

**Amendments to San Francisco Bay Conservation and Development Commission Regulations  
Title 14, Division 5, Chapter 13. Enforcement Procedures.**

Amend Title 14, Division 5, Chapter 13 as follows:

Deletions to Existing Text Shown in Strikeout:	<del>Example</del>
Additions to Existing Text Shown in Underscore:	<u>Example</u>

1. Amend Section 11301 to read as follows:

**§ 11301. Grounds for Permit Revocation.**

Any one of the following actions shall be grounds for the complete or partial revocation of a Commission permit:

~~(1)~~(a) the violation of a term or condition of a permit,

~~(2)~~(b) the violation of a Commission cease and desist order or an Executive Director's cease and desist order, or

~~(3)~~(c) the inclusion of inaccurate information in a permit application or at the public hearing on a permit application.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66638 and 66641(d); Government Code; Section 29601, Public Resources Code; and *Sunset Amusement Company v. Board of Police Commissioners* (1972) 7 Cal.3d 64, 80.

2. Amend Section 11302 to read as follows:

**§ 11302. Grounds for the Imposition of Administrative Civil ~~Penalties~~ Liability.**

Any one of the following actions shall constitute grounds for the imposition of administrative civil penalties-liability by the Commission:

~~(1)~~(a) the undertaking of any activity that requires a Commission permit without having obtained the Commission permit or

~~(2)~~(b) the violation of any term or condition of a Commission permit.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66641.5(e) and 66641.6, Government Code; and Sections 29610- and 29611, Public Resources Code.

3. Amend Section 11303 to read as follows:

**§ 11303. Referral to the Attorney General by the Commission or the Executive Director.**

(a) A violation of any one of the following shall be grounds for the referral of the violation by the Commission or the Executive Director to the Attorney General's Office without the

Commission's having issued either a cease and desist order or a permit revocation order: (1) the McAteer-Petris Act, (2) the Suisun Marsh Preservation Act, (3) the Federal Coastal Zone Management Act, or (4) a term or condition of a Commission permit.

(b) In addition, a violation of either a Commission cease and desist order or a Commission permit revocation order shall also be grounds for the referral of the violation by either the Commission or the Executive Director to the Attorney General's Office.

(c) A referral made to the Attorney General's Office pursuant to subsections (a) and (b) may include any other unresolved, alleged violation including those of the type enumerated in Section ~~11386~~11390.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections ~~66641(d)~~, 66640(a), 66641(b), and 66642(a), Government Code; and Section 29601, Public Resources Code.

4. Amend the title of Subchapter 2, Section 11310, and the title of Subchapter 2, Article 2, to read as follows:

**Subchapter 2. Procedures for the Issuance of Cease and Desist Orders, Permit Revocation Orders, and ~~Civil Penalty Orders~~ Setting Administrative Civil Liability**

**Article 1. Definitions**

**§ 11310. Definitions.**

The following definitions are applicable to this chapter:

(a) "Complaint," as used in subsection (b) of Section 66641.6 of the Government Code, means the document that initiates the possible imposition of administrative civil ~~penalties liability~~ by the Commission. A complaint shall contain the information required by Government Code Section 66641.6(b) and ~~otherwise follow the format~~ and include the information for a staff violation report/complaint as set out in Appendix H.

(b) "Enforcement committee," as used in this chapter, means a committee that the Commission has established pursuant to Commission resolution. ~~or by appointment by the~~ The Chair shall appoint Commission members or other representatives of the Commission to the enforcement committee without the concurrence of the Commission objection to assist the Commission in carrying out its enforcement responsibilities. The enforcement committee shall consist of no fewer than four and no more than six Commission members or other representatives of the Commission. A quorum of the enforcement committee necessary to conduct business, to hold hearings and to vote on recommended enforcement decisions shall consist of three members notwithstanding the total number of enforcement committee members. The enforcement committee shall select from its members a chair, who shall serve for a period agreed upon by a majority of the enforcement committee members. The enforcement committee shall conduct its hearings in accordance with the Commission's laws and regulations upon matters referred to it by either the Executive Director or the Commission. The Chair of the Commission may change the members of the enforcement committee from

time to time as necessary due to changes in membership of the Commission or to fill vacancies on the committee provided that the Chair notifies the Commission prior to such change at a Commission meeting and the Commission concurs.

(c) “Enforcement hearing,” as used in this chapter, means any public hearing held before ~~a hearing officer~~, the enforcement committee, or the Commission as part of a Commission enforcement proceeding.

~~(d) “Hearing Officer,” means any person appointed by the Commission to receive evidence, hear arguments, make findings of fact, and recommend to the Commission what action it should take on an enforcement matter.~~

~~(e)~~ (d) “Person,” as used in Sections 66637 through 66642 of the Government Code and in this chapter, means any individual, firm, association, organization, partnership, business trust, corporation, company, or governmental agency.

~~(f)~~ (e) “Respondent,” as used in this chapter, means a person to whom the Commission staff has issued a violation report or complaint and a statement of defense form in accordance with Section 11321(c).

(f) As used in this Chapter, “significant harm to the Bay’s resources or to existing or future public access” shall be determined based on both the context and intensity of the violation.

(1) “Context” refers to the location of the violation and the characteristics of the area where it occurs. Areas with important environmental or ecological significance (e.g., habitat or refugia for sensitive species) are generally considered to be more significant than previously degraded habitat or areas with limited habitat value, and highly visible and/or frequently used areas are generally considered to be more significant than isolated areas with low visibility or infrequent usage.

(2) “Intensity” refers to the severity of the impact and the degree to which it affects the environment or public access. Violations presenting significant ecosystem hazards (e.g., toxic or biohazardous fill) or involving large portions of a particular site shall generally be considered to be more severe. In addition, violations that substantially interfere with the ability to use designated public access or encompass large portions of a designated public access area will be considered to be more significant.

(3) Where multiple violations are alleged at a site, if a single violation results in harm that is individually limited but cumulatively significant when added to other violations at the site, it shall be determined that the violation has resulted in significant harm to the Bay’s resources or to existing or future public access.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections ~~66637-66642~~, 66637, 66638, 66641.5(e), 66641.6, and 66643, Government Code; Section 29601, Public Resources Code.

## **Article 2. Commission Cease and Desist Orders, Permit Revocation Orders, and ~~Civil~~ Penalty Orders Setting Administrative Civil Liability**

5. Amend Section 11320 to read as follows:

**§ 11320. Staff Investigation and Discovery, and Appointment of a Hearing Officer.**

(a) As part of any enforcement investigation, the Executive Director may issue ~~subpenas~~ subpoenas and the staff may send interrogatories, conduct depositions, and inspect property at any time.

(b) At the request of the Executive Director or the chair of the enforcement committee, or on its own initiative, the Commission may appoint a hearing officer to conduct an investigation or hold a hearing, make proposed findings of fact, and recommend to the Commission what action it should take on an enforcement matter. A hearing officer appointed to hold an enforcement hearing shall proceed in accordance with the procedural requirements of Section 11327 and shall adopt a recommended enforcement decision in accordance with Section 11330.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 11180, ~~11181~~, 66637, 66638, 66641.5(e), 66641.6, and 66643, Government Code; and Section 29601, Public Resources Code.

6. Amend Section 11321 to read as follows:

**§ 11321. Commencing Commission Enforcement Proceedings.**

(a) If the Executive Director believes, ~~that as the a~~ 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, circumstances, extent, and gravity of the violation or violations so warrant, the Executive Director shall commence Commission enforcement proceedings by issuing at least 45 days prior to holding an enforcement hearing on the matter the following materials to the last known address of each party that the Executive Director believes may be legally responsible in some manner for the alleged violation:

(1) a violation report that ~~complies with~~ follows the format and contains the information set out in Appendix H,

(2) a complaint for administrative civil penalties liability that ~~complies with~~ follows the format and contains the information set out in Appendix H if the staff seeks civil penalties, and

(3) a statement of defense form that ~~complies with~~ follows the format and requests the information set out in Appendix I. The violation report and complaint for administrative civil penalties liability can be combined into a single document so long as it contains all the information required for both.

(b) The violation report and/or complaint shall refer to list all documents, including any declarations under penalty of perjury, on which the staff relies to provide a prima facie case of the violations alleged and give notice that the documents may be inspected at the Commission's office and that copies will be provided with five days prior notice and upon payment of the cost of copying of all such documents shall be attached to or accompany the

violation report and/or complaint or shall be provided to the respondent in electronic format upon request.

(c) Issuance of a violation report and/or complaint shall occur when the violation report and/or complaint is mailed by certified mail to all persons or entities named as a respondent in the violation report and/or complaint. ~~Issuance of a complaint for civil penalties shall occur when the complaint for civil penalties is mailed by certified mail to all persons or entities named as a respondent in the complaint.~~ Upon written consent of the respondent or respondent's authorized representative, a violation report and/or complaint shall be mailed to the respondent or the respondent's authorized representative by email.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66638, 66641.5(e), and 66641.6, Government Code; and Sections 29601, 29610 and -29611, Public Resources Code.

7. Amend Section 11322 to read as follows:

**§ 11322. Respondent's Required Response to the Violation Report or Complaint, the Executive Director's Consideration of the Respondent's Response, and Extensions of Time.**

(a) Within thirty-five (35) days of the issuance of the violation report and/or complaint and the statement of defense form, each respondent shall submit to the Commission ~~as at its office~~ an original and ~~five one copies~~ copy of the completed statement of defense form (or an original and one copy of a document providing the information requested by the form) and an original (or verified copy) and ~~five one copies~~ copy of all documents that the respondent wants to be made part of the record of the enforcement proceeding, including any declarations under penalty of perjury and any documentary evidence such as letters, photographs, and similar matters. Once submitted, all such declarations and documents shall be permanently retained by the Commission as part of the enforcement record.

(b) If a respondent believes that cross-examination of a person ~~relied on by whose~~ declaration under penalty of perjury has been submitted with staff in its violation report and/or complaint is needed to show or contest a fact alleged in the violation report and/or complaint, the respondent shall request such cross-examination in the completed statement of defense form. The completed statement of defense form or an addendum shall list the name of each person whose declaration under penalty of perjury has been submitted with the violation report and/or complaint that the respondent wants to cross examine, all documents referred to in such person's declaration about which the respondent wants to cross-examine, a description of the area of knowledge about which the respondent wants to cross-examine the person, including a specific reference to the fact or information respondent disputes, the information that respondent believes can be elicited by cross-examination, and the reasons the respondent believes that the information can best be provided by cross-examination rather than by the submittal of declarations or other written evidence.

(c) Within 35 days of the issuance of a complaint for administrative civil penalties liability and a statement of defense form, each respondent shall submit to the Commission at its office

either (1) a certified cashier's check in the amount of the proposed administrative civil penalty or (2) the completed statement of defense form, ~~and copies of~~ all documents that the respondent wants to be made part of the record of the enforcement proceeding in accordance with subsection (a), including any declarations under penalty of perjury and any documentary evidence such as letters, photographs, and similar matters, and any request to allow cross-examination in accordance with subsection (b).

(d) If the staff wants to cross-examine any person whose declaration under penalty of perjury has been submitted with a respondent's completed statement of defense form, the staff shall, within seven days of receiving ~~a~~ the completed statement of defense form, mail to all respondents a list of all persons whose declaration under penalty of perjury has been submitted by respondent that the staff wants to cross examine, all documents referred to in such person's declaration about which staff wants to cross-examine the person, a description of the area or areas of knowledge about which the staff wants to cross-examine the witness, and the information that the staff hopes to elicit in cross-examination.

(e) If the Executive Director sends a violation report and a complaint for administrative civil penalties liability together, paying the civil penalties will not release the respondent from the possible issuance of a cease and desist order or permit revocation order.

(f) If the Executive Director issues a violation report only, and not a complaint for administrative civil liability, the Executive Director shall for good cause extend the 35-day time limit imposed by subsection (a) upon receipt within the 35-day time limit of a written request for such extension and demonstration of good cause. ~~The~~ If the Executive Director issues a violation report and complaint for administrative civil liability or only a complaint for administrative civil liability, the Executive Director may at his or her discretion shall for good cause extend the 35-day time limit imposed by paragraphs (a) and (c) of this section upon receipt within the 35-day time limit of a written request for such extension, ~~and a written demonstration of good cause,~~ and waiver of and consent to extend the 60-day time limit for a hearing on the complaint under Government Code Section 66641.6(b). ~~The~~ Any extension shall be valid only to those specific items or matters that the Executive Director identifies to the requesting party as being exempt from the 35-day filing requirement and shall be valid only for such additional time as the Executive Director allows.

(g) If a respondent responds to a complaint for ~~the imposition of~~ administrative civil ~~penalties liability~~ by submitting a cashier's check in the ~~appropriate~~ amount of the penalty proposed in the complaint to the Executive Director in a timely fashion, the Executive Director shall cash the check and list the violation, the amount of the proposed penalty, and the fact that the respondent has agreed to pay the penalty as part of the administrative permit listing within 30 days of receipt of the check.

(h) At the next Commission meeting after receiving the listing, the Commission can object to the amount of a proposed administrative civil penalty that a respondent has paid by voting by a majority of those present and voting. If the Commission so objects, the Executive Director shall return the respondent's money and the respondent shall ~~file~~ submit his or her completed

statement of defense form and supporting documents within 35 days of the Commission's action. Thereafter, the enforcement matter shall proceed according to these regulations.

