

San Francisco Bay Conservation and Development Commission

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DESCRIPTION OF PROGRAM CHANGES TO THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION COASTAL MANAGEMENT PROGRAM (BCDC-2023-2)

AUGUST 1, 2023

Amendments to Commission Regulations, California Code of Regulations, Title 14, Division 5
Chapter 13 (Enforcement Procedures) and Appendices H, I and New Appendix J

Summary

The San Francisco Bay Conservation and Developments Commission (“Commission”) has adopted regulations that are codified at Title 14 of the California Code of Regulations (“C.C.R.”), Division 5, Sections 10110-11990. On April 21, 2022, the Commission adopted a set of amendments to its regulations concerning enforcement procedures that are codified at Title 14 of the C.C.R., Division 5, Chapter 13, Sections 11300-11386 and Appendices H and I, as well as a new Appendix J entitled “Administrative Civil Penalty Policy.” The amendments were approved by the California Office of Administrative Law on June 2, 2022, and became effective under California law on October 1, 2022.

In summary, the amendments:

- Add a definition of the term "significant harm to the Bay's resources or to existing or future public access."
- Clarify that declarations under penalty of perjury may be submitted by both staff and a respondent in an enforcement proceeding, and that cross-examination may be allowed only of such declarants.
- Establish an additional option for Commission action on an Enforcement Committee recommended enforcement decision.
- Add an Administrative Civil Penalty Policy as Appendix J of the regulations to be used to calculate administrative civil penalties in accordance with the factors that the Commission is required by statute to consider in determining the amount of administrative civil penalties for violations.
- Increase some of the standardized fine amounts established by the regulations for certain categories of violations.
- Provide for notices and documents related to an enforcement hearing to be sent by email or regular mail, and to be made available on the Commission’s website.
- Allow certain documents to be sent to a respondent by email (rather than certified or registered mail), with the respondent’s consent.
- Revise certain nomenclature used in the regulations for clarity and consistency.
- Revise the authority and reference citations throughout the regulations to correct errors and ensure consistency between or among regulatory provisions on the same topic.

Set forth below is a section-by-section description of the amendments. All section references are to the section of the Commission regulations in Title 14 of the C.C.R.

Section 11301. Grounds for Permit Revocation

Section 11301 identifies the actions constituting grounds for complete or partial revocation of a Commission permit. This section was amended to redesignate subsections (1), (2), and (3) as subsections (a), (b), and (c), respectively, for format consistency with other regulations.

The Authority and Reference note was amended to add a reference to Government Code section 66638.

Section 11302. Grounds for the Imposition of Administrative Civil Liability

Section 11302 identifies the actions constituting grounds for the imposition of administrative civil liability. The title and first sentence of this section were amended to change the word “penalties” to “liability.” The first sentence was also amended to add the word “administrative” before the word “civil” to make this section consistent with the terminology used in Government Code sections 66641.5(e) and 66641.6, which refer to administrative civil liability. This section was also amended to redesignate subsections (1) and (2) as subsections (a) and (b), respectively,

The Authority and Reference note was amended to add references to Government Code sections 66641.5(e) and 66641.6.

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

Subsection 11303(c) was amended to change the reference to section “11386” of the regulations to section “11390” to be consistent with the amendments, discussed below, which amended and expanded former section 11386 into six sections and to reflect that with these changes, new section 11390 will enumerate the types of violations subject to standardized fines.

The Authority and Reference note was amended to: (1) delete the reference to Government Code section 66641(d); and (2) add references to Government Code sections 66640(a), 66641(b), and 66642(a).

Section 11310 -- Definitions

In the first sentence of subsection 11310(a), the word “penalties” was changed to “liability.” The second sentence of this subsection was amended to clarify that: (1) a complaint for administrative civil liability (“complaint”) shall follow the format and include the information for a violation report/complaint as set out in Appendix H; and (2) Appendix H applies to a violation report and/or a complaint issued by the Commission staff.

Subsection 11310(b) was amended to expand the definition of “Enforcement Committee” to incorporate provisions from Commission Resolution 93-9, entitled “Establishing an Enforcement

Committee, Setting Procedures, and Appointing Members.” The amended definition addresses the composition of the Committee, quorum requirement, and selection of a chair, and provides that the Committee shall conduct its hearings in accordance with the Commission’s laws and regulations.

Subsection 11310(c) was amended to delete the reference to a hearing held before a hearing officer.

Subsection 11310(d), defining the term “Hearing Officer,” was deleted, and former subsections (e) and (f) were redesignated as subsections (d) and (e), respectively.

Subsection 11310(e) (as redesignated) was amended to clarify that a respondent means a person to whom the Commission staff has issued a violation report or complaint.

New subsection 11310(f) was added to define the term “significant harm to the Bay’s resources or to existing or future public access.” Whether a violation has resulted in “significant harm” is determined based on both the context and intensity of the violation. As described in the definition, “context” refers to the location of the violation and the characteristics of the area where it occurs; “intensity” refers to the severity of the impact and the degree to which it affects the environment or public access. The definition further provides that where multiple violations are alleged, if a single violation results in harm that is individually limited but cumulatively significant when added to other violations, it may be determined that the violation has resulted significant harm to the Bay’s resources or to public access.

The Authority and Reference note was amended to delete the overbroad reference to Government Code sections 66637-66642 and instead add specific references to Government Code sections 66337, 66638, 66641.5(e), 66641.6, and 66643.

Section 11320 – Staff Investigation and Discovery, and Appointment of a Hearing Officer

The title of Section 11320 was amended to add the words “and Appointment of a Hearing Officer.”

In subsection 11320(a), the word “subpenas” was changed to “subpoenas.”

New subsection (b) was added to provide that the Commission may appoint a hearing officer to conduct an investigation or hold a hearing at the request of the Executive Director or chair of the Enforcement Committee or on its own initiative. Subsection (b) further provides that a hearing officer holding an enforcement hearing shall do so in accordance with the procedural requirements of section 11327 and shall adopt a recommended enforcement decision in accordance with section 11330.

The Authority and Reference note was amended to add references to Government Code sections 66641.5(e) and 66641.6.

Section 11321 -- Commencing Commission Enforcement Proceedings

Subsection 11321(a) was amended to provide that the Executive Director shall commence Commission enforcement proceedings whenever he or she believes, as the result 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. As amended, subsection (a) incorporates the term "significant harm to the Bay's resources or to existing or future public access" as defined in section 11310 and expands on the former language which provided that the Executive Director shall commence Commission enforcement proceedings whenever he or she believes that the results of an enforcement investigation so warrant.

Subsection (a) was also amended to: (1) clarify that a violation report shall follow the format and include the information set out in Appendix H; (2) refer to a complaint for administrative civil liability, rather than to a complaint for civil penalties; and (3) clarify that a statement of defense form shall follow the format and include the information set out in Appendix I.

Subsection 11320(b) was amended to clarify that: (1) staff may submit declarations under penalty of perjury with a violation report or complaint; and (2) a violation report or complaint shall list, rather than refer to, all documents on which staff relies to provide a prima facie case of the alleged violations, and that all such documents shall be attached to or accompany the violation report or complaint or shall be provided to the respondent in electronic format upon request.

This first sentence of subsection 11320(c) was amended to refer to issuance of a violation report and/or complaint; with these revisions, the second sentence of this subsection was deleted as unnecessary. This subsection was also amended to provide that upon written consent of the respondent a violation report or complaint may be mailed to the respondent by email.

The Authority and Reference note was amended to add references to: (1) Government Code section 66641.5(e); and (2) Public Resources Code section 29601.

Section 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

The title of section 11322 was amended to add the words "or Complaint, the Executive Director's Consideration of the Respondent's Response, and Extensions of Time." The title was amended to reflect that, in addition to a respondent's response to a violation report, this section addresses a respondent's response to a complaint, the Executive Director's consideration of the respondent's response, and extensions of time.

Subsection 11322(a) was amended to: (1) refer to issuance of a violation report and/or complaint; (2) reduce the required number of copies a respondent must submit of the completed statement of defense form and supporting documents; and (3) clarify that as alternative to a completed

statement of defense form, a respondent may submit a document providing the information required by the form.

Subsection 11322(b) was amended to clarify that a respondent may request cross-examination only of a person whose declaration under penalty of perjury is submitted with the violation report and/or complaint.

