Attachment A

STATE WATER RESOURCES CONTROL BOARD

WATER QUALITY ENFORCEMENT POLICY

Adopted **(New Date to be Determined)** ~~**Adopted April 4, 2017**~~
Effective **(New Date to be Determined)** ~~**Effective October 5, 2017**~~

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

November 2023 First Revised Proposed Amendment – Revisions from February 2023 – New proposed language is shown in Green, **Bold**, and **Double Underlined**. Existing Policy language that was originally proposed to be deleted but is now restored is shown in Green, *Italicized* and Underlined. Existing Policy language or originally proposed new language that is now deleted is shown in ~~double strikethrough~~.

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Water Quality Enforcement Policy – ~~April 4, 2017~~ (New Date to be Determined)

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INTRODUCTION

The State Water Resources Control Board (State Water Board) and the Regional Water Quality Control Boards (Regional Water Boards) (together **Water Boards** ~~**"Water Boards"**~~) have primary responsibility for the coordination and control of water quality in California. In the Porter-Cologne Water Quality Control Act (Porter-Cologne), the Legislature declared that the "state must be prepared to exercise its full power and jurisdiction to protect the quality of the waters in the state from degradation...." (Wat. Code, § 13000). Porter-Cologne grants the Water Boards the authority to implement and enforce water quality laws, regulations, policies, and plans to protect the groundwater and surface waters of the State. Timely and consistent enforcement of these laws is critical to the success of the water quality program and to ensure that the people of the State have clean water. The goal of this Water Quality Enforcement Policy (Policy) is to protect and enhance the quality of the waters of the State by defining an enforcement process that addresses water quality problems in the most fair, efficient, effective, and consistent manner. In adopting this Policy, the State Water Board intends to provide guidance that will enable Water Board staff to expend its limited resources in ways that openly address the greatest needs, deter harmful conduct, protect the public, and achieve maximum water quality benefits. Toward that end, it is the intent of the State Water Board that the Regional Water Boards' decisions be consistent with this Policy.

A good enforcement program relies on well-developed compliance monitoring systems designed to identify and correct violations, help establish an enforcement presence, collect evidence needed to support enforcement actions where there are identified violations, and help target and rank enforcement priorities. Compliance with regulations is critical to protecting public health and the environment, and it is the preference of the State Water Board that the most effective and timely methods be used to assure that the regulated community achieves and maintains compliance. Tools such as providing assistance, training, guidance, and incentives are commonly used by the Water Boards and work very well in many situations. There is a point, however, at which this cooperative approach should make way for a more forceful approach.

This Policy addresses the enforcement component (i.e., actions that take place in response to a violation) of the Water Boards' regulatory framework, which is an equally critical element of a successful regulatory program. Without a strong and fair enforcement program to back up the cooperative approach, the entire regulatory framework would be in jeopardy. Enforcement is a critical ingredient in creating the deterrence needed to encourage the regulated community to anticipate, identify, and correct violations. Formal enforcement should always result when a non-compliant member of the regulated public begins to realize a competitive economic advantage over compliant members of the regulated public. The principle of fairness in enforcement requires that those who are unwilling to incur the expenses of regulatory compliance not be rewarded for making that choice. It is the intent of the State Water Board that formal enforcement should be used as a tool to maintain a level-playing field for those who comply with their regulatory obligations by setting appropriate civil liabilities for those who do not. Appropriate penalties and other consequences for

violations offer some assurance of equity between those who choose to comply with requirements and those who violate them. It also improves public confidence when government is ready, willing, and able to back up its requirements with action.

In furtherance of the water quality regulatory goals of the Water Boards, this Policy:

- Establishes a process for ranking enforcement priorities, while at the same time recognizing that the variety and scope of specific beneficial uses in each Region may require unique considerations when setting priorities;
- Re-affirms the principle of progressive enforcement, which contemplates an escalating series of actions **to obtain compliance.** ~~**beginning with notification of violations and compliance assistance, followed by increasingly severe consequences, culminating in a complaint for civil liabilities or other formal enforcement.**~~ While progressive enforcement is the most typical approach to enforcement, it may not be **the** ~~**an**~~ appropriate ~~**enforcement**~~ response **in all circumstances;** ~~**As discussed in Section B of Appendix A, progressive enforcement may not be appropriate, for example, when violations result from intentional or grossly negligent misconduct, or where the impacts tobeneficial uses are above moderate or major;**~~
- Establishes an administrative civil liability **(ACL)** assessment methodology to create a transparent, fair, and consistent statewide approach to liability assessment;
- Recognizes the value in using alternatives ~~**to**~~ **in** the assessment of civil liabilities, such as supplemental environmental projects, compliance projects, *and* enhanced compliance actions, ~~and corrective action projects,~~ but requires standards for the approval of such alternatives to ensure they provide the expected benefits;
- Identifies circumstances in which the State Water Board will take action, even though the Regional Water Boards have primary jurisdiction;
- Addresses the eligibility requirements for small communities to qualify for carrying out compliance projects, in lieu of paying mandatory minimum penalties (MMP) pursuant to California Water Code **(Water Code)** section 13385;
- Emphasizes the recording of enforcement data and the communication of enforcement information to the public and the regulated community; and,
- Establishes annual enforcement reporting and planning requirements for the WaterBoards.

The State's water quality requirements are not solely the purview of the Water Boards and their staff. Other agencies, including local government and the California Department of Fish and Wildlife (DFW) have the ability to enforce certain water quality provisions in state law. State law also allows members of the public to bring enforcement matters to the attention of the Water Boards and authorizes aggrieved persons to petition the State Water Board to review most actions or failures to act of the Regional Water Boards. In addition, State and federal statutes provide for public participation in the issuance of orders, policies, and water quality control plans. Finally,

the federal Clean Water Act (CWA) authorizes citizens to bring suit against dischargers for certain types of CWA violations.

I. FAIR, FIRM, CONSISTENT, AND TRANSPARENT ENFORCEMENT

It is the policy of the State Water Board that the Water Boards shall strive to be transparent, fair, firm, and consistent in taking enforcement actions throughout the State, while recognizing the unique facts of each case. The Water Boards acknowledge that contractors or agents for legally responsible persons (the discharger(s) named in the underlying order, or the owner and operator in the case of an unpermitted discharge) frequently bear some of the responsibility for violations. In appropriate cases, the Water Boards may bring enforcement actions against contractors and/or agents, in addition to the legally responsible person(s) or permittees, for some or all of the same violations.

A. Standard and Enforceable Orders

Water Board orders shall be consistent except as appropriate for the specific circumstances related to the violation or discharge, and to accommodate differences in applicable water quality control plans.

B. Determining Compliance

The Water Boards ~~shall implement a consistent and~~ **have a variety of** *valid* ~~approach~~ **approaches that can be used** *to determine compliance* ~~with enforceable orders~~. **In utilizing these approaches, the Water Boards' interpretation of what constitutes compliance shall be consistent except as appropriate to accommodate differences in specific circumstances.**

C. ~~A.~~ Consistent Enforcement

The Water Boards' enforcement actions shall be suitable for each type of violation, providing consistent treatment for violations that are similar in nature and have similar water quality impacts. Where necessary, enforcement actions shall also ensure a timely return to compliance.

The Water Boards achieve consistency in enforcement by applying the penalty ~~calculator~~ **calculation methodology** in Section VI and not by comparing enforcement matters. While comparing similar enforcement cases is not prohibited and may be relevant, this Policy does not require a Water Board to compare a proposed penalty to other actions that it or another Water Board has taken, or **to** make findings about why the assessed or proposed amounts differ.

D. ~~B.~~ Fair Enforcement

Fair enforcement requires, at a minimum, adequate civil liabilities to ensure that no competitive economic advantage is attained through non-compliance, while recognizing that, in many cases, merely recapturing the economic benefit gained by non-compliance

is insufficient to establish an appropriate level of specific and/or general deterrence and a higher penalty should be imposed.

E. ~~C.~~ Progressive Enforcement

Progressive enforcement is one of the most important components of fair and consistent enforcement. Generally, progressive enforcement is grounded in the idea that the Water Boards' mission is, in part, to preserve, enhance, and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses. Progressive **enforcement** ~~Enforcement~~ contemplates an escalating series of actions beginning with notification of violations and compliance assistance, followed by enforcement orders compelling compliance, culminating in a complaint for civil liabilities. While **progressive enforcement** ~~Progressive Enforcement~~ is the most typical approach to enforcement, it is not always the most appropriate enforcement strategy. Rather, it must be balanced with the other important aspects of enforcement discussed in this Policy. **Progressive enforcement is only possible when enforcement is discretionary and is not applicable when assessing mandatory minimum penalties. As discussed in Section B of Appendix A, progressive enforcement** ~~Progressive Enforcement~~ may not be an appropriate enforcement response when**, for example,** violations result from intentional or grossly negligent misconduct, or where the impacts to beneficial uses are above moderate or major. The Water Boards may consider previous efforts to address similar issues.

F. ~~D.~~ Transparency

Water Board enforcement orders should provide clear and consistent evidence and policy-based findings by decision makers to support order directives.

G. ~~E.~~ Environmental Justice and Disadvantaged Communities

The Water Boards shall promote enforcement of all health and environmental statutes within their jurisdictions in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority and low-income populations in the state.

Specifically, the Water Boards shall pursue enforcement that is consistent with the goals identified in CalEPA's Intra-Agency Environmental Justice Strategy, August 2004 ~~(https://calepa.ca.gov/files/2017/01/EnvJustice-Documents-2004yr-EnglishStrategy.pdf)~~ **(https://calepa.ca.gov/wp-content/uploads/sites/6/2017/01/EnvJustice-Documents-2004yr-EnglishStrategy.pdf) and the September 10, 2021, Memorandum of Understanding on Collaborative Efforts on Enforcement and Compliance Assurance in Overburdened Communities between US EPA and CalEPA (https://calepa.ca.gov/wp-content/uploads/sites/6/2021/09/2021-09-10-MOU_CalEPA-USEPA-1.pdf)** as follows:

a. Integrate environmental justice considerations into the enforcement of environmental laws, regulations, and policies;

b. Ensure meaningful public participation in enforcement matters;

c. Improve data collection and availability of violation and enforcement information for minority communities and low-income populations; and,

d. Ensure effective cross-media coordination and accountability in addressing environmental justice issues.

Publicly-owned treatment works (POTW), public water companies, municipal ~~storm water~~ stormwater collection and sewage collection systems that serve environmental justice and disadvantaged communities must comply with water quality protection laws. When water quality violations occur in these ~~disadvantaged~~ communities, passing costs associated with facility upgrades and compliance measures through to ratepayers may create unduly burdensome financial hardships in the same way it does with small, disadvantaged communities (discussed below).

In recognition of the financial hardships the cost of compliance may pose for environmental justice and disadvantaged communities and, in furtherance of the Water Boards' commitment to environmental justice in enforcement, the Water Boards should consider informal enforcement and/or compliance assistance as the first step to address violations, unless there are extenuating circumstances. The Water Boards should consider the disadvantaged community POTW's, public water company's or municipal ~~storm water~~ stormwater collection system's commitment to achieve compliance, the degree of economic hardship potentially imposed on ratepayers, and the availability of grants or low/no interest loans.

The Water Boards shall also prioritize and pursue enforcement in furtherance of State Water Board Resolution 2016-0010, adopting the Human Right to Water as a core value, and will make information about violations of the Human Right to Water available through the Water Boards' public databases. In furtherance of the Human Right to Water, the Water Boards shall prioritize the enforcement of violations that involve a discharge or threatened discharge, which results in or threatens to result in, the contamination of drinking water resources.

In addition, the Water Boards shall consider the State Water Board's Racial Equity Resolution 2021-0050, which defines racial equity as "racial equity occurs when race can no longer be used to predict life outcomes, and outcomes for all groups are improved." In furtherance of achieving racial equity, the Water Boards shall prioritize the enforcement of violations that involve an undue impact to communities where Black, Indigenous, and people of color reside.

The California Communities Environmental Health Screening Tool (CalEnviroScreen) is a screening methodology used to help identify California communities that are disproportionately burdened by multiple sources of pollution (https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-40). CalEnviroScreen is a resource for the Water Boards to utilize in determining whether a geographic area is a disadvantaged community.

Communities identified as disadvantaged within CalEnviroScreen are considered

disadvantaged for the purposes of this Policy. The Water Boards may also designate additional geographic areas as disadvantaged or environmental justice communities on a case-by-case basis. In order to make this determination, the Water Boards may consider the following definitions:

"Disadvantaged Community" per Health and Safety Code section 39711 includes:

- Areas disproportionately affected by environmental pollution and other hazards that can lead to negative public health effects, exposure, or environmental degradation; or
- Areas with concentrations of people that are of low income, high unemployment, low levels of homeownership, high rent burden, sensitive populations, or low levels of educational attainment.

Water Code section 189.7 also defines "Disadvantaged Community," for the purpose of directing the Water Boards to engage in targeted outreach prior to the adoption of a plan, policy, or permit. Water Code section 189.7, subdivision (d)(1) provides: "'Disadvantaged community' means a community in which the median household income is less than 80 percent of the statewide annual median household income level."

"Environmental Justice" per Government Code section 65040.12 and Public Resources Code section 30107.3 means the fair treatment and meaningful involvement of people of all races, cultures, incomes, and national origins, with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies. 'Environmental justice' includes, but is not limited to, all of the following:

- The availability of a healthy environment for all people.
- The deterrence, reduction, and elimination of pollution burdens for populations and communities experiencing the adverse effects of that pollution, so that the effects of the pollution are not disproportionately borne by those populations and communities.
- Governmental entities engaging and providing technical assistance to populations and communities most impacted by pollution to promote their meaningful participation in all phases of the environmental and land use decisionmaking process.
- At a minimum, the meaningful consideration of recommendations from populations and communities most impacted by pollution into environmental and land use decisions.

H. ~~F.~~ California Native American Tribes

The Water Boards are committed to improving communication and working relationships with California Native American Tribes. Consistent with the Water Board's Tribal Consultation Policy (https://www.waterboards.ca.gov/about_us/public_participation/tribal_affairs/doc

s/california_water_board_tribal_cunsultation_policy.pdf) and CalEPA's Tribal Consultation Policy (https://calepa.ca.gov/wp-content/uploads/sited/6/2020/03/CalEPA-Tribal-Consult-Protocol_200220_Final_a.pdf), this Policy encourages engaging with California Native American Tribes on a government-to-government basis in order to achieve meaningful consultation and collaboration. Where enforcement actions impact or threaten to impact tribal lands, tribal interests or tribal cultural resources, the Water Boards will communicate, engage, and consult with California Native American Tribes.