(i) At any time after issuance of a violation report and/or complaint, the Executive Director and a respondent may agree on the terms of a proposed stipulated order or a 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. The Executive Director shall include the proposed stipulated order or proposed settlement agreement in his or her recommended enforcement decision prepared in accordance with Section 11326. If the Commission fails to adopt the proposed stipulated order or proposed settlement agreement, and the respondent has not submitted a completed statement of defense form, copies of any supporting documents, and any request for cross-examination in accordance with subsections (a) and (b), the respondent shall submit his or her completed statement of defense form, copies of any supporting documents, and any request for cross-examination within 35 days of the Commission's failure to adopt the proposed stipulated order or proposed settlement agreement. Thereafter, the enforcement matter shall proceed according to these regulations. If the Commission fails to adopt the proposed stipulated order or proposed settlement agreement, and the respondent has previously submitted a completed statement of defense form, copies of any supporting documents, and any request for cross-examination, the Executive Director shall prepare a new recommended enforcement decision in accordance with Section 11326 within 30 days of the Commission's failure to adopt the proposed stipulated order or proposed settlement agreement, and thereafter, the enforcement matter shall proceed according to these regulations.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 11415.60, 66638, 66641.5(e), and 66641.6, Government Code; and Sections 29601, 29610 and -29611, Public Resources Code.

8. Amend Section 11323 to read as follows:

**§ 11323. Distribution of Notice of Enforcement Hearings.**

(a) At least ten (10) days prior to the initial enforcement hearing on a proposed Commission cease and desist order, a proposed permit revocation order, or a proposed Commission civil penalty order, whether held before the enforcement committee, ~~or the Commission, or a hearing officer,~~ the Executive Director shall mail by ~~regular mail~~ first class mail or send by email, and shall also make available on the Commission's website, a written notice of the date, time, and place of the initial enforcement hearing to all respondents at their last known address, the Deputy Attorney General advising the enforcement committee or Commission, and to all members of the public who have requested in writing that they receive such notice, provided that no notice need be mailed to the respondent if the respondent has already received notice of the hearing in a cease and desist order issued by the Executive Director. A meeting notice mailed and posted on the Commission's website pursuant to California Government Code Section 11125 will meet this notice requirement.

(b) After the initial enforcement hearing, notice of further enforcement hearings may be given by either announcing the date, time, and place of the further meeting on the record at the close of the preceding enforcement hearing or by mailing by first class mail or sending by email, and also making available on the Commission's website, written notice of the date, time, and place of the further meeting to all respondents at least 10 days prior to the further enforcement hearing.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66638, 66641.5(e), and 66641.6, Government Code; and Section 29601, Public Resources Code.

9. Amend Section 11324 to read as follows:

**§ 11324. Distribution of the Violation Report, Complaint, Statement of Defense Form(s), and Recommended Enforcement Decision.**

At least ten (10) days prior to the enforcement hearing, the Executive Director shall make available on the Commission's website and shall mail by regular mail first class mail or send by email the following materials to each respondent, ~~and to the committee members if the enforcement hearing will be held before the enforcement committee, to the hearing officer if the enforcement hearing will be held before a hearing officer,~~ or to the Commission if the enforcement hearing will be held before the Commission, and to the Deputy Attorney General advising the enforcement committee or Commission: (1) the violation report and/or complaint for administrative civil liability and all documents or other evidence cited therein or listed on an index of supporting documents or evidence attached thereto, (2) each completed statement of defense form and the enclosed exhibits, with a notation that indicates if any of the statements have been filed in an untimely fashion, and (3) a recommended enforcement decision that complies with Section 11326.

NOTE: Authority cited: Section 66632(f), Government Code, and Section 29201(e), Public Resources Code. Reference: Sections ~~66637~~ 66638 and 66641.6, Government Code; and Section 29601, Public Resources Code.

10. Amend Section 11326 to read as follows:

**§ 11326. Contents of an Executive Director's Recommended Enforcement Decision.**

(a) The Executive Director shall prepare a recommended enforcement decision on a proposed Commission cease and desist order, a proposed permit revocation order, or a proposed ~~civil penalty~~ order setting administrative civil liability.

(b) The Executive Director's recommended enforcement decision shall be in writing and shall include:

(1) a ~~brief~~ summary of (A) any background to the alleged violation, (B) the ~~essential~~ allegations made by staff in its violation report and/or complaint, (C) ~~a list of all essential~~ the allegations either admitted or not contested by respondent(s), and (D) all defenses and mitigating factors raised by the respondent(s), ~~and (E);~~



(2) any staff response to the defenses, mitigating factors, or arguments raised by the respondent(s), and any rebuttal evidence raised submitted by the staff to matters raised in the statement of defense form, with references to supporting documents;

~~(2)(3)~~ a summary and analysis of all ~~unresolved~~ disputed issues;

(4) a recommended enforcement decision on a proposed order setting administrative civil liability shall identify all violations for which administrative civil penalties are proposed and include:

~~(i)~~ (A) the total amount of proposed administrative civil penalties; and

~~(ii)~~ (B) 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 J of these regulations, in determining the total amount of the proposed administrative civil penalties;

~~(3)(5)~~ a statement of whether the Executive Director has issued a cease and desist order and its expiration date; ~~and~~

~~(4)(6)~~ a recommendation on what action the Commission should take; and

~~(5)(7)~~ the proposed text of any cease and desist order, permit revocation order, ~~or civil penalty order~~ setting administrative civil liability, or stipulated order that the Executive Director recommends that the Commission issue or any settlement agreement that the Executive Director recommends that the Commission approve.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66638, ~~66642~~ 66641.5(e), and 66641.6, and 66641.9, Government Code; and Sections 29601, 29610 and 29611, Public Resources Code.

11. Amend Section 11327 to read as follows:

**§ 11327. Enforcement Hearing Procedure.**

Enforcement hearings shall proceed in the following manner:

(a) the Chair or enforcement committee chair shall announce the matter, ask all respondents or their attorneys present to identify themselves for the record, ~~indicate what matters are already part of the record,~~ and announce any imposition of time limits for presentations to be made by the staff, the respondent(s), and the public at the hearing;

(b) the Chair or enforcement committee chair may impose time limits based on the circumstances of the alleged violation(s), the number of other items contained on the meeting agenda, the number of persons who intend to speak, and such other factors as the Chair believes relevant;

(c) the staff shall summarize the violation report and/or complaint for administrative civil liability and recommended enforcement decision with particular attention to limiting its presentation to issues of controversy;

(d) each respondent shall summarize its position(s) on the matter(s) relevant to the alleged violation or proposed order with particular attention to those issue(s) where an actual controversy exists between the staff and the ~~reported~~ respondent party(s) or parties;

(e) members of the public ~~other speakers~~ may speak concerning the matter;

(f) presentations made by the staff, a respondent, and ~~other speakers~~ the public shall be limited to responding to (1) evidence already made part of the enforcement record and (2) the policy implications of such evidence; the enforcement committee ~~and or~~ the Commission shall not allow oral testimony unless the committee ~~and or~~ Commission believes that such testimony is essential to resolve any factual issues that remain unresolved after reviewing the existing written record and whose resolution is essential to determining whether a violation has occurred or to determining what remedy is appropriate. If the committee or Commission allows oral testimony, such testimony shall be taken under oath, and all representatives of the staff and all respondents shall be given a right to examine or cross-examine all witnesses who are allowed to testify ~~and a right to have rebuttal witnesses similarly testify~~;

(g) cross-examination of any witness whose declaration under penalty of perjury has become part of the enforcement record shall be permitted only if the party who wishes to cross-examine has identified in writing pursuant either to Section ~~11322(a)~~ 11322(b) or Section ~~11322(c)~~ 11322(d) the person to be cross-examined, the area or areas of information into which the cross-examination will delve, and the information sought to be uncovered. 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. 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) or Section 11322(d), including any member of the public who has commented on an enforcement matter or submitted information related to an alleged violation.

(h) enforcement ~~Committee~~ members, ~~a hearing officer, and or~~ Commissioners may ask questions at any time during the hearing or deliberations.

(i) the enforcement committee, ~~hearing officer,~~ or Commission shall close the public hearing after the staff, all respondents, and the public have completed their presentations and committee members, ~~the hearing officer,~~ or Commissioners have completed their questioning;

(j) the enforcement committee or Commission shall rule on any objections to the admissibility of evidence or the acceptance of late evidence and identify any evidence submitted but rejected because it was not filed in a timely manner or in violation of Section 11328.

~~(j)~~ (k) the enforcement committee or Commission shall deliberate and vote on an enforcement matter; and

~~(k)~~ (l) if a hearing officer has been appointed for an enforcement matter, the hearing officer shall render a written decision that follows the format of an ~~Executive Director's~~ enforcement committee recommended enforcement decision in accordance with Section 11330 within 14 days of the closing of the enforcement hearing.

NOTE: Authority cited: ~~section~~Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections ~~66637-66638~~, 66641.5(e), and 66641.6, Government Code; and Section 29601, Public Resources Code.

12. Amend Section 11328 to read as follows:

**§ 11328. Acceptance of Late Evidence.**

The introduction of surprise testimony and exhibits at enforcement hearings shall be discouraged. All documents and declarations under penalty of perjury shall be submitted with the violation report and/or complaint or the completed statement of defense form, except to the extent otherwise provided by Section 11322(d) or the Executive Director has extended the time for such submittal pursuant to Section 11322(d) 11322(f), or the Commission or enforcement committee admits the evidence testimony into the record pursuant to Section 11327(f) and this section. To this end, the Commission, ~~any hearing officer, and or the~~ enforcement committee shall not accept into the record or consider any statement of defense form or any written evidence not filed in a timely manner unless the Commission, ~~hearing officer,~~ or enforcement committee finds that (1) the person seeking to introduce the evidence made all reasonable efforts to obtain and submit the evidence in a timely manner but was unable to do so and would be substantially ~~harmed~~ prejudiced if the evidence were not admitted and (2) no other party would suffer substantial prejudice by its admission.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections ~~66638~~, 66641.5(e), and 66641.6, Government Code; and Section 29601, Public Resources Code.

13. Amend Section 11329 to read as follows:

**§ 11329. Admissibility of Evidence.**

(a) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of such evidence over objection in civil actions.

(b) Hearsay evidence, including but not limited information provided by the public to the Commission or staff or in public comments, may be admitted and used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action or unless it is in the form of a declaration under penalty of perjury ~~or in the form of another document referred to in a violation report or complaint for the imposition of civil penalties and the declarant or author of the other document~~ is subject to cross-examination as provided in Sections ~~11321~~, 11322, and 11327.

(c) The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing, and irrelevant or unduly repetitious evidence shall be excluded.

(d) The Chair, ~~or the enforcement committee chair, or the hearing officer if one has been appointed~~ shall have the final authority to determine whether any evidence whose admissibility is challenged by objection shall be admitted into evidence and become part of the record.

(e) In determining whether to admit testimony or exhibits into the record over objection, the Chair, ~~or the enforcement committee chair, or the hearing officer if one has been appointed~~ shall consult with the Deputy Attorney General ~~in attendance~~ advising the Commission or enforcement committee at the hearing.

NOTE: Authority cited: ~~section~~Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66638, 66641.5(e), and 66641.6, Government Code; ~~and~~ Section 29601, Public Resources Code; ~~and Section 351, Evidence Code.~~

14. Amend Section 11330 to read as follows:

**§ 11330. Adoption of an Enforcement Committee ~~or a Hearing Officer~~ Recommended Enforcement Decision.**

(a) ~~After the enforcement committee or a hearing officer~~ After the enforcement committee ~~has closed the enforcement hearing and completed its deliberations, it shall adopt a recommended enforcement decision, which shall include all of the following:~~

~~(a)(1) all of the matters required by Section 11326; and a summary of (A) any background to the alleged violations, (B) the allegations made by staff in its violation report and/or complaint, (C) the allegations either admitted or not contested by respondent(s), (D) the defenses and mitigating factors raised by the respondent(s), and (E) the staff's response to the defenses, mitigating factors, or arguments raised by the respondent(s);~~

(2) a statement of any rulings by the enforcement committee;

(3) a recommended enforcement decision on a proposed order setting administrative civil liability shall identify the violations for which penalties are proposed and include:

(A) the total amount of proposed administrative civil penalties; and

(B) 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 Appendix J of these regulations, in determining the total amount of the proposed administrative civil penalties;

(4) a statement of whether the Executive Director has issued a cease and desist order and its expiration date;

~~(b)(5) any further written report on or explanation of the enforcement proceedings as the enforcement committee or hearing officer believes is appropriate;~~

(6) a recommendation on what action the Commission should take; and

(7) the proposed text of any cease and desist order, permit revocation order, order setting administrative civil liability, or stipulated order that the enforcement committee recommends that the Commission issue or any settlement agreement that the enforcement committee recommends that the Commission approve.

(b) The enforcement committee ~~or a hearing officer~~ can adopt with or without change the staff Executive Director's recommended enforcement decision. The chair of the enforcement committee shall direct Commission counsel to prepare the enforcement committee recommended enforcement decision, provided that: (1) Commission counsel shall submit the enforcement committee recommended enforcement decision to the respondent(s) by email for review not less than three days before the Executive Director mails the recommended decision to the Commission and respondent(s) in accordance with Section 11331; and (2) if the respondent(s) provides written comments on or objections to the recommended decision within two days of receipt thereof, the Executive Director may modify the recommended decision based on such comments or objections, if he or she determines that such modifications are appropriate, and shall include the respondent's comments or objections when mailing the recommended decision to the Commission and respondent(s) in accordance with Section 11331.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66638, ~~and 66641.5(e), -66641.6, and 66641.9,~~ Government Code; and Sections 29601, 29610 and 29611, Public Resources Code.

15. Amend Section 11331 to read as follows:

**§ 11331. Referral of the Recommended Enforcement Decision to the Commission.**

At least ten (10) days prior to the Commission's consideration of a recommended enforcement decision referred to it either directly by the Executive Director, ~~or by the enforcement committee, or by a hearing officer,~~ the staff shall mail by first class mail or send by email, and shall also make available on the Commission's website, the recommended enforcement decision to all respondents, ~~and~~ to all Commissioners, and to the Deputy Attorney General advising the Commission.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66638, ~~and 66641.5(e), and -66641.6,~~ Government Code; and Section 29601, Public Resources Codes.