Subsection 11322(c) was amended to: (1) refer to a complaint for administrative civil liability, rather than to a complaint for civil penalties; and (2) clarify that a respondent submitting a completed statement of defense form shall also submit copies of all documents the respondent wants to be made part of the record of the enforcement proceeding and any request to allow cross-examination.

Subsection 11322(d) was amended to clarify that staff may request cross-examination only of a person whose declaration under penalty of perjury has been submitted with a respondent's completed statement of defense form.

Subsection 11322(e) was amended to refer to a complaint for administrative civil liability, rather than to a complaint for civil penalties.

Subsection 11322(f) was amended to provide that if the Executive Director issues only a violation report, he or she shall extend the 35-day time limit for respondent's response upon receipt within the 35-day time limit of a written request for such extension and demonstration of good cause. This subsection was also amended to provide that if the Executive Director issues a violation report and complaint or only a complaint, the Executive Director shall extend the 35-day time limit for a response upon receipt within the 35-day time limit of a written request for such extension, demonstration of good cause, and waiver of or consent to extend the 60-day time limit for a hearing on the complaint.

Subsection 11322(g) was amended to: (1) to refer to a complaint for administrative civil liability, rather than to a complaint for civil penalties; and (2) clarify that any cashier's check for payment shall be in the amount of the penalty proposed in the complaint.

New subsection 11322(i) was added to provide that after issuance of a violation report or complaint, the Executive Director and respondent may agree on the terms of a proposed stipulated order or proposed settlement agreement to resolve a violation or violations, which may include a schedule of corrective actions to be implemented by the respondent and payment of administrative civil penalties. Any proposed stipulated order or proposed settlement agreement will be included in the Executive Director's recommended enforcement decision and will be considered by the Commission. This subsection provides for further proceedings if the Commission fails to adopt a proposed stipulated order or proposed settlement agreement, with the next steps depending on whether the respondent has previously submitted a completed statement of defense form and supporting documents.

The Authority and Reference note was amended to add references to: (1) Government Code sections 11415.60 and 66641.5(e); and (2) Public Resources Code sections 29601.

Section 11323 -- Distribution of Notice of Enforcement Hearings

Section 11323 was amended to allow for mailing notices of an enforcement hearing by email or regular mail, and to require staff to make such notices available on the Commission's website. In addition, subsection 11323(a) was amended to: (1) clarify that the Executive Director shall provide notice of the initial enforcement hearing to, in addition to all respondents, the Deputy Attorney General advising the Enforcement Committee or Commission; and (2) delete the reference to a hearing officer.

The Authority and Reference note was amended to specifically reference Government Code section 66641.5(e).

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

The title of section 11324 was amended to add the word "Complaint" to reflect that a complaint is one of the documents to be distributed in accordance with this section.

Section 11324 was amended to allow for distribution of materials for an enforcement hearing by email or regular mail, and to provide for making these materials available on the Commission's website. This section was also amended to: (1) clarify that, in addition to the respondent and the Enforcement Committee or Commission (depending on who will hear the matter), copies of materials for the hearing shall be mailed or emailed to the Deputy Attorney General advising the Committee or Commission; and (2) delete the reference to a hearing officer.

The Authority and Reference note was amended to change the reference to Government Code section 66637 to Government Code section 66638.

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

Subsection 11326(a) was amended to refer to an order setting administrative civil liability, rather than to a civil penalty order, to be consistent with the terminology used in Government Code section 66641.6.

Subsection 11326(b) was amended in several respects to modify and clarify the required contents of the Executive Director's Recommended Enforcement Decision ("ED RED"). Former subsection (b)(1) was divided into two subsections, (b)(1) and (b)(2), with subsection (b)(2) clarifying that the ED RED shall contain the staff's response to the defenses, mitigating factors, or arguments raised by the respondent and any rebuttal evidence submitted by the staff to matters raised in the statement of defense. Former subsection (b)(2) was redesignated as subsection (b)(3), and a new subsection (b)(4) was added to specify that a ED RED on a proposed order setting administrative civil liability shall identify all violations for which administrative civil penalties are proposed and

include: (1) the total amount of proposed administrative civil penalties; and (2) a statement of the applicable factors set forth in Government Code section 66641.9 that the Executive Director considered, consistent with the Administrative Civil Penalty Policy, in determining the total amount of the proposed civil penalties. Former subsections (b)(3), (b)(4), and (b)(5) were redesignated as subsections (b)(5), (b)(6), and (b)(7), respectively. Finally, subsection (b)(7) was amended to refer to an order setting administrative civil liability, rather than to a civil penalty order, and to clarify that, depending on the manner of resolution of an enforcement action, an ED RED shall include the text of any proposed stipulated order that the Executive Director recommends that the Commission issue or any proposed settlement agreement that the Executive Director recommends that the Commission approve.

The Authority and Reference was amended to: (1) delete the reference to Government Code section 66642; (2) add references to Government Code sections 66641.5(e) and 66641.9; and (3) add references to Public Resources Code sections 29610 and 29611.

Section 11327 -- Enforcement Hearing Procedure

Subsections 11327(a) and (b) were amended to refer to the Chair of the Commission or the Enforcement Committee Chair depending on whether the hearing is held before the Commission or the Committee.

Subsection 11327(c) was amended to refer to a violation report and/or complaint.

Subsection 11327(d) was amended to correct a typographical error by changing the word "reported" to "respondent."

Subsections 11327(e) and (f) were amended to clarify that the other speakers at an enforcement committee hearing, other than staff and the respondent(s), are members of the public. Subsection (f) was also amended to: (1) clarify that if oral testimony is allowed, staff and all respondents shall be allowed to examine or cross-examine all testifying witnesses; and (2) delete the former text referring to the right to have rebuttal witnesses testify.

Subsection 11327(g) was amended to clarify that following cross-examination of a witness whose declaration under penalty of perjury has become part of the enforcement record, a representative of the opposing party shall be entitled to examine the witness on the area or areas of information addressed during cross-examination. Subsection (g) was also amended to state that neither cross-examination nor direct examination shall be allowed of any person who has not submitted a declaration under penalty of perjury which has become part of the enforcement record and who has not been identified in writing pursuant to either section 11322(b) (*i.e.*, by a respondent) or section 11322(d) (*i.e.*, by staff), including any member of the public who has commented on an enforcement matter or submitted information related to an alleged violation.

Subsections 11327(g) and (i) were amended to delete the references to a hearing officer.

New subsection 11327(j) was added to state that the Enforcement Committee or Commission shall rule on any objections to the admissibility of evidence or the acceptance of late evidence and shall identify any evidence submitted but rejected because it was not filed in a timely manner.

Former subsections (j) and (k) were redesignated as subsections (k) and (l), respectively. Redesignated subsection 11327(l) was amended to provide that 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 Enforcement Committee recommended enforcement decision (rather than an Executive Director's recommended decision) in accordance with section 11330.

The Authority and Reference note was amended to: (1) delete the reference to Government Code section 66637; (2) add a reference to Government Code section 66641.5(e).

Section 11328 – Acceptance of Late Evidence

Section 11328 was amended to clarify that all documents and declarations under penalty of perjury are required to be submitted with the violation report and/or complaint or the completed statement of defense form, except to the extent otherwise provided by sections 11322(d), 11322(f) (changed from 11322(d) to correct an error), or 11327(f) and this section. Section 11328 was also amended to: (1) delete the references to a hearing officer; and (2) clarify that a person seeking to introduce late evidence must show that he or she made all reasonable efforts to obtain and submit the evidence in a timely manner but was unable to do so and will be substantially prejudiced if the evidence were not admitted.

The Authority and Reference note was amended to add a reference to Government Code section 66641.5(e).

Section 11329 -- Admissibility of Evidence

Subsection 11329(b) was amended to: (1) acknowledge that hearsay evidence may include information provided by the public to the Commission or staff or in public comments; and (2) delete the former text referring to potential cross-examination of the author of a document that contains hearsay evidence when the document is referred to in a violation report or complaint. Subsection (b) was also amended to delete an incorrect reference to section 11321, which does not address cross-examination.

Subsections 11329(d) and (e) were amended to delete references to a hearing officer.

The Authority and Reference note was amended to add references to: (1) Government Code section 66641.5(e); and (2) Evidence Code section 351.

