

DRAFT CIVIL PENALTY POLICY

I. INTRODUCTION

This policy addresses the assessment of administrative civil penalties. Government Code section 66641.5(e) authorizes BCDC to impose on any person or entity an administrative civil penalty of between ten dollars (\$10) and two thousand dollars (\$2000), for each day in which the violation occurs or persists, up to a maximum of thirty thousand dollars (\$30,000) for a single violation. Government Code section 66641.9 sets forth the factors to be used by the commission in determining the amount of administrative civil liability.

Administrative civil penalties are an important part of BCDC's enforcement authority. Civil penalties deter noncompliance and help to ensure a level playing field so that violators do not obtain an economic advantage over others who have made the investments necessary to comply.

The goal of this policy is to promote the enforcement goals of consistency, transparency, and fairness. By using the matrix and formula set forth in this policy, staff and the Commission will be able to fairly establish civil penalties in accordance with the statutory criteria in Government Code section 66641.9.

While the consistent application of this policy is important in ensuring fairness, it is equally important that the policy allow for adjustments as appropriate to reflect legitimate differences among similar violations. In establishing penalties, comparisons to prior cases could be relevant but are not required and there is no need to analyze why the penalty amounts in other actions may differ.

This policy does not apply to violations that are resolved using the standardized fine process set forth in Section 11386 of BCDC's regulations. Standardized fine amounts are established in that regulation based on the type of violation and are determined based on the time that it takes to correct the violation.

II. PENALTY CALCULATION METHODOLOGY

Penalties are calculated by first establishing a base penalty amount, calculated by determining:

- (1) The gravity of the violation and the degree of deviation from the requirement at issue, and
- (2) Whether an adjustment based on the culpability of the violator is warranted.

Next, upward or downward adjustments to the base penalty amount may be made to reflect the particular circumstances of the violation and actions by the violator. Finally, the penalty will be adjusted to ensure that the amount is no less than the amount necessary to recoup any proceeds gained from the unauthorized activity or any economic benefit derived from noncompliance.

PART 1 – Determine the Base Penalty for Each Violation

Step 1 – Calculate the initial base penalty

The initial base penalty is determined based on an evaluation of the gravity of the actual or potential harm to the Bay's resources or public access and the extent of deviation from the applicable requirements of the law or permit at issue.

The gravity of harm categories are as follows:

- (1) **Major** – This category is for violations involving a high potential for harm or high level of actual harm to the Bay or public access. Violations will first be scored using the following six impact scoring criteria: (a) habitat value (violation location); (b) durability (violation duration); (c) toxicity (destructiveness); (d) size (scope); (e) nature (violation authorized or authorizable); and (f) visibility and the formula developed for use in prioritizing cases. Physical violations involving fill that receive an impact score above the established threshold score (currently 60) are considered major, and violations involving public access limitations that receive an impact score above the established threshold score (currently 55) are considered major.
- (2) **Moderate** – This category is for violations involving a moderate potential for harm or moderate level of actual harm to the Bay or public access. Physical violations involving fill that receive an impact score between the established thresholds (currently 40 - 60) are considered moderate. Violations involving public access limitations that receive an impact score between the established thresholds (currently 35 – 54) are considered moderate.
- (3) **Minor** – This category is for violations involving minor or minimal threats to the Bay and public access. Physical violations involving fill that receive an impact score below the established threshold (currently 40) are considered minor. Violations involving public access limitations that receive an impact score below the established threshold (currently 35) are considered minor.

The impact of violations involving a failure to submit required documentation will be categorized as moderate or minor in accordance with the definitions set forth below. No violations of this nature will be categorized as major.

The failure to submit the following will be considered to be **Moderate** violations: (1) Property interest; (2) Post-dredge surveys; (3) Owners' association CC&Rs; (4) Monitoring plans and reports for Bay restoration projects; (5) Emergency permit applications; (6) Construction plans for a constructed project; (7) Recorded legal instruments to dedicate public access, open space, or view corridor areas prior occupancy; (8) Executed originals of permits.

The failure to submit any of the following will be considered **Minor** violations: (1) Incomplete construction plans; (2) Foundation layout inspections; (3) Annual live-aboard documentation; (4) Permit assignments; (5) Certificates of contractor review; (6) Notices of completion; (7) Recorded permits.

For any documentation that is not listed above, staff and the Commission will refer to the list and reference the category used for similar documents.