16. Amend Section 11332 to read as follows:

**§ 11332. Commission Action on Recommended Enforcement Decision.**

(a) Except as provided in subsection (c), ~~When~~ the Commission acts on a recommended enforcement decision, the Commission shall allow representatives of the staff, each respondent, and members of the public an opportunity to present their respective arguments or comments on the recommendation, subject to such reasonable time limits as the Chair may

impose and subject to a prohibition against the introduction of any new evidence unless the Commission proceeds either to remand the matter ~~to the enforcement committee or hearing officer~~ or hold a de novo evidentiary hearing.

(b) Thereafter, the Commission shall do one of the following:

(1) adopt the recommended enforcement decision without any change in any proposed cease and desist order, permit revocation order, or ~~civil penalty order~~ setting administrative civil liability;

(2) either (A) dismiss the entire matter by voting not to issue any proposed cease and desist order, proposed permit revocation order, or proposed order setting administrative civil penalty order liability or (B) ~~if adopt~~ the recommended enforcement decision ~~with regard to~~ includes one or more of a proposed cease and desist order, a proposed permit revocation order, and a proposed order setting administrative civil penalty order liability, adopt the recommended enforcement decision with regard to one or more proposed orders and dismiss the other proposed order(s) recommended in the recommended enforcement decision by voting not to issue them;

(3) remand the matter to the enforcement committee, ~~hearing officer~~, or the staff for further action as the Commission directs; or

(4) reject the recommended enforcement decision and decide to consider the entire matter de novo. In this event, the Commission shall continue the public hearing to the next available Commission meeting, when it shall proceed in accordance with the same procedural requirements as the Commission must follow under these regulations pursuant to Section 11327. As part of this de novo proceeding, the Commission can accept additional evidence only in compliance with Sections 11327 and 11328 or if the Commission provides the staff, all respondents, and the public a reasonable opportunity to review and respond to the additional evidence prior to the Commission's de novo review.

(c) If the respondent(s) agrees in writing to accept the recommended enforcement decision, and the Executive Director also agrees to accept the recommended decision, the Executive Director shall calendar the recommended enforcement decision as a consent item on a Commission meeting agenda. At the Commission meeting, after allowing public comment on the consent item the Commission shall determine by a majority of those commissioners present and voting whether to adopt the recommended enforcement decision on consent without any change and without any further proceedings. If a majority of those commissioners present and voting do not determine to adopt the recommended decision on consent, the Commission shall proceed to act on the matter in accordance with subsections (a) and (b).

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66638, ~~and 66641.5(e), -66641.6 and 66641.9,~~ Government Code; and Sections 29601, 29610 and 29611, Public Resources Code.

17. Amend Section 11333 to read as follows:

**§ 11333. Commission Hearing Procedures on Direct Referral of an Enforcement Matter by the Executive Director.**

The Executive Director shall determine whether to refer an enforcement matter to the Commission or to the enforcement committee. When the Executive Director refers an enforcement matter directly to the Commission ~~rather than to the enforcement committee~~, the Commission shall follow the procedures set out in Sections 11327 through 11329 and in Section 11334.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66638, ~~and 66641.5(e), and -66641.6~~, Government Code; and Section 29601, Public Resources Code.

18. Amend Section 11334 to read as follows:

**§ 11334. Voting on a Proposed Commission Cease and Desist Order, a Proposed Commission Permit Revocation Order, or a Proposed Commission ~~Civil Penalty Order~~ Setting Administrative Civil Liability.**

(a) The Commission shall vote on a recommended enforcement decision, a proposed Commission cease and desist order, a proposed permit revocation order, or a proposed order setting administrative civil penalty order liability by roll call in alphabetical order except that the Chair shall vote last;

(b) Any member may change his or her vote at any time before the Chair announces the final tally; and

(c) The decision of whether or not to issue an order shall be by majority vote of those present and voting.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66638 and 66641.5(e), ~~and -66641.6~~, Government Code; and Section 29601, Public Resources Code.

19. Amend Section 11340 to read as follows:

**§ 11340. Contents of Cease and Desist Orders.**

(a) Cease and desist orders shall be signed by the Executive Director and shall contain the following:

(1) a statement of whether the Executive Director is issuing the order pursuant to Section 66637 of the Government Code or the Commission is issuing the order pursuant to Section 66638 of the Government Code;

(2) the names of the person or persons who have undertaken or who are threatening to undertake the activity that is the subject of the order;

(3) identification of the property where the activity has been undertaken or may be undertaken;

(4) a description of the activity;

(5) the effective date of the order;

(6) the expiration date, if any, of the order;

(7) any terms, conditions, or other provisions necessary to bring the activity into compliance with the provisions of the McAteer-Petris Act, the Suisun Marsh Preservation Act, or a permit;

(8) written findings that (1) explain the decision to issue the order and (2) provide the factual and legal basis for the issuance of the order;

(9) in the case of an order issued by the Executive Director, notice of the date and place of any public hearing to be held on any cease and desist order proposed to be issued by the Commission relating to the same activity if the Executive Director has scheduled one;

(10) notice that a respondent may file with the superior court a petition for writ of mandate for review of the order pursuant to Section 1094.5 of the Code of Civil Procedure within thirty (30) days after service of a copy of the order; and

(11) such other provisions that the Commission has approved, including provisions relating to:

(A) a disclaimer of any effect of the order upon any duties, rights, or obligations under private agreements or under regulations of other public bodies;

(B) the obligation to conform strictly to the order and the consequences of the failure to do so; and

(C) the fact that the order does not constitute a recognition of property rights.

(b) A cease and desist order can be combined with a permit revocation order and/or a an order setting administrative civil penalty order liability so long as the combined order contains all the information required under these regulations for ~~both such~~ each type of orders.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66638 and ~~66641.5-66641.6~~, Government Code; and Section 29601, Public Resources Code.

20. Amend Section 11341 to read as follows:

**§ 11341. Modifications of Cease and Desist Orders Issued by the Executive Director.**

The Executive Director may modify a cease and desist order that he or she has issued for good cause, but he or she shall not do so in a manner that extends the 90-day expiration period provided for in Section 66637 of the Government Code unless a respondent stipulates in writing to the extension. The Executive Director may, however, issue consecutive cease and desist orders for a persisting violation or a persisting threatened violation.



NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections ~~66638~~ 66637 and ~~66641.5-66641.6~~, Government Code; and Section 29601, Public Resources Code.

21. Amend Section 11342 to read as follows:

**§ 11342. Modification of Cease and Desist Orders Issued by the Commission.**

The Executive Director may modify a cease and desist order issued by the Commission for good cause if the modification would not be a material alteration of the order.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections ~~66638~~ and ~~66641.5-66641.6~~, Government Code; and Section 29601, Public Resources Code.

22. Amend Section 11343 to read as follows:

**§ 11343. Appeal from the Modification of a Commission Cease and Desist Order.**

(a) A person who has been personally served with a Commission cease and desist order or to whom the Commission has mailed by certified mail a cease and desist order and to whom the order is directed may appeal to the Commission any modification of the order by the Executive Director by filing a written statement that the party is appealing the modification and the reasons for the appeal.

(b) If the appeal is ~~complete and~~ filed within ten days of the personal service or mailing by certified mail of the modification to the order, the appeal shall stay the effect of the modification, but the previously effective order shall remain in effect.

(c) Appeals ~~to of~~ modifications of a cease and desist order by the Executive Director cannot be filed more than ten days after the personal service or mailing by certified mail of the modification.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections ~~66638~~ and ~~66641.5-66641.6~~, Government Code; and Section 29601, Public Resources Code.

23. Amend Section 11350 to read as follows:

**§ 11350. Contents of Permit Revocation Orders.**

(a) Commission permit revocation orders shall be signed by the Executive Director and shall contain the following:

(1) the names of the person or persons who have violated a term or condition of a Commission permit or a Commission cease and desist order or who have misstated any information on a permit application or at a public hearing;

(2) an identification of the term or condition of a permit or a cease and desist order that was violated, or the information that was misstated on the permit application;

(3) the effective date of the order;

(4) the work and uses that are no longer authorized and the date by which any corrective actions or termination of uses must occur;

(5) any terms, conditions, or other provisions that the Commission may determine that, if complied with, could avoid revocation of the permit;

(6) written findings that (A) explain the decision to issue the permit revocation order and (B) provide the factual and legal basis for the issuance of the order;

(7) notice that an aggrieved party can file with the superior court a petition for a writ of mandate for review of the order pursuant to Section 1094.5 of the Code of Civil Procedure.

(b) A permit revocation order can be combined with a cease and desist order and or a an order setting administrative civil penalty order liability so long as the combined order contains all the information required by these regulations for ~~both~~ each types of orders.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66638 and 66641, Government Code; and Section 29601, Public Resources Code; and Sunset Amusement Company v. Board of Police Commissioners (1972) 7 Cal.3d 64, 80.

24. Amend Section 11351 to read as follows:

**§ 11351. Modification of Permit Revocation Orders.**

The Executive Director may modify a permit revocation order for good cause if the modification would not materially change the order.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Section 66638-66641(d), Government Code; and Sections 29600 and 29601, Public Resources Code.

25. Amend Section 11352 to read as follows:

**§ 11352. Appeal from Modification of a Permit Revocation Order.**

(a) A person to whom the Commission has issued a permit revocation order may appeal to the Commission any modification of the order by the Executive Director by filing within ten (10) days of the date of the personal service or mailing by certified mail of the modification a written statement that the party is appealing the modification and the reasons for the appeal.

(b) If the appeal is ~~complete and~~ filed within ten days of the personal service or mailing by certified mail of the modification to the order, the appeal shall stay the effect of the modification, but the previously effective order shall remain in effect.

(c) Appeals ~~to of~~ modifications of a permit revocation order by the Executive Director cannot be filed more than ten days after the personal service or mailing by certified mail of the modification.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Section ~~66638-66641(d)~~, Government Code; and Section ~~29600~~ 29601, Public Resources Code.

26. Amend Section 11360 to read as follows:

**§ 11360. Preparation and Execution of Commission Cease and Desist Orders, ~~and Permit Revocation Orders,~~ and Orders Setting Administrative Civil Liability.**

The Executive Director shall prepare and sign a cease and desist order, ~~or a permit revocation order,~~ or an order setting administrative civil liability authorized by the Commission no later than the fifth (5th) working day following approval.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections ~~66637-66642-66638~~, 66638, 66641.5(e), and 66641.6, Government Code; and Sections 29601, 29610 and 29611, Public Resources Code.

27. Amend Section 11361 to read as follows:

**§ 11361. Issuance.**

“Issuance” of a cease and desist order, a permit revocation order, ~~a~~ an order setting administrative civil ~~penalty order~~ liability, or of any modification of such orders, is complete when the Executive Director executes the original ~~copies~~ copy of the order or modification and ~~they are~~ it is stamped “Issued BCDC” with the date.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections ~~66637~~, ~~66638~~, 66641.5(e), and 66641.6, Government Code; and Sections 29600 and 29601, Public Resources Code.

28. Amend Section 11362 to read as follows:

**§ 11362. Service of Copies.**

(a) Persons to Whom the Order or Modification is Issued. The Executive Director shall cause to be personally served or mailed by certified mail an original copy of a cease and desist order, a permit revocation order, and of any modifications of such orders to each person to whom the order or modification is being issued and the owner of the property on which any violation addressed by the order occurred no later than the second working day following the date of issuance, except that with the written consent of the party to be served, the Executive Director shall serve any such order or order modification by email. The Executive Director shall cause to be personally served or mail by registered mail ~~a~~ an order setting administrative civil ~~penalty order~~ liability or modification to such order to each person to whom the order is being issued no later than the second working day following the date of issuance, except that with the written consent of the party to be served, the Executive Director shall serve any such order or modification by email.

(b) Other Interested Persons. The Executive Director shall personally serve on or shall mail by ~~regular~~ certified mail a copy of a cease and desist order or a permit revocation order

authorized by the Commission and of any modification of such an order to each person who appeared at the hearing and submitted a written request for a copy as soon as possible after the Commission authorized the order or modification no later than the second working day following the date of issuance, except that with the written consent of the party to be served, the Executive Director shall serve any such order or order modification by email. (For civil penalty orders, see subdivision (d) of Government Code Section 66641.6.) The Executive Director shall cause to be personally served or mail by registered mail an order setting administrative civil liability or modification to such order to each person who appeared at the hearing and submitted a written request for a copy, except that with the consent of the party to be served, the Executive Director shall serve any such order or order modification by email. In addition, the Executive Director shall post on the Commission's website a copy of a cease and desist order, permit revocation order, or an order setting administrative civil liability, or any modification of such orders no later than the second working day following issuance.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66637, -66638, 66641.5(e), and 66641.6, Government Code; and Sections 29600 and 29601, Public Resources Code.