Section 11330 -- Adoption of an Enforcement Committee Recommended Enforcement Decision

The title and text of Section 11330 were amended to delete references to a hearing officer.

Section 11330 was amended to modify and clarify, in a revised subsection (a), the required contents of the Enforcement Committee's Recommended Enforcement Decision ("EC RED"). Amended subsections 11330(a)(1), (a)(4), (a)(6), and (a)(7) specify certain matters to be summarized in the EC RED, rather than referring to section 11326, which describes these matters in specifying the contents of the ED RED. New 11330 subsection (a)(2) requires the EC RED to include a statement of any rulings by the Enforcement Committee. New subsection (a)(3) provides that a recommended decision on proposed an order setting administrative civil liability shall identify all violations for which civil penalties are proposed and include: (1) the total amount of proposed civil penalties; and (2) a statement of the applicable factors set forth in Government Code section 66641.9 that the Enforcement Committee considered, consistent with the Administrative Civil Penalty Policy, in determining the total amount of the proposed administrative civil penalties.

Amended subsection 11330 (b) (which incorporates text that was not previously in a designated subsection) establishes a process for preparing the EC RED. Subsection (b) states that the Enforcement Committee Chair shall direct BCDC counsel to prepare the EC RED provided that: (1) BCDC counsel submits the EC RED to all respondents for review prior to mailing the EC RED to the Commission; and (2) if the respondents provide written comments or objections, the Executive Director may revise the recommended decision based on such comments or objections and shall include the respondent's comments or objections when mailing the EC RED to the Commission.

The Authority and Reference note was amended to: (1) specifically reference Government Code section 66641.5(e); (2) add a reference to Government Code section 66641.9; and (3) add references to Public Resources Code sections 29610 and 29611.

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

Section 11331 was amended to allow for mailing a recommended enforcement decision by email or regular mail, and to require staff to make the recommended decision available on the Commission's website. This section was also amended to delete the reference to a hearing officer.

The Authority and Reference note was amended to specifically reference Government Code section 66641.5(e).

Section 11332 -- Commission Action on Recommended Enforcement Decision

Subsection 11332(a) was amended to reference the additional option for Commission action on an EC RED established by the new subsection (c), discussed below. Subsection (a) was also amended to: (1) reflect that staff, each respondent, and members of the public may present their respective comments, as well arguments, on the recommendation; and (2) delete the reference to a hearing officer.

Subsection 11332(b) was amended to refer to an order setting administrative civil liability, rather than to a civil penalty order. Subsection (b)(2)(B) was amended to clarify that this subsection states the options available to the Commission when the recommended decision includes one or more of the identified types of orders. Subsection (b)(3) was amended to delete the reference to a hearing

officer. Subsection (b)(4) was amended to add a reference to regulation section 11328, which governs the acceptance of late evidence.

New subsection 11332(c) was added to establish an additional option for Commission action on an EC RED. If the respondent and Executive Director both agree to accept the Enforcement Committee's recommended decision, the Executive Director will calendar the recommended decision as a consent item on a Commission meeting agenda. At the Commission meeting, after allowing public comment on the consent item, the Commission will determine by a majority vote whether to adopt the recommended enforcement decision on consent without any change and without any further proceedings. If it does not vote to adopt the recommended decision on consent, the Commission will proceed to act on the matter in accordance with the provisions of subsections (a) and (b).

The Authority and Reference was amended to: (1) specifically reference Government Code section 66641.5(e); (2) add a reference to Government Code section 66641.9; and (3) add references to Public Resources Code sections 29610 and 29611.

Section 11333 -- Commission Hearing Procedures on Direct Referral of an Enforcement Matter by the Executive Director

Section 11333 was amended to add a new first sentence to clarify and confirm that the Executive Director has the discretion to determine whether to refer an enforcement matter to the Commission or to the Enforcement Committee. The second sentence was amended to delete the unnecessary reference to the alternative of referring a matter to the Enforcement Committee.

The Authority and Reference note was amended to specifically reference Government Code section 66641.5(e).

Section 11334 -- Voting on a Proposed Commission Cease and Desist Order, a Proposed Commission Permit Revocation Order, or a Proposed Commission Order Setting Administrative Civil Liability

The title Section 11343 and the text of subsection (a) were amended to refer to an order setting administrative civil liability, rather than to a civil penalty order.

The Authority and Reference was amended to specifically reference Government Code section 66641.5(e).

Section 11340 -- Contents of Cease and Desist Orders

Subsection 11340(b) was amended to refer to an order setting administrative civil liability, rather than to a civil penalty order. Subsection 11340(b) was amended to change "both such orders" to "each type of order" because the provision refers to three types of potential orders, not two.

The Authority and Reference note was amended to delete the references to Government Code sections 66641.5 and 66641.6.

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

Section 11341 was amended to clarify that the Executive Director may modify a cease and desist order issued by the Executive Director only for good cause.

The Authority and Reference note was amended to: (1) change the reference to Government Code section 66638 to Government Code section 66637; and (2) delete the references to Government Code sections 66641.5 and 66641.6.

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

Section 11342 was amended to clarify that the Executive Director may modify a cease and desist order issued by the Commission only for good cause.

The Authority and Reference note was amended to delete the references to Government Code sections 66641.5 and 66641.6.

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

Subsection 11343(a) was amended to provide that a person subject to a Commission cease and desist order who appeals any modification of the order by the Executive Director must do so by filing a written statement that the party is appealing the modification and the reasons for the appeal.

Subsection 11343(b) was amended to delete the words “complete and” as unnecessary and refer instead simply to if an appeal is timely filed.

Subsection 11343(c) was amended to correct a typographical error by changing “to” to “of.”

The Authority and Reference note was amended to delete the references to Government Code sections 66641.5 and 66641.6.

Section 11350 -- Contents of Permit Revocation Orders

Subsection 11350(b) was amended to refer to an order setting administrative civil liability, rather than to a civil penalty order. Subsection 11350(b) was amended to change “both such orders” to “each type of order” because the provision refers to three types of potential orders, not two.

The Authority and Reference note was amended to: (1) delete the reference to Government Code section 66641; and (2) add a reference to *Sunset Amusement Company v. Board of Police Commissioners* (1972) 7 Cal.3d 64, 80.

Section 11351 -- Modification of Permit Revocation Orders

Section 11351 was amended to clarify that the Executive Director may modify a permit revocation order only for good cause.

The Authority and Reference note was amended to delete the reference to Government Code section 66641(d) and add references to: (1) Government Code section 66638; and (2) Public Resources Code section 29601.

Section 11352 -- Appeal from Modification of a Permit Revocation Order

Subsection 11352(b) was amended to delete the words “complete and” as unnecessary and refer instead simply to if an appeal is timely filed.

Subsection 11352(c) was amended to correct a typographical error by changing “to” to “of.”

The Authority and Reference note was amended to: (1) delete the references to Government Code section 66641(d) and Public Resources Code section 29600; and (2) add references to Government Code section 66638 and Public Resources Code section 29601.

Section 11360 -- Preparation and Execution of Commission Cease and Desist Orders, Permit Revocation Orders, and Orders Setting Administrative Civil Liability

The title of Section 11360 was amended to add the words “and Orders Setting Administrative Civil Liability.”

The text of this section was amended to refer to an order setting administrative civil liability, rather than to a civil penalty order.

The Authority and Reference note was amended to: (1) delete the overbroad reference to Government Code sections 66637-66642; (2) add specific references to Government Code sections 66638, 66641.5(e), and 66641.6; and (3) add references to Public Resources Code sections 29610 and 29611.

Section 11361 -- Issuance

Section 11361 was amended to refer to an order setting administrative civil liability, rather than to a civil penalty order. This section was also amended to change: (1) “copies” to “copy,” since the reference is to the original copy of an order; and (2) “they are” to “it is,” to reflect the change from the plural subject (copies) to the singular (copy).

The Authority and Reference note was amended to add a reference to Government Code section 66641.5(e).

