

Penalty Policy Development – Economic benefit considerations

Karen Donovan

August 14, 2019

Section 66641.9

“In determining the amount of administrative civil liability, the commission shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the violation is susceptible to removal or resolution, the cost to the state in pursuing the enforcement action, and with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary removal or resolution efforts undertaken, any prior history of violations, the degree of culpability, **economic savings, if any, resulting from the violation**, and such other matters as justice may require.”

Goal of Enforcement is to Promote BCDC's Mission

Enforcement ensures that the regulated community complies with statutory requirements

Section 66601 – “The Legislature further finds and declares . . . that while some individual fill projects may be necessary and desirable for the needs of the entire bay region . . . a governmental mechanism must exist for evaluating individual projects as to their effect on the entire bay”

Section 66601 – “The Legislature further finds and declares . . . that existing public access to the shoreline and waters of the San Francisco Bay is inadequate and maximum feasible public access, consistent with a proposed project, should be provided.”

Section 66632 – “Any person or governmental agency wishing to place fill, to extract materials, or to make any substantial change in use of any water, land, or structure, within the area of the commission’s jurisdiction shall secure a permit from the commission”

Enforcement Policy Goals

- Deterrence
 - Deter violator from future violations
 - Deter similarly situated parties from committing the same violations
- Fairness
 - Preventing violators from gaining a competitive advantage
 - Facilitating timely resolution of enforcement actions
- Consistency
 - Promoting consistent treatment of similar violations
- Transparency
 - Ensure that BCDC's enforcement process and enforcement decisions are clearly communicated

Reason for Including Economic Benefit

- Deters violations by ensuring that civil penalties are more than a cost of doing business
- Attaches a financial risk to non-compliance, encouraging protection of the Bay and public access to the shoreline
- Levels the playing field and provides equity between those who comply and those who violate
- Promotes consistency by establishing expectations as to what should be recovered in all enforcement actions, absent extraordinary circumstances

Should staff incorporate the recapture of economic benefit into the penalty policy that staff is developing?

How should economic benefit be factored into the penalty calculation?

Option 1:

Penalty = Economic Benefit + Gravity-Based Amount +/- Adjustments

Option 2:

Economic Benefit is assumed to be the minimum acceptable civil penalty amount

Sub-options:

- Establish set goal (e.g. 10%) above economic benefit
- Establish only that penalty amount should exceed economic benefit of non-compliance

Other Factors

For additional internal development:

- Culpability of violator
- Violator history
- Voluntary removal or resolution efforts

For future consideration:

- Cost to the state in pursuing the enforcement action
- Violator size/unique characteristics
- Ability to pay and ability to continue in business

Additional questions or comments?