I. Facilities Serving Small Communities

The State Water Board has a comprehensive strategy for **wastewater** facilities serving small and/or disadvantaged communities that extends beyond enforcement and will revise that strategy as necessary to address the unique compliance challenges faced by these communities (see State Water ~~**Resources Control**~~ Board Resolution 2008-0048). Consistent with this strategy, reference in this Section **I** ~~**H F**~~ to small communities is intended to denote both small and disadvantaged small communities.

POTWs, public water companies, municipal ~~**storm water**~~ **stormwater** collection and sewage collection systems that serve small communities must comply with water quality protection laws. The State Water Board recognizes that complying with environmental laws and regulations will require higher per capita expenditures in small communities than in large communities. When water quality violations occur, traditional enforcement practices used by the Water Boards may result in significant costs to these communities and their residents, thereby limiting their ability to achieve compliance without suffering disproportionate hardships.

In recognition of these factors, informal enforcement or compliance assistance will be the first steps taken to return a facility serving a small community to compliance, unless the Water Board finds that extenuating circumstances apply. Informal enforcement is covered in Appendix A. Compliance assistance activities are based on an entity's commitment to achieve compliance and shall be ~~**offered**~~ **considered** in lieu of enforcement for communities which demonstrate that commitment when an opportunity exists to correct the violations. Compliance assistance activities that serve to bring a facility into compliance include, but are not limited to:

- Education of the discharger and its employees regarding their permit, order, monitoring/reporting program, or any applicable regulatory requirements;
- Working with the discharger to seek solutions to resolve violations or eliminate the causes of violations; and,
- Assistance in identifying available funding and resources to implement measures to achieve compliance.

Further, the Water Boards recognize that timely initiation of progressive enforcement is important for a noncompliant facility serving a small community. When enforcement is taken before a large liability accumulates, there is greater likelihood the facility serving

the small community will be able to address the liability and return to compliance within its financial capabilities.

II. ENFORCEMENT PRIORITIES FOR DISCRETIONARY ENFORCEMENT ACTIONS

It is the policy of the State Water Board that every violation results in the appropriate enforcement response consistent with the priority of the violation established in accordance with this Policy. This Policy acknowledges that enforcement prioritization enhances the Water Boards' ability to leverage their scarce enforcement resources and to achieve the general deterrence needed to encourage the regulated community to anticipate, identify, and correct violations. To that end, the Water Boards shall rank violations, then prioritize cases for formal discretionary enforcement action to ensure the most efficient and effective use of available resources. Each Regional Water Board shall appoint an Enforcement Coordinator to assist with prioritizing cases and implementing this Policy.

Enforcement staff for each Regional Water Board and/or relevant division at the State Water Board shall meet periodically, but in no event less than quarterly, to pre-screen and analyze potential cases for discretionary enforcement. These enforcement prioritization meetings should include the Regional Water Board Enforcement Coordinator, one or more attorney liaisons from the State Water Board Office of Enforcement, enforcement staff and the lead prosecutor or the lead prosecutor's designee. Program leads and supervisors are encouraged to refer potential enforcement matters to the lead prosecutor or the lead prosecutor's designee for analysis and discussion, and to attend all or appropriate parts of the prioritization meetings. Because the purpose of the enforcement prioritization meetings is for Water Board leadership, staff, and their attorneys to candidly discuss case prioritization, some or all of the dialogue and/or documents referred to at the meetings may be attorney client privileged and/or work product protected. Appropriate protocols should be established by Water Board leadership to maintain separation of functions between enforcement staff attending the prioritization meeting and staff who may serve in an advisory capacity to the Board at an adjudicatory hearing.

A. Ranking Violations

The first step in enforcement prioritization is to determine the relative significance of each violation or series of violations at a particular facility. Significance should be determined by analyzing the severity of impacts to beneficial uses, the level of disregard for regulatory program requirements, and deviation from applicable water quality control plan standards or permit or order conditions.

Class A priority violations are those violations that potentially pose an immediate and substantial threat to beneficial uses and/or that have the potential to cause significant detrimental impacts individually or cumulatively to human health or the environment. Unless unusual, unique or ~~**exceptions**~~ **exceptional** circumstances exist, Class A violations ordinarily include, but are not limited to, the following:

- Discharges causing exceedances of primary maximum contaminant levels for chemical constituents in receiving waters with a beneficial use of municipal and domestic supply (MUN);
- Unauthorized discharges of *sewage, regardless of level of treatment, within 1,000 feet of a municipal water* ~~intake impacting the use of municipal drinking water supply~~ **supply intake or well. Discharges of sewage solely to land that are promptly cleaned up and do not pose a threat to municipal water supplies are generally not Class A violations**;
- Discharges exceeding water quality based effluent limitations for priority pollutants as defined in the California Toxics Rule by 100 percent or more;
- Discharges causing demonstrable detrimental impacts to aquatic life and aquatic-dependent wildlife (e.g., fish kill);
- Discharges violating numeric acute toxicity effluent limitations;
- Unauthorized discharges from Class II surface impoundments;
- For discharges subject to Title 27 requirements, failure to implement corrective actions inaccordance with WDRs;
- Unpermitted fill of wetlands exceeding 0.5 acre in areal extent;
- Unauthorized discharges of construction materials to receiving waters with beneficial uses of COLD, WARM, ~~and/or~~ WILD**, BIOL, RARE, or SPAWN**; and,
- Discharges causing in-stream turbidity in excess of 100 nephelometric turbidity units (NTU) in inland surface waters with beneficial uses of COLD, WARM, ~~and/or~~ WILD**, BIOL, RARE, or SPAWN**, except during storm events.

Violations involving recalcitrant parties who deliberately avoid compliance with water quality regulations or Water Board orders are also considered Class A priority violations because they pose a serious threat to the integrity of the Water Boards' regulatory programs.

All other violations are Class B violations.

B. Case Prioritization for Individual Entities

The second step in enforcement prioritization involves establishing case priorities for discretionary enforcement actions against specific individual entities, and determining the appropriate remedial tool. Discharges ~~**that fall into one of the "Class A" categories above**~~ **identified as Class A** will be further analyzed for the extent of impact to beneficial uses when Regional Water Boards prioritize cases and determine whether

and how to proceed with enforcement.

In determining the importance of addressing the violations of a given entity, the following non-exclusive factors should be considered:

1. In furtherance of the Human Right to Water, violations that involve a discharge or threatened discharge, that results in or threatens to result in, the contamination of drinking water resources;
2. **Whether the violations impact or threaten to impact environmental justice or disadvantaged communities;**
3. **Consistent with the State Water Board's Racial Equity Resolution, violations that involve an undue impact or threatened impact to Black and Indigenous communities and other communities of color, and violations that impact or threaten to impact California Native American Tribes;**
4. ~~3.~~ Significance of the entity's violation(s) as assessed in Step 1;
5. ~~4.~~ Whether the entity has avoided the cost of compliance and therefore gained acompetitive economic advantage and/or economic benefit;
6. ~~5.~~ Compliance history of the entity:
   a. Whether the violations have continued over an unreasonably long period afterbeing brought to the entity's attention **or** ~~**and**~~ reoccurring, **or both**;
   b. Whether the entity has a history of noncompliance; and,
   c. Good-faith efforts to eliminate noncompliance.~~;~~
7. ~~6.~~ Evidence of, or threat of, pollution or nuisance caused by violations;
8. ~~7.~~ The magnitude of impacts of the violation(s);
9. ~~8.~~ Case-by-case factors that may mitigate a violation;
10. ~~9.~~ Impact or threat to high priority watersheds or water bodies (e.g., due to the vulnerability of an existing beneficial use or an existing state of impairment);
11. ~~10.~~ Potential to abate effects of the violations;
12. ~~11.~~ Strength of evidence in the record to support the enforcement action;
13. ~~12.~~ Availability of resources for enforcement; and,
14. ~~13.~~ Whether the action is likely to encourage similarly situated members of the regulated public to voluntarily identify, and avoid or correct similar violations.

C. Setting Statewide and Regional Priorities

~~**On a biennial basis, the**~~ **As necessary, the** State Water Board Office of Enforcement will propose statewide enforcement priorities and vet them with the Regional Water Board enforcement teams. Based on this process, some proposed statewide

enforcement priorities will become statewide enforcement initiatives. These initiatives may be based on types of violations, individual regulatory programs, particular watersheds, **impacts to environmental justice or disadvantaged communities,** or any other combined aspect of the regulatory framework in which an increased enforcement presence may be required on a statewide or multi-regional basis. These initiatives ~~**will**~~ **should** be documented in an annual enforcement report **or otherwise reported out to the public** and reevaluated each year.

It is recommended that, on an annual basis, enforcement staff for each Regional Water Board seek input at a regularly noticed public meeting of the Regional Water Board and consider identifying general enforcement priorities based on input from members of the public and Regional Water Board members within thirty (30) days thereafter.

D. Mandatory Enforcement Actions

In addition to these criteria for discretionary enforcement, the Water Boards will continue to address mandatory enforcement obligations imposed by law (e.g., MMPs under Wat. Code § 13385, subds. (h) & (i)). ~~**As detailed in Appendix B, absent good cause, these mandatory actions should be taken within 18 months of the time that the violations became known.**~~

E. Multiple Violations Resulting from the Same Incident

By statute, certain situations that involve multiple violations are treated as a single violation per day, such as a single operational upset that leads to simultaneous violations of more than one pollutant parameter. (Wat. Code § 13385, sub. (f)(1).) For situations not addressed by statute, multiple violations can be alleged as a single violation at the discretion of the Water Boards, under the following circumstances:

a. **The facility violates the same requirement at one or more locations within the facility;**
b. **A single operational upset leads to violations that occur on multiple days;**
c. **Violations are not independent of one another or are not substantially distinguishable. For such violations, the Water Boards should consider the most egregious violation(s); or,**
d. **A single act leads to violations of similar requirements in different applicable permits or plans, but the requirements are designed to address the same water quality issue.**

If the violations do not fit the above categories, each instance of the same violation shall be alleged as a separate violation.

Except where statutorily required, multiple violations shall not be grouped and considered as a single violation when those multiple violations each result in a distinguishable economic benefit to the violator.

III. ENFORCEMENT ACTIONS

The Water Boards have a variety of enforcement tools to use in response to noncompliance by dischargers. With certain specified exceptions ~~California~~ Water Code section 13360, subdivision (a), prohibits the State Water Board or Regional Water Board from specifying the design, location, type of construction, or particular manner in which compliance may be had with a particular requirement. All enforcement actions and their applicable compliance milestones will be tracked in the Water Board's enforcement databases. See Appendix A for additional information.

IV. STATE WATER BOARD ENFORCEMENT ACTION

The Regional Water Boards have primary responsibility for matters directly affecting the quality of waters within their region, including enforcement matters. The State Water Board generally acts as an administrative appellate body for enforcement proceedings, but also has oversight authority in water quality enforcement matters and may, from time to time, take enforcement action in lieu of the Regional Water Board ~~as follows~~ **where it determines that it is appropriate to do so. Some potential examples include, but are not limited to, the following**:

- In response to petitions alleging inaction or ineffective enforcement action by a Regional Water Board;
- To enforce statewide or multi-regional general permits;
- To investigate and take enforcement against multi-regional facilities and/or permittees;
- Where a discharger's violations cause actual or potential harm in more than one region;
- Where the Regional Water Board's lead prosecutor has requested that the State Water Board take over the enforcement action;
- Where a Regional Water Board is unable to take an enforcement action because of quorum problems, conflicts of interest, or other administrative circumstances;
- Where an enforcement matter involves both water rights and water quality violations ~~and the water rights violations are predominant~~; and,
- Where an enforcement matter involves both water quality violations and alleged Health and Safety Code violations for fraud, waste and/or abuse of funds from the Underground Storage Tank (UST) Cleanup Fund, and actions where the Executive Director has determined that enforcement by the State Water Board is necessary and appropriate.

Where the State Water Board decides to pursue such enforcement, the Office of Enforcement will coordinate investigation of the violations and preparation of the enforcement action with the staff of the affected Regional Water Boards to ensure that the State Water Board will not duplicate efforts of the Regional Water Board. Except

under unusual circumstances, the Regional Water Board enforcement staff will have the opportunity to participate and assist in any investigation and the Office of Enforcement will seek input from the Regional Water Board enforcement staff in the development of any resulting enforcement action. Such action may be brought before the State Water Board or the Regional Water Board, as is deemed appropriate for the particular action. The decision as to where to bring the enforcement action will be discussed with the affected Regional Water Board enforcement staff. Enforcement actions requiring compliance monitoring or long-term regulatory follow-up will generally be brought before the appropriate Regional Water Board.

V. COORDINATION WITH OTHER REGULATORY AGENCIES

A. Hazardous Waste Facilities

At hazardous waste facilities where the Regional Water Board is the lead agency for corrective action oversight, the Regional Water Board shall consult with Department of Toxic~~s~~ Substances Control (DTSC) to ensure, among other things, that corrective action is at least equivalent to the requirements of the Federal Resource, Conservation, and Recovery Act (RCRA).

B. Oil Spills

The Water Boards will consult and cooperate with the Office of Spill Prevention and Response (OSPR) at DFW for any oil spill involving waters under the jurisdiction of OSPR.

C. General

The Water Boards will work cooperatively with other local, state, regional, and federal agencies when violations for which the agency itself is not responsible occur on lands owned or managed by the agency. Where appropriate, the Water Boards will also coordinate enforcement actions with other agencies that have concurrent enforcement authority.

VI. MONETARY ASSESSMENTS IN ADMINISTRATIVE CIVIL LIABILITY ~~(ACL)~~ ACTIONS

A. Penalty Calculation Methodology

The following provisions apply to all discretionary ACL actions. MMPs required pursuant to Water Code section 13385, subdivisions (h) and (i), are discussed in Section VII.

As a general matter, where a civil penalty structure has been devised to address environmental violations, as in the ~~California~~ Water Code, civil penalties do not depend on proof of actual harmor damages to the environment. Courts in reviewing similar environmental protection statutes have held that a plaintiff need not prove a loss before

recovering a penalty; instead, the defendant must demonstrate that the penalty should be less than the statutory maximum. In certain cases, a strong argument can be made that consideration of the statutory factors can support the statutory maximum as an appropriate penalty for water quality violations in the absence of any other mitigating evidence. Moreover, as discussed below, Porter-Cologne requires that certain civil liabilities be set at a level that accounts for any "economic benefit or savings" violators gained through their violations. (Wat. Code, § 13385, subd. (e).) Economic benefit or savings is a factor to be considered in determining the amount of other civil liabilities. (Wat. Code, § 13327.) The Water Boards should impose civil liabilities at levels sufficient to ensure that violators do not gain a competitive economic advantage from avoiding and/or delaying the costs of compliance. Fairness does not require the Water Boards to compare an adopted or proposed penalty to other actions. The Water Boards have powerful liability provisions at their disposal which the Legislature and the public expect them to fairly and consistently implement for maximum enforcement impact to address, correct, and deter water quality violations. It is the intent of the State Water Board, by establishing this penalty calculation methodology, to help ensure that these powerful liability provisions are exercised in a transparent, fair, and consistent manner.