Section 11362 -- Service of Copies

Section 11362 was amended to clarify the requirements for service of a cease and desist order, permit revocation order, order setting administrative civil liability, or any modification of such orders in accordance with applicable statutory requirements. Specifically, subsection 11362(a) was amended to require ceases and desist orders issued by the Executive Director or Commission to be served on the owner of property where violation occurred as well as the party charged with violation. Subsection 11362(b) was amended to require an order setting administrative civil liability to be served on any person who appeared at the hearing and requested a copy, as well as the party

to whom the order is issued. Subsection (b) was also amended to require an order setting administrative civil liability to be served by mail no later than the second working day following the date of issuance, which is the same timeframe for service of a cease and desist order established by subsection (a). Finally, subsections (a) and (b) were each amended to allow service of any issued order by email with the consent of the party served, and subsection (b) was amended to require the Executive Director to post a copy of any issued order on the Commission's website.

The Authority and Reference note was amended to add a reference to Government Code section 66641.5(e).

Section 11370 -- Enforcement Record

Subsection 11370(b) was amended to refer to a complaint for administrative civil liability, rather than for civil penalties.

Subsection 11370(c) was amended to add a reference all documents submitted with a timely filed statement of defense as being part of the record, consistent with the reference to documents referred to in the violation report in subsection (a).

Subsection 11370(e) was amended to change "staff" to "Executive Director" to reflect that under section 11326, the Executive Director prepares a recommended enforcement decision. Subsection (e) was also amended to refer to any other evidence, in addition to documents, that may be referred to or included in the recommendation.

Subsection 11370(f) was amended to provide that enforcement hearings and deliberations may be documented by either minutes or a verbatim transcript (except that a verbatim transcript shall be prepared of any oral testimony, cross-examination, or direct examination). Subsection (f) was also amended to refer to any oral testimony or any cross-examination and any direct examination of a person whose declaration under penalty of perjury has become part of the enforcement record and to delete the former reference to eyewitness or expert testimony.

Former subsection 11370(j) was deleted, because the regulations require staff and respondent(s) to identify and submit copies of the specific documents or other evidence upon which they rely, and the remaining subsections were redesignated accordingly.

Redesignated subsections (k), (l), (m), (n), and (o), which refer, respectively, to the McAteer-Petris Act, the San Francisco Bay Plan, the Suisun Marsh Preservation Act, the Suisun Marsh Protection Plan, and the Suisun Marsh Local Protection Program, were each amended to state that these laws or documents will be part of the record only if relevant to any of the issues raised in the proceeding.

The Authority and Reference was amended to: (1) correct a typographical error in the Authority citation to the Public Resources Code by changing section "29210(e)" to "29201(e)"; (2) delete the reference to Government Code sections 66639 and (3) add references to Government Code sections 66638, 66641.5(e), and 66641.6.

Section 11380 -- Content of Complaint for Administrative Civil Liability

The title of Section 11380 was amended to refer to a complaint for administrative civil liability, rather than to a complaint for civil penalties.

Section 11380 was amended to clarify that a complaint shall follow the format and contain the information set out in Appendix H. This section was also amended to provide that a complaint shall identify the violations for which administrative civil penalties are proposed and include: (1) a list or table of all alleged violations for which staff is proposing a penalty; (2) the total amount of proposed penalties; and (3) a statement of the applicable factors set forth in Government Code section 66641.9 that the Executive Director considered, consistent with the Administrative Civil Penalty Policy, in determining the total amount of the proposed administrative civil penalties.

The Authority and Reference note was amended to: (1) add an Authority citation to Public Resources Code section 29201(e); (2) add references to Government Code sections 66641.5(e) and 66641.9; and (3) add references to Public Resources Code sections 29610 and 29611.

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

The title and text of Section 11381 were amended to refer to a complaint for administrative civil liability, rather than to a complaint for civil penalties.

Subsection 11381(a) was amended to provide that 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).

Subsection 11380 (c) was amended to add a new subsection (c)(2) to provide that factors to be considered by the Executive Director in determining whether to refer a complaint to the Commission or to the Enforcement Committee shall include: (1) whether Executive Director has issued a cease and desist order for the violations alleged in the complaint; and (2) whether the Executive Director has proposed that any order setting administrative civil liability be combined with a Commission cease and desist order and/or a permit revocation order. The remaining subsections of subsection (c) were redesignated accordingly.

The Authority and Reference note was amended to add a reference to Government Code section 66641.5(e).

Section 11382 -- Further Procedures for Commission Review of Complaints for Administrative Civil Liability

The title and text of Section 11382 were amended to refer to complaints for administrative civil liability, rather than to complaints for civil penalties.

Section 11382 was amended to delete the unnecessary and inappropriate references to sections 11310 and 11361 through 11370. As amended, this section refers to the procedures established by sections 11321 (commencement of Commission enforcement proceedings) through 11334 (voting

on a proposed Commission order). This section was also amended to delete the reference to a hearing officer.

The Authority and Reference note was amended to add a reference to Government Code section 66641.5(e).

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

The title and text of Section 11383 were amended to refer to an order setting administrative civil liability, rather than to complaints for civil penalties.

Subsection 11383(a)(2) was amended to provide that an order setting administrative civil liability shall include, in addition to the amount of the civil penalties, a statement of the applicable factors set forth in Government Code section 66641.9 that the Commission considered in determining the amount of the civil penalties. Subsection (a)(3) was amended to require such an order to specify the date by which the civil penalties must be paid in full, or, if the penalties are to be paid in installments, the amount of each installment and the date by which each installment must be paid.

Subsection (b) was amended to provide that any combined order shall contain all the information required under the regulations for “each type of order,” rather than “both” orders, since this subsection refers to three types of potential orders, not two.

The Authority and Reference note was amended to: (1) add an Authority citation to Public Resources Code section 29201(e); (2) add a reference to Government Code section 66641.5(e); and (3) add references to Public Resources Code sections 29610 and 29611.

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

The title and text of Section 11384 were amended to refer to an order setting administrative civil liability, rather than to a civil penalty order.

Section 11384 was amended to clarify that: (1) the Executive Director may modify an order setting administrative civil liability only for good cause; and (2) the modification may not alter the total amount of civil penalties.

The Authority and Reference note was amended to specifically reference Government Code section 66641.5(e).

Section 11385 -- Appeal from Modification of an Order Setting Administrative Civil Liability

The title of Section 11385 was amended to change “a Permit Revocation” to “an Order Setting Administrative Civil Liability.” The former reference to a permit revocation order was an error because appeal from modification of a permit modification order is addressed by section 11352 and because by its terms the text of section 11385 addresses appeal from modification of an order setting administrative civil liability.

The text of Section 11385 was amended to refer to an order setting administrative civil liability, rather than to a civil penalty order.

Subsection 11385(b) was amended to delete the words “complete and” as unnecessary and refer instead simply to if an appeal is timely filed.

Subsection 11385(c) was amended to correct a typographical error by changing “to” to “of.”

The Authority and Reference note was amended to specifically reference Government Code section 66641.5(e).

New Chapter 13, Subchapter 2, Article 3 -- Standardized Fines, Amending Section 11386 and Adding Sections 11387, 11388, 11389, 11390, and 11391.

The amendments added a new Article 3 to Chapter 13, Subchapter 2 of the regulations, entitled “Standardized Fines.” Furthermore, the amendments broke up and expanded former section 11386 into six sections by revising section 11386 and adding new sections 11387 through 11391.

Section 11386 -- Applicability of Article

The title of Section 11386 was changed from “Standardized Fines” to “Applicability of Article.” As amended, section 11386 contains the provisions of former subsection 11386(a) and identifies the categories of violations that, based on specified determinations by the Executive Director, are subject to resolution through the standardized fines process.

Subsection 11386(a)(1) was amended to change the former reference to subsection 11386(e) to new section 11390.

New subsection 11386(b) was added to state that “significant harm to the Bay’s resources or to existing or future public access” shall be determined in accordance with the definition of this term in section 11310(f), as discussed above.

New subsection 11386(c) was added to state that in cases involving both a violation that has not resulted in significant harm to the Bay's resources or to existing or future public access and a violation that has resulted in such harm, the Executive Director may, 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.

The Authority and Reference note for this section includes Authority citations to: (1) Government Code section 66632(f); and (2) Public Resources Code section 29201(e). The references are to: (1) Government Code section 66641.5(e); and (2) Public Resources Code section 29610.