29. Amend Section 11370 to read as follows:

**§ 11370. Enforcement Record.**

The record of an enforcement proceeding shall consist of

- (a) the violation report, including all documents referred to in the report;
- (b) any complaint for administrative civil penalties liability;
- (c) all timely filed statement of defense form(s), including all documents submitted therewith;
- (d) all untimely filed statement of defense forms that have nevertheless been admitted into evidence;
- (e) the ~~staff~~ Executive Director's recommended enforcement decision, including all documents and any other evidence referred to or included in the recommendation,
- (f) minutes or a verbatim transcript of all enforcement committee and Commission enforcement hearings and deliberations, provided, that if ~~eyewitness or expert~~ any oral testimony or any cross-examination and direct examination of a person whose declaration under penalty of perjury has become part of the enforcement record is allowed at the enforcement hearing, a verbatim transcript of such testimony shall also be included;
- (g) all evidence submitted but rejected because it was not filed in a timely manner or violated Section 11328, with a notation that it was rejected and is included in the record only so that a reviewing court will know what evidence was rejected;
- (h) any enforcement committee's or hearing officer's recommended enforcement decision,
- (i) any order that the Commission issues,

~~(j)~~ all other materials maintained in the Commission's file for the enforcement matter,  
~~(k)~~(i) such other permit or other Commission files as have explicitly been made a part of the record,

~~(l)~~(k) the McAteer-Petris Act, if relevant to any of the issues raised in the proceeding,

~~(m)~~(l) the San Francisco Bay Plan, if relevant to any of the issues raised in the proceeding,

~~(n)~~(m) the Suisun Marsh Preservation Act, if relevant to any of the issues raised in the proceeding,

~~(o)~~(n) the Suisun Marsh Protection Plan, if relevant to any of the issues raised in the proceeding,

~~(p)~~(o) the Suisun Marsh Local Protection Program, if relevant to any of the issues raised in the proceeding, and

~~(q)~~(p) the Commission's regulations.

NOTE: Authority cited: Section 66632(f), Government Code; and Section ~~29210(e)~~29201(e), Public Resources Code. Reference: Sections ~~66639-66638, -66640, 66641.5(e), 66641.6, and 66641.7, Government Code; and Sections 29600 and 29601, Public Resources Code.~~

30. Amend Section 11380 to read as follows:

**§ 11380. Content of Complaint for Administrative ~~Imposition of Civil Penalties~~ Liability.**

The complaint shall follow the ~~same format as required for a Violation Report~~ and contain the information set out in Appendix H to these regulations. The complaint shall identify the violations for which administrative civil penalties are proposed and include:

(a) a list or table of all alleged violations for which staff is proposing a penalty;

(b) the total amount of proposed administrative civil penalties; and

(c) 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 J of these regulations, in determining the total amount of the proposed administrative civil penalties;

Note: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66641.5(e), 66641.6, and 66641.9, Government Code; and Sections 29610 and 29611, Public Resources Code.

31. Amend Section 11381 to read as follows:

**§ 11381. Commission Hearing on Complaint for Administrative ~~Imposition of Civil Penalties~~ Liability.**

(a) The Commission shall comply with the requirements of Cal. Govt. Code Section 66641.6(b) by either: (1) hearing the matter itself within 60 days of the service of the

complaint; or (2) by having the enforcement committee hold a hearing within 60 days of the service of the complaint. With the written consent of the respondent(s) to whom a complaint is issued, the Executive Director shall for good cause extend the 60-day time limit for a hearing on the complaint under Government Code Section 66641.6(b).

(b) The Executive Director shall determine whether to refer a complaint for ~~the~~ administrative ~~imposition of civil penalties~~ liability to the Commission or to the enforcement committee.

(c) When the Executive Director determines whether to refer a complaint ~~for civil penalties~~ to the Commission or to the enforcement committee, he or she shall consider the following factors:

(1) the time that it would take the Commission or enforcement committee to complete consideration of the complaint,

(2) whether the Executive Director has issued a cease and desist order for the violation or violations alleged in the complaint, and 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,

~~(2)~~ (3) the relative workloads of the Commission and the enforcement committee at the time,

~~(3)~~ (4) whether the complaint involves any policy issues that should be determined by the Commission initially,

~~(4)~~ (5) whether the Commission or the enforcement committee has already heard any enforcement matter that is related to the complaint, and

~~(5)~~ (6) any request by the Commission that it hear the matter directly.

NOTE: Authority cited: Section 66632(f), Government Code. Reference: Sections 66641.5(e) and 66641.6, Government Code.

32. Amend Section 11382 to read as follows:

**§ 11382. Further Procedures for Commission Review of Complaints for ~~the issuance of~~ Administrative Civil Penalty Orders Liability.**

The Commission shall follow the procedures established by Sections ~~11310 and 11321~~ through 11334 ~~and Sections 11361 through 11370~~ of these regulations when it considers a recommended enforcement decisions from either the staff or the enforcement committee ~~or a hearing officer~~ relative to the possible imposition of administrative ~~imposition of civil penalties~~ liability.

NOTE: Authority cited: Section 66632(f), Government Code. Reference: Sections 66641.5(e), 66641.6, and 66641.9, Government Code.

33. Amend Section 11383 to read as follows:

**§ 11383. Contents of a Commission ~~Civil Penalty Order~~ Setting Administrative Civil Liability.**

(a) A Commission ~~civil penalty order~~ setting administrative civil liability shall be signed by the Executive Director and shall contain the following:

(1) the name(s) of the person(s) required to pay the civil ~~penalty~~ penalties;

(2) the amount of the civil ~~penalty~~ penalties and findings that address the applicable factors set forth in Government Code Section 66641.9 that the Commission considered in determining the amount of the civil penalties;

(3) the date by which the civil ~~penalty~~ 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;

(4) written findings that (1) explain the decision to issue the ~~civil penalty order~~ setting administrative civil liability and (2) provide the factual and legal basis for the issuance of the order, and

(5) notice that a person to whom the Commission issues ~~a civil penalty~~ an order setting administrative civil liability may file with the superior court a petition for writ of mandate for review of the order pursuant to Section 1094.5 of the Code of Civil Procedure within thirty (30) days after service of a copy of the order.

(b) ~~A civil penalty~~ An order setting administrative civil liability can be combined with a cease and desist order or a permit revocation order so long as the combined order contains all the information required under these regulations for ~~both is contained in the combined orders~~ each type of order.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66641.5(e), 66641.6, and 66641.9, Government Code; and Sections 29610 and 29611, Public Resources Code.

34. Amend Section 11384 to read as follows:

**§ 11384. Modification of a Commission ~~Civil Penalty Order~~ Setting Administrative Civil Liability.**

The Executive Director may modify ~~a civil penalty~~ an order setting administrative civil liability for good cause if the modification would not alter the total amount of the ~~penalty~~ civil penalties or otherwise materially change the order.

NOTE: Authority cited: Section 66632(f), Government Code. Reference: Sections 66641.5(e), 66641.6, and 66641.9, Government Code.

35. Amend Section 11385 to read as follows:

**§ 11385. Appeal from Modification of ~~a Permit Revocation~~ an Order Setting Administrative Civil Liability.**

(a) A person to whom the Commission has issued ~~a civil penalty~~ an order setting administrative civil liability may appeal to the Commission any modification of the order by the Executive Director by filing within ten (10) days of the date of personal service or mailing by registered mail of the modification a written statement that the party is appealing the modification and the reasons for the appeal.

(b) If the appeal is ~~complete and~~ filed within ten days of the personal service or mailing by registered mail of the modification to the order, the appeal shall stay the effect of the modification, but the previously effective order shall remain in effect.

(c) Appeals ~~to of~~ of modifications of ~~a civil penalty~~ an order setting administrative civil liability by the Executive Director cannot be filed more than ten days after the personal service or mailing by registered mail of the modification.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66641.5(e), 66641.6, and 66641.9, Government Code.

36. Amend Section 11386 by adding Article 3 to Chapter 13, Subchapter 2, revising Section 11386, and adding new Sections 11387 through 11391, all to read as follows:

### **Article 3. Standardized Fines**

#### **§ 11386. ~~Standardized Fines~~ Applicability of Article.**

(a) This ~~Section~~ Article shall apply to an enforcement action if the Executive Director determines:

(1) that an alleged violation is one of the types identified in ~~subsection 11386(e)~~ Section 11390;

(2) that the alleged violation has not resulted in significant harm to the Bay's resources or to existing or future public access; and

(3) that the alleged violation can be corrected in a manner consistent with the Commission's laws and policies.

(b) 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 Section 11310(f).

(c) If an enforcement action involves both an alleged violation that has not resulted in significant harm to the Bay's resources or to existing or future public access and an alleged violation that has resulted in significant harm to such resources or public access or that is otherwise not subject to resolution under this Article, the Executive Director may, depending on the nature and extent of all the violations and on whether the responsible party has taken appropriate action to resolve the violations, commence Commission enforcement proceedings for all the alleged violations by following the procedures established by Sections 11321 through 11334 of these regulations.



NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Section 66641.5(e), Government Code; and Section 29610, Public Resources Code.

**§ 11387. Notice of Alleged Violation.**

~~(b) Except as provided in subsection (g), if~~ If this Section Article applies to an enforcement action, the Executive Director shall mail a written notice to the person(s) believed to be responsible for the alleged violation(s) that contains all of the following information:

~~(1) (a)~~ the nature of the alleged violation(s) and each and every action that must be taken to correct the alleged violation;

~~(2) (b)~~ the fact that if the alleged violation(s) is/are fully corrected within 35 days of the mailing of the notice, the Commission shall not impose any fine-civil penalty; and

~~(3) (c)~~ the fact that if the alleged violation(s) is/are not fully corrected within 35 days of mailing of the notice, the person believed to be responsible for the alleged violation(s) may be subject to the payment of a fine-civil penalty and may resolve the penalty portion of the alleged violation(s) by taking each and every corrective action required by the notice and paying the standardized fine specified in subsections (e), and (f) Section 11390(a) or 11390(b) without having to go through a formal Commission enforcement proceeding pursuant to Sections 11300 through 11385 11321 through 11334, except as provided in subsection (h) Section 11390(d).

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Section 66641.5(e), Government Code; and Section 29610, Public Resources Code.

**§ 11388. Opportunity to Complete Corrective Action without Imposition of a Standardized Fine.**

~~(c) Except as provided in subsection (g) Section 11390(c), if the person believed to be responsible for the alleged violation(s) submits to the Executive Director information demonstrating that the alleged violation(s) have not occurred or that such person has completed each and every corrective action specified in the notice pursuant to subsection (b) Section 11387 within thirty-five (35) days after the mailing of the notice, the Commission shall not impose any standardized or other fine.~~

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Section 66641.5(e), Government Code; and Section 29610, Public Resources Code.

**§ 11389. Opportunity to Complete Corrective Action with Imposition of a Standardized Fine.**

~~(d) Except as provided in subsections (g) and (h) Sections 11390(c) and 11390(d), if the person believed to be responsible for the alleged violation(s) fails to submit to the Executive Director information demonstrating that such person has complete one or more of the completed each and every corrective actions required by the notice pursuant to subsection (b)~~

Section 11387 within thirty-five (35) days after the date of the mailing of the notice, the responsible person may resolve ~~the penalty portion of the alleged violation(s)~~ by completing each and every corrective action required by the notice sent pursuant to ~~subsection (b)~~ Section 11387 and by paying a fine in the amount provided in ~~subsections (e) and (f)~~ Sections 11390(a) or 11390(b).

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Section 66641.5(e), Government Code; and Section 29610, Public Resources Code.

**§ 11390. Violations Subject to a Standardized Fine and Schedule of Standardized Fines.**

~~(e)~~ (a) The following standardized ~~civil penalties~~ fines shall apply to the following types of alleged violations:

(1) for the failure to return an acknowledged, executed Commission permit before commencing the work authorized by the permit, ~~or, for any permit issued to authorize previously commenced or completed work, for failure to return an acknowledged, executed permit within the time period stated in the permit:~~

(A) if the fully executed permit is returned between thirty-six (36) and sixty-five (65) days after the date of the mailing of the notice required by ~~subsection (b)~~ Section 11387: ~~ONE TWO THOUSAND DOLLARS (\$1,000.00~~ TWO THOUSAND DOLLARS (\$2,000.00); or

(B) if the fully executed permit is returned more than sixty-five (65) days after the date of the mailing of the notice required by ~~subsection (b)~~ Section 11387: ~~THREE FIVE THOUSAND DOLLARS (\$3,000.00~~ FIVE THOUSAND DOLLARS (\$5,000.00) plus ~~ONE FIVE HUNDRED DOLLARS (\$100.00~~ FIVE HUNDRED DOLLARS (\$500.00) per day from the sixty-fifth (65) day to the date the fully executed permit is received by the staff.

(2) for the failure to submit any document other than an acknowledged, executed Commission permit in the form, manner or time required by a Commission permit:

(A) if a required document is submitted between thirty-six (36) and sixty-five (65) days after the date of the mailing of the notice required by ~~subsection (b)~~ Section 11387: ~~ONE TWO THOUSAND DOLLARS (\$1,000.00~~ TWO THOUSAND DOLLARS (\$2,000.00) per document;

(B) if a required document is submitted between sixty-six (66) and ninety-five (95) days after the date of the mailing of the notice required by ~~subsection (b)~~ Section 11387: ~~THREE FIVE THOUSAND DOLLARS (\$3,000.00~~ FIVE THOUSAND DOLLARS (\$5,000.00) per document; or

(C) if a required document is submitted more than ninety-five (95) days after the date of the mailing of the notice required by ~~subsection (b)~~ Section 11387: ~~THREE FIVE THOUSAND DOLLARS (\$3,000.00~~ FIVE THOUSAND DOLLARS (\$5,000.00) for each document plus ~~ONE FIVE HUNDRED DOLLARS (\$100.00~~ FIVE HUNDRED DOLLARS (\$500.00) per day for each document, from the ninety-sixth (96th) day to the date the document is received by the staff.

