

# Penalty Policy Development

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Item #6

June 11, 2020

# OUTLINE

- Review of prior briefings
- Review of Enforcement goals and penalty policy objectives
- How the policy will be used
- What the policy will include
- Method for determining the base penalty
- Applying the adjustment factors
- Economic benefit
- Ability to pay

# AUDIT RECOMMENDATION

To ensure that it maximizes the efficiency and effectiveness of its enforcement permitting programs, the commission should take the following actions by January 2020:

- Create a penalty calculation worksheet. The commission should require the worksheet's use for all enforcement actions that will result in fines or penalties, and it should create formal policies, procedures, and criteria to provide staff with guidance on applying the worksheet.

# PRIOR DISCUSSIONS

- July 11, 2019 – Initial Briefing
  - Discussed elements of enforcement programs
  - Reviewed other agency penalty and enforcement policies
  - Reviewed the potential elements of a penalty policy
- August 8, 2019 – Briefing on factors in calculating initial base penalty
  - Discussed factors used by other agencies to determine a base penalty amount
  - Discussed whether separate analyses should be used for base penalty for fill and public access violations
- August 14, 2019 – Briefing on economic benefit and other policy considerations
  - Reviewed the objectives for considering economic benefit as part of the evaluation of civil penalties
  - Discussed options for factoring economic benefit into the penalty calculation
- September 25, 2019 – Briefing on adjustment factors
  - Discussed ability to pay and violator culpability and conduct

## 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.

# Enforcement 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

# PENALTY POLICY GOALS

- Consistency and Transparency – Ensure that civil administrative penalties are assessed in accordance with BCDC’s laws and regulations
- Deterrence – Ensure that penalties are sufficient to deter both individual violators and the regulated community as a whole from committing violations
- Deterrence – Remove any economic incentives for noncompliance
- Fairness – Ensure that penalties are appropriate for the gravity of the violation

# HOW WILL THE POLICY BE USED

- Used by staff, the Enforcement Committee, and Commission during all administrative civil penalty proceedings
- During settlement negotiations, the policy would guide staff in making proposals, but penalties could be adjusted as a result of negotiations with a violator

# WHAT THE PENALTY POLICY WILL INCLUDE

- Criteria for use in determining a monetary civil penalty amount
- Guidance on using the criteria and addressing the factors in section 66641.9 of the McAteer-Petris Act

# WHAT IS ADDRESSED SEPARATELY IN OTHER ENFORCEMENT PROGRAM PROCEDURES AND POLICIES

- Case prioritization
- Case management, including procedures for step-wise actions in pursuing a case
- Supplemental environmental projects and similar means of reducing the monetary civil penalty through voluntary actions
- Criteria for combining or aggregating violations for purposes of assessing penalties

# PART I - DETERMINING THE BASE PENALTY AMOUNT

## Step 1: Calculate the initial gravity-based penalty

Extent of deviation from legal requirement or permit condition

		MAJOR	MODERATE	MINOR
Potential For Harm	MAJOR	\$1600- 2000* (80% - 100%)	\$1200-1599 (60% - 80%)	\$500-1199 (25% - 60%)
	MODERATE	\$1200-1600 (60% - 80%)	\$800-1199 (40% - 60%)	\$250-799 (12.5% - 40%)
	MINOR	\$800-1200 (40% - 60%)	\$250-799 (12.5% - 40%)	\$10-249 (.5% - 12.5%)

\*Per §66641.5(e), \$2000 is maximum civil penalty per day – shown percentages are extent that amount is less than \$2000

# PART I - DETERMINING THE BASE PENALTY AMOUNT

## Step 2:

- Make a downward adjustment, as appropriate, for violations that are susceptible to removal or resolution, not to exceed 10%

# PART II - ADJUSTMENT FACTORS SPECIFIC TO THE VIOLATOR

## Degree of culpability:

- Whether respondent knew or should have known that a requirement was violated
- Whether respondent knew or should have known of the hazards associated with the conduct
- Whether respondent took precautions to avoid the event that led to the violation

Base liability may be adjusted upward, up to +25% for high degree of culpability

Base liability may be adjusted downward, up to -25% for low degree of culpability

# PART II - ADJUSTMENT FACTORS SPECIFIC TO THE VIOLATOR

## History of violations:

Base liability *may* be adjusted upward, up to +10% for prior history of violations within the past 5 years

Upward adjustment *will be made (i.e. it is mandatory)* for prior violations of the same permit term or instances involving the same or substantially similar unauthorized activities within the past 5 years

Base liability is not adjusted downward where the respondent has no prior history of violations

# **PART II - ADJUSTMENT FACTORS SPECIFIC TO THE VIOLATOR**

## **Voluntary removal or resolution efforts & efforts at cooperation:**

Base liability may be adjusted upward, up to +25% if violator has failed to cooperate, delayed compliance, or created obstacles to achieving compliance

Base liability may be adjusted downward, up to -25% for exceptional cooperation and efforts to remedy violation

# OTHER FACTORS IN SECTION 66641.9

- Cost to state in pursuing enforcement action

# OTHER FACTORS AS JUSTICE MAY REQUIRE

- Considerations of environmental justice
- Other equitable considerations

## **PART III - ECONOMIC BENEFIT**

- Penalty will be set at a level that will, at a minimum, recover the economic benefit that the violator gained from the violation(s)

# 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

# **PART IV – ADDRESSING ABILITY TO PAY/ABILITY TO CONTINUE IN BUSINESS**

- This is a defense to mitigate a potential civil liability
- It must be raised by the violator
- Violator must present evidence to support an argument that it lacks ability to pay

# NEXT STEPS

- Develop draft Penalty Policy
- Discussion at upcoming Enforcement Committee meeting
- Present to Commission
- Adoption in accordance with legal requirements

# QUESTIONS

- Do you support this approach to establishing a policy to address penalties?
- Do you want to develop a policy that will be used by the Committee and Commission in adjudicating cases and adopting civil penalties?
- Do you agree with the proposed method of determining an initial gravity-based penalty amount?
- Do you agree with the proposed method of applying adjustment factors?

**Additional questions or comments?**