Section 11387 -- Notice of Alleged Violation

New section 11387 makes several changes to former subsection 11386(b) and specifies the information to be included in the written notice to the person responsible for a violation subject to

resolution through the standardized fines process (*i.e.*, the notice of violation). The notice is required to: (1) identify the nature of the violation and the action(s) that must be taken to correct the violation; (2) state that if the violation is corrected within 35 of the date of the notice, the Commission shall not impose any fine; and (3) state that if the violation is not corrected within 35 days of the date of the notice, the person responsible for the violation may be subject to payment of a fine and may resolve the violation by taking the corrective action required by the notice and paying the standardized fine specified in section 11390(a) or 11390(b).

As amended, section 11387 deletes the former reference to subsection (b) and redesignates subsections (1), (2), and (3), as subsections (a), (b), and (c), respectively. The former reference to subsection (g) (new subsection 11390(c)) was deleted as incorrect. The former references to subsections (e), (f), and (h) were changed to correspond to new subsections 11390(a), (b), and 11390(d), respectively.

The former references in this section to a “civil penalty or “penalty” were changed to refer to a “fine.” The former references to the person “believed to be responsible” for a violation were changed to refer to the person “responsible.”

In amended subsection 11387(c): (1) the words “the penalty portion of” were deleted and the words “taking each and every corrective action required by the notice and” were added to clarify that the responsible party will resolve the violation in full by both taking the required corrective actions and paying the specified standardized fine; (2) the word “formal” was changed to “Commission” because section 11321 refers to Commission enforcement proceedings; and (3) the general reference to sections 11300 through 11385 was changed to refer to sections 11321 through 11334, which are the specific regulations governing Commission enforcement proceedings.

The Authority and Reference note for section 11387 is the same as the Authority and Reference note for amended section 11386, discussed above.

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

New section 11388 makes changes to former subsection 11386(c) and provides that the Commission shall not impose any standardized fine if the party responsible for the violation submits information demonstrating that such person has completed each and every corrective action specified in the notice of violation issued pursuant to section 11387 within 35 days. As amended, this section also provides that the Commission will not impose a standardized fine if the responsible party submits information demonstrating that the alleged violation has not occurred.

Section 11388 was amended to: (1) change the references to former subsections (b) and (g) to correspond to new subsections 11387 and 11390(c), respectively; and (2) delete the words “or other” before the word “fine” as unnecessary and potentially confusing.

The Authority and Reference note for section 11388 is the same as the Authority and Reference notes for amended section 11386 and new section 11387.

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

New section 11389 makes changes to former subsection 11386(d) and provides that if a responsible party fails to submit information demonstrating that such person has completed each and every corrective action specified in the notice of violation within 35 days, such party may resolve the violation by completing each and every required corrective action as soon thereafter as possible and by paying a fine in the amount provided in sections 11390(a) or 11390(b).

Section 11389 was amended to change the former references to subsections (b), (e), (f), (g), and (h) to correspond to new section 11387 and new subsections 11390(a), 11390(b), and 11390(c), and 11390(d), respectively. Section 11389 was also amended to delete the words “the penalty portion of” a violation to clarify that the responsible party will resolve the violation in full by both taking the required corrective actions and paying the specified standardized fine.

The Authority and Reference note for section 11389 is the same as the Authority and Reference notes for amended section 11386 and new sections 11387 and 11388.

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

New section 11390 contains four subsections, (a) through (d), that make changes to redesignated former subsections 11386(e), (f), (g), and (h), respectively.

New subsection 11390(a) establishes the schedule of standardized fines that applies to six categories of violations described in the regulation. This subsection was amended to change: (1) the former reference to “civil penalties” to “fines;” and (2) the references to former subsection (b) to correspond to new section 11387.

Subsection 11390(a)(1) establishes the standardized fines that apply to the failure to return an executed permit before commencing the work authorized by the permit. This subsection was amended to: (1) add the word “acknowledged” before the words “executed permit;” and (2) apply to the failure to return an acknowledged, executed permit issued to authorize previously commenced or completed work (*i.e.*, an after-the-fact permit) within the time period stated in the permit.

Subsection 11390(a)(1)(A) was amended to increase from \$1,000 to \$2,000 the standardized fine that applies if an executed permit is returned between 36 and 65 days after the date of the notice of violation. Subsection (a)(1)(B) was amended to increase the standardized fine that applies if an executed permit is returned more than 65 days after the date of the notice from \$3,000 plus \$100

per day from 65th day to the date the executed permit is received to \$5,000 plus \$500 per day from 65th day to the date the executed permit is received.

Subsection 11390(a)(2) establishes the standardized fines that apply to the failure to submit any document other than an acknowledged, executed permit in the form, manner, or time required by a Commission permit. Subsection (a)(2)(A) was amended to increase from \$1,000 to \$2,000 the standardized fine that applies if a required document is submitted between 36 and 65 days after the date of the notice of violation. Subsection (a)(2)(B) was amended to increase from \$3,000 to \$5,000 the standardized fine that applies if a required document is submitted between 66 and 95 days after the date of the notice. Subsection (a)(2)(C) was amended to increase the standardized fine that applies if a required document is submitted more than 95 days after the date of the notice from \$3,000 plus \$100 per day from 96th day to the date the document is submitted to \$5,000 plus \$500 per day from 96th day to the date the document is submitted.

Subsection 11390(a)(3) establishes the standardized fines that apply to the failure to comply with any condition required by a Commission permit not covered by former subsections (e)(1) or (e)(2), which have been redesignated as subsections 11390(a)(1) or (a)(2). The first clause of subsection (a)(3) was amended to change “and” to “or” because subsections (a)(1) and (a)(2) describe two different categories of violations related to different permit conditions. Subsection 11390(a)(3)(A) was amended to increase from \$1,000 to \$2,000 the standardized fine that applies if the failure to comply is corrected between 36 and 65 days after the date of the notice of violation. Subsection (a)(3)(B) was amended to increase from \$3,000 to \$5,000 the standardized fine that applies if the failure to comply is corrected between 66 and 95 days after the date of the notice. Subsection (a)(3)(C) was amended to increase the standardized fine that applies if the failure to comply is corrected more than 95 days after the notice from \$3,000 plus \$100 per day from 96th day to the date the failure to comply is corrected to \$5,000 plus \$500 per day from 96th day to the date the failure to comply is corrected. The final clause of subsection (a)(3)(C) was amended to insert the words “violation is corrected or” before the words “the required improvements are provided,” because, while providing the required improvements may be a means of achieving permit compliance, more generally this subsection requires a permittee to correct the violation.

Subsection 11390(a)(4) establishes the standardized fines that apply to the failure to obtain a Commission permit prior to undertaking any activity that can be authorized by an administrative permit. This subsection was amended to also apply to the failure to obtain an amendment to a previously issued permit prior to undertaking any activity that can be authorized by a permit amendment. Subsections 11390(a)(4)(A), (B), and (C) were each amended to delete the vague reference to “a filable application” and substitute the words “a 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.” Subsection (a)(4)(C) was amended to increase the standardized fine that applies if either an application is submitted or the unauthorized activity is completely corrected more than 95 days after the date of

the notice of violation from \$5,000 plus \$100 per day to \$5,000 plus \$500 per day from the 96th day to the date a complete and properly executed application accompanied by the applicable application fee is submitted or the activity is completely corrected.

Subsection 11390(a)(5) establishes the standardized fines that apply to the failure to obtain a Commission permit prior to undertaking any activity that can be authorized by a regionwide permit. This subsection was amended to also apply to the failure to obtain a permit prior to undertaking any activity that can be authorized by an abbreviated regionwide permit. Subsections 11390(a)(5)(A), (B), and (C) were each amended to delete the words “filable application” and substitute the words “a complete notice of intent to proceed under a regionwide permit or abbreviated regionwide permit.” Subsection (a)(5)(A) was amended to increase from \$1,000 to \$2,000 the standardized fine that applies if either a notice of intent to proceed is submitted between 36 and 65 days and the Executive Director approves the notice of intent within 155 days of the date of the notice of violation or the unauthorized activity is completely corrected between 36 and 65 days of the notice of violation. Subsection (a)(5)(B) was amended to increase from \$2,000 to \$4,000 the standardized fine that applies if either a notice of intent to proceed is submitted between 66 and 95 days and the Executive Director approves the notice of intent within 185 days of the date of the notice of violation or the unauthorized activity is completely corrected between 66 and 95 days of the notice of violation. Subsection (a)(4)(C) was amended to increase the standardized fine that applies if either a notice of intent to proceed is submitted or the unauthorized activity is completely corrected more than 95 days after the notice of violation from \$2,000 plus \$100 per day to \$5,000 plus \$500 per day from the 96th day to the date a complete notice of intent to proceed is submitted or the unauthorized activity is completely corrected.