(3) for the failure to comply with any condition required by a Commission permit not covered by subsections ~~(e)(1)~~ (a)(1) and or ~~(e)(2)~~ (a)(2):

(A) if corrected between thirty-six (36) and sixty-five (65) days after the date of the mailing of the notice required by subsection (b) Section 11387: ~~ONE TWO THOUSAND DOLLARS (\$1,000.00)~~ TWO THOUSAND DOLLARS (\$2,000.00) for each violation of each separate permit requirement; or

(B) if corrected between sixty-six (66) and ninety-five (95) days after the date of the mailing of the notice required by subsection (b) Section 11387: ~~THREE FIVE THOUSAND DOLLARS (\$3,000.00)~~ FIVE THOUSAND DOLLARS (\$5,000.00) for each violation of each separate permit requirement; or

(C) if corrected more than ninety-five (95) days after the date of the mailing of the notice required by subsection (b) Section 11387: ~~THREE FIVE THOUSAND DOLLARS (\$3,000.00)~~ FIVE THOUSAND DOLLARS (\$5,000.00) for each violation of each separate permit requirement, plus ~~ONE FIVE HUNDRED DOLLARS (\$100.00)~~ FIVE HUNDRED DOLLARS (\$500.00) per day for each violation, from the ninety-sixth (96th) day to the date the violation is corrected or the required improvements are provided.

(4) for the failure to obtain a Commission permit or an amendment to a previously issued Commission permit prior to undertaking any activity that can be authorized by an administrative permit or an amendment to previously issued Commission permit:

(A) if either a ~~filed~~ complete and properly executed application accompanied by a check or money order for the applicable application fee, as determined pursuant to Appendix M, Section (b) of the Commission's regulations, is submitted between thirty-six (36) and sixty-five (65) days and a permit or permit amendment is obtained within one hundred and fifty-five (155) days after the date of the mailing of the notice required by subsection (b) Section 11387 or the unauthorized activity is completely corrected between thirty-six (36) and sixty-five (65) days after the date of the mailing of the notice required by subsection (b) Section 11387: TWO THOUSAND DOLLARS (\$2,000.00);

(B) if either a ~~filed~~ complete and properly executed application accompanied by a check or money order for the applicable application fee, as determined pursuant to Appendix M, Section (b) of the Commission's regulations, is submitted between sixty-six (66) and ninety-five (95) days and a permit or permit amendment is obtained within one hundred and eighty-five (185) days after the date of the mailing of the notice required by subsection (b) Section 11387 or the unauthorized activity is completely corrected between sixty-six (66) and ninety-five (95) days after the date of the mailing of the notice required by subsection (b) Section 11387: FIVE THOUSAND DOLLARS (\$5,000.00);

(C) if a ~~filed~~ complete and properly executed application accompanied by a check or money order for the applicable application fee, as determined pursuant to Appendix M, Section (b) of the Commission's regulations, is submitted more than ninety-five (95) days after the date of the mailing of the notice required by subsection (b) Section 11387 or the unauthorized activity is completely corrected within the same time limits: FIVE THOUSAND DOLLARS (\$5,000.00) plus ~~ONE FIVE HUNDRED DOLLARS (\$100.00)~~ FIVE HUNDRED DOLLARS (\$500.00) per day from the ninety-sixth (96th) day to the date ~~a permit is obtained~~ the fully complete and properly executed application accompanied by a check or money order for the applicable application fee is submitted or the activity is completely corrected.

(5) for the failure to obtain a Commission permit prior to undertaking any activity that can be authorized by a statewide permit or an abbreviated statewide permit:

(A) if either a ~~filed application~~ complete notice of intent to proceed under a statewide permit or abbreviated statewide permit is submitted between thirty-six (36) and sixty-five (65) days and ~~a permit is obtained~~ the Executive Director approves the notice of intent to proceed within one hundred and fifty-five (155) days after the date of the mailing of the notice required by ~~subsection (b)~~ Section 11387 or the unauthorized activity is completely corrected between thirty-six (36) and sixty-five (65) days after the date of the mailing of the notice required by ~~subsection (b)~~ Section 11387: ~~ONE TWO THOUSAND DOLLARS (\$1,000.00)~~ TWO THOUSAND DOLLARS (\$2,000.00);

(B) if either a ~~filed application~~ complete notice of intent to proceed under a statewide permit or an abbreviated statewide permit is submitted between sixty-six (66) and ninety-five (95) days and ~~a permit is obtained~~ the Executive Director approves the notice of intent to proceed within one hundred and eighty-five (185) days after the date of the mailing of the notice required by ~~subsection (b)~~ Section 11387 or the unauthorized activity is completely corrected between sixty-six (66) and ninety-five (95) days after the date of the mailing of the notice required by ~~subsection (b)~~ Section 11387: ~~TWO FOUR THOUSAND DOLLARS (\$2,000.00)~~ FOUR THOUSAND DOLLARS (\$4,000.00);

(C) if a ~~filed application~~ complete notice of intent to proceed under a statewide permit or an abbreviated statewide permit is submitted more than ninety-five (95) days after the date of the mailing of the notice required by ~~subsection (b)~~ Section 11387 or the unauthorized activity is completely corrected within the same time limits: ~~TWO FOUR THOUSAND DOLLARS (\$2,000.00)~~ FOUR THOUSAND DOLLARS (\$4,000.00) plus ~~ONE FIVE HUNDRED DOLLARS (\$100.00)~~ FIVE HUNDRED DOLLARS (\$500.00) per day from the ninety-sixth (96th) day to the date ~~a permit is obtained~~ the complete notice of intent to proceed is submitted or the unauthorized activity is completely corrected.

(6) for the placement of fill, the extraction of materials or a change in use that could not be authorized under the Commission's laws and policies ~~but is an activity similar in size and scope to the activities listed in Sections 10601(a) through 10601(e)~~:

(A) if the violation is corrected and the area restored to its prior status between thirty-six (36) and sixty-five (65) days after the mailing of the notice required by ~~subsection (b)~~ Section 11387: ~~THREE THOUSAND DOLLARS (\$3,000.00)~~ THREE THOUSAND DOLLARS (\$3,000.00);

(B) if the violation is corrected and the area restored to its prior status between sixty-six (66) and ninety-five (95) days after the mailing of the notice required by ~~subsection (b)~~ Section 11387: ~~EIGHT THOUSAND DOLLARS (\$8,000.00)~~ EIGHT THOUSAND DOLLARS (\$8,000.00);

(C) if the violation is corrected and the area returned to its prior status more than ~~ninety-five (95)~~ ninety-five (95) days after the mailing of the notice required by ~~subsection (b)~~ Section 11387: ~~EIGHT THOUSAND DOLLARS (\$8,000.00)~~ EIGHT THOUSAND DOLLARS (\$8,000.00) plus ~~ONE FIVE HUNDRED DOLLARS (\$100.00)~~ FIVE HUNDRED DOLLARS (\$500.00) per day to the date the violation is completely corrected.

~~(f) (b)~~ (b) A person ~~believed to be~~ responsible for any alleged violation must pay double the amount listed in ~~subsection (e)~~ subsection (a) to resolve ~~the civil penalty portion of the alleged~~

violation if that person has previously paid or has been assessed but has failed to pay any standardized fine pursuant to ~~section 11386~~ subsection (a) and Section 11391 within the five years prior to resolution of the alleged violation.

~~(g)~~ (c) If a violation resolved pursuant to ~~subsection (c)~~ Section 11388 is repeated by the same person within five years of the resolution of the prior violation, ~~subsections (c), (e), and (f)~~ Section 11388 and subsections (a) and (b) shall not apply. Instead, the person ~~believed to be~~ responsible for the subsequent ~~alleged~~ violation may resolve ~~the civil penalty portion of the~~ subsequent alleged violation by paying ~~ONE TWO HUNDRED DOLLARS (\$100.00)~~ TWO HUNDRED DOLLARS (\$200.00) per day for each day the subsequent alleged violation occurs or persists after the date of the mailing of the notice required by Section 11387.

~~(h)~~ (d) If the person responsible for the alleged violation does not complete all the required corrective actions and ~~pay the appropriate standardized civil penalties within the time limits specified by the Executive Director or, if no time limit is specified, within 125 days of the notice mailed pursuant to subsection (b)~~ Section 11387 or does not pay the amount of standardized fines assessed in accordance with this section when payment is due under Section 11391(c) or (d), the Executive Director may commence Commission enforcement proceedings in accordance with ~~Sections 11300 through 11385~~ Sections 11321 through 11334. If the Executive Director determines that ~~an alleged violator~~ the person responsible for the violation has not made a good-faith effort to correct an alleged violation, the Executive Director may terminate the opportunity for ~~settlement~~ resolution of the violation using the standardized fine process ~~thirty five (35) days after~~ by mailing a notice stating that the process ~~will~~ is no longer be available. After mailing such notice, the Executive Director shall commence Commission enforcement proceedings in accordance with Sections 11321 through 11334 to resolve the violation.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Section 66641.5(e), Government Code; and Section 29610, Public Resources Code.

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

~~(i)~~ (a) After the violation has been completely resolved, the Commission staff shall notify the person responsible for the violation by first class mail or email of the amount of standardized fines assessed in accordance with Section 11390. The notice shall state that if any person subject to the standardized civil penalties fines listed in subsections (e), (f), and (g) believes that the amount of standardized fines is inappropriate or was not properly determined in accordance Section 11390, that person can appeal the proposed amount of the penalty fines to the Executive Director and the Chair, by submitting to the Executive Director within 21 days of the date of the notice a written statement that the person is appealing and the reasons for the appeal. who ~~The Commission staff shall submit to the Executive Director a response to the appeal within 14 days after receipt thereof. The Executive Director and the Chair can reduce the amount of the standardized civil penalty fines to an amount that they believe is appropriate and can establish a schedule for the payment of the standardized fines in installments.~~

~~(f)~~(b) If any person subject to the standardized ~~civil penalties~~ finest listed in ~~subsections (e), (f), and (g)~~ Sections 11390(a), (b), or (c) believes that the 35-day time limit for resolution without a standardized fine established pursuant to subsection (h) Sections 11387 and 11388 is inappropriate not feasible, that person may appeal the time limit to the Executive Director and the Chair, ~~who~~ by submitting to the Executive Director within 35-days of the notice mailed pursuant to Section 11387 a written statement that the person is appealing the 35-day time limit, the reasons for the appeal, and a proposed alternative date to complete the required corrective action. 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.

(c) 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 thirty (30) days after the date of the notice provided under subsection (a).

(d) 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.

~~(k)~~ (e) Any person receiving a notice under Section 11387 believed to be responsible for an alleged violation is entitled to a formal may 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 hearing proceedings according to in accordance with sections 11300 through 11385 Sections 11321 through 11334 if that person believes it is such proceedings are necessary to fairly determine liability for the violation, the appropriate remedy, or the appropriate fine or administrative civil penalty amount. A waiver of the opportunity to resolve a violation under this Article 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 (21) days after the date of the notice provided by Commission staff under subsection (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 (14) days after the date of the decision of the Executive Director and Chair on any appeal of the amount of standardized fines. If a letter waiving the opportunity to resolve a violation under this Article and requesting that the violation be resolved through Commission enforcement proceedings is submitted after the Commission staff has provided notice under subsection (a) of the amount of standardized fines assessed or after the decision of the Executive Director and Chair on any appeal of the amount of standardized fines, no such fines shall be due pursuant to that notice or that decision, and the appropriate amount of fines or administrative civil penalties shall be determined through Commission enforcement proceedings.

(f) If a person subject to standardized fines fails to pay such fines when due and payable under subsection (c) or (d), as applicable, 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 under subsection (e), the Executive Director shall commence Commission enforcement proceedings in accordance with Sections 11321 through 11334 to resolve the violation. In those proceedings, the person subject to such fines may not contest his or her liability for the violation or that the violation occurred, and the Commission shall determine only whether the amount of standardized fines was properly calculated in accordance with Section 11390.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections ~~66632(f)~~ and 66641.5(e), Government Code; and Sections ~~29201(e)~~ and 29610, Public Resources Code.

## Appendix H

### Violation Report/Complaint for ~~the Administrative~~ ~~Imposition of Civil Penalties Liability~~

File:

Permit:

Date Mailed:

35<sup>th</sup> Day After Mailing:

60<sup>th</sup> Day After Mailing:

Hearing Date:

### Violation Report/Complaint for Administrative Civil Liability

[Insert Name(s) of Respondent(s)]

FAILURE TO RESPOND TO THIS VIOLATION REPORT/COMPLAINT FOR ~~THE ADMINISTRATIVE~~  
~~IMPOSITION OF CIVIL PENALTIES LIABILITY~~ BY COMPLETING THE ENCLOSED STATEMENT OF DEFENSE  
FORM AND ENCLOSING ALL PERTINENT DECLARATIONS UNDER PENALTY OF PERJURY, PHOTOGRAPHS,  
LETTERS, AND OTHER WRITTEN DOCUMENTS COULD RESULT IN A CEASE AND DESIST ORDER, A PERMIT  
REVOCATION ORDER, OR ~~CIVIL PENALTY~~ AN ORDER SETTING ADMINISTRATIVE CIVIL LIABILITY AND  
IMPOSING A SUBSTANTIAL CIVIL PENALTY BEING ISSUED TO YOU OR IN A SUBSTANTIAL  
ADMINISTRATIVE CIVIL PENALTY BEING IMPOSED ON YOU WITHOUT YOUR HAVING AN OPPORTUNITY  
TO CONTEST THEM BY RAISING ANY DEFENSES OR MITIGATING FACTORS OR TO INTRODUCE ANY  
EVIDENCE.

The San Francisco Bay Conservation and Development Commission is issuing this violation  
report/complaint for ~~the administrative imposition of civil penalties liability~~ and the enclosed statement  
of defense form because the Commission's staff believes that you may be responsible for or involved  
with a possible violation of either the Commission's laws or a Commission permit. The report/complaint  
contains a brief summary description of the alleged violation, a summary of all the pertinent information  
that currently known to staff, and a list of all supporting evidence relied on by staff—currently relies on.  
All the listed supporting evidence is attached to or accompanies that this report/complaint or will be  
provided to you in electronic format upon request. —refers to is available in the enforcement file for this  
matter located at the Commission's office. You can arrange to review the Commission's enforcement file  
for this matter located at the Commission's offices and/or have copies of these materials at the  
Commission's office of to have copies made at your expense or both by contacting  
\_\_\_\_\_ of the Commission's staff at telephone number 415-557-3686 352-  
3600. The ~~staff also intends that the~~ report/complaint informs you of the nature of the possible violation  
and lists the supporting evidence so that you can fill out the enclosed Statement of Defense form and  
otherwise be prepared for the Commission enforcement proceedings.

