environment Impaired – This factor examines the size or acreage involved in comparison to other violations observed within the same watershed, regionally or nationally.
3. Severity of Impacts to the Aquatic Environment – This factor considers the overall impact of the discharges to waters of the U.S. It also looks at whether the discharge caused, or threatens to cause, adverse impacts to, or the destruction of waters, or has caused or contributed to violation of any applicable water quality standard. In addition,

under this factor, there should be a consideration of whether the violation resulted in harm to aquatic life or wildlife dependent on aquatic habitat.

4. Uniqueness/Sensitivity of the Affected Resource – This factor considers whether the affected ecosystem is nationally or regionally limited, of a type that has become rare due to cumulative impacts, or is relatively abundant.
5. Secondary or Off-Site Impacts – This factor examines the extent to which the discharges caused, or threatened to cause, secondary or off-site impacts such as erosion and downstream sedimentation problems or nuisance species intrusion.
6. Duration of violation – This factor considers both the length of time that the discharge activity occurred and the length of time that dredged or fill material has remained in place.

The “B” Factors relate to compliance significance and focus on the violator. A value between 0 and 20 is assigned for each of the following factors:

1. Degree of Culpability – This involves an evaluation of the defendant’s degree of negligence, recklessness, intent or responsibility involved in committing the violation. The factors examines the violators experience with or knowledge of the statutory program and whether the violator knew or should have known of the need to obtain a permit, as well as the violator’s control over the unlawful conduct.
2. Compliance History of the Violator – This considers whether the violator has a history of violations.
3. Need for Deterrence – This considers whether the violator appears likely to violate again and the prevalence of violations of the type at issue in the regulated community.

The Policy also includes a consideration of additional adjustment factors (“M”), which include a recalcitrance adjustment based on bad faith conduct, and an incentive factor to encourage quick settlement.

As an example, if an entity discharged rock, concrete and other materials to a .3 acre portion of a 5-acre wetland site located adjacent to an industrial area and near an area affected by rising water levels, and the entity has not removed the fill after being notified two years earlier, the “A” Factors could be determined as follows:

For #1 (Harm to Human Health or Welfare)	12
For #2 (Extend of Aquatic Environment Impaired)	9
For #3 (Severity of Impacts to the Aquatic Environment)	8
For #4 (Uniqueness/Sensitivity of the Affected Resource)	6
For #5 (Secondary or Off-Site Impacts)	0
For #6 (Duration) -	<u>15</u>
Total -	51

The “B” Factors could be determined as follows:

For #1 (Degree of Culpability)	10
For #2 (Compliance History of Violator)	2
For #3 (Need for Deterrence)	<u>15</u>
Total -	27

Using the formula, the calculation of preliminary gravity amount would be done as follows:

$$117,000 = (51 + 27) \times 1,500$$

There are additional reductions and adjustments that are applied to this figure pursuant to the Policy, and the calculation applies only to the preliminary gravity amount.

State Water Resources Control Board Water Quality Enforcement Policy

The State Water Resources Control Board’s Water Quality Enforcement Policy follows a multi-step process to determine the Total Base Penalty or Total Base Liability Amount. For discharge violations, the first step involves determining the actual harm or potential for harm. This entails a consideration of three factors: (1) the degree of toxicity of the discharge, which is scored on a scale of 0 - 4; (2) the actual harm or potential harm to beneficial uses, which is scored on a scale from 0 - 5; and (3) the susceptibility to cleanup or abatement, which receives a score of 0 if 50 percent or more is cleaned up and a score of 1 if less than 50 percent is susceptible to cleanup or abatement. The scores for each factor are added to derive a number between 1 and 10.

The next step involves determining the extent to which the violation deviates from the specific requirement that was violated. There are three categories – minor, moderate, and major. For violations where the effluent limitation, prohibition, monitoring requirement, or deadline was rendered ineffective in its essential requirement, the deviation factor will be major. Conversely, where the intended effectiveness of the requirement remained generally intact, the deviation will be minor.

Using these steps, a multiplier is then developed. For per day violations, it is as follows:

Deviation from Requirement	Potential For Harm									
	1	2	3	4	5	6	7	8	9	10
Minor	0.005	0.007	0.01	0.02	0.04	0.08	0.14	0.2	0.3	0.35
Moderate	0.007	0.013	0.025	0.05	0.1	0.15	0.27	0.4	0.5	0.6
Major	0.01	0.02	0.04	0.08	0.15	0.28	0.41	0.6	0.8	1.0



As an example of how the calculations work, for a treatment plant that has discharged sludge as a result of a pump failure, assuming that approximately 60% of the spill was able to be cleaned up immediately, the potential scoring could be as follows:

First, a value of 3 could be assigned for the harm or potential harm, in recognition that there was a moderate impact on beneficial uses of the adjacent creek due to the nature of the discharge. Next, a score of 3 could also be assigned to for the toxicity of the discharge, in recognition that sludge of this nature typically contains elevated concentrations of coliform and concentrated heavy metals. Next, because more than 50% of the discharge was susceptible to cleanup, this factor would receive a value of 0. Adding these, the potential for harm score would then be 6 (3 [harm] + 3 [toxicity] + 0 [cleanup] = 6).

Using the chart, and assuming that the discharge occurred over a single day and that the deviation from requirement category was “major,” the per day factor would be 0.28. This factor would be multiplied by the amount of the statutory maximum to derive the initial per day penalty. Assuming, for example, that the maximum penalty is \$10,000, the per day amount would be \$2,800. Because the violation only occurred over a single day, the initial liability amount with then be \$2,800.

As a fourth step, similar to other agencies, the Boards consider additional “adjustment factors,” particularly the discharger’s degree of culpability, history of violations, and cleanup and cooperation. A total base liability amount is then determined after applying the adjustments, and then other factors may be used to reduce or increase that amount.