

San Francisco Bay Conservation and Development Commission

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TO: Enforcement Committee Members

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SUBJECT: **Staff Report on Proposed Amendments to Chapter 13 Regulations (Enforcement Procedures) Including Proposed Administrative Civil Penalty Policy**
(For Enforcement Committee consideration on September 10, 2020)

Introduction and Summary

Chapter 13 of the Commission’s regulations, entitled “Enforcement Procedures” was last comprehensively reviewed and amended in 1989. Since then, there have been only a few amendments and additions to the Chapter 13 regulations. In 1993, section 11386, entitled “Standardized Fines,” was added to the regulations to identify certain violations that are appropriate to resolve through corrective action and the payment of uniform fines, as set forth in that section, without Commission enforcement proceedings. The most recent amendments to the Chapter 13 regulations, which were adopted in 2003, related to the standardized fines process.

In 2016-2017, BCDC’s Chief Counsel identified the need to review the Chapter 13 regulations and develop proposed amendments to improve the clarity and consistency of certain regulations based on experience gained with the regulations in a number of Commission enforcement proceedings. In May 2019, the California State Auditor released Audit Report No. 2018-120 that includes recommendations to improve BCDC’s enforcement program overall and to make specific changes to the regulations that govern BCDC’s enforcement program. After the Audit Report was issued, the Enforcement Committee held numerous public meetings in the second half of 2019 and through June 2020 to consider and implement the audit’s recommendations, including the recommendations to create and implement regulatory changes. In addition, on July 29, 2020, the Enforcement Committee hosted a public workshop focused on a number of proposed amendments to the enforcement regulations, as well as a draft proposed civil penalty policy.

With the assistance of the Attorney General’s Office, BCDC’s counsel recently completed a comprehensive review of the Chapter 13 regulations and drafted the accompanying package of proposed amendments to the regulations. In addition to addressing various issues identified through that review, the proposed amendments integrate the work of the Enforcement Committee to implement the audit recommendations for specific changes or additions to the regulations. The most significant proposed amendments to the Chapter 13 regulations, along with certain changes that are proposed throughout Chapter 13 to improve the clarity and consistency of the

regulations, are described below. Following this summary, the remainder of this staff report provides a section-by-section description of the principal substantive proposed amendments.

The proposed amendments would add a definition of the term "significant harm to the Bay's resources or to existing or future public access." This term currently is used in the standardized fines regulation (section 11386(a)) to identify violations that are not suitable for resolution through the standardized fines process. The audit included a recommendation to define this term. The Enforcement Committee discussed the proposed definition at its meeting on October 10, 2019, and the definition was also considered at the Enforcement Committee workshop on July 29, 2020. Under the proposed definition, whether a violation has resulted in "significant harm to the Bay's resources or to existing or future public access" would be determined based on both the context and intensity of the violation. As further described in the proposed definition, "context" refers to the location of the violation and the characteristics of the area where it occurs; "intensity" refers to the severity of the impact and the degree to which it affects the environment or public access.

The proposed amendments would add an Administrative Civil Penalty Policy as Appendix O of the Commission's regulations. The proposed policy implements and expands upon an audit recommendation to create "a penalty calculation worksheet" to be used for all enforcement actions that creates "formal policies, procedures, and criteria to provide staff with guidance on applying the worksheet." The Enforcement Committee discussed elements that might be appropriate to include in a civil penalty policy at public meetings held on July 11, August 8, August 14, and September 25, 2019. On July 11, 2020, the Enforcement Committee engaged in a follow-up discussion of all of the elements that could be included in a civil penalty policy and how these would be implemented, and a draft of the policy was presented and discussed at the Enforcement Committee workshop on July 29, 2020.

In summary, under the proposed Administrative Civil Penalty Policy, penalties would be calculated by first establishing a base penalty amount by determining: (1) the gravity of the violation and the degree of deviation from the requirement at issue; and (2) whether an adjustment is warranted based on the susceptibility of the violation to removal or resolution. 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. The penalty may also be adjusted to ensure that the amount is no less than necessary to recoup any proceeds gained from the unauthorized activity or any economic benefit derived from noncompliance. The proposed policy includes a section on addressing an alleged violator's ability to pay/ability to continue in business, making it clear that the violator must raise this argument and present evidence to support it. Finally, the proposed policy includes a section on supplemental environmental projects (SEPs). A SEP is an environmentally beneficial project that a violator voluntarily agrees to undertake and complete in partial resolution of an enforcement action. A SEP is a project that the violator is not otherwise legally required to perform, which may be undertaken in exchange for an offset of a portion of the monetary civil penalty that would otherwise apply as a result of a violation. This section of the policy has been substantially revised in response to comments provided at the July 29th Enforcement Committee workshop, including establishing detailed guidelines and requirements for

SEPs, based on review of the SEP policies adopted by the State Water Resources Control Board and the Department of Toxic Substances Control.