Receipt of the report and the enclosed statement of defense form is the first step in ~~formal~~  
Commission enforcement proceedings. Subsequently, either the Commission or its enforcement  
committee ~~may shall~~ hold an enforcement hearing and the Commission will determine what, if any,  
enforcement action to take.

Careful reading and a timely response to these materials is are essential to allow you to present  
your side of the case to the Commission. A copy of the Commission's enforcement regulations is also



included so that you can fully understand the Commission's enforcement procedures. If you have any questions concerning either the ~~violation report~~/complaint, the enclosed statement of defense form, the procedures that the Commission and its enforcement committee follow, or anything else pertinent to this matter, ~~you should contact as quickly as possible~~ \_\_\_\_\_ of the Commission's staff as quickly as possible at telephone number 415-~~557-3686~~ 352-3600. Thank you for your cooperation.

1. Person or persons ~~believed~~ responsible for the violation or illegal unauthorized activity:

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2. Brief description of the nature of the violation or illegal unauthorized activity:

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3. Description of and location of the property on which the violation or illegal unauthorized activity occurred:

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4. Name of owner, lessee (if any), and other person(s) (if any) who controls property on which violation or illegal unauthorized activity occurred:

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5. Approximate date (and time if pertinent and known) that the violation or illegal unauthorized activity occurred:

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6. Summary of all pertinent information currently known to the staff in the form of proposed findings of fact with references to all pertinent supporting evidence listed in an attachment to the report/complaint contained in the staff's enforcement file (the file is available at the Commission's offices for your review; you should call the above listed staff enforcement officer to arrange to review the file):

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7. Provisions of law or Commission permit that the staff alleges ~~has~~have been violated:

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8. If the staff is proposing that the Commission impose an administrative civil penalty as part of this enforcement proceeding, ~~the amount of the proposed penalty:~~

- (a) A list or table of all alleged violations for which staff is proposing a penalty;
- (b) The total amount of proposed administrative civil penalties; and
- (c) 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 J of the Commission's regulations, in determining the total amount of the proposed administrative civil penalties; and

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9. Any other statement or information that the staff believes is either pertinent to the alleged violation or unauthorized activity or important to a full understanding of the alleged violation or unauthorized activity:

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10. A list of all supporting evidence relied on by staff, including any declarations under penalty of perjury, that is attached to or accompanies this report/complaint or that will be provided to you in electronic format upon request.

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NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66638, 66641.5(e) and 66641.6, Government Code; and Sections 29601, 29610 and 29611, Public Resources Code.

## Appendix I

### Statement of Defense Form

BY \_\_\_\_\_, 20\_\_\_\_ : ~~FAILURE~~ (1) ~~TO COMPLETE THIS FORM (OR A DOCUMENT PROVIDING THE INFORMATION REQUESTED BY THIS FORM)~~, (2) ~~TO INCLUDE WITH THE COMPLETED FORM ALL DOCUMENTS, DECLARATIONS, UNDER PENALTY OF PERJURY, AND OTHER EVIDENCE YOU WANT PLACED IN THE RECORD AND TO BE CONSIDERED BY THE COMMISSION, (3) TO LIST ANY WITNESSES WHOSE DECLARATION IS PART OF THE STAFF CASE AS IDENTIFIED IN THE VIOLATION REPORT/COMPLAINT FOR ADMINISTRATIVE CIVIL LIABILITY THAT YOU WISH TO CROSS-EXAMINE, THE AREA OF KNOWLEDGE ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE WITNESS, AND THE INFORMATION YOU HOPE TO ELICIT BY CROSS-EXAMINATION, AND (4) TO RETURN THE COMPLETED FORM AND ALL INCLUDED MATERIALS TO THE SF SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION STAFF. FAILURE TO DO SO, OR TO SUBMIT A WRITTEN EXTENSION REQUEST (AS DISCUSSED BELOW), OR TO CONTACT \_\_\_\_\_ OF THE SF BAY COMMISSION ENFORCEMENT STAFF BY \_\_\_\_\_,~~ 19\_\_\_\_ MEANS THAT YOU WILL WAIVE THE OPPORTUNITY TO RAISE ANY DEFENSES OR MITIGATING FACTORS OR TO INTRODUCE ANY EVIDENCE AND THAT THE ENFORCEMENT COMMITTEE OR COMMISSION CAN REFUSE TO CONSIDER SUCH ANY STATEMENTS AND EVIDENCE THAT YOU SUBMIT AT A LATER DATE WHEN THE ENFORCEMENT COMMITTEE OR COMMISSION HEARS THIS MATTER.

~~DEPENDING ON THE OUTCOME OF FURTHER DISCUSSIONS THAT OCCUR WITH THE SF BAY COMMISSION ENFORCEMENT STAFF AFTER YOU HAVE COMPLETED AND RETURNED THIS FORM, ADMINISTRATIVE OR LEGAL ENFORCEMENT PROCEEDINGS MAY NEVERTHELESS BE INITIATED AGAINST YOU. IF THAT OCCURS, ANY STATEMENTS THAT YOU MAKE ON THIS FORM (OR IN A DOCUMENT PROVIDING THE INFORMATION REQUESTED BY THIS FORM) WILL BECOME PART OF THE ENFORCEMENT RECORD AND MAY BE USED AGAINST YOU.~~

YOU MAY WISH TO CONSULT WITH OR RETAIN AN ATTORNEY BEFORE YOU COMPLETE THIS FORM OR OTHERWISE CONTACT THE ~~SF BAY~~ COMMISSION ENFORCEMENT STAFF.

This form is enclosed with a violation report/complaint for administrative civil liability. The violation report/complaint indicates that you may be responsible for or in some way involved in ~~with~~ either a violation of the Commission's laws, a Commission permit, or a Commission cease and desist order. The violation report/complaint summarizes what the possible violation involves, who may be responsible for it, where and when it occurred, if the Commission staff is proposing any administrative civil penalty and, if so, how much, and other pertinent information concerning the possible violation.

This form requires you to respond to the alleged facts contained in the violation report/complaint, to raise any affirmative defenses that you believe apply, ~~to request any cross-examination that you believe necessary,~~ and to inform the staff of all facts that you believe may exonerate you of any legal responsibility for the possible violation or may mitigate your responsibility. This form also requires you to enclose with the completed statement of defense form copies of all written documents, such as letters, photographs, maps, drawings, etc. and written declarations under penalty of perjury that you want the Commission to consider as part of this enforcement hearing. Failure to raise a defense or mitigating factor in or to submit evidence with your response to the violation report/complaint will waive your right to raise such defense or mitigating factor or to submit such evidence at the enforcement hearing on this matter. This form also requires you to identify by name any person whose declaration under penalty of perjury was submitted by staff with the violation report/complaint whom you may want to cross-examine ~~prior to~~ at the enforcement hearing on this matter, the area of

knowledge that you want to cover in the cross-examination, the nature of the testimony that you hope to elicit, and the reasons that you believe other means of producing this evidence are unsatisfactory. Finally, if the staff is only proposing a civil penalty, ~~i. e., no~~ (i.e., issuance of either a cease and desist order or a permit revocation order is not proposed), this form allows you ~~alternatively~~ to pay the proposed ~~fine~~ civil penalty without contesting the matter if you chose to do so, subject to notification of the amount by the Commission.

~~IF YOU WANT TO CROSS-EXAMINE ANY PERSON ON WHOSE TESTIMONY THE DECLARATION UNDER PENALTY OF PERJURY STAFF HAS RELIED IN SUBMITTED WITH THE VIOLATION REPORT/COMPLAINT, YOU MUST COMPLETE PARAGRAPH SEVEN EIGHT TO THIS STATEMENT OF DEFENSE FORM. THIS PARAGRAPH REQUIRES YOU TO SET OUT (1) THE NAME(S) OF THE PERSON(S) YOU WANT TO CROSS-EXAMINE, (2) REFERENCES TO ANY DOCUMENTS ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE PERSON, (3) THE AREA OF KNOWLEDGE ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE PERSON, (4) THE INFORMATION THAT YOU BELIEVE CAN BE ELICITED BY CROSS-EXAMINATION, AND (5) THE REASON WHY BELIEVE THIS INFORMATION CANNOT BE PRESENTED BY DECLARATION OR OTHER DOCUMENT.~~

~~You should c~~omplete the this form as fully and accurately as you can ~~and as quickly as you can~~ and return an original and one copy of the completed form and an original and one copy of all documents that you want to be made part of the record of the enforcement proceeding, it no later than 35 days after its having been this form was mailed to you, to the Commission's enforcement staff at the following address:

San Francisco Bay Conservation and Development Commission  
~~30 Van Ness Avenue, Suite 2011~~ 375 Beale Street, Suite 510  
San Francisco, CA ~~94102~~ 94105

~~If you believe that you have good cause for not being able to complete this form and submit all written documents and any declarations under penalty of perjury that you want the Commission to consider within the required 35 days of its having been mailed-mailing, you may, within that time, submit a written extension request explaining why you need additional time to respond. If the Executive Director has issued a combined violation report and complaint for administrative liability, or only a compliant for administrative liability, your extension request shall include a waiver of and consent to extend the 60-day time limit for a hearing on the complaint under Government Code Section 66641.6(b). please complete it to the extent that you can and within 35 days of the mailing of the violation report send the statement of defense form completed as much as possible with a written explanation of what additional information you need to complete the form in its entirety, how long it will take to obtain the additional information needed to complete the form, and why it will take longer than 35 days to obtain the additional information, and send all of this to the Commission's staff at the above address. Following this procedure does not mean that the Executive Director will automatically allow you to take the additional time to complete the form. Only if the Executive Director determines that you have shown good cause for the delay and have otherwise completed the form as much as is currently possible will he grant an extension to complete the form.~~

~~If the staff-violation report/complaint that accompanied this statement of defense form included a proposed administrative civil penalty, you may, if you wish, resolve the civil penalty aspect of the alleged violation by simply providing to the staff a certified cashier's check in the amount of the proposed fine civil penalty within the 35-day time period. If you choose to follow this alternative, the Executive Director will cash your check and place a brief summary of the violation and proposed administrative civil penalty along with a notation that you are choosing to pay the civil penalty rather than contesting it~~

on an administrative permit listing. (See 14 C.C.R. § 11322(g).) If no Commissioner objects to the amount of the administrative civil penalty, your payment will resolve the civil penalty portion of the alleged violation. If a Commissioner objects to the amount of the proposed payment of the administrative civil penalty, the Commission shall determine by a majority of those present and voting whether to accept or object to let the proposed civil penalty stand. If such a majority votes to let accept the proposed civil penalty stand, your payment will resolve the civil penalty portion of the alleged violation. If such a majority ~~does not let the~~ objects to the proposed civil penalty stand, the Commission shall direct the staff to return the money paid to you and shall direct you to file your completed statement of defense form and all supporting documents within 35 days of the Commission's actions. Of course, you also have the opportunity of contesting the fine from the outset by completing this form and filing it and all supporting documents within 35 days of its having been mailed to you.

If you have any questions, please contact ~~as soon as possible~~ \_\_\_\_\_ of the Commission Enforcement Staff as soon as possible at telephone number 415-~~557-3686~~ 352-3600.

1. Facts or allegations contained in the violation report/complaint that you admit (with specific reference to the paragraph number in the violation report/complaint):

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2. Facts or allegations contained in the violation report/complaint that you deny (with specific reference to paragraph number in the violation report/complaint):

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3. Facts or allegations contained in the violation report/complaint of which you have no personal knowledge (with specific reference to paragraph number in the violation report/complaint):

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4. Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any documents, photographs, maps, letters, or other evidence that you believe are relevant, please identify such evidence by name, date, type, and any other identifying information and provide the original or a copy if you can):

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5. If the Executive Director is proposing that the Commission impose an administrative civil penalty as part of this enforcement proceeding and if you would be unable to pay the proposed penalty or paying the proposed penalty would have a substantial adverse effect on your ability to continue in business, provide factual information establishing such inability to pay or such adverse effect. Submit all relevant supporting documentation which may include but not be limited to audited financial statements and reports (or if not audited, then those that are the basis of tax returns or regulatory filings), 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 applicable. Before submitting this information redact (cover or blackout) all personal information including your 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:

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~~5-6.~~ Any other information, statement, etc. that you want to make:

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~~6-7.~~ Documents, exhibits, declarations under penalty of perjury or other materials that you have attached to or enclosed with this statement to support your answers or that you want to be made part of the administrative record for this enforcement proceeding. (Please list in chronological order by date, author, and title and enclose a copy with this completed form):

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7.8. Name of any person whose declaration under penalty of perjury was ~~listed in~~ submitted with the violation report/complaint as being part of the staff's case who the respondent wants to cross-examine, identify all documents referred to in such person's declaration about which you want to cross-examine the person, the area or areas of information about which the respondent wants to cross-examine the ~~witness~~ person, and the information that the respondent hopes to elicit in cross-examination, and state the reason(s) why some other method of proving this information is unsatisfactory.

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NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 66638, 66641.5(e) and 66641.6, Government Code; and Sections 29601, 29610 and 29611, Public Resources Code.

## APPENDIX J

### ADMINISTRATIVE CIVIL PENALTY POLICY

#### INTRODUCTION

This policy addresses the assessment of administrative civil penalties. Government Code Section 66641.5(e) authorizes the Commission 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 considered by the Commission in determining the amount of administrative civil liability.

Administrative civil penalties are an important part of the Commission'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.