The categories of potential extent of deviation from an applicable requirement, are as follows:

- (1) Major – This category is for violations that deviate from the requirement to such an extent that the requirement is completely ignored and none of its provisions are complied with.
- (2) Moderate – This category is for violations that deviate from the requirement but still comply with some of the most important requirements.
- (3) Minor – This category is for violations that deviate to a minor degree from the requirement, in circumstances where the requirement functions nearly as intended, but not as well as if the entirety of the requirement had been met.

Using the matrix shown below, which is based on the statutory range of between \$10 and \$2,000 per day per violation, a penalty amount will be determined from the range provided in the matrix, based on the circumstances of the individual violation. After selecting the amount, the amount will be multiplied by the number of days that the violation has persisted to determine the total initial base penalty. Consistent with Government Code section 66641.5(e), the penalty for a single violation may not exceed \$30,000.

Extent of deviation from legal requirement

		MAJOR	MODERATE	MNOR
Potential For Harm	MAJOR	\$1600-2000	\$1200-1599	\$500-1199
	MODERATE	\$1200-1600	\$800-1199	\$250-799
	MINOR	\$800-1200	\$250-799	\$10-249

Step 2 – Adjustment based on the nature of the violation

After the initial base penalty amount is determined using the matrix, that amount may be adjusted downward for violations that are susceptible to removal or resolution. The downward adjustment is discretionary and may not exceed 10% of the initial base penalty amount.

PART II – Adjustments Specific to the Violator

Step 1 – Degree of culpability

The base penalty amount may be adjusted upward or downward by 25% based on the violator’s degree of culpability prior to or when engaging in the violation. In assessing degree of culpability, staff and the Commission shall consider:

- (1) Whether the violator knew or should have known that the conduct violated a requirement;
- (2) Whether the violator knew or should have known of any hazards associated with the conduct; and
- (3) Whether the violator took precautions to avoid the event that led to the violation.

Upward adjustments, up to +25%, should be made for intentional or grossly negligent violations. An intentional violation exists when the violation is committed knowingly, deliberately or willfully, and intentional conduct, including includes situations where the violator intended to engage in the actions that constitute a violation, justifies a higher adjustment. Gross negligence may arise when a violator acted with extreme carelessness and deliberate disregard for the harms involved.

Downward adjustments, up to -25%, may be made for accidental violations or situations where the violation was outside of the violator's control and the violator took measures to avoid a violation. Violations that are the result of accidents or inadvertent omissions may warrant a downward adjustment.

Step 2 – History of violations

The base penalty may be adjusted upward, up to 10%, for a prior history of violations within the past 5 years. Upward adjustments are mandatory and will be made for prior violations of the same permit term or instances involving the same or substantially similar unauthorized activities within the past 5 years.

Because entities are expected to comply with the law, staff and the Commission will not adjust base liability downward where the violator has no prior history of violations.

Step 3 – Voluntary removal or resolution efforts and efforts at cooperation

Staff and Commission may adjust the base penalty upward or downward based on the violator's cooperation and resolution efforts.

Penalties may be adjusted downward, up to -25%, where a violator has taken extraordinary actions to cooperate with an investigation in a timely manner and has engaged in exceptional efforts to voluntarily resolve or mitigate the impacts of the unauthorized conduct.

Staff and the Commission may adjust liability upward, up to +25%, in situations where a violator has delayed compliance or created obstacles to achieving compliance, including interfering with the removal or resolution of the violation. Upward adjustments, up to +25% shall be appropriate where the violator's removal and resolution efforts have fallen below what would normally be expected as a response.

Step 4 – Other factors

Part 1 – Cost to state in pursuing the enforcement action

BCDC may seek to recover the costs of investigating and pursuing an enforcement action as part of the civil penalty amount. When staff seeks to include the costs of pursuing an enforcement action, the costs will be itemized by documenting the work performed, the time spent on the task, and the hourly rate for each staff member involved. Attorney staff costs and other costs incurred in having staff prepare for and attend an enforcement hearing cannot be included in the civil penalty amount.

Part 2 – Other factors as justice may require

BCDC may adjust the civil penalty amount for “such other matters as justice may require.” *See* Government Code § 66641.9(a).

If a violator identifies, and provides, information not previously included among the other criteria listed in this policy, this may be used for a further adjustment to the penalty amount.

Considerations of environmental justice may also justify an adjustment to the civil penalty in extraordinary circumstances. BCDC’s Environmental Justice Policy may be consulted in determining the appropriate remedy for any violation.

PART III – Economic Benefit

It is important that civil penalties be established in an amount that ensures that entities that voluntarily incur the costs of regulatory compliance are not placed at a competitive disadvantage in comparison to entities that fail to comply. It is also important that penalties be set at an amount that exceeds any economic benefit that the violator realizes so that fines and penalties are not viewed simply as a cost of doing business.