While it is a goal of this Policy to establish broad consistency in the Water Boards' approach to enforcement, the Policy recognizes that, with respect to liability determinations, each Regional Water Board, and each specific case, is somewhat unique. The goals of this section are to provide a consistent approach and method of analysis of the applicable statutory factors, and to provide a transparent analytical route for decision makers to deliberate on the evidence presented and make the necessary findings when determining an ACL. Where violations are standard and routine, a consistent and repeatable outcome can be reasonably expected using this Policy. In more complex matters, however, the need to assess all of the applicable factors in liability determinations may yield different outcomes in cases that may have many similar attributes. Making transparent and evidence-based and/or ~~policy-supported~~ **policy-based** findings will provide sound bases for those different outcomes.

Liabilities imposed by the Water Boards are an important part of the Water Boards' enforcement authority. Accordingly, any assessment of an ACL, whether negotiated pursuant to a settlement agreement or imposed after an administrative adjudication, should:

- Be assessed in a fair and consistent manner;
- Fully eliminate any economic advantage obtained from noncompliance;[1]
- Fully eliminate any unfair competitive advantage obtained from noncompliance;

[1] When liability is imposed under ~~California~~ Water Code **§ section** 13385, Water Boards are statutorily obligated to recover, at a minimum, all economic benefit to the violator as a result of the violation. Consistent with the principles of fairness expressed herein, this Policy extends the requirement to recover a minimum of all economic benefit **plus 10 percent** to all discretionary ACL actions, except when decision makers make specific, evidence-based **or policy-based** findings, **or both,** under Step **7** ~~8~~, Other Factors as Justice May Require. **Under no circumstances shall the decision makers impose a liability that is below the economic benefit amount when liability is imposed under Water Code section 13385.**

- Contain evidence-based and/or policy-based findings that provide transparency in understanding the bases for a decision;
- Bear a reasonable relationship to the gravity of the violation and the **actual** harm or potential for harm to beneficial uses or regulatory program resulting from the violation;
- Deter the specific person(s) identified in the ACL from committing further violations; and,
- Deter similarly situated person(s) in the regulated community from committing the same or similar violations.

The liability calculation process set forth in this ~~chapter~~ **section** provides the ~~decision-maker~~ **decision maker** with a methodology for arriving at a liability amount consistent with these objectives. This process is applicable to determining administratively adjudicated assessments, as well as those obtained through settlement. In reviewing a petition challenging the use of this methodology by a Regional Water Board, the State Water Board will generally defer to the decisions made by the Regional Water Board~~s~~ in calculating the liability amount unless it is demonstrated that the Regional Water Board made a clear factual mistake or error of law, or that it abused its discretion.

~~**The following provisions apply to all discretionary ACL actions. MMPs required pursuant to California Water Code section 13385, subdivisions (h) and (i), are discussed in Chapter VII.**~~

General Approach

A brief summary of each step is provided immediately below. A more complete discussion of each step is presented later in this section.

Step 1. *Actual Harm or Potential for Harm for Discharge Violations* – Calculate ActualHarm or Potential for Harm considering: (1) the degree of toxicity of the discharge; (2) the actual or potential for harm to beneficial uses; and (3) the discharge's susceptibility to cleanup or abatement.

Step 2. *Per Gallon and Per Day Assessments for Discharge Violations* – For discharges resulting in violations, use Table 1 and/or Table 2 to determine Per Gallon and/orPer Day Assessments. Depending on the particular language of the ACL statute being used, either or both tables may be used. Multiply these factors by per gallon and/or per day amounts, as described below. Where allowed by ~~code~~ **the Water Code**, both amounts should be determined and added together. This becomes the initial ACL amount for the discharge violations.

Step 3. *Per Day Assessments for non-Discharge Violations* – For non-discharge violations, use Table 3 to determine per day assessments. Multiply these factors by the per day amount **after considering whether to collapse days for multiple day violations** ~~as described below~~. This becomes the initial ACL amount for the non-discharge violations. ~~**Where allowed by the California Water Code, amounts for these violations**~~

~~should be added to amounts (if any) for discharge violations from Step 2, above.~~

Step 4. *Adjustment Factors* – Adjust the initial amounts for each violation by factors addressing the violator's conduct.~~, multiple instances of the same violation, andmultiple day violations~~.

Step 5. *Total Base Liability Amount* – Add the adjusted amounts for each violation from Step 4.

Thereafter, the Total Base Liability **Amount** ~~amount~~ may be adjusted, based on consideration of the following:

~~**Step 6**~~. ~~***Ability to Pay and Ability to Continue in Business* – If the Total Base Liability calculated under the methodology exceeds the discharger's ability to pay, or would impact the discharger's ability to continue in business, the decision maker may adjust the liability downward provided express findings are made to justify so doing. Decision makers need only consider ability to pay and continue in business under the California Water Code and this Policy, and are well within their discretion to decline to reduce a liability based on this factor.~~

Step **6** ~~7~~. *Economic Benefit* – The economic benefit of the violations must be determined based on the best available information, and the amount of the ACL should exceed this amount **by at least 10 percent** so that avoiding costs of compliance is not rewarded.

Step **7** ~~8~~. *Other Factors as Justice May Require* – Determine if there are additional factors that should be considered that would justify an increase or a reduction in the Total Base Liability **Amount** ~~amount~~. These factors must be supported by evidence**-based** or policy**-based** considerations and documented ~~in the ACL Complaint or Order~~ by a finding that, taken as a whole, the liability amount is just in light of the violations. One of the factors decision makers should consider in this step is the staff costs of investigating the violations and issuing the ACL. Subject to the guidance provided in more detail below regarding when to begin and end the calculation of staff costs and how much to charge for particular staff, staff costs can and should be added to the amount of the ACL.

Step 8. ***Ability to Pay and Ability to Continue in Business* – If the Total Base Liability Amount calculated under the methodology exceeds the discharger's ability to pay, or would impact the discharger's ability to continue in business, the decision maker may adjust the liability downward provided express findings are made to justify so doing. Decision makers need only consider ability to pay and continue in business under the Water Code and this Policy, and are well within their discretion to decline to reduce a liability based on this factor.**

Step 9. *Maximum and Minimum Liability Amounts* – Determine the statutory maximum and **statutory and policy-based** minimum amounts of the

ACL, if any. Adjust the ACL to ensure it is within these limits.

Step 10. *Final Liability Amount* – The final liability amount will be assessed after consideration of the above factors. The final liability amount and significant considerations regarding the liability amount must be discussed in the ACL Complaint and in any order imposing liability.

STEP 1 – Actual or Potential for Harm for Discharge Violations

Calculating this factor is the initial step for discharge violations. Begin by determining the actual harm or potential harm to the water body's beneficial uses caused by the violation using a three-factor scoring system to quantify: (1) the degree of toxicity of the discharge; (2) the actual harm or potential harm to beneficial uses; and (3) the discharge's susceptibility to cleanup or abatement for each violation or group of violations. Because actual harm is not always quantifiable due to untimely reporting, inadequate monitoring, and/or other practical limitations, potential harm can be used under this factor.

Factor 1: The Degree of Toxicity of the Discharge

The evaluation of the degree of toxicity considers the physical, chemical, biological, and/or thermal characteristics of the discharge, waste, fill, or material involved in the violation or violations and the risk of damage the discharge could cause to the receptors or beneficial uses. A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material, as outlined below. Evaluation of the discharged material's toxicity should account for all the characteristics of the material prior to discharge, including, but not limited to,whether it is partially treated, diluted, concentrated, and/or a mixture of different constituents. Toxicity analysis should include assessment of both lethal and sublethal effects such as effects on growth and reproduction. Factor 2 (below) is focused on impacts or the threat of impacts to beneficial uses in specific receiving waters; whereas Factor 1 is focused on the nature and characteristics, or toxicity of the material discharged in the context of potential impacts to beneficial uses more generally.

0 = Discharged material poses a negligible risk or threat to potential receptors (**e.g.~~i.e.~~**, the chemical and/or physical characteristics of the discharged material are benign and would not impact potential receptors **[e.g. human health, aquatic life, habitat, etc.]**).

1 = Discharged material poses only minor risk or threat to potential receptors (**e.g.~~i.e.~~**, the chemical and/or physical characteristics of the discharged material are relatively benign and would not likely cause harm to potential receptors **[e.g. human health, aquatic life, habitat, etc.]**).

2 = Discharged material poses a moderate risk or threat to potential receptors (**e.g.~~i.e.~~**, the chemical and/or physical characteristics of the discharged material have some level oftoxicity or pose a moderate level of threat to potential receptors **[e.g. human health, aquatic life, habitat, etc.]**).

3 = Discharged material poses an above-moderate risk or a direct threat to

potential receptors (e.g.~~i.e.~~, the chemical and/or physical characteristics of the discharged material exceed known risk factors or there is substantial threat to potential receptors [e.g. human health, aquatic life, habitat, etc.]).

4 = Discharged material poses a significant risk or threat to potential receptors (e.g.~~i.e.~~, the chemical and/or physical characteristics of the discharged material far exceed risk factors and pose a significant threat to potential receptors ~~uses~~ [e.g. human health, aquatic life, habitat, etc.]).

Factor 2: Actual Harm or Potential Harm to Beneficial Uses

The evaluation of the actual harm or the potential harm to beneficial uses factor considers the harm to beneficial uses in the affected receiving water body that may result from exposure to the pollutants or contaminants in the discharge, consistent with the statutory factors of the nature, circumstances, extent, and gravity of the violation(s). The Water Boards may consider actual harm or potential harm to human health, in addition to harm to beneficial uses. The score evaluates direct or indirect actual harm or potential for harm from the violation. A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm is negligible (0), minor (1), below moderate (2), moderate (3), above moderate (4), or major (5). Actual harm as used in this section means harm that is documented and/or observed. Potential harm should be evaluated in the context of the specific characteristics of the waste discharged and the specific beneficial uses of the impacted waters.

0 = Negligible – no actual harm or potential harm to beneficial uses.

1 = Minor – no actual harm and low threat of harm to beneficial uses. A score of minor is typified by a lack of observed impacts, but based on the characteristics of the discharge and applicable beneficial uses; there is potential short term impact to beneficial uses with no appreciable harm.

2 = Below moderate – less than moderate harm or potential harm to beneficial uses. A score of below moderate is typified by observed or reasonably expected potential impacts, but based on the characteristics of the discharge and applicable beneficial uses, harm or potential harm to beneficial uses is measurable in the short term, but not applicable.

3 = Moderate – moderate harm or potential harm to beneficial uses. A score of moderate is typified by observed or reasonably expected potential impacts, but harm or potential harm to beneficial uses is moderate and likely to attenuate without appreciable medium or long term acute or chronic effects.

4 = Above moderate – more than moderate harm or potential harm to beneficial uses. A score of above moderate is typified by observed or reasonably expected potential significant impacts, and involves potential for actual partial or temporary restrictions on, or impairment of, beneficial uses.

5 = Major – high harm or threat of harm to beneficial uses. A score of major is typified by observed or reasonably expected potential significant impacts, and involves potential for or actual acute, and/or chronic (e.g., more than five day)

restrictions on, or impairment of, beneficial uses, aquatic life, and/or human health.

Factor 3: Susceptibility to Cleanup or Abatement

A score of 0 is assigned for this factor if the discharger cleans up 50 percent or more of the discharge within a reasonable amount of time. A score of 1 is assigned for this factor if less than 50 percent of the discharge is susceptible to cleanup or abatement, or if 50 percent or more of the discharge is susceptible to cleanup or abatement, but the discharger failed to cleanup 50 percent or more of the discharge within a reasonable time. Natural attenuation of discharged pollutants in the environment is not considered cleanup or abatement for purposes of evaluating this factor.

Final Score – "Potential for Harm"

The scores for the factors are then added to provide a Potential for Harm score for each violation or group of violations. The total score is used in the "Potential for Harm" axis for the Penalty Factor in Tables 1 and 2. The maximum score is 10 and the minimum score is 0.

STEP 2 – Assessments for Discharge Violations

~~**For violations of National Pollutant Discharge Elimination System (NPDES) permit effluent limitations, the base liability should be established by calculating the mandatory minimum penalty required under Water Code section 13385(h) and (i). The mandatory penalty should be adjusted upward where the facts and circumstances of the violation(s) warrant a higher liability via discretionary action in accordance with the outcome of the enforcement prioritization processes described in Section II, above.**~~

This step addresses per gallon and per day assessments for discharge violations. Generally, NPDES permit effluent limit violations should be addressed on a per day basis only.[2] However, where deemed appropriate, some NPDES permit effluent limit violations, and violations such as effluent spills or overflows, ~~**storm water**~~ **stormwater** discharges, or unauthorized discharges, the Water Boards should consider whether to assess both per gallon and per day penalties.

Per Gallon Assessments for Discharge Violations

Where there is a discharge, the Water Boards shall determine an initial liability amount on a per gallon basis using the Potential for Harm score and the extent of Deviation from Requirement of the violation. These factors will be used in Table 1 below to determine a Per Gallon Factor for the discharge. Except for certain high-volume discharges discussed below, the per gallon assessment would then be the Per Gallon Factor multiplied by the number of gallons subject to penalty multiplied by the maximum

[2] **NPDES permit violations subject to MMPs under Water Code section 13385(h) and (i) are addressed per violation. See Section VII for more information on MMPs.**

per gallon penalty amount allowed under the ~~California~~ Water Code.

TABLE 1 – Per Gallon Factor for Discharges

	Potential for Harm									
Deviation from Requirement	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**
Minor	0.005	0.007	0.01	0.02	0.04	0.08	0.14	0.2	0.3	0.35
Moderate	0.007	0.013	0.025	0.05	0.1	0.15	0.27	0.4	0.5	0.6
Major	0.01	0.02	0.04	0.08	0.15	0.28	0.41	0.6	0.8	1.0

The Deviation from Requirement reflects the extent to which the violation deviates from the specific requirement (effluent limitation, prohibition, monitoring requirement, construction deadline, etc.) that was violated. The categories for **Deviation from Requirement** in Table 1 are defined as follows:

- Minor – The intended effectiveness of the requirement remained generally intact (e.g., while the requirement was not met, its intended effect was not materially compromised).
- Moderate – The intended effectiveness of the requirement was partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement was only partially achieved).
- Major – The requirement was rendered ineffective (e.g., the requirement was rendered ineffective in its essential functions).