This policy consists of two parts: (1) Part I, Penalty Calculation Methodology; and (2) Part II, Supplement Environmental Projects. The goal of this policy is to promote the enforcement goals of consistency, transparency, fairness, and the deterrence of noncompliance.

By using the methodology and considering the factors set forth in Part I of this policy, the Executive Director will be able to recommend and the Commission will be able to establish fair 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.

The Executive Director shall apply Part I of this policy in proposing an administrative civil penalty amount for all violations in a complaint for administrative civil liability and the Commission shall apply Part I of this policy in establishing an administrative civil penalty amount for all violations in an order setting administrative civil liability. This policy does not apply to violations that are resolved using the standardized fines process set forth in Sections 11386-11391 of the Commission's regulations. Standardized fine amounts are established in those regulations based on the type of violation and are determined based on the time that it takes to correct the violation.

Part II of this Policy establishes guidelines and requirements for Supplemental Environmental Projects. A supplemental environmental project is an environmentally beneficial project that a violator agrees to undertake and complete voluntarily in partial resolution of an enforcement action, which the violator is not otherwise legally required to perform and for which the



Commission agrees to offset a portion of the monetary administrative civil penalty that would otherwise apply as a result of the violation(s).

## I. PENALTY CALCULATION METHODOLOGY

A summary of the penalty calculation methodology is provided below, followed by a more complete discussion of each step.

Step 1 – Determine the total initial base penalty amount for each violation by evaluating: (a) the gravity of harm of the violation; and (b) the extent of deviation from the requirement at issue. Based on those evaluations, use Table 1 to determine the initial base penalty amount for the violation. Multiply the initial base penalty amount by the number of days that the violation has persisted to determine the total initial base penalty for the violation.

Steps 2, 3, and 4 – Adjustments specific to the violator. The following additional factors shall be considered for potential adjustment of the total initial base penalty for each violation: Step 2, the violator’s degree of culpability for the violation; Step 3, any history of violations by the violator; Step 4, any voluntary removal or resolution efforts and cooperation by the violator.

Step 5 – Determine total base penalty amount by calculating the sum for all violations of the total initial base penalty amount for each violation (i.e., the initial base penalty amount for the violation multiplied by the number of days of violation) multiplied for each violation by the percentages of any adjustments for the violator’s culpability, history of violations, and voluntary efforts to resolve the violation.

Step 6 – Consider adjustment of the total base penalty amount based on additional factors and determine the final penalty amount. Depending on the available information, the Executive Director may recommend adjusting or the Commission may adjust the total base penalty amount based on consideration of the following factors: (a) any economic benefit to the violator; (b) the violator’s ability to pay or continue in business; (c) costs to the State in pursuing the enforcement action; (d) other factors as justice may require. The final penalty amount shall be determined by making any appropriate adjustments to the total base penalty amount based on consideration of these additional factors.

Step 1 – Determine the total initial base penalty for each violation.

The initial base penalty for each violation is determined by evaluating: (a) the gravity of the harm to the Bay’s resources or public access; and (b) the extent of deviation from the applicable requirements of the law or permit at issue. Based on these evaluations, Table 1 below is used to determine the initial base penalty for the violation. The initial base penalty amount is multiplied by the number of days that the violation has persisted to determine the total initial base penalty for the violation.

(a) Gravity of harm.

This penalty calculation methodology applies to two types of violations: (1) physical violations (i.e., unauthorized fill, use, or activity or failure to perform work, construct improvements, or provide public access as required by a Commission permit); and (2) paper violations (i.e., failure to submit a document as required by law or a Commission permit). For physical violations, gravity of harm is determined using a scoring system to quantify consideration of six factors. For paper violations, gravity of harm is determined based on the type of document.

(1) Physical violations.

For physical violations, gravity of harm is determined using a six-factor scoring system to quantify: (1) habitat value; (2) durability; (3) toxicity; (4) size; (5) nature of violation; and (6) visibility. Because actual harm is not always apparent or quantifiable due to untimely reporting, inadequate monitoring, and/or other practical limitations, potential harm can be used to determine gravity of harm.

The Commission has jurisdiction over different geographical areas (i.e., San Francisco Bay, the shoreline band, salt ponds, managed wetlands, certain waterways, and Suisun Marsh). If a violation occurs in or impacts more than one area of the Commission's jurisdiction, the violation shall be scored for each applicable area and the highest score shall be used to determine gravity of harm.

Factor 1 – Habitat Value.

Evaluation of habitat value considers the physical and biological resources at the location of a violation based on scientific assessment of the affected habitat(s).

Score

- 1 Open Bay; previously degraded aquatic habitat; salt pond; upland area with limited to no habitat value; upland area in agricultural, industrial, commercial, or residential use.
- 2 Fringe marsh; mud flats; subtidal marsh; intertidal zone, beach; upland area with moderate habitat value; upland area adjacent to open space or park land that are impacted by the violation; vacant or graded undeveloped land.
- 3 Tidal or brackish marsh; aquatic area containing eel grass; aquatic area providing habitat for listed endangered species; high-quality aquatic habitat or adjacent to high-quality habitat; managed wetlands; certain waterways; riparian zones; land containing trees; upland area providing habitat for listed endangered species; high-quality upland habitat or adjacent to high-quality upland habitat.

Factor 2 – Durability.

Evaluation of durability considers the duration of the violation.

Score

- 1      Transitory or easily removed fill, activity, use, or construction in Bay, tidal marsh, managed wetlands, or other aquatic habitat; dredging; temporary or single events or uses in an upland area or impacting existing or required public access.
- 2      Unpermitted moored boat or other structure in Bay, tidal marsh, managed wetlands, or other aquatic habitat; unpermitted live-aboard or anchor-out boat; portable, temporary, or easily removed or remediated activity, use, or construction in an upland area; temporary or easily removed unauthorized restrictions or limitations on existing or required public access.
- 3      Permanent or long-lasting activity, use, or construction in Bay, tidal marsh, managed wetlands, or other aquatic habitat (including but not limited to solid fill, water control structure, moorings, pilings); permanent or long-lasting activity, use, or construction in an upland area; failure to provide required public access or public access improvements; permanent closure of public access area or amenities or removal of public access improvements; failure to maintain public access improvements as required by a permit; unpermitted lot split.

Factor 3 – Toxicity (Destructiveness).

Evaluation of toxicity considers the characteristics of the fill, activity, use, dredging and dredged material disposal, or construction and the hazards or risks of damage to human health, plants, wildlife, or other biological resources based on scientific assessment of the potential toxic effects of the violation.

Score

- 1      No or low human health or safety hazards; no or low ecosystem hazards to fish, other aquatic organisms, or other wildlife.
- 2      Medium human health or safety hazards; medium ecosystem hazards to fish, other aquatic organisms, or other wildlife.
- 3      High human health or safety hazards; high ecosystem hazards to fish, other aquatic organisms, or other wildlife.

Factor 4 – Size.

Evaluation of size considers the square footage, volume, and locations affected by the violation.

Score

- 1 Bay fill or shoreline fill, use, activity, or construction of less than 250 square feet in extent or less than 100 cubic feet in volume, and the violation is limited to a single location.
- 2 Bay fill or shoreline fill, use, activity, or construction of between 251 to 1,000 square feet in extent or between 101 and 300 cubic feet in volume, and the violation is limited to no more than three locations.
- 3 Bay fill or shoreline fill, use, activity, or construction greater than 1,000 square feet in extent or greater than 300 cubic feet in volume, and the violation affects four or more locations or extends throughout a site or property.

Factor 5 – Nature of Violation.

Evaluation of nature of the violation considers whether the activity, use, or construction constituting the violation can be resolved by compliance with an existing Commission permit or can be resolved by being authorized by a Commission permit or permit amendment.

Score

- 1 Violation can be resolved by compliance with an existing permit, coverage under an abbreviated regionwide or regionwide permit, plan approval, time extension, or a revised work-window authorization. Examples include: a floating single-boat dock; disposal of yard waste; failure to complete an activity, use, or construction in the manner authorized under an existing permit; failure to provide required public access improvements or make required public access available to the public; failure to maintain public access improvements as required by a permit.
- 2 Violation can be resolved by issuance of an amendment to an existing permit or issuance of a new administrative or major permit. Examples include: installation of mooring balls in the Bay; placement of fill in the Bay for a water-oriented use; new activity, use, or construction at a marina or in the shoreline band; new levee construction; levee repair; new activity, use, or construction in an existing or required public access area that can be authorized (e.g., utilities, trash receptacles, outdoor dining); expansion of existing development in Suisun Marsh.
- 3 Violation cannot be permitted in a manner consistent with the Commission's laws and policies. Examples include: placement of un-engineered or contaminated fill in the Bay or other aquatic area; placement of fill in the Bay for a non-water-oriented use; dredging of tidal marsh or dredging at any location outside of an authorized work window; new activity, use, or construction in an existing or required public access area that cannot be authorized (e.g., installation of a fence or gate blocking access or construction of a structure);

commercial use of public park land; construction or installation of new development in Suisun Marsh that is inconsistent with the Suisun Marsh Protection Plan or the Suisun Marsh Local Protection Program.

#### Factor 6 – Visibility.

Evaluation of visibility considers the conspicuousness of the violation.

#### Score

- 1 Violation not highly visible to the public; low number of viewers of violation or of users impacted by violation. No or few public reports of the violation. Violation at or adjacent to an industrial development, office park, residential area, or public access area that is not intensively used.
- 2 Violation highly visible to the public; high number of viewers of violation or of users impacted by violation. Multiple public reports of the violation. Violation at or adjacent to commercial or retail use (e.g., restaurant, bar, shopping area, public plaza), ferry terminal, tourist destination, water attraction, or public access area that is intensively used.

#### Final Gravity of Harm Score and Categorization of Gravity of Harm.

The scores for each of the six factors are added to produce a final gravity of harm score for the violation and to categorize the violation's gravity of harm as "Major," "Moderate," or "Minor." The minimum score is 6 and the maximum score is 17. The categorization of a violation's gravity of harm as major, moderate, or minor is used in the "Gravity of Harm" axis in Table 1 to determine the initial base penalty amount for the violation.

- (1) Major – This category is for violations involving a high level of actual harm or high level of potential for harm to the Bay's resources or public access. Physical violations that receive a gravity of harm score of 14 or higher 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's resources or public access. Physical violations that receive a gravity of harm score between 10 and 13 are considered moderate.
- (3) Minor – This category is for violations involving minor or minimal threats to the Bay's resources and public access. Physical violations that receive a gravity of harm score of 9 or lower are considered minor.

#### (2) Paper Violations.

The gravity of harm 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

paper violations will be categorized as “Major.” The categorization of a violation’s gravity of harm as moderate or minor is used in the “Gravity of Harm” axis in Table 1 for determining the initial base penalty amount for the violation.

The failure to submit any of the following as required by a Commission permit will be considered to be moderate violations: (1) Property interest; (2) Post-dredge surveys; (3) Owners’ association Conditions, Covenants and Restrictions; (4) Monitoring or mitigation plans or reports; (5) Descriptive material concerning emergency work authorized by an emergency permit; (6) Construction plans for plan review and approval; (7) As-built construction plans; (8) Recorded legal instruments to dedicate public access, open space, or view corridor areas; (9) Special event reports; (10) Flood reports and adaptation plans; (11) Executed originals of permits.

The failure to submit any of the following as required by a Commission permit will be considered minor violations: (1) Foundation layout inspections; (2) Annual live-aboard documentation; (3) Permit assignments; (4) Certificates of contractor review; (5) Notices of completion; (6) Recorded permits.

For any documentation required by a Commission permit that is not listed above, the Executive Director or the Commission will refer to the lists and reference the category used for similar documents.

(b) Extent of deviation from applicable requirement.

For both physical violations and paper violations, the deviation from applicable requirement reflects the extent to which the violation deviates from the specific requirement of law (statute or regulation) or a term or condition of a Commission permit. The categories of a violation’s 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.

The categorization of a violation’s extent of deviation from an applicable requirement as major, moderate, or minor is used in the “Extent of Deviation from Legal Requirement” axis in Table 1 to determine the initial base penalty amount for the violation.

For a single requirement, the range of potential deviation will vary, depending on the requirement at issue. For example, if a permittee completely fails to provide the public access

improvements required by a permit, the deviation would be major. If the permittee provides most of the required public access improvements but significant elements are omitted, the deviation would be moderate. If the permittee provides substantially all the required public access improvements with only one or two minor elements missing, the deviation would be minor. Similarly, failure to submit a proposed legal instrument to dedicate a public access area to Commission counsel for review and approval would be a major deviation; failure to resolve any concerns raised by Commission counsel on a proposed legal instrument so that an approved legal instrument may be recorded would be a moderate deviation; failure to timely record the approved legal instrument would be a minor deviation.

(c) Use Table 1 to determine the initial base penalty amount.

Based on the evaluations of gravity of harm and extent of deviation from the applicable requirement, use the matrix shown in Table 1 below, which is based on the statutory penalty range of between \$10 and \$2,000 per day per violation, to determine the initial base penalty amount for each violation. The Executive Director shall recommend or Commission shall determine the initial base penalty amount from the range provided in the matrix that corresponds to the appropriate gravity of harm and extent of deviation categories based on the facts and circumstances of each individual violation.

Table 1

*Extent of Deviation from Legal Requirement*

		<u>MAJOR</u>	<u>MODERATE</u>	<u>MINOR</u>
<u>Gravity of Harm</u>	<u>MAJOR</u>	<u>\$1600-2000</u>	<u>\$1200-1599</u>	<u>\$500-1199</u>
	<u>MODERATE</u>	<u>\$1200-1600</u>	<u>\$800-1199</u>	<u>\$250-799</u>
	<u>MINOR</u>	<u>\$800-1200</u>	<u>\$250-799</u>	<u>\$10-249</u>

(d) Determine the total initial base penalty for each violation.