The proposed amendments would establish an additional option for Commission action on an Enforcement Committee recommended enforcement decision. Specifically, if the respondent in an enforcement proceeding and the Executive Director both agree to accept the Committee's recommended decision, the Executive Director would calendar the recommended decision as a consent item on a Commission meeting agenda. At the Commission meeting, after allowing public comment on the consent item, the Commission would determine by a majority vote whether to adopt the recommended enforcement decision on consent without any change and without any further proceedings. If it did not vote to adopt the recommended decision on consent, the Commission would proceed to act on the matter in accordance with the provisions of the existing regulations.

Under the existing regulations, oral testimony is not allowed at an enforcement hearing, except in limited circumstances, but cross-examination may be permitted of any person who has submitted a declaration under penalty of perjury. The proposed amendments clarify that declarations under penalty of perjury may be submitted by staff with a violation report or complaint for administrative civil liability ("complaint") and by a respondent with a statement of defense, and further clarify that cross-examination may be allowed only of such declarants. Cross-examination would not be allowed of any person who has not submitted a declaration under penalty of perjury, including the author of a document or any member of the public who has commented on an enforcement matter or submitted information related to an alleged violation.

The proposed amendments revise certain nomenclature used in the regulations for clarity and consistency. For example, the existing regulations generally refer to a "Complaint for Administrative Imposition of Civil Penalties" and a "Civil Penalty Order." The proposed amendments would revise these references to instead use the statutory language of a "Complaint for Administrative Civil Liability" and an "Order Setting Administrative Civil Liability," respectively. This terminology mirrors the language in Government Code section 66641.6.

As required by the Administrative Procedure Act, each section of the regulations includes a "note" that cites the Commission's statutory authority to adopt the regulation and references the statute(s), San Francisco Bay Plan policy, or caselaw implemented by or supporting the need for the regulation. The proposed amendments revise the authority and reference citations throughout the Chapter 13 regulations to correct errors and ensure consistency between or among regulatory provisions on the same topic or subject matter.

The proposed amendments would provide for notices and documents related to an enforcement hearing to be sent by email or regular mail, and also to be made available on the Commission's website. In addition, the proposed amendments would allow certain documents, including a violation report, complaint, and a Commission order, to be sent to a respondent by email (rather than certified or registered mail), with the respondent's consent.

Specific Proposed Amendments to the Chapter 13 Regulations

Following is a section-by-section summary of the most significant substantive proposed amendments to the Chapter 13 regulations.

Section 11310 -- Definitions

Subsection (b) would be amended to expand definition of “Enforcement Committee” to incorporate a number of provisions from Commission Resolution 93-9, entitled “Establishing an Enforcement Committee, Setting Procedures, and Appointing Members.” The amended definition would address the composition of the Committee, quorum requirement, and selection of a chair, and provide that the Committee shall conduct its hearings in accordance with the Commission’s laws and regulations.

Subsection (g) would be added to define the term “significant harm to the Bay’s resources or to existing or future public access,” as discussed above.

Section 11321 -- Commencing Commission Enforcement Proceedings

Subsection (a) would be amended to provide that the Executive Director shall commence Commission enforcement proceedings whenever he or she believes, as the results of an enforcement investigation, that any person has caused or threatens to cause significant harm to the Bay’s resources or to existing or future public access, or that the nature, circumstance, extent, and gravity of the violation or violations so warrant. The amendment expands on the existing language which provides that the Executive Director shall commence Commission enforcement proceedings whenever he or she believes that the results of an enforcement investigation so warrant.

Subsection (b) would be amended to clarify that staff may submit declarations under penalty of perjury with a violation report or complaint (as currently reflected in existing Appendix I – Statement of Defense Form).

Subsection (c) would be amended to provide that upon written consent of the respondent a complaint may be mailed to the respondent by email.

Section 11322 -- Respondent’s Required Response to the Violation Report

The title of section 11322 would be amended to reflect that in addition to a respondent’s response to a violation report, this section addresses a respondent’s response to a complaint, the Executive Director’s consideration of the respondent’s response, and extensions of time.

Subsection (a) would be amended to reduce the required number of copies a respondent must submit of the completed statement of defense form (or other document providing the information required by the form) and supporting documents. The amendment would also require a

respondent to provide electronic copies of the completed statement of defense form and all supporting documents in a format that allows for posting on the Commission's website in compliance with current Americans with Disabilities Act accessibility guidelines.

Subsection (f) would be amended to provide that if the Executive Directors issues only a violation report, he or she may extend the 35-day time limit for respondent's response thereto upon receipt within the 35-day time limit of a written request for such extension and demonstration of good cause. If the Executive Director issues a violation report and complaint or only a complaint, the Executive Director may extend the 35-day time limit for a response upon receipt within the 35-day time limit of a written request for such extension, demonstration of good cause, and waiver of or consent to extend the 60-day time limit for a hearing on the complaint under Government Code section 66641.6(b).

