

BRIEFING ON CALCULATION OF VIOLATIONS

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Presentation outline

- Enforcement program goals
- Summary of BCDC's current practice for calculating violations
- Summary of other agency practices
- Proposal and principles for calculating violations
- Committee discussion

Audit recommendation

The commission should take the following 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.**

Overarching goal of enforcement – furthering BCDC's mission

- Protection of the Bay
- Ensuring maximum feasible public access

Enforcement mission and goals

- **Fairness and Consistency**

- Provide equitable treatment and be both consistent and flexible enough to allow for adjustments for legitimate differences in situations and cases

- **Efficient and Effective Deterrence**

- Provide firm disincentives to noncompliance (deterrence) and effective incentives to resolve violations quickly

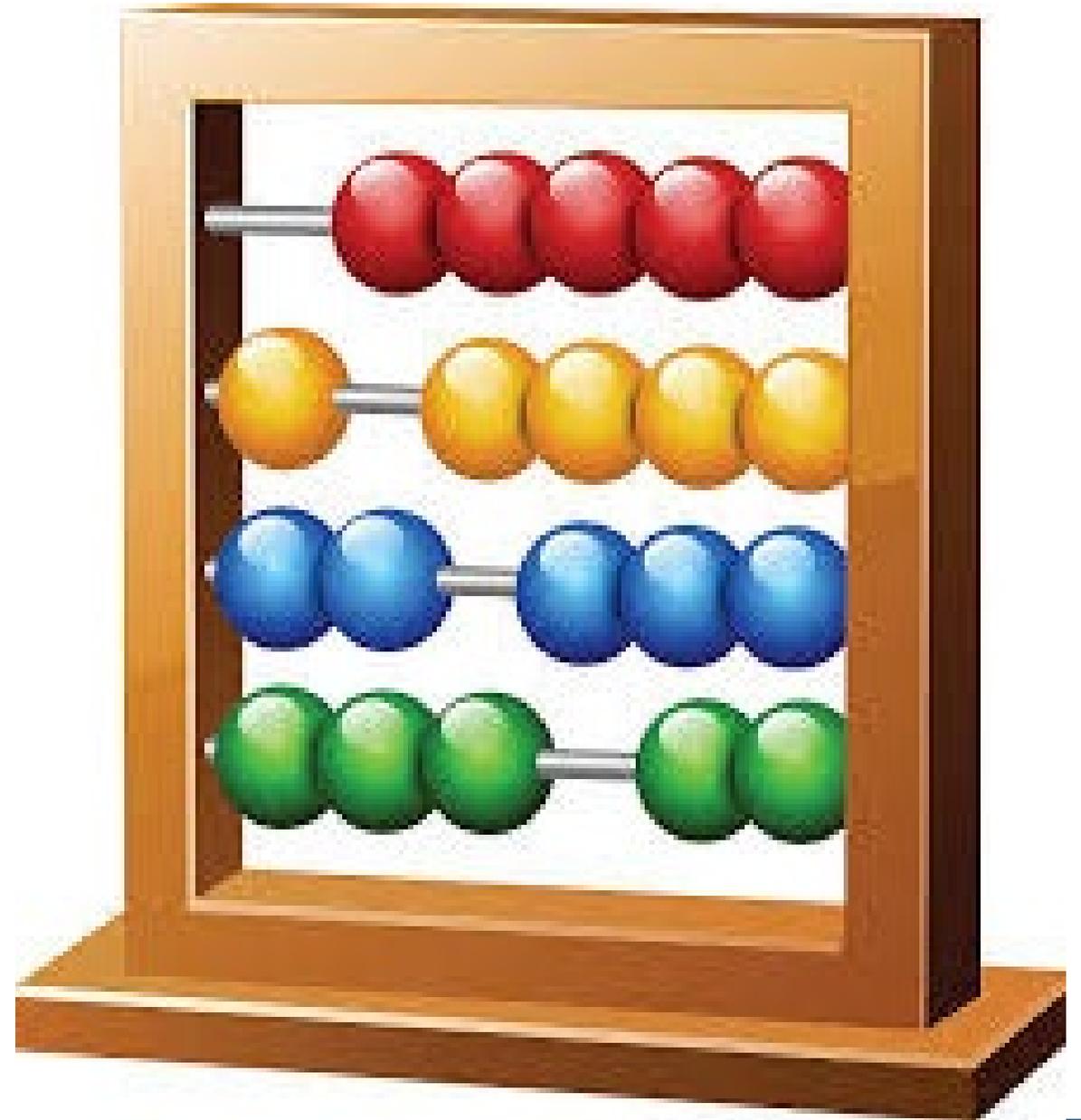
- **Transparency**

- Actions should be clear and based in policy, regulations, and statute

- **Swift and timely action**

- Ensure that violations involving risk to the Bay or public access are resolved swiftly and not allowed to continue

WHAT BCDC IS CURRENTLY DOING



BCDC Law

- McAteer-Petris Act section 66641.5(e)

Civil liability may be administratively imposed by the commission in accordance with Section 66641.6 on any person or entity for **any violation of this title or any term or condition of a permit** issued by or on behalf of the commission in an amount which shall be not less than ten dollars (\$10), nor more than two thousand dollars (\$2,000), for each day in which that violation occurs or persists, but the commission may not administratively impose a fine of more than thirty thousand dollars (\$30,000) for a single violation.

- Suisun Marsh Preservation Act section 29601