For requirements with more than one part, the Water Boards shall consider the extent of the violation in terms of its adverse impact on the effectiveness of the most significant requirement.

High Volume Discharges

In most cases, the Water Boards shall apply the above per gallon factor to the maximum per gallon amounts allowed under the ~~California~~ Water Code for the violations involved. However, recognizing that the volume of certain discharges can be very high, the Water Boards may elect to use a value between $2.00 per gallon and $10.00 per gallon with the above factor to determine the per gallon amount for discharges that are between 100,000 gallons and 2,000,000 gallons for each discharge event, whether it occurs on one or more days. For discharges in excess of 2,000,000 gallons, or for discharges of recycled water that has been treated for reuse, the Water Boards may elect to use a maximum of $1.00 per gallon with the above factor to determine the per gallon amount. These provisions are advisory and intended to provide a basis for achieving consistency and substantial justice in setting appropriate civil liabilities. Where electing to use a maximum of $1.00 per gallon or $2.00 per gallon would result in an inappropriately small civil liability based on the severity of impacts to beneficial uses, the discharger's degree of culpability, and/or other considerations, a higher amount, up to the statutory maximum, should be used. Examples of discharges

that could be subject to a reduction include, but are not limited to, wet weather sewage spills, partially-treated sewage spills, discharges from irrigated agricultural operations, potable water discharges, and construction or municipal stormwater discharges.

~~Generally, the Water Boards should attempt to avoid using a per gallon value that results in a lower penalty than what would be calculated for a smaller volume discharge in order to avoid rewarding or incentivizing the failure to mitigate the number of gallons discharged. For example, it would generally be inappropriate to use a maximum per gallon penalty of $2.00 for a discharge of 105,000 gallons when doing so would result in a lower penalty than would be imposed for a discharge of 95,000 gallons where the per gallon penalty was $10.00.~~

The Water Boards should be thoughtful when reducing the per gallon liability in order to avoid rewarding or incentivizing the failure to mitigate the number of gallons discharged and to further consistency in enforcement so that more egregious violations are assessed a higher liability than less egregious violations.

Per Day Assessments for Discharge Violations

Where there is a discharge, the Water Boards shall determine an initial liability factor per day based on the Potential for Harm score and the extent of Deviation from Requirement of the violation. These factors will be used in Table 2, below, to determine a Per Day Factor for theviolation. The per day assessment would then be the Per Day Factor multiplied by the maximum per day amount allowed under the ~~California~~ Water Code. Where ~~deemed~~ appropriate **under this Policy and allowed by the Water Code** ~~such as for a large scale spill or release~~, it is intended that Table 2 be used in conjunction with Table 1, so that both per gallon and per day amounts be considered under Water Code section 13385.

TABLE 2 – Per Day Factor for Discharges

	Potential for Harm									
Deviation from Requirement	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**
Minor	0.005	0.007	0.01	0.02	0.04	0.08	0.14	0.2	0.3	0.35
Moderate	0.007	0.013	0.025	0.05	0.1	0.15	0.27	0.4	0.5	0.6
Major	0.01	0.02	0.04	0.08	0.15	0.28	0.41	0.6	0.8	1.0

The categories for **Deviation from Requirement** in Table 2 are defined as follows:

- Minor – The intended effectiveness of the requirement remained generally intact (e.g., while the requirement was not met, its intended effect was not materially compromised).
- Moderate – The intended effectiveness of the requirement was partially compromised(e.g., the requirement was not met, and the effectiveness of the

requirement was only partially achieved).

- Major – The requirement was rendered ineffective (e.g., the requirement was rendered ineffective in its essential functions).

For requirements with more than one part, the Water Boards shall consider the extent of the violation in terms of the adverse impact on the effectiveness of the most significant requirement. The Water Boards shall apply the above per day factor to the maximum per day amounts allowed under statute for the violations involved. Where **appropriate under this Policy and** allowed by ~~**code**~~ **the Water Code**, both the per gallon and the per day amounts should be determined and added together. This becomes the initial amount of the ACL for the discharge violation~~**s**~~.

STEP 3 – Per Day Assessments for Non-Discharge Violations

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of deviation from applicable requirements. These violations include, but are not limited to, failure to conduct routine monitoring and reporting, failure to provide required information, and the failure to prepare required plans. While all non-discharge violations harm or undermine the Water Boards' regulatory programs and compromise the Water Boards' ability to perform their statutory and regulatory functions, some non-discharge violations have the potential to directly or indirectly impact beneficial uses and should result in more serious consequences.

The Water Boards shall use the matrix set forth below to determine the initial liability factor for each violation. The per day assessment would then be the Per Day Factor multiplied by the maximum per day amount allowed under the ~~**California**~~ Water Code. For multiple day violations, please refer to the Adjustment Factors in Step 4, below.

Table 3 shall be used to determine the initial penalty factor for a violation. The Water Boards should select a penalty factor from the range provided in the matrix cell that corresponds to the appropriate Potential for Harm and the Deviation from Requirement categories. The numbers in parenthesis in each cell of the matrix are the midpoints of the range.

TABLE 3 – Per Day Factor for Non-Discharge Violations

	Potential for Harm		
Deviation from Requirement	**Minor**	**Moderate**	**Major**
Minor	0.1 (0.15) 0.2	0.2 (0.25) 0.3	0.3 (0.35) 0.4
Moderate	0.2 (0.25) 0.3	0.3 (0.35) 0.4	0.4 (0.55) 0.7
Major	0.3 (0.35) 0.4	0.4 (0.55) 0.7	0.7 (0.85) 1

The categories for **Potential for Harm** in Table 3 are defined as follows:

- Minor – The characteristics of the violation have little or no potential to impair the WaterBoards' ability to perform their statutory and**/or** regulatory functions, present only a minor threat to beneficial uses, and/or the circumstances of the violation indicate a minor potential for harm.
- Moderate – The characteristics of the violation have substantially impaired the Water Boards' ability to perform their statutory and**/or** regulatory functions, present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. Most non-discharge violations should be considered to present a moderate potential for harm.
- Major – The characteristics of the violation have wholly impaired the Water Boards' ability to perform their statutory **and/**or regulatory functions, present a particularly egregious threat to beneficial uses, and/or the circumstances of the violation indicate a very high potential for harm. Non-discharge violations involving failure to comply with directives in cleanup and abatement orders **(CAO)**, cease and desist orders, and investigative orders, involving reports relating to impaired water bodies and sensitive habitats, should be considered major.

The categories for **Deviation from Requirement** in Table 3 are defined as follows:

- Minor – The intended effectiveness of the requirement remained generally intact (e.g., while the requirement was not met, its intended effect was not materially compromised).
- Moderate – The intended effectiveness of the requirement was partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement was only partially achieved).

- Major – The requirement was rendered ineffective (e.g., the requirement was rendered ineffective in its essential functions).

For requirements with more than one part, the Water Boards shall consider the extent of the violation in terms of the adverse impact on the effectiveness of the most significant requirement. For ~~or~~ any given requirement, the Deviation from Requirements may vary. For example, if a facility does not have a required response plan, or has not conducted required monitoring, submitted a required monitoring report, characterization report, or corrective action plan, the deviation would be major. If a facility has prepared a required plan, or submitted the required monitoring report, but significant elements are omitted or materially deficient, the deviation would be moderate. If a facility has a required plan or submitted the required monitoring report with only minor elements missing and/or minor deficiencies, the deviation would be minor.

Multiple Day Violations

For violations that are assessed a civil liability on a per day basis, the initial liability amount should be assessed for each day up to thirty (30) days. For non-discharge violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation. For these cases, the Water Board must make express findings that the violation:

a. **Is not causing daily detrimental impacts to the environment and is not causing daily detrimental impacts to the regulatory program;**
b. **Results in no discrete economic benefit from the illegal conduct that can be measured on a daily basis; or,**
c. **Occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation.**

If one of the above findings is made, an alternate approach to penalty calculation for multiple day, non-discharge violations may be used. In these cases, the liability shall not be less than an amount that is calculated based on an assessment of the liability for the first 30 days of the violation, plus an assessment for each 5-day period of violation, until the 60th day, plus an assessment for each 30 days of violation thereafter. For example, a non-discharge violation lasting 60 days would accrue a total of 36 days of violation, based on a per day assessment for days 1-30, 35, 40, 45, 50, 55, and 60. Similarly, a non-discharge violation lasting 90 days would accrue a total of 37 days of violation, based on a per day assessment for days 1-30, 35, 40, 45, 50, 55, 60, and 90. The suggested method for collapsing days of violation is intended to set the maximum permitted approach for reducing the number of days of violation when one or more of the above-referenced findings can be made. The Water Boards are within their discretion to decline to collapse days, or to collapse days at any level deemed appropriate between the maximum suggested number of collapsed days and the actual number of days of violation.

Any non-discharge violation that results in a delay to remedial action including, but not limited to, failure to timely submit a site conceptual model or corrective action plan under a CAO or other regulatory authority, or failure to submit certain technical or monitoring reports required by an investigation order under Water Code section 13267 or 13383, are not the type of violation for which the findings required by this section can ordinarily be made. Finding (b) may be made, at the discretion of the Water Board, in cases where the sole economic benefit measurable on a daily basis is "the time value of money."

It is never appropriate to collapse days for a discharge violation.

Multiply the days of violation by the Potential for Harm factor by the **maximum per day amounts under statute for the violations involved** ~~**Deviation from Requirement**~~ to determine the initial ACL amount for non-discharge violations.

STEP 4 – Adjustment Factors

Violator's Conduct Factors

The Water Boards must consider three additional factors for potential modification of the **initial** ACL amount: the violator's degree of culpability, the violator's prior history of violations, and the violator's voluntary efforts to cleanup, or its cooperation with regulatory authorities after the violation. Not all factors will apply in every liability assessment.

TABLE 4 – Violator's Conduct Factors

Factor	Adjustment
Degree of Culpability	Discharger's degree of culpability prior to the violation: Higher liabilities should result from intentional or negligent violations than for accidental,non-negligent violations. A first step is to identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation. The test for whether a discharger is negligent is what a reasonable and prudent person would have done or not done under similar circumstances. Adjustment should result in a multiplier between **0.75 and 1.5**, with a higher multiplier for intentional misconduct and gross negligence, and alower multiplier for more simple negligence. A neutral assessment of 1.0 should be used when a discharger is determined to have acted as a reasonable and prudent person would have. A multiplier of less than 1.0 should only be used when a discharger demonstrates that it has exceeded the standard of care expected of a reasonably prudent person to prevent the violation. **A discharger that has been made aware of the violation by the Water Boards, through either a formal or informal enforcement action, as described in Appendix A, Sections A and B, should receive a higher culpability assessment if the violation**

Factor	Adjustment
	continues or if a subsequent, related violation occurs.
History of Violations	Any prior history of violations: Where the discharger has no prior history of violations, this factor should be neutral, or 1.0. Where the discharger has ~~at least one~~ prior violation*s* within the last five years, the Water Boards should use a multiplier of **1.1**. Where the discharger has a history of similar or numerous dissimilar violations, the Water Boards should consider adopting a multiplier above 1.1. **For the purpose of this factor, "violation" means a self-reported (when monitoring and reporting of violations is required and not part of a voluntary compliance assessment), stipulated, or adjudicated violation of the Water Code, Health and Safety Code, or other ~~similar~~ environmental protection statute for which the Water Boards have enforcement authority. Under no circumstances shall this factor ever be below 1.0.**
Cleanup and/or Cooperation	Voluntary efforts to cleanup and/or to cooperate with regulatory authorities in returning to compliance after the violation: Adjustment should result in a multiplier between **0.75 to 1.5**, using the lower multiplier where there is exceptional cleanup and cooperation compared to what can reasonably be expected, and higher multiplier where there is not. A reasonable and prudent response to a discharge violation or timely response to a ~~Water Board Notice of Violation, order, or similar communication identifying the violation~~ ~~order~~ **formal or informal enforcement action, as described in Appendix A, sections A and B,** should receive a neutral adjustment as it is assumed a reasonable amount of cooperation is the warranted baseline. Adjustments below or above 1.0 should be applied where the discharger's response ~~to a violation or order~~ is above and beyond, or falls below, the normally-expected response, respectively. ~~Failure to timely respond to a Water Board Notice of Violation, order, or similar communication identifying the violation may also be considered when determining the degree of culpability for any violation that continues after the notification.~~

After each of the above factors is considered for the violations involved, the applicable factor should be multiplied by the initial ACL amount proposed for each violation to determine the ~~revised amount~~ **Total Base Liability Amount** for that violation.

~~Multiple Violations Resulting from the Same Incident~~

~~By statute, certain situations that involve multiple violations are treated as a single violation perday, such as a single operational upset that leads to simultaneous violations of more than one pollutant parameter. (Water Code § 13385, sub. (f)(1).) For situations not addressed by statute, a single base liability amount can also be assessed for multiple violations at the discretion of the Water Boards, under the following circumstances:~~

a. The facility has violated the same requirement at one or more locations within the facility;

b. A single operational upset where violations occur on multiple days;

c. When violations are not independent of one another or are not substantially distinguishable. For such violations, the Water Boards should consider the most egregious violation;

d. A single act that violates similar requirements in different applicable permits or plans, but which are designed to address the same water quality issue.

If the violations do not fit the above categories, each instance of the same violation shall be calculated as a separate violation.

Except where statutorily required, multiple violations shall not be grouped and considered as a single base liability amount when those multiple violations each result in a distinguishable economic benefit to the violator.

Multiple Day Violations

For violations that are assessed a civil liability on a per day basis and do not constitute a single operational upset, the initial liability amount should be assessed for each day up to thirty (30) days. For violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation. For these cases, the Water Board must make express findings that the violation:

a. Is not causing daily detrimental impacts to the environment and is not causing daily detrimental impacts to the regulatory program;

b. Results in no discrete economic benefit from the illegal conduct that can be measured on a daily basis; or,

c. Occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation.

If one of the above findings is made, an alternate approach to penalty calculation for multiple day violations may be used. In these cases, the liability shall not be less than an amount that is calculated based on an assessment of the initial Total Base Liability Amount for the first 30 daysof the violation, plus an assessment for each 5-day period of violation, until the 60th day, plus an assessment for each 30 days of violation thereafter. For example, a violation lasting 60 days would accrue a total of 36 days of violation, based on a per day assessment for days 1-30, 35, 40, 45, 50, 55, and 60. Similarly, a violation lasting 90 days would accrue a total of 37 days of violation, based on a per day assessment for days 1-30, 35, 40, 45, 50, 55, 60, and 90. Thesuggested method for collapsing days of violation is intended to set the maximum permitted approach for reducing the number of days of violation when one or more of the

~~above-referenced findings can be made. The Water Boards are within their discretion to decline to collapse days, or to collapse days at any level deemed appropriate between the maximum suggested number of collapsed days and the actual number of days of violation.~~

~~Failure to timely submit a site conceptual model or corrective action plan under a CAO or other regulatory authority, failure to submit a response to an investigation order under Water Code section 13267, as well as similar violations that delay remedial action, are not the type of violation for which the findings required by this section can ordinarily be made. Finding (b) may be made, at the discretion of the Water Board, in cases where the sole economic benefit measurable on a daily basis is "the time value of money."~~

STEP 5 – Determination of Total Base Liability Amount

The Total Base Liability Amount will be determined by adding the amounts above for each violation, though this may be adjusted for multiple day violations as noted above. Depending on the statute controlling the liability assessment for a violation, the liability can be assessed as either a per day penalty, a per gallon penalty, or both.