Subsection (i) would be added to provide that after issuance of a violation report or complaint, the Executive Director and a respondent may agree on the terms of a proposed stipulated order or proposed settlement agreement to resolve a violation or violations, which may include a schedule of corrective actions to be implemented by the respondent and payment of administrative civil penalties. A proposed stipulated order or proposed settlement agreement would be included in the Executive Director's recommended enforcement decision and would be adopted by Commission. The proposed amendment provides for further proceedings if Commission fails to adopt a proposed stipulated order or proposed settlement agreement, depending on whether or not the respondent has previously submitted a completed statement of defense form and supporting documents.

Section 11323 -- Distribution of Notice of Enforcement Hearings

This section would be amended to allows for mailing notices of an enforcement hearing by email or regular mail, and also for making such notices available on the Commission's website.

Section 11324 -- Distribution of the Violation Report, Statement of Defense Form(s), and Recommended Enforcement Decision

This section would be amended to allow for distribution of materials for an enforcement hearing by email or regular mail, and also provide for making these materials available on the Commission's website. This section would also be amended to clarify that, in addition to the respondent and the Enforcement Committee, hearing officer, or Commission, depending on who will hear the matter, copies of materials for the hearing shall also be mailed or emailed to the Deputy Attorney General advising the Enforcement Committee, Commission, or hearing officer.

Section 11326 -- Contents of an Executive Director's Recommended Enforcement Decision

This section would be amended to modify and clarify the required contents of the Executive Director's Recommended Enforcement Decision ("ED RED"). In particular, subsection (b)(2) would be amended to clarify that the ED RED shall contain the staff's response to the defenses, mitigating factors, or arguments raised by the respondent and any rebuttal evidence submitted by the staff to

matters raised in the statement of defense. A new subsection (b)(4) would be added to specify that a ED RED on a proposed order setting administrative civil liability shall identify all violations for which administrative civil penalties are proposed and include: (1) the total amount of proposed administrative civil penalties; (2) a statement of the applicable factors set forth in Government Code section 66641.9 that the Executive Director considered, consistent with the Administrative Civil Penalty Policy, in determining the total amount of the proposed civil penalties.

Section 11327 -- Enforcement Hearing Procedure

Subsection 11327(f) currently provides that oral testimony shall not be allowed at an enforcement hearing unless it is determined that such testimony is essential to resolve any factual issues that remain unresolved after reviewing the written record and whose resolution is essential to determining whether a violation has occurred or to determining what remedy is appropriate. Subsection (f) further provides that if oral testimony is allowed, such testimony shall be taken under oath, and all representatives of the staff and all respondents shall be given a right to cross-examine all witnesses who are allowed to testify. Subsection (f) would be amended to clarify that if oral testimony is allowed, staff and all respondents shall be allowed to examine or cross-examine all witnesses who are allowed to testify. Subsection (f) would also be amended to delete the existing provision referring to the right to have rebuttal witnesses testify, since this would allow a party to call a surprise witness not previously identified and who did not submit a declaration under penalty of perjury.

Subsection (g) would be amended to clarify that following cross-examination of a witness whose declaration under penalty of perjury has become part of the enforcement record, a representative of the opposing party shall be entitled to examine the witness on the area or areas of information addressed during cross-examination. Subsection (g) would also be amended to state that neither cross-examination nor direct examination shall be allowed of any person who has not submitted a declaration under penalty of perjury which has become part of the enforcement record and who has not been identified in writing pursuant to either Section 11322(b) (*i.e.*, by a respondent) or Section 11322(d) (*i.e.*, by staff), including any member of the public who has commented on an enforcement matter or submitted information related to an alleged violation.

New subsection (i) would be added to state that the Enforcement Committee, hearing officer, or Commission shall rule on any objections to the admissibility of evidence or the acceptance of late evidence and shall identify any evidence submitted but rejected because it was not filed in a timely manner.

Section 11329 -- Admissibility of Evidence

Subsection 11329(b) would be amended to note that hearsay evidence may include information provided by the public to the Commission or staff or in public comments. Subsection (b) would also be amended to delete existing text referring to potential cross-examination of the author of a document that contains hearsay evidence when the document is referred to in a violation report or complaint. As discussed above, the proposed amendments to section 11327 clarify that cross-examination would be allowed only of any person who submits a declaration under penalty of

perjury. Staff or a respondent may identify a statement in a document as hearsay but would not be allowed to cross-examination the author of the document on that grounds.