Subsection 11390(a)(6) establishes the standardized fines that apply to the placement of fill, extraction of materials, or a change of use that could not be authorized under the Commission’s law and policies. This subsection was amended delete the former reference to an activity that could not be authorized “but is an activity similar in size and scope to the activities listed in Sections 10601(a) through 10601(e).” Subsection 11390(a)(6)(C) was amended to increase the standardized fine that applies if a violation is corrected and the area restored more than 95 days after the date of the notice of violation from \$8,000 plus \$100 per day to \$8,000 plus \$500 per day from the 96th day to the date the violation is corrected and the area is corrected.

New subsection 11390(b) makes changes to former subsection 11386(f) and provides that a person responsible for a violation must pay double the amount listed in subsection 11390(a) if that person has previously paid any standardized fine within the five years prior to resolution of the alleged violation. This subsection was amended to change the references to former subsections (e) and section 11386 to correspond in both instances to new subsections 11390(a) and to add a reference to new section 11391. This subsection was also amended to change the former reference to a “person believed to be responsible” to refer instead to a “person responsible.” This subsection was also amended to delete the words “the civil penalty portion of” a violation to clarify that the responsible party will fully resolve a violation by both taking the required corrective actions and

paying the specified standardized fine. Finally, this section was amended to apply in instances where a violator has been assessed but has failed to pay any standardized fine as well as where a violator has previously paid a standardized fine.

New subsection 11390(c) makes changes to former subsection 11386(g) and provides that if a violation resolved without the imposition of a standardized fine is repeated by the same person within five years, certain provisions of the standardized fines regulations shall not apply; instead the person responsible for the subsequent violation shall pay the standardized fine specified in this subsection for each day the subsequent violation occurs or persists after the date of the notice of violation. This subsection was amended to change the references to former subsections (c), (e), and (f) to correspond to new section 11388 and new subsections 11390(a) and (b), respectively. This subsection was also amended to delete the words “the civil penalty portion of” a violation to clarify that the responsible party will fully resolve a violation by both taking the required corrective actions and paying the specified standardized fine. Finally, this subsection was amended to: (1) increase the standardized fine applicable under this subsection from \$100 to \$200 per day; and (2) clarify that such fine shall accrue for each day the violation continues to occur or persist after the date of mailing of the notice of violation until the violation is resolved.

New subsection 11390(d) makes changes to former subsection 11386(h) and provides that if the person responsible for the violation does not complete all the required corrective actions within 125 days of the notice of violation or does not pay the amount of standardized fines assessed when payment is due, the Executive Director may commence Commission enforcement proceedings to resolve the violation. This subsection was amended to change the reference to former subsection (b) to correspond to new section 11387. This subsection was also amended to refer to a failure to pay the amount of standardized fines assessed in accordance with section 11390 when payment is due under subsection 11391(c) or (d), rather than refer generally to a failure to pay within any time limits specified by the Executive Director. This subsection was also amended to change the general reference to sections 11300 through 11385 to refer to sections 11321 through 11334, which are the specific regulations governing Commission enforcement proceedings. Finally, this subsection was amended to provide that if the Executive Director determines that the person responsible for the violation has not made a good-faith effort to correct the violation, the Executive Director may terminate the opportunity for resolution of the violation using the standardized fine process and promptly commence Commission enforcement proceedings by mailing a notice to the violator stating that the standardized fine process will no longer be available (rather than terminating the standardized fine process 35 days after mailing the notice).

The Authority and Reference note for section 11390 is the same as the Authority and Reference notes for amended section 11386 and new sections 11387, 11388 and 11389.

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

New section 11391 contains six subsections, (a) through (f), which modify the provisions of former subsections 11386 (i) through (k) and add three new subsections.

Subsection 11391(a) makes changes to former subsection 11386(i) and provides that after a violation has been completely resolved, a person subject to standardized fines can appeal the amount of the fines to the Executive Director and Chair, who can reduce the amount of the fines to an amount they believe appropriate. Subsection 11391(a) was amended to require the staff, after the violation has been resolved, to notify the person responsible for the violation of the amount of standardized fines assessed and provides that the notice shall advise the person of his or her right to appeal the amount of the fines by submitting within 21 days a written statement that the person is appealing and the reasons for the appeal. This subsection was also amended to provide that staff may submit a response to the appeal within 14 days. This subsection was also amended to provide that the Executive Director and Chair can establish a schedule for the payment of the standardized fines in installments, as well as reduce the amount of the standardized fines to an amount that they believe appropriate. Finally, this subsection was amended to change the former references to “civil penalties” and “penalty” to “fines.”

Subsection 11391(b) make changes to former subsection 11386(j) and provides any person who believes that the time limit for resolution of a violation is inappropriate may appeal that time limit to the Executive Director and Chair who can modify the time limit as they believe appropriate. Subsection 11390(b) was amended to change the references to former subsections (e), (f), and (g) to correspond to new subsections 11390(a), 11390(b), and 11390(c), respectively, and to change the reference to former subsection (h) to new sections 11387 and 11388. This subsection was also amended to clarify that: (1) any appeal will be of the 35-day time limit for resolution of a violation without standardized fines pursuant to sections 11387 and 11388, rather than of any time limit established pursuant to former subsection (h) (new subsection 11390(d)); and (2) any appeal will be on the grounds that meeting the 35-day limit is “not feasible,” rather than, vaguely, “inappropriate.” This subsection was also amended to require the person appealing to submit within 35-days of the notice of violation a written statement that the person is appealing, the reasons for the appeal, and proposing an alternative date to complete the required corrective action. Finally, this subsection was amended to provide that the Executive Director and the Chair can modify both the 35-day time limit and the time periods for accrual of standardized fines set forth in Section 11390(a) for the violation as they believe appropriate.

New subsection 11391(c) provides that if any person subject to standardized fines does not appeal the amount of such fines within 21 days of receiving notice from staff under subsection (a) of the amount of standardized fines assessed, the full amount of such fines shall be due and payable by cashier’s check 30 days after the date of the notice.

New subsection 11391(d) provides that if any person subject to standardized fines appeals the amount of such fines within 21 days of receiving notice from staff under subsection (a) of the amount of standardized fines assessed, any fines that 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.

Subsection 11391(e) makes changes to former subsection 11386(k) and provides any person responsible for a violation is entitled to have the violation resolved through Commission

enforcement proceedings if that person believes such proceedings are necessary to fairly determine liability for the violation, the appropriate remedy, or the appropriate fine or civil penalty amount. Subsection 11391(e) was amended to provide that any person receiving a notice of violation under section 11387 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 proceedings. As amended, this subsection provides that such a waiver and request that the violation be resolved through Commission enforcement proceedings may be submitted at any time after receipt of a notice of violation but no later than: (1) twenty one days after the date of the notice provided by staff under subsection 11391(a) of amount of standardized fines assessed, if the person receiving such notice elects not to appeal the amount of such fines; or (2) fourteen days after the date of the decision of the Executive Director and Chair on any appeal of the amount of standardized fines. This subsection was also amended to state that if a waiver and request that the violation be resolved through Commission enforcement proceedings is submitted after staff has provided notice under subsection 11391(a) 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 decision, and the appropriate amount of fines or administrative civil penalties shall be determined through Commission enforcement proceedings. Finally, this subsection was amended to change the general reference to sections 11300 through 11385 to refer to sections 11321 through 11334, which are the specific regulations governing Commission enforcement proceedings.

New subsection 11391(f) provides that if a person subject to standardized fines fails to pay such fines when due and payable, and if such person has not waived the opportunity to resolve a violation under this Article and requested that the violation be resolved through Commission enforcement proceedings, the Executive Director shall commence Commission enforcement proceedings to resolve the violation. Subsection 11391(f) further provide that in such enforcement proceedings, the person subject to 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.

The Authority and Reference note for section 11391 is the same as the Authority and Reference note for former section 11386 with the following changes: (1) deletion of the reference to Government Code Section 66632(f); (2) amendment of the reference to Government Code section 66641.5 to specifically reference section 66641.5(e); and (3) deletion of the reference to Public Resources Code Section 29201(e). As amended, the Authority and Reference note for section 11391 is same as the Authority and Reference notes for amended section 11386 and new sections 11387, 11388, 11389 and 11390.