Violation A =
(Initial ACL Amount) x (Culpability) x (Violation History) x
(Cleanup and Cooperation) x ~~X~~ (# of Days)
+
Violation B
+
Violation C
=
Total Base Liability Amount

~~STEP 6 – Ability to Pay and Ability to Continue in Business~~

~~If the Water Boards have sufficient financial information necessary to assess the violator's ability to pay the Total Base Liability Amount or to assess the effect of the Total Base Liability Amount on the violator's ability to continue in business, the Total Base Liability Amount may be adjusted to address the ability to pay or to continue in business. The ability of a discharger to pay an ACL is determined by its income (revenues minus expenses) and net worth (assets minus liabilities).~~

~~In most cases, it is in the public interest for the discharger to continue in business and bring its operations into compliance. However, the Water Boards are not required to ensure that civil liabilities are set at levels that allow violators to continue in business. Rather, the Water Code requires the Water Boards to consider this issue when imposing civil liabilities.~~

~~Civil liabilities should be imposed at levels that do not allow violators to obtain a competitive economic advantage over dischargers that voluntarily incur the costs~~

~~of regulatory compliance, whether or not the violator is able to continue in business after incurring the liability. A civil liability may never be imposed below the economic benefit realized by the violator for violations of Water Code section 13385. A civil liability may only be imposed below this level for violations of other provisions of the Water Code based on specific, evidence-based findings that imposing a civil liability that recovers less than the economic benefit realized by the violator would be unjust or against public policy.~~

~~A discharger's financial records may be private and/or in its exclusive possession, custody, and control. Accordingly, it can be difficult for the Water Boards to thoroughly evaluate a violator's ability to pay and continue in business without at least some level of cooperation. As addressed above, the Water Boards are under no obligation to ensure that a violator has the ability to pay or continue in business, but, rather, they are obligated to consider these factors when imposing a civil liability. The Water Boards consider the ability to pay and the ability to continue in business defenses available to dischargers to mitigate a potential civil liability.~~

~~If staff anticipates that the discharger's ability to pay or ability to continue in business will be a contested issue in the proceeding, staff should conduct a simple preliminary financial investigation based on publicly available information prior to issuing the ACL complaint. Staff should submit a summary of the results (typically as a finding in the Complaint or as part of staff's initial transmittal of evidence to the discharger), in order to put evidence about these factors into the record for the proceeding and to give the discharger an opportunity to submit additional evidence about its finances if it chooses. If staff makes an initial showing that a discharger has sufficient income or net worth to pay the proposed liability, then the burden of proof on this factor shifts to the discharger to produce sufficient evidence that it lacks an ability to pay. Staff may issue a subpoena for financial documents to make an assessment of whether,and the extent to which, an adjustment of the Total Base Liability should be made based on these two factors. If the discharger fails to produce evidence about its finances to rebut the staff's prima facie evidence and/or fails to respond to a subpoena, the Water Boards should treat that failure as a waiver of the right to challenge its ability to pay or effect on its ability to continue in business at the hearing, or an admission that the discharger is able to pay the proposed liability and that proposed liability will not affect its ability to continue in business.~~

~~As a general practice, in order to maintain the transparency and legitimacy of the Water Boards'enforcement programs, any financial evidence that the discharger chooses to submit in an enforcement proceeding will be treated as a public record. Some private information on financial documents may be redacted. Dischargers may seek an in camera or private review of financial information in the context of settlement negotiations with staff.~~

~~Once all appeals are exhausted and an ACL Order becomes final, failure to pay the ACL amount within 30 days may result in a referral to collection and/or liens or other judicial remedial actions to secure payment.~~

~~STEP 7~~ STEP 6 – Economic Benefit

The Economic Benefit Amount shall be estimated for the act(s) that constitute the violation(s) ~~every violation~~. Economic benefit is any savings or monetary gain derived from the act or omission that constitutes the violation. In cases where the violation occurred because the discharger postponed improvements to a treatment system, failed to implement adequate control measures (such as BMPs), or did not take other measures needed to prevent the violations, the economic benefit may be substantial. Economic benefit should be calculated as follows:

a. Determine those actions required to comply with a permit or order of the Water Boards, an enforcement order, or an approved facility plan, or that were necessary in the exercise of reasonable care, to prevent or mitigate a violation of the Water Code. Needed actions may have been such things as obtaining regulatory coverage, capital improvements to the discharger's treatment system, implementation of adequate BMPs, staff training, the development of a plan, or the introduction of procedures to improve management of the facility.

b. Determine when and/or how often these actions should have been taken as specified in the permit, order, or approved facility plan, or as necessary to exercise reasonable care, in order to prevent or mitigate the violation.

c. Evaluate the types of actions that should have been taken to avoid or mitigate the violation~~,~~ and estimate the costs of these actions. There are two types of costs that should be considered~~:~~: delayed costs and avoided costs. Delayed costs include expenditures that should have been made sooner (e.g., for capital improvements such as plant upgrades and collection system improvements, training, development of procedures and practices), but that the discharger implemented too late to avoid the violation and/or is still obligated to perform. Avoided costs include expenditures for equipment or services that the discharger should have incurred to avoid or mitigate the incident of noncompliance, but that are no longer required. Avoided costs also include ongoing costs such as needed additional staffing from the time determined under step "b" to the present, treatment, or disposal costs for waste that cannot be cleaned up, and the cost of effective erosion control measures that were not implemented as required.

d. Calculate the present value of the economic benefit. The economic benefit is equal to the present value of the avoided costs plus the "interest" on delayed costs. This calculation reflects the fact that the discharger has had the use of the money that should have been used to avoid or mitigate the instance of noncompliance. This calculation should be done using the United States Environmental Protection Agency's (U.S. EPA) computer program, BEN,[3]

[3] U.S. EPA developed the BEN model to calculate the economic benefit a violator derives from delaying and/or avoiding compliance with environmental statutes. Funds not spent on environmental compliance are available for other profit-making activities or, alternatively, a defendant avoids the costs associated with obtaining additional funds (e.g., cost of debt) for environmental compliance. BEN calculates the economic benefits gained from delaying and

unless the Water Board determines, or the discharger demonstrates to the satisfaction of the Water Board, that based on case-specific factors, an alternate method is more appropriate for a particular situation.

e. Determine whether the discharger has gained any other economic benefits. These may include income from continuing production when equipment used to treat discharges should have been shut down for repair or replacement, or income from unauthorized or unpermitted operations.

The Water Boards **shall** ~~**should**~~ not adjust the economic benefit for expenditures by the discharger to abate the effects of the unauthorized conduct or discharge, or the costs to come into, or return to, compliance. The discharger's conduct relating to abatement is appropriately considered under a "cleanup and**/or** cooperation" liability factor.

The Economic Benefit Amount should be compared to the adjusted Total Base Liability Amount. The adjusted Total Base Liability Amount should be at least 10 percent higher than the Economic Benefit Amount so that liabilities are not construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violations. **Civil liabilities should be imposed at levels that do not allow violators to obtain a competitive economic advantage over dischargers that voluntarily incur the costs of regulatory compliance, whether or not the violator is able to continue in business after incurring the liability. A civil liability may never be imposed below the economic benefit realized by the violator for violations of Water Code section 13385.** Absent express findings of exceptional circumstances and as qualified under Other Factors as Justice May Require, below, if the adjusted Total Base Liability Amount is lower than the Economic Benefit Amount plus 10 percent, the Economic Benefit Amount plus 10 percent shall be the civil liability. It would be unfair to dischargers that voluntarily incur the costs of regulatory compliance to impose a lower amount absent exceptional circumstances.

~~STEP 8~~ STEP 7 – Other Factors As Justice May Require

If the Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for "other factors as justice may require," but only if express findings are made to justify this adjustment. Examples of circumstances warranting an adjustment under this step are:

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avoiding required environmental expenditures, such as capital investments, one-time, non-depreciable expenditures, and annual operation and maintenance costs. BEN uses standard financial cash flow and net present value analysis techniques based on generally accepted financial principles. First, BEN calculates the costs of complying on time and of complying late adjusted for inflation and tax deductibility. To compare the on time and delayed compliance costs in a common measure, BEN calculates the present value of both streams of costs, or "cash flows," as of the date of initial noncompliance. BEN derives these values by discounting the annual cash flows at an average of the cost of capital throughout this time period. BEN can then subtract the delayed-case present value from the on-time-case present value to determine the initial economic benefit as of the noncompliance date. Finally, BEN compounds this initial economic benefit forward to the penalty payment date at the same cost of capital to determine the final economic benefit of noncompliance.

a. The discharger has provided, or Water Board staff has identified, other pertinent information not previously considered that indicates a higher or lower amount is justified.

b. A consideration of environmental justice issues indicates that the amount would have a disproportionate impact on a particular disadvantaged group, or would be insufficient to provide substantial justice to a disadvantaged group.

c. The calculated amount is entirely disproportionate to assessments for similar conduct made in the recent past using the same ~~Enforcement~~ Policy.

d. The Water Boards are bound by statute to recover a minimum of the economic benefit to the violator in an action for violations of Water Code section 13385. Because it is unfair to dischargers that voluntarily incur the costs of regulatory compliance, the Water Boards should only impose civil liabilities in an amount less than the economic benefit to the violator for violations of other provisions of the Water Code in exceptional circumstances where not doing so would be against public policy, have a disproportionate effect on a disadvantaged community or group, or be patently unjust. As discussed throughout the Policy, to be fair to dischargers that voluntarily incur the costs of regulatory compliance, the Water Boards should strive to impose civil liabilities 10 percent greater than the economic benefit to the violator to help ensure that they are not viewed merely as a cost of doing business.

Costs of Investigation and Enforcement Adjustment

The Water Boards may exercise their discretion to include some of the costs of investigation and enforcement in a ~~total administrative~~ civil liability. Including some staff investigation and enforcement costs is valid from an economic standpoint as it requires those who commit water quality violations to pay a greater percentage of the full costs of their violations. ~~However, this~~ This important consideration ~~must be~~ is balanced against the potential of discouraging a discharger from exercising its right to be heard and other important due process considerations. It is also important to establish a transparent and economically defensible method of calculating staff costs. This Policy sets forth a recommended approach for including staff costs in an ACL that is intended to facilitate the Water Boards' ability to balance these important considerations. Whether, and the extent to which, staff costs should be included in a civil liability should be considered separately by the Water Boards under this factor because they are unrelated to impacts to water quality and not specifically identified as a statutory factor to be considered indetermining the amount of a liability.

Water Boards are strongly encouraged to recover staff costs that reflect the effort to investigate and issue an enforcement action. When staff recommends that costs of investigation be included in a civil liability, a declaration documenting costs incurred shall be submitted as part of the hearing evidence package. The declaration shall itemize the costs incurred for investigation and enforcement by documenting for each staff member his or her staff classification, the applicable hourly rate including benefits and overhead (Hourly Burdened Rate), and the number of hours worked on the specific enforcement action.

Investigation and enforcement costs may be included in a civil penalty for documented staff work beginning when the violation is discovered by staff. Staff costs should not be allowed for any investigation or enforcement work undertaken by staff regarding the specific allegations set forth in the ACL **Complaint** ~~**complaint**~~ after it is issued. Attorney staff costs and any staff costs associated with preparing for or attending a **settlement meeting or** hearing should never be included in a civil liability.

Staff costs must be recovered under Water Code section 13399.33(d) for ACL actions for violations under Water Code section 13399.33.

STEP 8 – Ability to Pay and Ability to Continue in Business

If the Water Boards have sufficient financial information necessary to assess the violator's ability to pay the Total Base Liability Amount or to assess the effect of the Total Base Liability Amount on the violator's ability to continue in business, the Total Base Liability Amount may be adjusted to address the ability to pay or to continue in business. The ability of a discharger to pay an ACL is determined by its income (revenues minus expenses) and net worth (assets minus liabilities).

In most cases, it is in the public interest for the discharger to continue in business and bring its operations into compliance. However, the Water Boards are not required to ensure that civil liabilities are set at levels that allow violators to continue in business. Rather, the Water Code requires the Water Boards to consider this factor when imposing civil liabilities.

A discharger's financial records may be private and in its exclusive possession, custody, and control. Accordingly, it can be difficult for the Water Boards to thoroughly evaluate a violator's ability to pay and continue in business without at least some level of cooperation. As addressed above, the Water Boards are under no obligation to ensure that a violator has the ability to pay or continue in business, but, rather, they are obligated to consider these factors when imposing a civil liability. The Water Boards consider the ability to pay and the ability to continue in business defenses available to dischargers to mitigate a potential civil liability.

~~If staff anticipates that the discharger's ability to pay or ability to continue in business will be a contested issue in the proceeding,~~ **Staff should conduct a simple preliminary financial investigation based on publicly available information prior to issuing the ACL Complaint. Staff should submit a summary of the results (typically as a finding in the Complaint or as part of staff's initial transmittal of evidence to the discharger), in order to put evidence about these factors into the record for the proceeding and to give the discharger an opportunity to submit additional evidence about its finances if it chooses. If staff makes an initial showing that a discharger has sufficient income or net worth to pay the proposed liability, then the burden of proof on this factor shifts to the discharger to produce sufficient evidence that it lacks an ability to pay. Staff may issue a subpoena for financial documents to make an assessment of whether, and the extent to which, an adjustment of the Total Base Liability should be made based**

on these two factors. If the discharger fails to produce evidence about its finances to rebut the staff's prima facie evidence or fails to respond to a subpoena, or both, the Water Boards should treat that failure as a waiver of the right to challenge its ability to pay or effect on its ability to continue in business at the hearing, or an admission that the discharger is able to pay the proposed liability and that proposed liability will not affect its ability to continue in business.

As a general practice, in order to maintain the transparency and legitimacy of the Water Boards' enforcement programs, any financial evidence that the discharger chooses to submit in an enforcement proceeding will be treated as a public record. Some private information on financial documents may be redacted. Dischargers may seek an in camera or private review of financial information in the context of settlement negotiations with staff.