Section 11330 -- Adoption of an Enforcement Committee or a Hearing Officer Recommended Enforcement Decision

Existing subsections 11330(a) and (b) would be amended to modify and clarify the required contents of the Enforcement Committee's Recommended Enforcement Decision ("EC RED"). As amended, subsection (a)(1) would specify certain matters to be summarized in the EC RED, rather than referring to these matters as required by section 11326, which specifies the contents of the ED RED. Amended subsection (a)(2) would require an EC RED to include a statement of any rulings by the enforcement Committee. Amended subsection (a)(3) would provide that a recommended decision on proposed an order setting administrative civil liability shall identify all violations for which civil penalties are proposed and include: (1) the total amount of proposed civil penalties; (2) a statement of the applicable factors set forth in Government Code section 66641.9 that the Enforcement Committee considered, consistent with the Administrative Civil Penalty Policy, in determining the total amount of the proposed administrative civil penalties.

As amended, subsection (b) would establish a process for preparing the EC RED. Subsection (b) would allow the chair of the enforcement Committee to direct BCDC counsel to prepare the EC RED provided that: (1) BCDC counsel submits the EC RED to all respondents for review; and (2) if the respondents provide written comments on or objections to the recommended decision, the Executive Director may revise the recommended decision based on such comments or objections and shall include the respondent's comments or objections when mailing the EC RED to the Commission and respondents.

Section 11331 -- Referral of the Recommended Enforcement Decision to the Commission

This section would be amended to allows for mailing a recommended enforcement decision by email or regular mail, and also for making the recommended decision available on the Commission's website.

Section 11332 -- Commission Action on Recommended Enforcement Decision

As discussed above, this section would be amended by adding subsection 11332(c) to establish an additional option for Commission action on an EC RED. Specifically, if the respondent in an enforcement proceeding and the Executive Director both agree to accept the Enforcement Committee's recommended decision, the Executive Director would calendar the recommended decision as a consent item on a Commission meeting agenda. At the Commission meeting, after allowing public comment on the consent item, the Commission would determine by a majority vote whether to adopt the recommended enforcement decision on consent without any change and without any further proceedings. If it did not vote to adopt the recommended decision on consent, the Commission would proceed to act on the matter in accordance with the provisions of the existing regulations.

Section 11341 -- Modification of Cease and Desist Orders Issued by the Executive Director

This section would be amended to clarify that the Executive Director may modify a cease and desist order issued by the Executive Director only for good cause.

Section 11342 -- Modification of Cease and Desist Orders Issued by the Commission

This section would be amended to clarify that the Executive Director may modify a cease and desist order issued by the Commission only for good cause.

Section 11343 -- Appeal from the Modification of a Commission Cease and Desist Order

This section would be amended to provide that a person subject to a Commission cease and desist order who appeals any modification of the order by the Executive Director to the Commission must do so by filing a written statement that the party is appealing the modification and the reasons for the appeal.

Section 11351 -- Modification of Permit Revocation Orders

This section would be amended to clarify that the Executive Director may modify a permit revocation order only for good cause.

Section 11362 -- Service of Copies

This section would be amended to clarify the requirements for service of a cease and desist order, permit revocation order, order setting administrative civil liability, or any modification of such orders in accordance with applicable statutory requirements. In particular, subsection (a) would be amended to reflect that Government Code sections 66637 and 66638 require ceases and desist orders to be served on the owner of property where violation occurred as well as the party charged with violation; Government Code section 66638 also requires a cease and desist order issued by the Commission to be served by each person who appeared at the hearing and requested a copy. Similarly, subsection (b) would be amended to reflect that Government Code section 66641.6(d) requires an order setting administrative civil liability to be served on any person who appeared at the hearing and requested a copy, as well as the party to whom the order is issued. This section would also be amended to allow service of any issued order by email with the consent of the party served, and to require the Executive Director to post a copy of any issued order on the Commission's website.

Section 11380 -- Content of Complaint for Administrative Civil Liability

This section would be amended to provide that a complaint shall include: (1) a list or table of all alleged violations for which staff is proposing a penalty; (2) the total amount of proposed penalties; and (3) a statement of the applicable factors set forth in Government Code section 66641.9 that the Executive Director considered, consistent with the Administrative Civil Penalty Policy, in determining the total amount of the proposed administrative civil penalties.

Section 11381 -- Commission Hearing on Complaint for Administrative Civil Liability

Subsection 11381(a) would be amended to provide that with the written consent of the respondent(s) to whom a complaint is issued, the Executive Director may extend the 60-day time limit for a hearing on the complaint under Government Code section 66641.6(b).

Subsection (c) would be amended to add as factors to be considered by the Executive Director in determining whether to refer a complaint to the Commission or to the Enforcement Committee: (1) whether Executive Director has issued a cease and desist order for the violations alleged in the complaint; and (2) whether the Executive has proposed that any order setting administrative civil liability be combined with a Commission cease and desist order and/or a permit revocation order.

Section 11383 -- Contents of a Commission Order Setting Administrative Civil Liability

Subsection 11383(a) would be amended to provide that an order setting administrative civil liability shall include, in addition to the amount of the civil penalties, a statement of the applicable factors set forth in Government Code section 66641.9 that the Commission considered in determining the amount of the civil penalties. Subsection (a) would also be amended to require such an order to specify the date by which the civil penalties must be paid in full, or, if the penalties are to be paid in installments, the amount of each installment and the date by which each installment must be paid.

