

Consideration Of Violations Resulting In Significant Harm to the Bay or Public Access

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Section 11386(a)

Section 11386 Standardized fines

- (a) This Section shall apply to an enforcement action if the Executive Director determines:
- (1) that an alleged violation is one of the types identified in subsection 11386(e);
 - (2) that the alleged violation has not resulted in significant harm to the Bay's resources or to the existing or future public access; and**
 - (3) That the alleged violation can be corrected in a manner consistent with the Commission's laws and policies.

Audit Recommendation

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

- **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.

Other Regulations

- Section 11386(e) – Lists the 6 types of actions eligible for resolution through standardized fines
(If the Executive Director has not determined that the alleged violation has resulted in significant harm to the Bay’s resources or to the existing or future public access)
- Section 10601 – Lists the “minor repairs or improvements” eligible for authorization through an administrative or minor permit
(Note that 11386(e) includes within the standardized fine-eligible violations “failure to obtain a Commission permit prior to undertaking any activity that can be authorized by an administrative permit.”)
- Section 10602 – Lists dredging activities eligible for authorization through an administrative or minor permit. Includes “new dredging projects to deepen existing navigation channels or basins that do not result in significant adverse environmental impacts or raise conflicts with the Commission’s laws and policies”

NEPA

40 CFR 1508.27

“Significantly” as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. . . .

(b) Intensity. This refers to the severity of impact. The following should be considered in evaluating intensity:

* * *

(2) The degree to which the proposed action affects public health or safety

(3) Unique characteristics of the geographic area

* * *

(6) The degree to which the action may establish precedent for future actions with significant effects or represents a decision in principle about a future condition.

CEQA

Guidelines section 15382. Significant Effect on the Environment

“Significant effect on the environment” means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. An economic or social change by itself shall not be considered a significant effect on the environment. A social or economic change related to a physical change may be considered in determining whether the physical change is significant.

CEQA

- Guideline section 15064.7 – Public agencies encouraged to develop thresholds of significance and thresholds of significance defined as “an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency”
- Guideline section 15065 – requires an agency to find that a project may have a significant effect here the project “has the potential to substantially degrade the quality of the environment; substantially reduce the habitat of a fish or wildlife species; . . . threaten to eliminate a plant or animal community”

Questions

Should BCDC pursue a definition of significant harm that delineates specific actions that would be deemed to constitute significant harm?

or

Should BCDC pursue a definition of significant harm that establishes the qualities or characteristics of a violation that would lead to a determination that the violation resulted in significant harm to the Bay's resources or to the existing or future public access?

Additional questions or comments?