STEP 9 – Maximum and Minimum Liability Amounts

For all violations, the applicable statute sets a maximum liability amount that may be assessed for each violation. For some violations, the statute also requires the assessment of a liability at no less than a specified amount. The maximum and minimum amounts for each violation must be determined for comparison to the amount of civil liabilities being proposed, and shall be set forth in any proposed settlement agreement, ACL **Complaint** ~~**complaint**~~, and/or order-imposing liability. For purposes of this step, the **minimum and** maximum **liabilities**~~**liability**~~ do~~**es**~~ not include any reduction in the number of days for multiple day violations, or in the maximum amount per gallon for high volume discharges, as provided for above when applying the methodology. Where the amount calculated for a particular violation exceeds the statutory maximum, the amount proposed must be reduced to that maximum. Similarly, the minimum statutory amount may require raising the amount being proposed, unless there is a specific provision that allows assessment below the minimum. In such cases, the express findings to support assigning a liability amount below this minimum must be set forth in the proposed settlement agreement, ACL **Complaint** ~~**complaint**~~, and/or order imposing liability.

STEP 10 – Final Liability Amount

The **Final Liability Amount** ~~**final liability amount**~~ consists of the added amounts for each violation, with any allowed adjustments, provided the amounts are within the statutory minimum and maximum amounts.

The administrative record must indicate how the Water Board arrived at the **Final Liability Amount** ~~**final liability amount**~~. In particular, where adjustments are made to the initial amount proposed in the ACL **Complaint** ~~**complaint**~~, the record should clearly reflect the Water Board's evidentiary and policy considerations underlying the adjustments, as the staff report or complaint may not reflect those final considerations. A Water Board's final determination should transparently mirror the analytical route it traveled, from the consideration of evidence to specific findings about the statutory factors it is required to consider, to the final outcome.

Once an ACL order is adopted and all appeals are exhausted, failure to pay the ACL amount within 30 days may result in a referral to collection, placement of liens, or other judicial remedial actions to secure payment.

B. Settlement Considerations

The liabilities resulting from the above methodology are for the Water Board's use during formal administrative proceedings. Staff preliminarily uses the same methodology when issuing an ACL **Complaint** ~~complaint~~, but calculated liabilities may be adjusted as a result of settlement negotiations with a violator. It is not the goal of the Enforcement Policy to address the full range of considerations that should be entertained as part of a settlement. It is appropriate to adjust the ACLs calculated pursuant to the methodology in consideration of hearing and/or litigation risks, including: equitable factors, mitigating circumstances, evidentiary issues, or other weaknesses in the enforcement action that the prosecution reasonably believes may adversely affect the ability to obtain the calculated liability from the administrative hearing body.[4] Ordinarily, these factors will not be fully known until after the issuance of an ACL **Complaint** ~~complaint~~ or through pre-complaint settlement negotiations with an alleged violator. These factors shall be generally identified in any settlement of an ACL that seeks approval by a Water Board or its designated representative.

Because the methodology proposed in this Policy is intended to provide a transparent and consistent approach to assessing civil liabilities, staff should be confident the Water Boards, regulated parties, and members of the public will be able to scrutinize the bases for their proposed liability. While differently-situated persons may differ over some of the factual evaluations, factors that should not affect the amount of the calculated civil liability sought from a violator in settlement include, but are not limited to, the following:

1. A general desire to avoid hearing or minimize enforcement costs;
2. A belief that members of a Water Board will not support a proposed liability before that Water Board has considered the specific facts and policy issues of the enforcement case or a similar case;
3. A desire to avoid controversial matters;
4. The fact that the initiation of the enforcement action is not as timely as it might have been under ideal circumstances (timeliness of the action as it affects the ability to present evidence or other timeliness considerations are properly considered); or,
5. The fact that a water body affected by the violation is already polluted or impaired.

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[4] ~~General statutes of limitations are inapplicable to administrative proceedings. Laches, and similar equitable defenses, have limited applicability to administrative enforcement proceedings since they may not be asserted if they would operate to nullify or defeat an important policy adopted for the public benefit. The Water Boards' enforcement actions invoke important laws and policies enacted to protect the quality of public waters. Equitable defenses are inapplicable to mandatory minimum statutory penalties because an equitable defense cannot be applied to avoid a statutory mandate.~~

Except as specifically addressed in this Policy, nothing in this Policy is intended to limit the use of Government Code section 11415.60.

C. Other Administrative Civil Liability Settlement Components

In addition to a reduction of ACLs, a settlement can result in the permanent suspension of aportion of the liability when the discharger voluntarily agrees to fund a Supplemental Environmental Project (SEP) (see the State Water Board's ~~Water Quality Control~~ Policy on SEPs), ~~or~~ a Compliance Project (see Section VIII), or an Enhanced Compliance Action (see Section IX and State Water Board's Policy on SEPs). ~~, or a Corrective Action Project (see Section X).~~

Settlement agreements should be memorialized by the Water Boards as stipulated ACL orders, and resolve only the claims that are made or could have been made based on the specific facts alleged in the ACL Complaint ~~complaint~~. A settlement shall never include the release of any unknown claims or a waiver of rights under Civil Code section 1542.

VII. MANDATORY MINIMUM PENALTIES FOR NPDES VIOLATIONS

Mandatory penalty provisions are required by ~~California~~ Water Code section 13385, subdivisions (h) and (i), for specified violations of NPDES permits. For violations that are subject to MMPs, the Water Boards must assess an ACL for the MMP or for a greater amount. ~~California~~ Water Code section 13385(h) requires that an MMP of $3,000 be assessed by the ~~Regional~~ Water Boards for each "serious violation" unless any of the defenses in section 13385(j) apply. A serious violation is any waste discharge that exceeds the effluent limitation for a Group I pollutant by 40 percent or more, or a Group II pollutant by 20 percent or more (see Appendix A to 40 CFR section 123.45), or a failure to file certain discharge monitoring reports for a complete period of 30 days. (Wat. Code §§ 13385, subd. (h)(2) & 13385.1). Section VII.D. of this Policy addresses special circumstances related to discharge monitoring reports. Section VII.E. of this Policy addresses situations where the effluent limitation for a pollutant is less than or equal to the quantitation limit.

~~California~~ Water Code section 13385(i) requires that an MMP of $3,000 be assessed by the ~~Regional~~ Water Boards for each ~~non-serious~~ violation that is considered a "serious violation" under section 13385(h), not counting the first three violations unless any of the defenses in section 13385(j) apply. The Water Boards have termed these violations as "chronic violations." A ~~non-serious~~ chronic violation occurs if the discharger does any one of the following four or more times in any period of 180 days:

(a) Violates a waste discharge requirement (WDR) effluent limitation;

(b) Fails to file a report of waste discharge pursuant to ~~California~~ Water Code section 13260;

(c) Files an incomplete report of waste discharge pursuant to ~~California~~ Water Code section 13260; or,

(d) Violates a whole effluent toxicity effluent limitation where the WDRs do not contain pollutant-specific effluent limitations for any toxic pollutants.

A. Timeframe for Issuance of MMPs

The intent of these provisions of the ~~California~~ Water Code is to assist in bringing the State's permitted facilities into compliance with ~~WDRs~~ NPDES permits. The Water Boards should issue MMPs within eighteen months of the time that the ~~violations qualify as MMP violations~~ Water Boards discovered the qualifying violation or within eighteen months from the time that the qualifying violation was reported to the Water Boards, whichever is earlier. This 18-month period shall not apply to MMPs assessed for dischargers regulated by state or regional municipal separate storm sewer system (MS4) permits or state general permits for stormwater discharges that include numeric effluent limitations.

The Water Boards shall expedite MMP issuance if~~,~~ (a) the discharger ~~qualifies as a~~ is a POTW serving a small community with financial hardship, or (b) the total proposed mandatory penalty amount is $30,000 or more. Where the NPDES Permit is being revoked or rescinded because the discharger will no longer be discharging under that permit, the Water Boards should ensure that all outstanding MMPs for that discharger are issued prior to termination of its permit to discharge.

B. MMPs for Small Communities with a Financial Hardship

Except as provided below, the Water Boards do not have discretion in assessing MMPs and must initiate enforcement against all entities that accrue a violation. However, ~~California~~ Water Code section 13385, subdivision (k), provides an alternative to assessing MMPs against a POTW that serves a small community with a financial hardship as determined by the Water Boards in accordance with the statute and this Policy. Under this alternative, the ~~Regional~~ Water Boards may allow the POTW to spend an amount equivalent to the MMP(s) toward a ~~c~~Compliance ~~p~~Project ~~that is designed to correct the violation~~ that satisfies the requirements of Water Code section 13385, subdivision (k), and Section VII of this Policy. In order to be eligible for a Compliance Project, a POTW must be serving a small community with a financial hardship as of the date of the adoption of the administrative civil liability order imposing MMPs.

A POTW is serving a small community when its service area: ~~serving a small community is a POTW serving a community that has a financial hardship and:~~

1. Has a population of 10,000 or fewer people; or,
2. Lies completely within one or more rural counties.[5]

A POTW serving incorporated areas completely within one or more rural counties is

[5] ~~The determination of the size of population served by the POTW and "rural county" status shall be made as of the time the penalty is assessed, not as of the time the underlying violations occurred.~~

considered a POTW serving a small community.

"Rural county" means a county classified by the Economic Research Service (ERS), United States Department of Agriculture (USDA), with a rural-urban continuum code of four through nine. The table below identifies qualified rural counties at the time this Policy was adopted. The list of qualified rural counties may change depending on reclassification by ERS. Consult the classification by ERS in effect at the time the enforcement action is taken.

Qualified Rural Counties		
Alpine	Inyo	Nevada
Amador	Lake	Plumas
Calaveras	Lassen	Sierra
Colusa	Mariposa	Siskiyou
Del Norte	Mendocino	Tehama
Glenn	Modoc	Trinity
Humboldt	Mono	Tuolumne
Based on 2013 USDA Rural-Urban Continuum Codes for California		

~~"Financial hardship" means that the community served by the POTW meets one of the following criteria:~~ **A POTW has a financial hardship when its service area satisfies one of the following criteria**:

- Median household income[6] for the community is less than 80 percent of the California median household income;
- The community has an unemployment rate[7] of 10 percent or greater; or,
- **At least** ~~T~~twenty percent of the population is below the poverty level.[8]

[6] **Median household income –** The median income divides the income distribution into two equal groups, one having incomes above the median and the other having incomes below the median.

[7] **Unemployed –** All civilians, 16 years and older, are classified as unemployed if they (1) were neither "at work" nor "with a job but not at work" during the reference week, (2) were actively looking for work during the last 4 weeks, and (3) were available to accept a job. Also included as unemployed are civilians who (1) did not work at all during the reference week, (2) were waiting to be called back to a job from which they had been laid off, and (3) were available for work except for temporary illness.

[8] **Poverty –** Following the Office of Management and Budget's Directive 14, the Census Bureau uses a set of income thresholds that vary by family size and composition to detect who is poor.

The median household income, unemployment rate, and poverty level of the population served by the POTW are based on the most recent United States Census (U.S. Census) block group[9] data ~~or a local survey approved by the Regional Water Board in consultation with the State Water Board~~.

~~"Rural county" means a county classified by the Economic Research Service (ERS), United States Department of Agriculture (USDA), with a rural-urban continuum code of four through nine. The table below identifies qualified rural counties at the time this Policy was adopted. Thelist of qualified rural counties may change depending on reclassification by ERS. Consult the classification by ERS in effect at the time the enforcement action is taken.~~

~~[4] The determination of the size of population served by the POTW and "rural county" status shall bemade as of the time the penalty is assessed, not as of the time the underlying violations occurred.~~

~~Qualified Rural Counties~~		
~~Alpine~~	~~Inyo~~	~~Nevada~~
~~Amador~~	~~Lake~~	~~Plumas~~
~~Calaveras~~	~~Lassen~~	~~Sierra~~
~~Colusa~~	~~Mariposa~~	~~Siskiyou~~
~~Del Norte~~	~~Mendocino~~	~~Tehama~~
~~Glenn~~	~~Modoc~~	~~Trinity~~
~~Humboldt~~	~~Mono~~	~~Tuolumne~~
~~*Based on 2013 USDA Rural-Urban Continuum Codes for California*~~		

For purposes of ~~California~~ Water Code section 13385, subdivision (k)(2), the Regional Water Boards are hereby delegated the authority to determine whether a POTW, that depends primarily on residential fees (e.g., connection fees, monthly service fees) to fund its wastewater treatment facility (operations, maintenance, and capital improvements), is serving a small community **with a financial hardship**, in accordance with the requirements set forth in this Policy.

If the total income for a family or unrelated individual falls below the relevant poverty threshold, then the family or unrelated individual is classified as being "below the poverty level."

[9] **Block group –** A subdivision of a census tract (or, prior to 2000, a block numbering area). A block group is the smallest geographic unit for which the Census Bureau tabulates sample data. A block group consists of all the blocks within a census tract beginning with the same number. ~~**Example: block group 3 consists of all blocks within a 2000 census tract numbering from 3000 to 3999. In 1990, block group 3 consisted of all blocks numbered from 301 to 399Z.**~~

The State Water Board will continue to make the determination of whether a POTW, that does not depend primarily on residential fees to fund its wastewater treatment facility, is serving a small community **with a financial hardship** for purposes of ~~California~~ Water Code section 13385**, subdivision** (k)(2).

If a POTW believes that the U.S. Census data do not accurately represent the population served by the POTW**, it may propose a local survey or alternative justification approved by the Regional Water Board.** ~~, or that~~ **As part of the local survey or alternative justification, the Regional Water Board may consider** additional factors**,** such as low population density in ~~it's~~ **the POTW's** service area**,** ~~should be considered, the POTW may present an alternative justification to the State or Regional Water Board for designation as~~ **to designate** a "POTW serving a small community **with a financial hardship**." **Low population density alone may not be sufficient to demonstrate financial hardship and in some instances other criteria such as household income below the median may need to be present.** The **local survey or alternative** justification must include a map of service area boundaries, a list of properties, the number of households, the number of people actually served by the POTW, and any additional information requested by the State or Regional Water Board. The Regional Water Board shall consult with the State Water Board when **designating a POTW as serving a small community with a financial hardship** ~~making a determination~~ based **on a local survey or alternative justification.** ~~upon these additional, site-specific considerations~~.

C. Single Operational Upset

In accordance with ~~California~~ Water Code section 13385, subdivision (f)(2), for the purposes of MMPs only, a single operational upset that leads to simultaneous violations of one or more pollutant parameters over multiple days shall be treated as a single violation. The ~~Regional~~ Water Board**s** shall apply the following U.S. EPA Guidance in determining if a single operational upset occurred: "Issuance of Guidance Interpreting Single Operational Upset" Memorandum from the Associate Enforcement Counsel, Water Division, U.S. EPA, September 27, 1989 (excerpted below).