Section 11384 -- Modification of a Commission Order Setting Administrative Civil Liability

This section would be amended to clarify that the Executive Director may modify an order setting administrative civil liability only for good cause.

Section 11386 -- Standardized Fines

Section 11386 currently has 11 subsections, with most of those subsections containing numerous further subsections. As a result, section 11386 can be difficult to follow, and certain provisions may be unclear; these concerns would be compounded by the additional detail and new provisions that would be included under the proposed amendments. For these reasons, the proposed amendments add a new Article 3 to Chapter 13, Subchapter 2 of the regulations, entitled Standardized Fines. It is further proposed to break up and expand existing section 11386 into six sections by revising section 11386 and adding new sections 11387 through 11391. Article 3 would consist of the following sections:

- Section 11386. Applicability of Article.
- Section 11387. Notice of Alleged Violation.
- Section 11388. Opportunity to Complete Corrective Action without Imposition of a Standardized Fines.
- Section 11389. Opportunity to Complete Corrective Action with Imposition of a Standardized Fines.
- Section 11390. Violations Subject to a Standardized Fines and Schedule of Standardized Fines.

- Section 11391. Notice of Liability for Standardized Fines and Opportunity to Appeal or to Resolve Violation through Commission Enforcement Proceedings.

Section 11386 -- Applicability of Article

As amended, section 11386 contains the provisions of existing subsection 11386(a), which identifies the violations that, based on determinations by the Executive Director, are subject to resolution through the Article 3 standardized fines process. Among other factors, Article 3 applies to violations that have not resulted in “significant harm to the Bay’s resources or to existing or future public access.” A new subsection (b) would be added stating that, for purposes of this Article, “significant harm to the Bay’s resources or to existing or future public access” shall be determined in accordance with the definition of this term in Section 11310(g). In addition, a new subsection (c) would be added to clarify that in cases involving both a violation that has not resulted in significant harm to the Bay’s resources or to existing or future public access and a violation that has resulted in such harm, the Executive Director may commence Commission enforcement proceedings for all the alleged violations (*i.e.*, issuance of a violation report and/or complaint leading to an enforcement hearing before the Enforcement Committee and adoption of an order by the Commission).

Section 11387 -- Notice of Alleged Violation

New section 11387 would contain and make minor modifications to the provisions of existing subsection 11386(b), which specifies the information to be included in the Executive Director written notice to the person responsible for the alleged violations subject to resolution through the standardized fines process.

Section 11388 -- Opportunity to Complete Corrective Action without Imposition of a Standardized Fines

New section 11388 would contain and modify the provisions of existing subsection 11386(c), which provide that the Commission shall not impose any standardized fines if the party responsible for the violation completes each and every corrective action specified in the Executive Director’s notice of violation within 35 days. As modified, this section would also provide that the Commission will not impose standardized fines if the responsible party submits information demonstrating that the alleged violation has not occurred.

Section 11389 -- Opportunity to Complete Corrective Action with Imposition of a Standardized Fines

New section 11389 would contain and make minor modification to the provisions of existing subsection 11386(d), which provides that if a responsible party fails to complete each and every corrective action specified in the Executive Director’s notice of violation within 35 days, such party may resolve the violation by completing each and every required corrective action as soon

thereafter as possible and by paying a fine in the amount provided in Sections 11390(a) or 11390(b).

Section 11390 -- Violations Subject to a Standardized Fines and Schedule of Standardized Fines

New section 11390 would include four subsections, (a) through (d), that contain and modify the provisions of existing subsections 11386(e) through (h).

Subsection 11390(a) (which contains and modifies the provisions of existing subsection 11386(a)) establishes the schedule of standardized fines that would apply to the various types of violations described in the regulation. The proposed amendments would raise the amounts of some but not all standardized fines to create a greater incentive for responsible parties to take necessary corrective action promptly to resolve violations. Increasing the fine amounts is appropriate because the standardized fine regulation was last amended in 2003. As an example, the fine for failing to return an acknowledged executed permit would be raised from \$1,000 to \$2,000 if the fully executed permit is returned between 35 days and 65 days after the violator receives a notice of violation from BCDC.

The proposed amendments to this subsection also would provide that if correcting a violation requires a document (such as a legal instrument, plan, or a permit application) to be reviewed and approved by or on behalf of the Commission, standardized fines would not continue to accrue during any period of time that Commission staff is reviewing the document. If the document is approved and no further corrective action is needed to correct the violation, no further fines would accrue following submission of the document. However, if the document is not approved, fines would resume accruing after staff provides comments on the document to the responsible party. Fines would also resume accruing if the document is approved but the responsible party has not completed all required corrective actions to resolve the violation.