The provisions of Chapter 4 (commencing with Section 66630) of Title 7.2 of the Government Code relating to cease and desist orders and penalties for violations thereof shall apply to **all development for which a marsh development permit from the Commission**, or the Commission hearing an appeal, **may be required** under this division.

[Note that “development” is defined in section 29114]

BCDC Regulations (1 OF 2)

Regulations Section 11321

Requires commencement of Commission enforcement proceedings by issuing a violation report in the format set out in Appendix H and/or a complaint for civil penalties in the format in Appendix H

Appendix H format includes descriptions of the alleged illegal activity and provisions of law or Commission permit that the staff alleges have been violated

BCDC Regulations (2 OF 2)

Regulations Section 11386(a). Standardized Fines:

Standardized fines regulation applies to an enforcement action if:

- (1) The alleged violation is one of the six types described in Section 11386(e);
- (2) The alleged violation has not resulted in significant harm to the Bay's resources or to existing or future public access; or
- (3) The alleged violation can be corrected in a manner consistent with the Commission's laws and policies

Example 1: Signage (1 of 3)

Without prior approval, permittee posted **two** signs on their public access boardwalk restricting public use hours to 7 AM to 7 PM.

1. Each sign violated a permit special condition for failing to seek plan approval (2 violations) **AND** violated the McAteer-Petris Act prohibition on unauthorized fill (2 violations)
2. The unauthorized restriction of the public access hours violated a separate permit special condition requiring unrestricted access to the public access area (1 violation)

Example 1: Signage (2 of 3)

Sign 1



Sign 2



Example 1: Signage (3 of 3)