After determining the initial base penalty amount using Table 1, that amount shall be multiplied by the number of days that the violation has persisted to determine the total initial base penalty for the violation. Consistent with Government Code Section 66641.5(e), the total initial base penalty for a single violation shall not exceed \$30,000.

Steps 2, 3, and 4 – Adjustments specific to the violator.

The Executive Director or the Commission shall consider the following additional factors specific to the violator for potential additional adjustments of the total initial base penalty amount for each violation: Step 2, the violator’s degree of culpability; Step 3, any history of violations by the violator; and Step 4, any voluntary removal or resolution efforts and cooperation by the violator. Not all factors will apply to every violator or violation.

Step 2 – Degree of culpability.

Consider whether to adjust the total initial base penalty amount upward or downward by as much as 25% based on the violator's degree of culpability prior to or when engaging in the violation. In assessing degree of culpability, the Executive Director or 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.

An upward adjustment, by as much as 25%, shall 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 situations where the violator intended to engage in the actions that constitute a violation, justifies a high adjustment. Gross negligence arises when a violator acted with extreme carelessness and deliberate disregard for the harms involved.

A downward adjustment, by as much as 25%, shall be made for accidental violations or situations where there is evidence the violation was outside of the violator's control and the violator took measures that exceeded the standard of care expected of a reasonably prudent person to avoid or minimize a violation. Violations that are the result of accidents or inadvertent omissions warrant a downward adjustment.

No adjustment shall be made when a violator is determined to have acted as a reasonable and prudent person would have. No adjustment will be made for the violator's degree of culpability, or for the considerations listed in Steps 3 and 4, below, if the adjustment would increase the total base penalty above \$30,000 for a single violation.

#### Step 3 – History of violations.

The total initial base penalty shall be adjusted upward, by as much as 10%, for a history of prior violations within the past five years. An upward adjustment of 10% is mandatory for prior violations of the same permit term or instances involving the same or substantially similar unauthorized activities within the past five years.

Because entities are expected to comply with the law, the Executive Director or the Commission will not adjust the total initial base penalty downward where the violator has no prior history of violations.

#### Step 4 – Voluntary removal or resolution efforts and efforts to cooperate.

The Executive Director or the Commission shall consider whether to adjust the total initial base penalty upward or downward based on the violator's cooperation and resolution efforts.



Penalties shall be adjusted downward, by as much as 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.

The Executive Director or the Commission shall adjust the total initial base penalty upward, by as much as 25%, in situations where a violator has delayed compliance or created obstacles to achieving compliance, including but not limited to interfering with the removal or resolution of the violation. An upward adjustment, up to 25%, shall be appropriate where the violator's removal and resolution efforts have fallen below what would reasonably be expected as a response.

No adjustment shall be made when a violator is determined to have responded to a violation or cooperated with Commission staff as a reasonable and prudent person would have.

Step 5 – Determine the total base penalty amount for all violations.

The total base penalty amount will be determined by calculating the sum for all violations of the total initial base penalty amount for each violation (i.e., the initial base penalty amount for the violation multiplied by the number of days of violation) multiplied for each violation by the percentages of any adjustments for the violator's culpability, history of violations, and voluntary efforts to resolve the violation.

Step 6 – Consider adjustment of the total base penalty amount based on additional factors and determine the final penalty amount.

Depending on the available information, including any evidence or arguments submitted by Commission staff, the violator, or the public, the Executive Director may recommend adjusting or the Commission may adjust the total base penalty amount for all violations based on consideration of the following additional factors: (a) any economic benefit to the violator; (b) the violator's ability to pay or continue in business; (c) costs to the state in pursuing the enforcement action; (d) other factors as justice may require.

When relevant information is available, the Executive Director or Commission shall consider each of these factors, but the Commission is not required to adjust a penalty in any particular manner, percentage, or amount based on any or all of them. When the total base penalty amount is adjusted based on consideration of any of these factors, specific findings as to the applicable factors shall be proposed by the Executive Director and made by the Commission.

(a) Economic benefit.

To further the enforcement goals of deterrence of violations and fairness, 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. If sufficient information is available to determine or reasonably estimate economic benefit, it is also important that penalties be set at an amount that exceeds

any economic benefit that the violator gains from such violation(s) so that penalties are not viewed simply as a cost of doing business.

Economic benefit is any monetary savings or 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.

If sufficient information is available to determine or reasonably estimate the economic benefit to the violator of a violation (or related violations) or the failure to comply with an applicable requirement, the Commission shall seek to recapture the economic benefit as part of the civil penalty. If sufficient information is available, the economic benefit shall be compared to the total initial base penalty amount for each violation for which economic benefit information is available, and if the total initial base penalty amount is less than the determined or estimated economic benefit, the total initial base penalty amount for that violation (or related violations) shall be set at a sum that is 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 for each violation shall never be set at an amount that exceeds the statutory maximum of \$30,000 per violation.

In many cases, there will not be sufficient information to determine the economic benefit of a violation, or it will be difficult or infeasible to calculate the precise economic benefit amount. Where economic benefit is presumed to be smaller than the total initial base penalty amount for a violation, the value of performing a calculation will be minimal. For cases where, at a minimum, an approximate calculation of economic benefit is warranted, depending on the available information, the calculation shall include:

- (1) Deferred costs, representing savings from delaying expenditures that should have been made sooner to comply with an applicable requirement or prevent the violation (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.

When sufficient information is available, 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.

(b) Ability to pay/ability to continue in business.

In determining civil penalty amounts, the Commission shall consider a violator's ability to pay and the effect of the penalty on the violator's ability to continue in business. However, because information relevant to these considerations is exclusively in the possession and control of the violator, the potential inability to pay or a potential effect on the violator's ability to continue in

business shall be considered only if the violator raises these issues as a defense to a complaint for administrative civil liability in the submitted statements of defense.

When ability to pay and/or ability to continue in business is raised as a defense, a violator shall submit factual information and supporting documentation to enable staff or the Commission to evaluate the violator's financial condition and any reduction of the civil penalty amount that may be appropriate. Relevant supporting documentation that a violator should provide includes, but may not be limited to, audited financial statements and reports (or if not audited, then those that are the basis of tax returns or regulatory filings), 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 applicable. Before submitting this information, the violator shall redact (cover or blackout) all personal information, including 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 number, or personal email address.

Depending on the information submitted by the violator, the assessment of ability to pay or effect on ability to continue in business may consider cash flow, real estate, personal property and other tangible assets, and other pertinent information.

The Commission is under no obligation to ensure that a violator has the ability to pay or continue in business. Rather, the Commission is obligated to consider these factors when imposing administrative civil penalties. Therefore, 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, the Commission shall consider whether a reduction in the civil penalty amount is warranted or whether an extended payment schedule and/or installment payments may be appropriate.

(c) Cost to the state in pursuing the enforcement action.

When feasible to do so, the Commission shall consider including the costs of investigating and pursuing an enforcement action as part of the civil penalty amount. If the Executive Director includes costs of investigating or pursuing an enforcement action in a complaint for administrative civil liability, 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. Investigation and enforcement costs may be included for staff (including attorney staff) work beginning when a violation is discovered and continuing until issuance of a complaint. Staff (including attorney staff) costs shall not be included for any investigation or enforcement work undertaken regarding the allegations set forth in a complaint after it is issued. Attorney staff costs and other staff costs incurred to prepare for and attend an enforcement hearing shall not be included in the civil penalty amount.

(d) Other factors as justice may require.

If the Commission determines that the penalty amount calculated using the preceding factors is inappropriate, it shall adjust the civil penalty amount for “such other matters as justice may require,” but only if specific findings are made to justify this adjustment. See Government Code § 66641.9(a). Examples of circumstances warranting an adjustment under this factor are:

- (1) The violator identifies and provides relevant information not considered under the other criteria listed in this policy.
- (2) Consideration of environmental justice issues indicates that the penalty amount would have a disproportionate impact on a disadvantaged group or would be insufficient to provide substantial justice to a disadvantaged group.
- (3) The calculated penalty amount is substantially disproportionate to the penalty assessment for similar violations made in the recent past using this policy.

(e) Final Penalty Amount.

The final penalty amount shall be the total base penalty amount for all violations as modified by any appropriate adjustments based on consideration of the additional factors identified above in this Step 6, provided the final penalty amount for each violation shall not exceed the statutory minimum of \$30,000 per violation.

The administrative record must indicate how the Commission arrived at the final penalty amount. Where the Commission adjusts the final penalty amount proposed by the Executive Director in the complaint for administrative civil liability, the record should clearly reflect the Commission’s evidentiary and policy considerations underlying the adjustments, as those considerations may not be reflected in the complaint or the Executive Director’s recommended enforcement decision.

## II. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

### A. Introduction.

A Supplemental Environmental Project (SEP) is an environmentally beneficial project that a violator agrees to undertake and complete voluntarily in partial resolution of an enforcement action, which the violator is not otherwise legally required to perform and for which the Commission agrees to offset a portion of the monetary administrative civil penalty that would otherwise apply as a result of the violation(s). Any SEP shall be performed either directly by a violator or by a third-party other than the violator using funds provided by the violator.

The Commission has broad discretion to settle enforcement actions, including discretion to include a SEP as a part of a stipulated order setting administrative civil liability or a settlement agreement. While SEPs may be useful in the resolution of enforcement actions, the funding of SEPs is not a primary goal of the Commission’s enforcement program, nor is it necessary that a SEP always be included in the resolution of an enforcement action that assesses a monetary administrative civil penalty. The decision whether to accept a proposed SEP, and the amount or

percentage of a total administrative civil penalty that may be offset by a SEP, is within the Commission's sole discretion and shall depend on the specific facts of a particular case.

This SEP policy is intended for use by the Commission's enforcement staff, enforcement committee, and the Commission in settling enforcement cases administratively and does not create any rights or benefits, substantive or procedural, enforceable by a party against the Commission, its staff, or any person. This SEP policy is not intended to be binding on the Commission or violators, or on courts in any judicial enforcement proceeding.

#### B. SEP Guidelines.

The following guidelines apply to SEPs:

1. A SEP shall have an adequate nexus to the Commission's statutory mandate to protect the Bay's resources and ensure public access to the Bay and its shoreline. There shall 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.
2. The Commission has identified the following four categories of projects which may qualify as a SEP: (1) Removal of Bay fill; (2) Enhancement of the Bay's resources, including habitat restoration or shoreline resiliency and adaptation to sea level rise; (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.
3. The amount of the penalty to be offset by a SEP shall not exceed 50% of the total administrative civil penalty amount that the violator is required to pay for the violation(s).
4. The Commission shall never compromise the stringency or timeliness of a regulatory requirement in exchange for a SEP. Performance of a SEP does not alter a violator's obligation to remedy a violation expeditiously and return to compliance or to comply with all applicable regulatory obligations.
5. A SEP cannot be used to satisfy the Commission's or another government agency's statutory or regulatory requirements, or to satisfy the violator's regulatory or permit obligation to perform a particular activity.
6. A SEP shall not directly financially benefit the Commission's functions, its staff, or family members of Commission staff.
7. A SEP shall be enforceable against a violator pursuant to a stipulated order setting administrative civil liability or a settlement agreement.
8. The Commission establishes the following preferences for a SEP: (a) a project with a geographic nexus (i.e., a project located in the same general area in which the violation(s) occurred); or (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.

9. The following are examples of projects that are not acceptable as SEPs: (a) projects that would benefit the violator or a property owned or controlled by the violator; (b) cash or in-kind donations to community groups, environmental organizations, state/local/federal entities, or any other third-party that are not directed towards a specific, approved project; (c) cash or in-kind contributions to environmental research, studies, assessments, or monitoring programs that are not directed toward a specific, approved project; and (d) general public educational or public environmental awareness projects.

C. Requirements for Stipulated Orders or Settlement Agreements Authorizing a SEP.

A SEP shall be enforceable through a stipulated order setting administrative civil liability or a settlement agreement. The order or agreement shall:

1. 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.
2. Address how the SEP will comply with the California Environmental Quality Act (CEQA), and incorporate any CEQA requirements into the time schedule for the SEP.
3. Require that all SEP funds shall 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.
4. Require a written acknowledgment by either the violator or third-party performing the SEP that any funds intended for the SEP, including all funds received by any third-party from the violator, shall be spent in accordance with the terms of the order or agreement on the specific, defined project.
5. Require the violator or third-party performing the SEP to provide the Commission with a full accounting of project expenditures. The violator or third-party performing the SEP shall agree to an audit of its SEP expenditures if requested by the Commission.
6. State that the SEP penalty offset amount that will be satisfied by performing the SEP shall be treated as a suspended administrative civil penalty, and that if the SEP is not fully implemented in accordance with the terms of the order or agreement, the Commission shall be entitled to recover the full amount of the suspended administrative civil penalty. Upon written demand by or on behalf of the Commission, the violator shall within 30 days pay the suspended administrative civil penalty amount to the Bay Fill Clean-up and Abatement Fund. Full payment of the suspended administrative civil penalty amount shall be in addition to any other applicable remedies for noncompliance with the terms of the order or agreement.

7. Require periodic reporting (quarterly reporting at a minimum) on agreed upon SEP performance milestones by the violator or third-party performing the SEP so that the Commission is able to monitor the timely and successful completion of the SEP.
8. Require the violator or third-party performing the SEP to provide a final completion report to the Commission certifying completion of the SEP in accordance with the terms of the order or agreement. The Commission shall review the SEP documentation and if it concurs with the certification shall provide the violator with a statement indicating that the SEP has been completed in accordance with the terms of the order or agreement and that any remaining suspended administrative civil penalty amount is waived.
9. 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 resolution of a Commission enforcement action.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 11415.60, 66641.5(e) and 66641.6, Government Code; and Sections 29610 and 29611, Public Resources Code.