Section 11391 -- Notice of Liability for Standardized Fines and Opportunity to Appeal or to Resolve Violation through Commission Enforcement Proceedings

New section 11391 would contain six subsections, (a) through (f), that contain and modify the provisions of existing subsections 11386 (i) through (k) and would add three new subsections.

As amended, subsection 11391(a) (which contains and modifies the provisions of existing subsection 11386(i)), would provide that, after a violation has been completely resolved, the Commission staff shall notify the person responsible for the violation of the amount of standardized fines assessed. The notice shall also advise person of his or her right to appeal the amount of the fines to the Executive Director and the Chair by submitting within 21 days a written statement that the person is appealing and the reasons for the appeal. The Commission staff may submit a response to the appeal within 14 days. Finally, this subsection as amended would provide that the Executive Director and Chair can reduce the amount of the standardized fines to an

amount that they believe is appropriate and can establish a schedule for the payment of the standardized fines in installments.

As amended, subsection 11391(b) (which contains and modifies the provisions of existing subsection 11386(j)), would allow any person subject to standardized fines who believes that the 35-day time limit for resolution of a violation without a standardized fine is not feasible to appeal the time limit to the Executive Director and Chair by submitting within 35-days of the notice of violation a written statement that the person is appealing, the reasons for the appeal, and proposing an alternative date to complete the required corrective action. As amended, this subsection would provide that the Executive Director and the Chair can modify the 35-day time limit and the time periods for accrual of standardized fines set forth in Section 11390(a) for the violation as they believe appropriate.

New subsection 11390(c) would provide that if any person subject to standardized fines does not appeal the amount of such fines within 21 days of receiving notice from Commission staff under subsection (a), the full amount of such fines shall be due and payable by cashier's check 30 days after the date of the notice provided under subsection (a).

New subsection 11390(d) would provide that if any person subject to standardized fines appeals the amount of such fines within 21 days of receiving notice from Commission staff under subsection (a), any fines the Executive Director and Chair determine to be appropriate shall be due and payable by cashier's check by the date or dates specified in their decision on the appeal.

As amended, subsection 11391(e) (which contains and modifies the provisions of existing subsection 11386(k)), would allow any person receiving a notice of violation under Section 11387 to waive the opportunity to resolve the violation under this Article by submitting a letter to the Executive Director indicating such a waiver and requesting that the violation be resolved through Commission enforcement proceedings. Such a waiver and request that the violation be resolved through Commission enforcement proceedings may be submitted at any time after receipt of a notice under Section 11387 but no later than: (1) twenty one days after the date of the notice provided by Commission staff under subsection 11391(a) of amount of standardized fines assessed, if the person receiving such notice elects not to appeal the amount of such fines to the Executive Director and Chair; or (2) fourteen days after the date of the decision of the Executive Director and Chair on any appeal of the amount of standardized fines.

New subsection 11390(f) would provide that if a person subject to standardized fines fails to pay such fines when due, and if such person has not submitted a letter waiving the opportunity to resolve a violation under this Article and requesting that the violation be resolved through Commission enforcement proceedings, the Executive Director may, at his or her sole discretion, either: (1) refer the matter to the Attorney General to file a civil action to recover the amount of standardized fines due; or (2) commence Commission enforcement proceedings to resolve the violation. This subsection would further provide that if the Executive Director refers the matter to the Attorney General, in any civil action to recover the amount of standardized fines due, the person subject to such fines may not contest his or her liability for the violation or that the violation

occurred, and the court shall determine only whether the amount of standardized civil penalties was properly calculated in accordance with Section 11390.

Appendix H -- Violation Report/ Complaint Form

As referenced in sections 11321(a)(1), 11321(a)(2), and 11380 of the regulations, Appendix H sets forth the format and content of a violation report and/or complaint for administrative civil liability. The proposed amendments would codify Commission staff's practice of including certain information at the top of the first page of a violation report/complaint, including any file and permit number, the date of mailing, the 35th day after mailing (*i.e.*, the date the respondent's completed statement of defense form is due, absent an extension), the 60th day after mailing (*i.e.*, the date a hearing on a complaint is required, absent an extension), and any scheduled hearing date.

Currently, Appendix H requires a violation report/complaint to reference all pertinent evidence relied upon by Commission staff and state that this evidence is available in the enforcement file for the matter. The proposed amendments would instead require a violation report/complaint to include a list of all evidence relied on by staff, including any declarations under penalty of perjury, and further require that all supporting evidence be attached to or accompany the report/complaint or be provided to the respondent in electronic format upon request.

If the staff is proposing that the Commission impose an administrative civil penalty, Appendix H current requires a complaint to state only the amount of the proposed penalty. The proposed amendments would require a complaint to include: (1) a list or table of all alleged violations for which staff is proposing a penalty; (2) the total amount of proposed penalties; and (3) a statement of the applicable factors set forth in Government Code section 66641.9 that the Executive Director considered, consistent with the Administrative Civil Penalty Policy in Appendix O of the Commission's regulations, in determining the total amount of the proposed penalties.