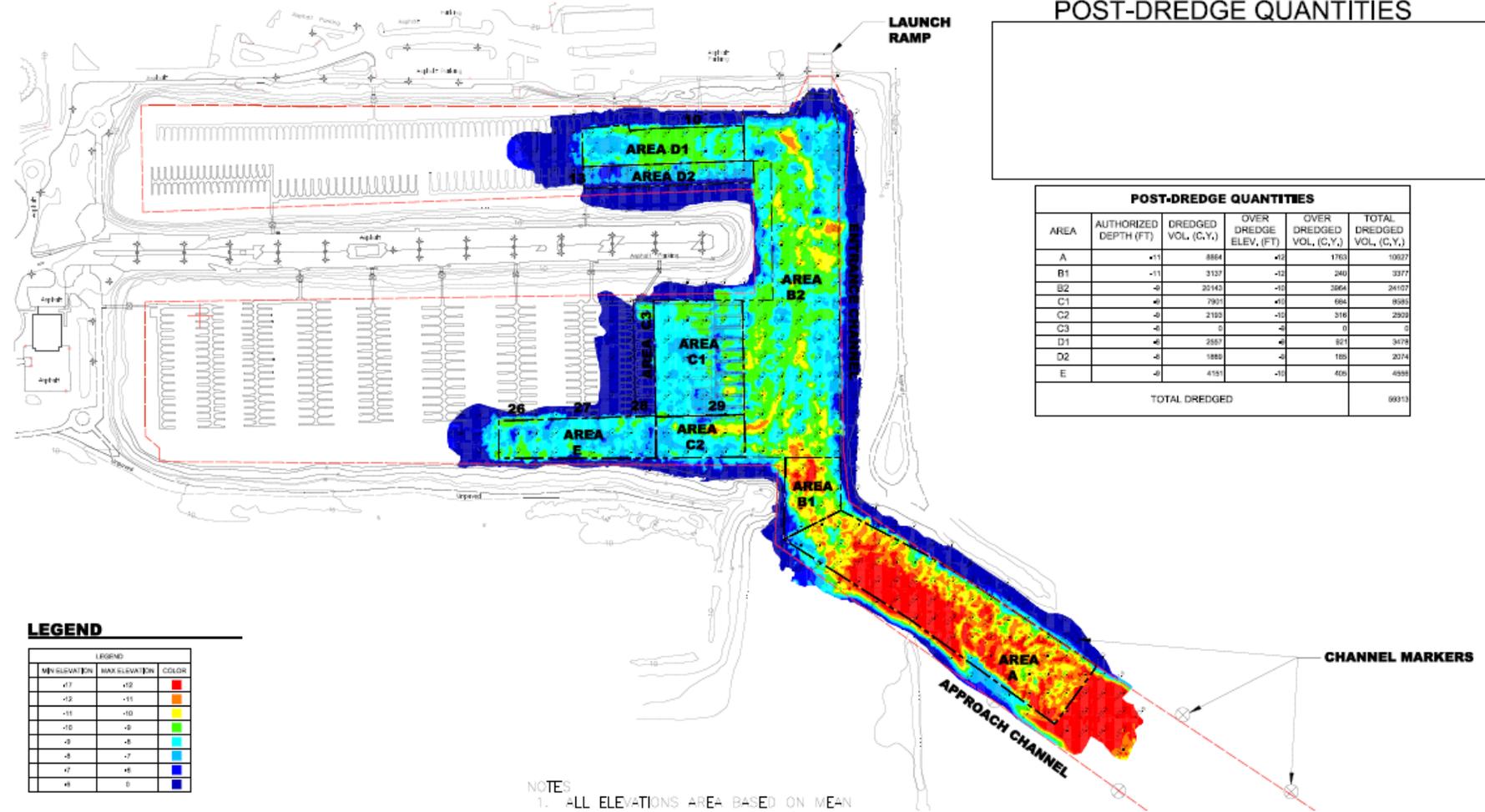
Rationale for combining 3 permit violations (unauthorized restriction) and 2 statutory violations (placement of fill) into one violation:

- The signs were identical and served to impose the same use restriction
- All five separate violations functioned together to serve the same end: restricting the public's access to the boardwalk

Example 2: Dredging (1 of 2)

Three Violations:

1. Dredging in unauthorized areas
2. Dredging beyond the approved depths in authorized areas
3. Unauthorized disposal of the illegally dredged material



Example 2: Dredging (2 of 2)

Rationale for calculating violations:

- Violations 1 and 2 distinguish between ***vertical depth*** and ***horizontal footprint*** of dredging
- Violation 3 combined disposal of material from both Violations 2 and 3

Example 3: Unauthorized Fill (1 of 2)



Example 3: Unauthorized Fill (2 of 2)

Rationale for calculating violations:

- The two activities occurred years apart
- Each project served distinct purposes
- The project in the water required additional approvals from other agencies

Example 4: Various Violations (1 of 2)

Five violations:

- Failure to submit and gain approval of public access plans prior to construction (Special Condition II.A)
- Failure to permanently guarantee public access area (Special Condition II.F.2)
- Failure to build public access improvements according to requirements, such as a public access pathway that is too narrow (Special Conditions II.A.2 and II.F.3)
- Failure to assign rights and obligations of permit when transferred from developer to HOA (Special Condition II.K)
- Unauthorized signage restricting public use of the required public access pedestrian and parking areas

Example 4: Various Violations (2 of 2)

Rationale for calculating violations:

- Three distinct paper violations (plans, public access guarantee and permit assignment)
- One combined violation involving same area and purpose (various noncompliant public access improvements)
- One distinct unauthorized activity (posting of signs that restrict public access provisions of permit)



WHAT OTHER AGENCIES ARE DOING



Other agency approaches (1 of 5)

Nuclear Regulatory Commission Enforcement Policy

Violation is the failure to comply with a requirement

Other agency approaches (2 of 5)

California Coastal Commission

Any development that is inconsistent with the terms and conditions of a previously issued permit or is undertaken without a permit is a violation

Coastal Act Section 30106 defines “development” broadly to include physical development, grading, extraction of materials, removal of vegetation, and actions that affect access (fencing, gates, and trespassing signs)

Staff may combine multiple instances of non-compliance with permit conditions into a single violation (e.g. unpermitted improvements and unpermitted closure during daylight hours = one public access violation)

OTHER AGENCY APPROACHES (3 OF 5)

Department of Toxic Substances Control (DTSC)

Health & Safety Code defines Class I violations; others are Class II

22 CCR 66272.64

- (a) At the discretion of the Enforcement Agency, a single initial penalty may be assessed for multiple violations. Multiple violations subject to this section are multiple instances of the same violation, where each is a violation in itself.
- (b) The assessment of a single initial penalty may be appropriate for multiple violations in the following cases.
- (1) The facility has violated the same requirement at one or more locations (e.g. units) within the facility.
 - (2) The violation occurs on separate occasions, unless the facility has been notified of the violation and has had sufficient time to correct the violation, and the violation is not a violation that continues uninterrupted for more than one day.
 - (3) When violations are not independent or are not substantially distinguishable. For such violations, the Enforcement Agency shall consider the extent of violation in terms of the most significant violation.

OTHER AGENCY APPROACHES (4 OF 5)

Virginia Department of Environmental Quality Enforcement Manual

“Enforceable environmental requirements” means the statutes, regulations, case decisions (including but not limited to permits and orders), decrees, or certifications that are enforceable by one of the boards or by DEQ

For certain violations (e.g. solid waste management), the enforcement manual states that multiple violations that arise out of a single act or omission may be consolidated into a single violation for purposes of calculating civil penalties