Appendix H, Violation Report/Complaint for Administrative Civil Liability

As referenced in sections 11321(a)(1), 11321(a)(2), and 11380, Appendix H sets forth the format and content of a violation report and/or complaint. Appendix H has been amended to provide for the following information regarding the enforcement process to be included at the top of the first page of a violation report/complaint: (1) any file and permit number; (2) the date of mailing of the violation report/complaint; (3) the 35th day after mailing (*i.e.*, the date the respondent's completed

statement of defense is due, absent an extension); (4) the 60th day after mailing (*i.e.*, the date a hearing on a complaint is required, absent an extension); (5) any scheduled hearing date; and (5) the name(s) or the respondent(s).

The title of Appendix H and the text of the introductory paragraphs have been revised for clarity and consistency, including changing former references to a “complaint for administrative imposition of civil penalties” and a “Civil Penalty Order” to instead use the statutory terms a “complaint for administrative civil liability” and an “order setting administrative civil liability,” respectively. The phone number of the Commission’s offices has been updated in the second and fourth paragraphs of Appendix H.

Appendix H formerly required a violation report/complaint to reference all pertinent evidence relied upon by Commission staff and state that this evidence is available in the enforcement file for the matter. Appendix H has been amended to instead require (by revisions to paragraph 2 and numbered item 6 and by the addition of a new numbered item 10) a violation report/complaint to include a list of all evidence relied on by staff, including any declarations under penalty of perjury, and to further require that all supporting evidence be attached to or accompany the violation report/complaint or be provided to the respondent in electronic format upon request.

If the staff is proposing that the Commission impose an administrative civil penalty, Appendix H formerly required a complaint to state only the amount of the proposed penalty. Appendix H has been amended to require (by revisions to numbered item 8) a complaint to include: (1) a list or table of all alleged violations for which staff is proposing a penalty; (2) the total amount of proposed penalties; and (3) a statement of the applicable factors set forth in Government Code section 66641.9 that the Executive Director considered, consistent with the Administrative Civil Penalty Policy in Appendix J, in determining the total amount of the proposed penalties.

Appendix H was amended to: (1) change the former references, in numbered items 1, 2, 3, 4, and 5, from “illegal activity” to “the violation or unauthorized activity;” and (2) delete the word “believed” from numbered item 1, so that as amended the item refers to the person or persons responsible for the violation or unauthorized activity.

The amendments to Appendix H add an Authority and Reference note. The Authority citations are to: (1) Government Code section 66632(f); and (2) Public Resources Code section 29201(e). The references are to: (1) Government Code sections 66638, 66641.5(e) and 66641.6; and (2) Public Resources Code sections 29601, 29610 and 29611.

Appendix I, Statement of Defense Form

As referenced in section 11321(a)(3), Appendix I sets forth the format of the statement of defense form to be completed, and the information requested to be provided, by a respondent in an enforcement proceeding. Numerous revisions have been made to the introductory paragraphs of Appendix I to improve clarity, reduce redundancy, and update the form with the Commission’s current office address and phone number. Consistent with the amendments to section

11322(a)(1), Appendix I was amended to provide that as an alternative to completing the statement of defense form, a respondent may submit a document providing the information requested by the form.

Appendix I was amended to delete the former first sentence of the second paragraph, which stated that depending on the outcome of further discussions with staff after the respondent has completed and returned the form, enforcement proceedings may nevertheless be initiated against the respondent. The deleted statement was misleading and inaccurate because enforcement proceedings will already have been initiated by issuance of the violation report/complaint.

Appendix I was amended to add a statement, in the fifth paragraph, advising a respondent that failure to raise a defense or mitigating factor or to submit evidence in response to the violation report/complaint will waive the respondent's right to raise such defense or mitigating factor or to submit such evidence at the enforcement hearing.

Appendix I was amended to clarify, in the fifth and sixth paragraphs, that a respondent may only identify for potential cross-examination any person whose declaration under penalty of perjury was submitted by staff with the violation report/complaint.

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

Appendix I was amended, by the addition of a new numbered item 5, to require, if staff is proposing an administrative civil penalty, a respondent asserting inability to pay, or that the proposed penalty would have a substantial adverse effect on the respondent's ability to continue in business, to raise this issue when the statement of defense is submitted and to provide factual information and supporting documentation establishing such inability to pay or such adverse effect. Relevant supporting documentation may include financial statements and reports, balance sheets, profit and loss statements, statements of net worth, annual budgets, bond prospectuses, and tax returns including supporting forms and schedules as may be appropriate. New numbered item 5 further provides that before submitting this information, a respondent should redact all personal information including any social security or tax-payer identification number, driver's license/state identification number, financial account number and any other private, non-public personal information including a residential address, personal telephone numbers, or personal email address.

The amendments to Appendix I add an Authority and Reference note. The Authority citations are to: (1) Government Code section 66632(f); and (2) Public Resources Code section 29201(e). The references are to: (1) Government Code sections 66638, 66641.5(e) and 66641.6; and (2) Public Resources Code sections 29601, 29610 and 29611.

Appendix J, Administrative Civil Penalty Policy

The amendments adopt an Administrative Civil Penalty Policy (“Policy”) as a new Appendix J to the regulations. The Policy consists of an Introduction and two parts: (1) Part I, Penalty Calculation Methodology; and (2) Part II, Supplemental Environmental Projects.

Introduction

The Introduction explains that the Policy addresses the assessment of administrative civil penalties as authorized by Government Code section 66641.5(e), and that Government Code section 66641.9(a) sets forth the factors the Commission is to consider in determining the amount of administrative civil liability. The Introduction states that the goal of the Policy to promote the enforcement goals of consistency, transparency, fairness, and deterrence of noncompliance.

The Introduction describes the applicability of the Policy by stating that the Executive Director shall apply the Penalty Calculation Methodology set forth in Part I in proposing an administrative civil penalty amount for all violations in a complaint for administrative civil liability and that the Commission shall apply Part I of the Policy in establishing an administrative civil penalty amount for all violations in an order setting administrative civil liability. The Introduction notes that the Policy does not apply to violations that are resolved using the standardized fine process set forth in sections 11386-11391 of the regulations.

The Introduction states that Part II of the Policy establishes guidelines and requirements that are applicable to a supplemental environmental project (“SEP”). The Introduction explains that a SEP is an environmentally beneficial project that a violator agrees to undertake and complete in partial resolution of an enforcement action and for which the Commission agrees to offset a portion of the administrative civil penalty that would otherwise apply to the violation(s).

Part I - Penalty Calculation Methodology

Part I of the Policy provides for consideration of the statutory factors set forth in Government Code Section 66641.9(a) and creates a transparent, fair, and consistent approach to determine and impose appropriate administrative civil penalties for violations. As summarized below, there are six steps to the Penalty Calculation Methodology.

Step 1. Determine the total initial base penalty amount for each violation. The initial base penalty is determined by evaluating: (a) the gravity of harm of the violation; and (b) the violation’s extent of deviation from the applicable requirement at issue.

In evaluating gravity of harm, the Policy distinguishes between 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 six-factor scoring system to quantify: (1) habitat value; (2) durability; (3) toxicity; (4) size; (5) nature of violation; and (6) visibility. Habitat value considers the physical and biological resources at the location of a violation; a violation occurring in high-quality, productive habitat will have a greater gravity of harm than a violation occurring in degraded habitat. Durability considers the duration of a violation; a violation involving a permanent or long-lasting activity will have a greater gravity of harm than a transitory or easily removed activity. Toxicity considers the hazards or risks of damage to human health, plants, wildlife, or other biological resources associated with a violation; a violation presenting high human health or safety hazards, such as the placement of contaminated fill in the Bay, will have a greater gravity of harm than a violation involving no or low human health or safety hazards. Size considers the area, volume, and locations affected by a violation; a violation extending over a large area or throughout a site will have a greater gravity of harm than a violation involving a small area or a single location. Nature of violation considers whether the violation can be resolved by compliance with an existing permit or can be authorized by issuance of a permit or permit amendment; a violation that cannot be permitted in a manner consistent with the Commission's laws and policies will have a greater gravity of harm than a violation that can be resolved by compliance with an existing permit. Visibility considers the conspicuousness of the violation; a violation that is highly visible to the public or that impacts many people will have a greater gravity of harm than a violation that is not highly visible to the public or that impacts few people.