Appendix I -- Statement of Defense Form

As referenced in section 11321(a)(3) of the regulations, Appendix I sets forth the format of the statement of defense form to completed by a respondent in an enforcement proceeding. The proposed amendments would make numerous editorial revisions to the form to improve clarity, reduce redundancy, and update the form with the Commission's current office address and phone number.

The proposed amendments would add a statement advising a respondent that failure to raise a defense or mitigating factor or to submit evidence in response to the violation report/complaint will waive the respondent's right to raise such defense or mitigating factor or to submit such evidence at the enforcement hearing on the matter.

The proposed amendments clarify that a respondent may only identify for potential cross-examination any person whose declaration under penalty of perjury was submitted by staff with the violation report/complaint.

Consistent with the proposed amendments to section 11322(a), the proposed amendments to Appendix I would require a respondent to provide electronic copies of both the completed statement of defense form and all supporting documents in a format that allows for posting on the Commission's website in compliance with current Americans with Disabilities Act accessibility guidelines.

Consistent with the proposed amendments to section 11322(f), the proposed amendments to Appendix I would clarify that for good cause a respondent may submit a written request for extension of the 35-day time limit to respond to a violation/report complaint; provided that if the staff has issued a combined violation report and complaint or only a complaint, the extension request must include a waiver of and consent to extend the 60-day time limit for a hearing on the complaint under Government Code 66641.6(b).

Where the staff is proposing an administrative civil penalty, the proposed amendments would require a respondent asserting inability to pay, or that the proposed penalty would have a substantial adverse effect on the respondent's ability to continue in business, to raise this issue when the statement of defense is submitted and to provide factual information and supporting documentation establishing such inability to pay or such adverse effect. The proposed amendments further provide that relevant supporting documentation may include audited financial statements and reports, balance sheets, profit and loss statements, statements of net worth, annual budgets, bond prospectuses, and tax returns including supporting forms and schedules as may be appropriate. The proposed amendments state that before submitting this information, a respondent should redact (cover or blackout) all personal information including any social security or tax-payer identification number, driver's license/state identification number, financial account number and any other private, non-public personal information including a residential address, personal telephone numbers, or personal email address.

Appendix O – Administrative Civil Penalty Policy

Similar to the penalty policies of other state agencies, including the State Water Resources Control Board, the proposed Administrative Civil Penalty Policy uses a multi-step process to first calculate a base penalty and then make adjustments for certain penalty factors that are set forth in Government Code section 66641.9.

A. Calculating the base penalty amount

The proposed policy includes the following matrix, which would be used to calculate the initial base penalty. The dollar sums in the matrix are based on the statutory range of between \$10 and \$2,000 per day per violation (*see* Government Code section 66641.5(e)).

Extent of deviation from legal requirement

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

Using this matrix, a determination would first be made regarding the gravity of harm or potential for harm to the Bay’s resources or public access. Violations with a high potential for harm or high level of actual harm are Major. Conversely, violations involving minor or minimal threats to the Bay and public access are Minor. These categories are described in detail in the proposed policy.

The proposed policy addresses “paper violations” involving the failure to submit documentation rather engaging in physical changes to the shoreline or Bay differently. The proposed Policy does not assign the “Major” label to any paper violations and states as follows:

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.

After determining the gravity of the harm or potential harm, the second determination that would be made in order to determine the initial base penalty range is the extent to which the violation deviated from the applicable requirements. Violations where the applicable requirements were completely ignored involve a Major deviation from the legal requirements. Conversely, violations that involve activities that deviate from the applicable requirements only to a minor degree involve a Minor deviation from the legal requirements.

The initial base penalty amount selected using the matrix may be adjusted downward up to -10% if the violation is susceptible to removal or resolution. This downward adjustment is discretionary, and it is included in recognition of the factors set forth in Government Code section 66641.9, which include “whether the violation is susceptible to removal or resolution.”

The initial monetary amount derived using the matrix and any additional discretionary downward adjustment of up to -10% is the “base penalty amount.” The next steps set forth in the proposed policy involve additional adjustments for factors specific to the violator. These factors also mirror the factors set forth in Government Code section 66641.9.

B. Adjustments to the base penalty amount

The first adjustment, which may be either an upward or downward adjustment of + or -25% would be based on the violator’s degree of culpability. When a violator has, for example, engaged in an activity that they knew or should have known was not authorized (*e.g.*, dredging without submitting a permit or episode approval), the proposed policy states that the initial base penalty may be adjusted upward, up to +25%.

A downward adjustment up to -25% may also be made where there is a very low degree of culpability. This would be the case for accidental situations where the violator took expected precautions to avoid the violation.

The next adjustment is for violators who have a history of violations. This adjustment of up to 10% may be made where a violator has a history of violations. No downward adjustment will be made where there is no history of violations because regulated entities are expected to comply with BCDC’s laws and regulations.