Economic benefit is any savings or monetary gain derived from the activity or failure to act that constitutes the violation. This includes costs that the violator has avoided through noncompliance, including for example, the savings derived from failing to provide public access improvements, prepare a required report, or complete a required study.

BCDC shall seek to recapture the economic benefit as part of the civil penalty. Civil penalties should never be set at an amount that is less than the economic benefit that the violator realized from the violation. The economic benefit should be compared to the civil penalty sum derived from engaging in the calculations set forth in Parts I and II, and if the amount derived from these calculations is less than the determined economic benefit, the penalty amount should be set at a sum that is at least 10% higher than the economic benefit amount to ensure that civil penalties are not construed as a cost of doing business and are assessed at an amount sufficient to deter future violations. Penalties may never be set at an amount that exceeds the statutory maximum of \$30,000 per violation.

In many cases, the precise economic benefit amount may be difficult to calculate. Where economic benefit is presumed to be smaller than the proposed penalty, the value of performing a calculation may be minimal. For cases where, at a minimum, an approximate calculation of economic benefit may be warranted, the calculation may include:

- (1) Deferred costs, representing savings from delaying expenditures that should have been made sooner (e.g., investments in public access amenities or studies);
- (2) Avoided costs, representing costs that the violator should have incurred, but did not incur, to avoid the unauthorized conduct or noncompliance.

The economic benefit calculation shall include periodic costs, including recurring costs that would be associated with operating and maintaining required improvements or equipment. The calculation shall also include capital costs for upgrades or improvements or equipment.

PART IV – Addressing ability to pay/ability to continue in business

In determining civil penalty amounts, BCDC must take into consideration a violator's ability to pay and the effect of the penalty on ability to continue in business. However, because information relevant to these considerations is exclusively in the possession and control of the violator, potential inability to pay or potential effect on ability to continue in business may be considered only if the violator raises these issues as a defense to a complaint for administrative imposition of civil penalties in the submitted statements of defense.

When ability to pay and/or ability to continue in business is raised as a defense, violators must submit supporting financial documents to enable staff and the Commission to evaluate the violator's financial condition and the reduction of the civil penalty amount that would be appropriate. Individuals and entities who have raised an inability to pay and/or continue in business should provide financial statements or reports, profit and loss statements, balance sheets, and/or tax returns, including IRS Forms 900, 1040, 11205, 1120, 8832, 1065, or other forms appropriate to their status or corporate form.

Governmental entities should submit annual financial reports, bond prospectuses, and budgets, which would typically be expected to be available for public review on the entity's website.

The assessment of ability to pay or effect on ability to continue in business may take into account cash flow, real estate, personal property and other tangible assets, and other pertinent information.

When a violator demonstrates a limited ability to pay or that there would be a substantial adverse effect on ability to continue in business after payment of the calculated civil penalty amount, BCDC will consider whether a reduction in the civil penalty amount is warranted and whether an extended payment plan and/or installment payments may be appropriate.

PART V – Supplemental Environmental Projects

A Supplemental Environmental Project (SEP) is an environmentally beneficial project that is included as part of an order imposing administrative civil penalties or a settlement agreement resolving violations. A violator may propose to voluntarily agree to undertake such a project in lieu of a portion, not to exceed 25%, of the total administrative civil penalty that the violator is required to pay for the violations. To qualify as SEP, the project must have a nexus to the violations and remove fill, enhance Bay resources, cleanup or abatement pollution or contamination, or enhance existing public access to the Bay or its shoreline.

A SEP may be implemented by the violator or by a third-party paid by the violator. If the violator proposes to implement a SEP, the violator shall submit to staff in writing: (1) a project description; (2) a budget showing the estimated number of hours of work to complete the project, the estimated staff or labor costs, and the estimated materials costs; and (3) a project schedule. If the violator proposes a SEP to be implemented by a third-party, the violator shall submit to staff in writing a proposal prepared by the third-party that includes: (1) a project description; (2) a budget showing the staff and labor costs and the materials costs; and (3) a project schedule.

Permit application fees necessary to implement the SEP may be included in the budget, but any staff or labor costs to prepare or process a permit application may not be included.

If a SEP is approved by the Commission and included as a requirement of an order imposing administrative civil penalties or a settlement agreement, the order or agreement shall require the violator to submit in writing: (1) documentation that the violator has paid all required amounts to any third-party implementing the SEP; (2) periodic status reports, not less frequently than every six months, on implementation of the SEP; and (3) a final report upon completion of the SEP.

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