U.S. EPA defines "single operational upset" as:

> *"an exceptional incident which causes simultaneous, unintentional, unknowing (not the result of a knowing act or omission), temporary noncompliance with more than one CWA effluent discharge pollutant parameter. Single operational upset does not include…noncompliance to the extent caused by improperly designed or inadequate treatment facilities."*

The U.S. EPA Guidance further defines an "exceptional" incident as a "non-routine malfunctioning of an otherwise generally compliant facility." Single operational upsets include such things as an upset caused by a sudden violent storm, some other exceptional event, or a bursting tank. A single upset may result in violations of multiple pollutant parameters. The discharger has the burden of demonstrating that the violations were caused by a single operational upset. A finding that a single operational upset has occurred is not a defense to liability, but may affect the number of violations.

D. Defining a "Discharge Monitoring Report" in Special Circumstances Under ~~California~~ Water Code Section 13385.1

~~California~~Water Code section 13385.1, subdivision (a)(1), states:

> *"for the purposes of subdivision (h) of section 13385, a 'serious violation' also means a failure to file a discharge monitoring report required pursuant to section 13383 for each complete period of 30 days following the deadline for submitting the report, if the reportis designed to ensure compliance with limitations contained in waste discharge requirements that contain effluent limitations."*

The legislative history of section 13385.1 indicates that the Legislature enacted the statute primarily to ensure better reporting by dischargers who might otherwise avoid penalties for violations of their NPDES permits by failing to submit monitoring reports that could disclose permit violations.

Because penalties under section 13385.1 are assessed for each complete period of 30 days following the deadline for submitting a report, penalties may potentially accrue for an indefinite time period. Dischargers who fail to conduct their required monitoring cannot go back, recreate,and submit the data for a prior monitoring period. In such a case, an MMP for a missing report will continue to be assessed and reassessed for each 30-day period following the deadline for submission until an ACL Complaint for MMPs is issued. This Policy is designed to assist dischargers by stopping the accrual of penalties for late or missing reports under the special circumstances described below. Nevertheless, under these circumstances, the discharger has the burden of submitting the required documentation pursuant to this Policy.

The following subsections provide additional guidance on the definition of a "discharge monitoring report," for the purposes of subdivision (a) of section 13385.1 only, in situations where: (1) there was a discharge to waters of the United States, but the discharger failed to conduct any monitoring during that monitoring period, or (2) there was no discharge to waters of the United States during the relevant monitoring period.

1. Defining a "Discharge Monitoring Report" Where There Is a Discharge to Waters of the United States and the Discharger Fails to Conduct Any Monitoring During the Monitoring Period

For purposes of section 13385.1, in circumstances where a discharge to waters of the United States did occur, but where the discharger failed to conduct any monitoring during the relevant monitoring period, a "discharge monitoring report" shall include a written statement to the ~~Regional~~ Water Board, signed under penalty of perjury in accordance with 40 CFR 122.41(k) and 40 CFR 122.22(a)(1), stating:

a. That no monitoring was conducted during the relevant monitoring period;

b. The reason(s) the required monitoring was not conducted; and,

c. The reason(s) the required discharge monitoring report was not submitted to the ~~Regional~~ Water Board by the requisite deadline, if the written statement is submitted after the deadline for submitting the discharge monitoring report~~.~~;

Upon the request of the ~~Regional~~ Water Board, the discharger may be required to support the written statement with additional explanation or evidence. Requiring a discharger to state underpenalty of perjury that it did not conduct monitoring for the required period ensures that the discharger is not conducting monitoring and withholding data indicating effluent limitation violations. This approach may not be used if the discharger did conduct monitoring during the monitoring period that it is required to report to the ~~Regional~~ Water Board because the results of that monitoring, even if incomplete, must be submitted to the ~~Regional~~ Water Board. This approach is consistent with the original legislative purpose of section 13385.1.

The written statement shall be treated as a "discharge monitoring report" for purposes of section 13385.1(a). MMPs for late or missing discharge monitoring reports assessed for each 30-day period will cease accruing upon the date the written statement is received by the ~~Regional~~ Water Board. While the submission of the written statement provides a cut-off date for MMPs assessed under section 13385.1, the ~~Regional~~ Water Board may impose additional discretionary ACLs pursuant to section 13385(a)(3).

2. Defining a "Discharge Monitoring Report" Where There Is No Discharge to Waters of the United States

Some ~~waste discharge requirements~~WDRs or associated monitoring and reporting programs for episodic or periodic discharges require the submission of either a discharge monitoring report, if there were discharges during the relevant monitoring period, or a report documenting that no discharge occurred, if there were no discharges.

A report whose submittal is required to document that no discharge to waters of the United States occurred during the relevant monitoring period is not a "discharge monitoring report" for purposes of section 13385.1(a). Under these circumstances, that report would not ensure compliance with limitations contained in ~~waste discharge requirements~~WDRs that contain effluent limitations, and therefore, the late submittal of such a report would be subject to discretionary civil liabilities, but would not be subject to MMPs.

As a matter of practice, however, if such a report has not been received, the ~~Regional~~ Water Board may presume that there were discharges during the relevant monitoring period and should consider imposing MMPs for the failure to timely submit a discharge monitoring report. The ~~Regional~~ Water Board shall not take final action to impose the MMP if the discharger submits a written statement to the ~~Regional~~ Water Board, signed under penalty of perjury in accordance with 40 CFR 122.41(k) and 40 CFR 122.22(a)(1), stating:

a. That there were no discharges to waters of the United States during the relevant monitoring period; and,

b. The reason(s) the required report was not submitted to the ~~Regional~~ Water Board by the deadline.

Upon the request of the ~~Regional~~ Water Board, the discharger may be required to support the written statement with additional explanation or evidence. Requiring a discharger to state under penalty of perjury that it did not discharge during the relevant monitoring period ensures that a discharger is not discharging and conducting monitoring and then withholding data indicating there are effluent limitation violations.

If such a statement is submitted, discretionary ACLs, which the ~~Regional~~ Water Boards may assess under section 13385**, subdivision** (a)(3), will cease upon the date the written statement is received by the ~~Regional~~ Water Board.

E. Defining a "Serious Violation" in Situations Where the Effluent Limitation Is Less Than or Equal to the Quantitation Limit

1. For discharges of pollutants subject to the State Water Board's "Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California," or the "California Ocean Plan," where the effluent limitation for a pollutant is lower than the applicable Minimum Level, any discharge that: (1) equals or exceeds the Minimum Level; and (2) exceeds the effluent limitation by 40 percent ormore for a Group 1 pollutant, or by 20 percent or more for a Group 2 pollutant, is a serious violation for the purposes of ~~California~~ Water Code section 13385**, subdivision** (h)(2).
2. For discharges of pollutants that are not subject to the State Water Board's "Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California," or the "California Ocean Plan" (e.g., pollutants that are not addressed by the applicable plan), where the effluent limitation for a pollutant is lower than the quantitation limit specified or authorized in the applicable ~~waste discharge requirements~~ **WDRs** or monitoring requirements, any discharge that: (1) equals or exceeds the quantitation limit; and (2) exceeds the effluent limitation by 40 percent or more for a Group 1 pollutant, or by 20 percent or more for a Group 2 pollutant, is a serious violation for the purposes of ~~California~~ Water Code section 13385**, subdivision** (h)(2).

VIII. COMPLIANCE PROJECTS ~~(CP)~~

A Compliance Project (CP) is a project designed to address problems related to the violation and bring the discharger back into compliance in a timely manner. CPs shall only be considered where they are expressly authorized by statute. At the time of the development of this Policy, CPs are expressly authorized by statute only in connection with ~~settlement of~~ MMPs for small communities with a financial hardship**, and may be imposed either in settlement or following a contested hearing**. (Wat. Code, § 13385, subd. (k).) Unless expressly authorized by future legislation, CPs ~~may~~ **shall** not be ~~considered~~ **permitted** in connection with other ACLs**, including those resolved**

through settlement.

Absent such statutory authorization, if the underlying problem that caused the violations addressed in the ACL has not been corrected, the appropriate manner for compelling compliance is through an enforcement order with injunctive terms such as a Cleanup and Abatement Order (CAO), Cease and Desist Order (CDO), or Time Schedule Order (TSO). ~~CPs do not include Corrective Action Projects that are expressly allowed in Section X of this Policy.~~

It is the policy of the State Water Board that the following conditions shall apply to CPs authorized under ~~California~~ Water Code section 13385, subdivision (k):

1. The amount of the penalty that is suspended shall not exceed the cost necessary to complete the CP;
2. The discharger must spend an amount of money on the CP that is equal to or greater than the amount of the penalty that is suspended. Grant funds may be used only for the portion of the cost of the CP that exceeds the amount of the penalty to be suspended;
3. Where implementation of the CP began prior to the ~~assessment of an MMP~~ **adoption of an administrative civil liability order imposing the MMPs**, all or a portion of the penalty may be suspended under these conditions:
    a. The cost of the CP yet to be expended is equal to or greater than the penalty that is suspended;
    b. The problem causing the underlying violations will be corrected by the ~~project~~ **CP**;
    c. The underlying violations occurred during, or prior to the initiation of, ~~project~~ **CP** implementation;
    d. The completion date of the ~~project~~**CP** is specified by an enforcement order (a CDO,CAO, TSO, or ACL Order) adopted at or before ~~the time the penalty is assessed~~ **the adoption of an administrative civil liability order imposing the MMPs**; and,
    e. The deadline for completion of the ~~project~~**CP** is within 5 years of the date of the assessment of the MMP;
4. **CPs may be comprised of various components, including:** ~~include, but are not limited to:~~
    a. Constructing new facilities;
    b. Upgrading or repairing existing facilities;
    c. Conducting water quality investigations or monitoring;
    d. Operating a cleanup system;
    e. Adding staff;
    f. Providing training;
    g. Conducting studies; and,

h. Developing operation, maintenance, or monitoring procedures.

5. CPs shall be designed to bring the discharger back into compliance in a five-year period and to prevent future noncompliance.
6. A CP is a project that the discharger is otherwise obligated to perform, independent of the ACL.
7. CPs must have clearly identified project goals, costs, milestones, and completion dates and these must be specified in an enforceable order (ACL Order, CDO, CAO, or TSO).
8. CPs that will last longer than one year must have quarterly reporting requirements.
9. Upon completion of a CP, the discharger must submit a final report declaring such completion and detailing fund expenditures and goals achieved.
10. If the discharger completes the CP to the satisfaction of the Water Board by the specified date, the suspended penalty amount is dismissed.
11. If the CP is not completed to the satisfaction of the Water Board on the specified date the amount suspended becomes due and payable to the State Water Pollution Cleanup and Abatement Account (CAA), or other fund or account as authorized by statute.
12. The *ACL* ~~complaint or~~ *order* ~~settlement agreement~~ must clearly state that payment of the previously suspended amount does not relieve the discharger of its independent obligation to take necessary actions to achieve compliance.

IX. ENHANCED COMPLIANCE ACTIONS ~~(ECA)~~

Enhanced Compliance Actions (ECAs**)** are projects that enable a discharger to make capital or operational improvements beyond those required by law, and are separate from projects designed to merely bring a discharger into compliance. **Similar to SEPs, ECAs are permitted in a settlement under the authority of Government Code 11415.60.** The Water Boards may approve a settlement with a discharger that includes suspension of a portion of the monetary liability of a discretionary ACL for completion of an ECA. **ECAs are never allowed to offset a mandatory minimum penalty**. Except as specifically provided below, any such settlement is subject to the rules**, and allowances for deviation from the rules as approved by the Director of the Office of Enforcement,** that apply to SEPs, including the 50 percent limit. Settlement agreements may contain both SEPs and ECAs, so long as the aggregate sum of the **suspended liability** ~~**costs for these alternatives**~~ does not exceed 50 percent of the total liability. **The Water Boards shall never impose ECAs at or following a contested hearing absent agreement by all parties to the proceeding.**

For these ECAs, the Water Boards shall require the following:

1. The 50 percent limit on ECAs shall not apply to **a settlement with** ~~**economically disadvantaged communities with a financial hardship**~~ **a publicly owned treatment works serving a small community**, the criteria for

which is defined in Water Code section 13385**, subdivision** (k);

2. ECAs must have clearly identified project goals, costs, milestones, and completion dates and these must be specified in the ACL order;
3. ECAs that will last longer than one year must have at least quarterly reporting requirements;
4. Upon completion of an ECA, the discharger must submit a final report declaring such completion and detailing fund expenditures and goals achieved;
5. If the discharger completes the ECA to the satisfaction of the Water Board by the specified date, the suspended amount is dismissed and no longer payable;
6. **If the ECA is not completed to the satisfaction of the Water Board on the specified date,the amount suspended becomes due and payable to the CAA, or other fund or accountas authorized by statute. For economically disadvantaged communities with financial hardship, the Executive Officer may extend specified deadline dates in writing upon a showing of good cause; and,**
6. The **ACL complaint or order** **settlement agreement** must clearly state that payment of the previously suspended amount does not relieve the discharger of its independent obligation to take necessary actions to achieve compliance.

If an ECA is utilized as part of a settlement of an enforcement action against a discharger, the monetary liability that is not suspended shall be no less than the amount of the economic benefit that the discharger received from its unauthorized activity, plus **an additional amount that is generally consistent with the factors for monetary liability assessment to deter future violations** **ten percent**.

X. CORRECTIVE ACTION PROJECTS

A Corrective Action Project (CAP) is a project designed to bring the discharger or responsible party back into compliance in a timely manner with a CAO issued pursuant to Water Code section 13304 or Health and Safety Code section 25296.10, or both. The Water Boards may approve a settlement of an enforcement action for failure to comply with a CAO with a discharger or responsible party that includes suspension of up to 50 percent of the monetary liability of a discretionary ACL for completion of a CAP. The CAP may, but is not required to be, related to correcting the violations resolved through settlement. Settlement agreements that include a CAP shall not also include a CP, SEP, or ECA.