Next, a downward or upward adjustment of - or +25% may be made based on the violator’s voluntary removal or resolution efforts and efforts to cooperate. The downward adjustment up to -25% is appropriate where a violator has taken extraordinary actions to assist with an investigation and work to resolve the unauthorized action. Conversely, an upward adjustment up to +25% is appropriate where a violator delays compliance or creates obstacles to achieving compliance.

There are two final adjustments that may be made to the base penalty amount. The first is that BCDC may seek to recover the costs of investigating and pursuing an enforcement action. If BCDC seeks to include these costs, the proposed policy provides that staff will document the work performed and time spent on the matter.

The final potential adjustment is a discretionary adjustment for “other factors as justice may require.” The quoted language is included in Government Code section 66641.9, and the policy states that such factors could include environmental justice considerations or other considerations that the violator identifies and documents.

C. Economic benefit

The next step under the proposed policy is to evaluate the economic benefit that a violator derived from its unauthorized action or failure to act. The policy makes it clear that, in assessing a civil penalty, BCDC will seek to recapture the economic benefit that the violator has realized. In other words, after determining the proposed civil penalty amount using the matrix and adjustments describe above, the penalty may be increased if the calculated sum is not sufficient to recapture

the economic benefit to the violator. The proposed policy states that 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. The proposed policy recognizes that the precise economic benefit amount may be difficult to calculate and describes the costs that should be considered in making this calculation.

D. Ability to pay/ability to continue in business

Under the proposed policy, the final step in determining the civil penalty is to examine any evidence presented by the violator to demonstrate an inability to pay the calculated penalty or an adverse impact on the violator's ability to continue in business. The proposed policy makes it clear that such information should be presented by the violator and that this issue will be evaluated only if raised by the violator. The proposed policy also sets forth the information that should be presented by the violator to demonstrate an inability to pay or an adverse effect on ability to continue in business.

E. Supplemental Environmental Projects

The final section of the proposed policy addresses SEPs, which are environmentally beneficial projects that a violator voluntarily agrees to undertake and complete to offset a portion of the calculated civil penalty. As discussed in the Introduction and Summary, above, this section of the policy has been substantially revised in response to comments provided at the July 29th Enforcement Committee workshop, including establishing detailed guidelines and requirements for SEPs.

The SEP guidelines include (but are not limited to):

- A SEP should have an adequate nexus to BCDC's statutory mandate to protect the Bay's resources and ensure public access to the Bay and its shoreline. There should also be an adequate nexus between the nature or location of the violation(s) at issue and the nature or the location of the SEP.
- The following four categories of projects may qualify as a SEP: (1) removal of Bay fill; (2) enhancement of the Bay's resources, including habitat restoration; (3) cleanup or abatement of pollution or contamination; and (4) enhancement of existing public access to the Bay or its shoreline. A SEP may fall into more than one category.
- The amount of the penalty to be offset by a SEP shall not exceed 25% of the total administrative civil penalty amount that the violator is required to pay for the violation(s).
- A SEP must be enforceable pursuant to a stipulated order setting administrative civil liability or a settlement agreement.
- The following preferences are established for a SEP: (a) a project with a community nexus (*i.e.*, a project located in the same general area in which the violation(s) occurred); and (b) a project

benefitting a vulnerable or disadvantaged community that is located in, adjacent to, or in close proximity to the same general area in which the violation(s) occurred.

Among other requirements, a stipulated order setting administrative civil liability or a settlement agreement authorizing a SEP shall:

- Accurately and completely describe the SEP, including a project description or scope of work, budget, schedule, and any relevant supporting materials, and provide reliable, measurable, and objective means to verify timely completion.
- Require that all SEP funds must be expended, and the SEP completed, within 36 months of Commission adoption of the order or agreement, unless the Executive Director grants an extension for good cause shown as to why the project has been delayed.
- Require a written acknowledgment by either the violator or third-party performing the SEP that any funds intended for the SEP shall be spent in accordance with the terms of the order or agreement on the specific, defined project.
- State that the SEP penalty offset amount that will be satisfied by performing the SEP shall be treated as a suspended civil penalty, and that if the SEP is not fully implemented in accordance with the terms of the order or agreement, BCDC shall be entitled to recover the full amount of the suspended penalty, less any amount that has been permanently suspended or excused based on the timely and successful completion of any interim project milestone.
- Require periodic reporting on agreed upon SEP performance milestones by the violator or third-party performing the SEP.
- Require the violator or third-party performing the SEP to provide a final completion report to BCDC certifying completion of the SEP in accordance with the terms of the order or agreement.
- Require that whenever the violator or third-party performing the SEP publicizes the SEP or results of the SEP, it shall state in a prominent manner that the project is being (or has been) undertaken as part of the settlement of a BCDC enforcement action.