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." These categories are described in the policy. In brief, violations with a high level of actual or potential harm to the Bay's resources or public access are Major; conversely, violations involving minor or minimal harm to the Bay's resources or public access are Minor.

For paper violations, gravity of harm, and the categorization of a violation as either "Moderate" or "Minor," is determined based on the type of document the submission of which is required by a Commission permit. No paper violations are categorized as "Major."

Evaluating the extent of deviation from an applicable requirement involves, for both physical violations and paper violations, considering the extent to which a violation deviates from the specific requirement of law (statute or regulation) or the term or condition of a Commission permit. The categories of extent of deviation from an applicable requirement are "Major," "Moderate," or "Minor." These categories are described in the policy. In brief, violations where the applicable requirement was completely ignored involve a Major deviation from the legal requirement; conversely, violations that involve activities that deviate from the applicable requirement only to a small or minimal extent involve a Minor deviation from the legal requirement.

Based on the evaluations of gravity of harm and extent of deviation from an applicable requirement, Table 1 is used to determine the initial base penalty amount for a violation. Table 1 consists of a matrix containing three rows for Gravity of Harm categorized as "Major," "Moderate,"

or “Minor,” and three columns for Extent of Deviation from Legal Requirement also categorized as “Major,” “Moderate,” or “Minor.” The dollar amounts in the cells of Table 1 are based on the statutory penalty range of between \$10 and \$2,000 per day per violation. The initial penalty amounts in Table 1 range from a low of \$10-249 for a violation with a Minor Gravity of Harm and Minor Extent of Deviation to a high of \$1600-2000 for a violation with a Major Gravity of Harm and Major Extent of Deviation.

After the initial base penalty amount is determined using Table 1, that amount is multiplied by the number of days that the violation has persisted to determine the total initial base penalty amount for the violation.

Steps 2, 3, and 4. After the total initial base penalty amount is determined, the next steps in the Penalty Calculation Methodology are to consider whether to adjust to the total base penalty amount for three factors specific to the violator: 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 2. The total initial base penalty amount may be adjusted upward or downward by as much as 25% based on the violator’s degree of culpability prior to or when engaging in the violation. An upward adjustment shall be made for intentional or grossly negligent violations. A downward adjustment shall be made for accidental violations or situations where 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. No adjustment shall be made when a violator acted as a reasonable and prudent person would have.

Step 3. 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. There shall be no downward adjustment where there is no history of violations because regulated entities are expected to comply with the Commission’s laws and permits.

Step 4. The total initial base penalty may be adjusted upward or downward by as much as 25% based on the violator’s cooperation and resolution efforts. Penalties shall be adjusted downward where a violator has taken extraordinary actions to cooperate with an investigation and to resolve or mitigate the impacts of the unauthorized activity. Penalties shall be adjusted upward where a violator has delayed compliance or created obstacles to achieving compliance. No adjustment shall be made when a violator is has responded to a violation or cooperated with Commission staff as a reasonable and prudent person would have.

Step 5. The total base penalty amount is 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. After the total base penalty amount for all violations is determined, the final step in the Penalty Calculation Methodology is to consider whether to adjust the total base penalty amount based on four additional factors and to 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.

Consideration of any economic benefit to the violator from the activity or failure to act that constitutes a violation will ensure 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. When sufficient information is available to determine or reasonably calculate the economic benefit of a violation (or multiple related violations), the economic benefit shall be compared to the total initial base penalty amount. If the total initial base penalty amount is less than the determined or estimated economic benefit, the total initial base penalty amount for the violation (or multiple related violations) shall be adjusted to be set at a sum that is 10% higher than the economic benefit to ensure that civil penalties may not be considered a cost of doing business and are assessed at an amount sufficient to deter future violations.

Consideration of a violator's ability to pay administrative penalties and/or ability to continue in business will avoid undue financial burden to violators in appropriate cases, even though the Commission is under no obligation to ensure that a violator is able to pay such penalties or continue in business. 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 and submits relevant supporting information.

Consideration of costs to the state will enable the Commission to recover the costs of investigating violations and pursuing an enforcement action when it is feasible to do so. If the Executive Director includes costs of investigating or pursuing an enforcement action in a complaint, 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.

Consideration of other factors as justice may require is necessary to allow the Commission to adjust the penalty amount if it determines that the calculated penalty amount is inappropriate for some specified reason, such as if the violator identifies and provides relevant information not considered under the other criteria listed in the Penalty Calculation Methodology or if the calculated penalty

amount is substantially disproportionate to the penalty assessment for similar violations made in the recent past using the Policy.

When relevant information is available, the Executive Director or Commission shall consider each of these factors, but the Commission is not required by Government Code section 66641.9(a) 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.

The final penalty amount shall be determined by making any appropriate adjustments to the total base penalty amount for all violations based on consideration of these four factors, provided that the final penalty amount for each violation shall not exceed the statutory minimum of \$30,000 per violation.

Part II - Supplemental Environmental Projects

Part II of the Policy recognizes the value in using a violator's performance of a SEP as an alternative to the violator's payment of a portion of the administrative civil penalties imposed for a violation or violations, while establishing guidelines and requirements for Commission approval of such a project to ensure that the project provides the expected benefits. Part II consists of three sections: Section A, Introduction; Section B, SEP Guidelines; and Section C, Requirements for Stipulated Orders or Settlement Agreements Authorizing a SEP.

Section A is an Introduction that defines the term SEP. The Introduction provides notice to the regulated community that, as a matter of policy, while SEPs may be useful in the resolution of enforcement actions, the funding of SEPs is not a primary goal of the enforcement program. The Introduction makes clear that the decision to accept a proposed SEP, and to determine the amount or percentage of a total administrative civil penalty that may be offset by a SEP, are within the Commission's sole discretion and will depend on the specific facts of a particular case.

Section B contains a set of guidelines that apply to SEPs. In summary, the guidelines:

- Provide that a SEP shall have an adequate nexus to the Commission's statutory mandate to protect the Bay's resources and public access to the Bay, and that there shall be an adequate nexus between the nature or location of the violation(s) and the nature or location of the SEP.
- Identify four categories of projects that are acceptable as a SEP.
- State that the amount of the penalty to be offset by a SEP shall not exceed 50% of the total penalty amount that the violator is required to pay for the violation(s).
- State that the Commission shall never compromise the stringency or timeliness of a regulatory requirement in exchange for a SEP, and that a SEP cannot be used to satisfy the Commission's or another government agency's statutory or regulatory requirements.

- State that a SEP shall not directly financially benefit the Commission's functions, its staff, or family members of its staff.
- State that a SEP must be enforceable pursuant to a stipulated order setting administrative civil liability or a settlement agreement.
- Identify the Commission's preferences for a SEP.
- Provide examples of projects that are not acceptable as SEPs.

Section C sets forth a set of requirements for any stipulated order or settlement agreement authorizing a SEP. In summary, such an order or agreement shall:

- Accurately and completely describes the SEP, including a project description or scope of work, budget, and schedule.
- Address how a SEP will comply with the environmental review requirements of the California Environmental Quality Act.
- Require that the SEP be completed within 36 months, unless the Executive Director grants an extension for good cause.
- Require that any funds intended for the SEP shall be spent in accordance with the order or agreement on the specific, defined project.
- State that the penalty offset amount that will be satisfied by performing the SEP shall be treated as a suspended civil penalty, and that if the SEP is not fully implemented, the Commission shall be entitled to recover the full amount of the suspended penalty.
- Require the violator or third-party performing the SEP to provide a full accounting of project expenditures, periodic reporting on agreed upon SEP performance milestones, and a final completion report certifying completion of the SEP in accordance with the terms of the order or agreement.
- Require that whenever the violator or third-party performing a SEP publicizes 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.

Authority and Reference Note

Appendix J includes an Authority and Reference. The Authority citations are to: (1) Government Code section 66632(f); and (2) Public Resources Code section 29201(e). The references are to: (1) Government Code sections 11415.60, 66641.5(e) and 66641.6; and (2) Public Resources Code sections 29610 and 29611.