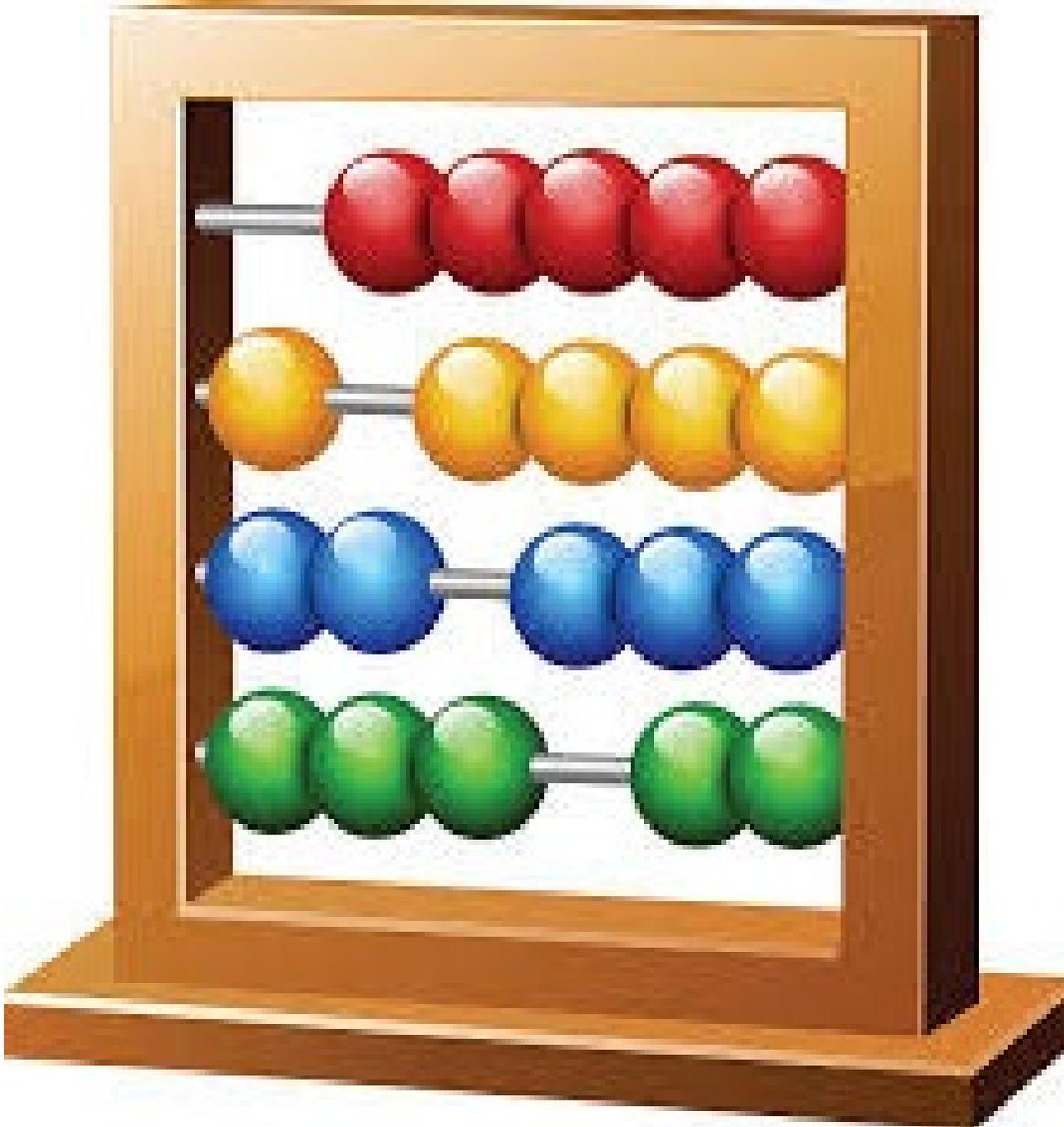
OTHER AGENCY APPROACHES (5 OF 5)

State Water Resources Control Board Water Quality Enforcement Policy

Water Code 13385 sets forth violations, including certain discharges, violations of WDR requirements, monitoring requirements, orders, etc.

Water Code 13385(f) – a single operational upset that leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

PROPOSAL



PROPOSAL

- Any violation of the statutes, regulations, or any term or condition of a permit is a violation
- Violations may be combined at BCDC's discretion based on specified principles

CONCEPTUAL PRINCIPLES FOR DISCUSSION

Reasons to Separate	Reasons to Combine
Distinguish activities that are substantially separate in time	Combine violations of requirements that serve the same purpose
Distinguish activities that require separate filing requirements or approvals (including from other agencies)	Combine closely related activities that occur at the same location
Distinguish activities that relate to separate special conditions	
Distinguish separate revenue-generating activities	
Distinguish vertical depth of dredging from horizontal footprint of dredging	
Distinguish dredging from disposal of dredged material	

QUESTIONS