For these CAPs, the Water Boards shall require the following:

1. CAPs are limited to actions that result in the cleanup of waste, abatement of the effects of waste, or both, and shall not include actions to prepare plans, reports, or conduct monitoring unless the action is a direct precursor to performing corrective action, such as, for example, preparation of a feasibility study;
2. CAPs shall only be available if the discharger or responsible party demonstrates to the satisfaction of the Water Board that it is unable to pay the

~~full liability amount in addition to performing the CAP;~~

~~3. CAPs must have clearly identified goals, costs, milestones, and completion dates and these must be specified in the settlement agreement;~~

~~4. CAPs that will last longer than one year must have at least quarterly reporting requirements;~~

~~5. Upon completion of a CAP, the discharger or responsible party must submit a final report declaring such completion and detailing fund expenditures and goals achieved;~~

~~6. If the discharger or responsible party completes the CAP to the satisfaction of the Water Board by the specified date, the suspended amount is dismissed and no longer payable; and,~~

~~7. If the CAP is not completed to the satisfaction of the Water Board on the specified date, the amount suspended becomes due and payable to the CAA, or other fund or account as authorized by statute.~~

~~If a CAP is utilized as part of a settlement of an enforcement action against a discharger or responsible party, the monetary liability that is not suspended shall be no less than the amount of the economic benefit that the discharger or responsible party received from its unauthorized activity, plus 10 percent.~~

X. ~~XI.~~ DISCHARGER VIOLATION REPORTING

For permitted discharges, all violations must be accurately reported in self-monitoring reports in a form acceptable to the ~~Regional~~ Water Board. Voluntary disclosure of violations that are not otherwise required to be reported to the Water Boards shall be considered by the Water Boards when determining the appropriate enforcement response.

Falsification or misrepresentation of such voluntary disclosures shall be brought to the attention of the appropriate ~~Regional~~ Water Board for possible enforcement action.

XI. ~~XII.~~ VIOLATION AND ENFORCEMENT DATA

The Water Boards will ensure that all violations and enforcement actions are accurately documented in the appropriate Water Board data management system. All violations should be addressed with an appropriate enforcement action. Enforcement action options are described in Appendix A. Sufficient information will be collected and maintained regarding regulated facilities and sites to allow preparation of internal and external reporting of violation and enforcement information, and development and reporting of performance measures regarding the Water Boards' enforcement activities. To ensure timely collection of this information, all violations will be entered within 10 days of discovery of the violation, and all enforcement actions will be entered within

20 days of the date of the enforcement action.

XII. ~~XII.~~ ENFORCEMENT REPORTING

In order to inform the public of the State and Regional Water Boards' performance with regard to enforcement activities, there are a number of legislatively mandated and elective reports the Water Boards are committed to producing on a regular basis, including those required by Water Code sections 13167 and 13399. See Appendix B for additional information on these reports.

XIII. ~~XIV.~~ POLICY REVIEW AND REVISION

It is the intent of the State Water Board that this Policy be reviewed and revised, as appropriate,at least every five years. Nothing in this Policy is intended to preclude revisions, as appropriate,on an earlier basis.

APPENDIX A: ENFORCEMENT ACTIONS

~~A. Standard Language~~

~~In order to provide a consistent approach to enforcement throughout the State, enforcement orders and hearing procedures shall be standardized to the extent appropriate. The State Water Board will create model enforcement orders and hearing procedures containing standardized provisions for use by the Regional Water Boards. The Regional Water Boards shall use the models, modifying terms, and conditions only as appropriate to fit the specific circumstances related to a discharge and to be consistent with Regional Water Board plans and policies.~~

A. Progressive Enforcement

Progressive enforcement refers to an escalating series of actions that allows for the efficient and effective use of enforcement resources to: (1) assist cooperative dischargers in achieving compliance; (2) compel compliance for repeat violations and recalcitrant violators; and (3) provide a disincentive for noncompliance. Enforcement staff will engage in the process described in ~~Part~~Section II of the Policy and exercise its discretion to determine which steps to take in an effort to efficiently use and prioritize limited resources. For some violations, an informal response such as a phone call, email, or staff enforcement letter is a sufficient first step to notify the discharger that the violation has been identified, and to encourage a swift and complete return to compliance. If any of the noted violations continue, staff's enforcement response should quickly escalate to increasingly more formal, forceful, and serious actions until compliance is achieved.

Progressive enforcement is not appropriate in all circumstances. Examples include, but are not limited to, emergency situations needing immediate response, violations resulting from intentional and/or grossly negligent conduct, violations by dischargers with a history of noncompliance, or violations resulting in significant impact or threat of impact to beneficial uses. In some cases, involving an injunctive component, such as investigation or CAO, progressive enforcement may be less of a priority than collecting data and analyses necessary to protect water quality. Progressive enforcement is a routine practice for Water Board staff, but should not be considered a requirement when swift or immediate enforcement is needed or justified to address a particular violation.

B. Informal Enforcement Actions

An informal enforcement action is any enforcement action taken by Water Board staff that is not defined in statute or regulation. An informal enforcement action can include any form of communication (oral, written, or electronic) between Water Board staff and a discharger concerning an actual, threatened, or potential violation. Informal enforcement actions cannot be petitioned to the State Water Board.

The purpose of an informal enforcement action is to quickly bring an actual, threatened, or potential violation to the discharger's attention and to give the discharger an opportunity to return to compliance as soon as possible. The Water Board may take formal enforcement action in place of, or in addition to, informal enforcement actions. Continued noncompliance,particularly after informal actions have been unsuccessful, ~~will~~ should result in escalation to more formal enforcement.

1. Oral and Written Contacts

For many violations, the first step is an oral contact. This involves contacting the discharger by phone or in person, informing the discharger of the specific violations, discussing how and why the violations have occurred or may occur, and how and when the discharger will correct the violation and achieve compliance. Staff must document such conversations in the facility case file and in the enforcement database.

A letter or email is often appropriate as a follow-up to, or in lieu of, an oral contact. Letters or emails, signed by staff or by the appropriate senior staff, should inform the discharger of the specific violations and, if known to staff, discuss how and why the violations have occurred or may occur. This letter or email should ask how and when the discharger will correct the violation and achieve compliance. The letter or email should require a prompt response and a certification from the discharger that the violation(s) has been corrected. In many cases, an email response may not be sufficient, and a formal written response will be required. Correction of the violation by the discharger shall be recorded in the enforcement database.

Oral enforcement actions, letters, or emails shall not include language excusing the violation or modifying a requirement or compliance date in WDRs or other orders issued by the Water Boards.

2. Notices of Violation ~~(NOV)~~

A~~n~~ Notice of Violation (NOV) letter is the most significant level of informal enforcement action. An NOV must be signed by the appropriate staff and provided to the discharger(s). In cases where the discharger has requested that its consultant be notified of ~~Regional~~ Water Board actions, the consultant should also receive a copy of the NOV. The NOV letter should~~shall~~ include a description of the specific violation, a summary of potential enforcement options available to address noncompliance (including potential ACL assessments), and a request for a certified, written response by a specified date that either confirms the correction of the violation or identifies a date by which the violation will be corrected. The summary of potential enforcement options should include appropriate citations to the Water Code, or other applicable code, and should specify that the Water Board reserves its right to take any enforcement action authorized by law.

~~The~~ An NOV can be ~~combined with a request for~~ accompanied by a separate order requiring submittal of technical or monitoring information pursuant to ~~California~~ Water Code sections 13267 and/or 13383, or similar requests. ~~The summary of potential enforcement options must include appropriate citations to the California~~

~~Water Code and must specify that the Regional Water Board reserves the right to take any enforcement action authorized by law. When combining~~ NOVs cannot be petitioned to the State Water Board because they are not final actions, while a ~~and California~~ Water Code section 13267 and/or 13383 order ~~requests, it should be noted that only requests made pursuant to section 13267 are petitionable~~ may be petitioned to the State Water Board.

C. Formal Enforcement Actions

Formal enforcement actions are statute-based actions to address a violation or threatened violation of water quality laws, regulations, policies, plans, or orders. The actions listed below present options available for formal enforcement[10]:

1. Notices to Comply

~~California~~ Water Code section 13399 *et seq*. deals with ~~statutorily defined~~ "minor" violations. When dealing with such a "minor" violation, a Notice to Comply ~~is generally the only means by which~~ may precede other forms of formal enforcement action by the State Water Board or Regional Water Board ~~can commence an enforcement action~~. A violation is determined to be "minor" by the State Water Board or the Regional Water Board after considering factors defined in ~~California~~ Water Code section 13399, subdivisions (e), ~~and~~(f), and (g) ~~and the danger the violation poses to, or the potential that the violation presents for, endangering human health, safety, welfare, or the environment~~.

a. Under most circumstances the violations listed below are considered to be "minor"violations:

(1) Inadvertent omissions or deficiencies in recordkeeping that do not prevent a Water Board from determining ~~whether~~ compliance ~~is taking place~~;

~~(2) Records (including WDRs) not being physically available at the time of the inspection, provided the records do exist and can be produced in a reasonable time;~~

(2) Inadvertent violations of insignificant administrative provisions that do not involve a discharge of waste or a threat thereof; and,

(3) Violations that result in an insignificant discharge of waste or a threat thereof; provided, however, that there is no significant threat to human health, safety, welfare,or the environment.

b. A violation is not considered "minor" if it includes any of the following:

(1) Any knowing, willful, or intentional violation of division 7 (commencing with section 13000) of the ~~California~~ Water Code;

(2) Any violation that enables the violator to benefit economically from noncompliance,either by realizing reduced costs or by gaining an unfair

[10] It is important to note that CAOs, CDOs, TSOs, and Technical/Monitoring Reports Orders are not always issued in an enforcement context. In some cases, these orders are requested by the regulated community and uncontested.

competitive advantage; and,

(3) Chronic violations or violations committed by a recalcitrant violator; and,

(4) Violations that cannot be corrected within 30 days.

In determining whether a violation is chronic or a violator is recalcitrant, the State Water Board or Regional Water Board shall consider whether there is evidence indicating that the violator has engaged in a pattern of neglect or disregard with respect to the requirements of division 7 of the Water Code or the requirements adopted pursuant thereto.

2. Notices of ~~Storm Water~~ Stormwater Noncompliance

The Storm Water[11] Enforcement Act of 1998 (Wat. Code, § 13399.25 et seq.) requires that each Regional Water Board provide a notice of noncompliance to any **industrial, including construction, ~~storm water~~ stormwater** dischargers who have failed to file a notice of intent to obtain coverage, a notice of non-applicability, a construction certification, or annual reports. If, after two notices, the discharger fails to file the applicable document, the Regional Water Board shall issue an ACL **Complaint ~~complaint~~** against the discharger. Alternatively, the Water Boards may enforce most of these violations under WaterCode section 13385.

3. Technical/Monitoring Report~~s~~ Orders ~~and Investigations~~

~~California~~ Water Code section 13267, subdivision (b), and section 13383, allow the Water Boards to conduct investigations and to require technical or monitoring reports from any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste. When requiring reports, pursuant to Water Code section 13267, subdivision(b), the Water Board must ensure that the burden, including the cost of reports, bears a reasonable relationship to the need for the reports and the benefits to be obtained from them. Further, **pursuant to Water Code section 13267, subdivision (b),** the Water Board shall provide a written explanation with regard to the need for the reports and identify the evidence that supports requiring them. **~~Although they should be cited inCleanup and Abatement Orders, Cease and Desist Orders and section 13308 Time Schedule Orders, it is important to note that Water Code sections 13267 and 13383 are not strictly enforcement statutes. State and Regional Water Boards should routinely cite those sections as authority whenever asking for technical or monitoring reports.~~**

Failure to comply with requirements made pursuant to **~~California~~** Water Code section 13267,subdivision (b), may result in administrative civil liability pursuant to **~~California~~** Water Code section 13268. Failure to comply with **~~orders~~ requirements** made pursuant to **~~California~~** Water Code section 13383 may result in administrative civil liability pursuant to **~~California~~** Water Code section 13385. Sections 13267, subdivision (b), and section 13383 requirements are enforceable when **~~signed~~ issued by a Water Board or issued** by the Executive Officer or Executive Director of the Water

[11] **Although the Water Code uses the term "storm water," the State Water Board and the regulated community have generally adopted the use of "stormwater" as one word. There is no legal distinction between the two.**

Boards or their delegates.

4. *Cleanup and Abatement Orders ~~(CAO)~~*

~~Cleanup and Abatement Orders (~~CAO~~s)~~ are ~~adopted~~ issued pursuant to ~~California~~ Water Code section 13304 and/or Health and Safety Code section 25296.10. CAOs may be issued to any person who has discharged or discharges waste into the waters of this State in violation of any ~~waste discharge requirement~~ WDR or other order or prohibition issued by a Regional Water Board or the State Water Board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the State and creates, or threatens to create, a condition of pollution or nuisance. The term "discharger" refers to those persons who may be subject to a CAO issued under Water Code section 13304; the term "responsible party" refers to those persons who may be subject to a CAO issued under Health and Safety Code section 25296.10. In some instances, for ease of reference, the term "discharger" is used broadly to include both dischargers and responsible parties. ~~(discharger)~~. The CAO requires the discharger to clean up the waste or abate the effects of the waste, or both, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.

The Regional Water Boards shall comply with State Water Board Resolution No. 92-49, *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges under Water Code Section 13304*, in issuing CAOs. CAOs shall require dischargers to clean up the pollution to background levels or the best water quality that is reasonable, if background levels of water quality cannot be restored, in accordance with Resolution 92-49. At a minimum, clean up levels must be sufficiently stringent to fully support beneficial uses, unless the Regional Water Board allows a containment zone. In the interim, and if restoration of background water quality cannot be achieved, the CAO shall require the discharger(s) to abate the effects of the waste ~~discharge~~.

Violations of CAOs should trigger further enforcement in the form of an ACL Complaint, a ~~TimeSchedule Order (~~TSO~~)~~ under ~~California~~ Water Code section 13308, or a referral to the Attorney General for injunctive relief or monetary remedies, or both.

5. *Section 13300 Time Schedule Orders ~~(TSO)~~*

Pursuant to ~~California~~ Water Code section 13300, a Regional Water Board can require the discharger to submit a time schedule that sets forth the actions the discharger will take to address actual or threatened discharges of waste in violation of requirements. Typically, those schedules, after any appropriate adjustments by the Regional Water Board, are then memorialized in an order. 13300 TSOs that require submission of technical ~~and~~ or monitoring reports should state that the reports are required pursuant to ~~California~~ Water Code section 13267.

6. *Section 13308 Time Schedule Orders ~~(13308 TSO)~~*

~~California~~ Water Code section 13308 authorizes the Regional Water Board to issue a ~~Section 13308 Time Schedule Order (~~13308 TSO~~)~~ that prescribes, in advance, a civil penalty if compliance is not achieved in accordance with the time schedule. The

Regional Water Board may issue a 13308 TSO if there is a threatened or continuing violation of a CAO, a ~~cease and desist order~~CDO, or any requirement issued under ~~California~~ Water Code sections 13267 or 13383. The penalty must be set based on an amount reasonably necessary to achieve compliance and may not contain any amount intended to punish or redress previous violations. The 13308 TSO provides the Regional Water Boards with their primary mechanism for motivating compliance, and if necessary, assessing monetary penalties against federal facilities. Orders under this section are thus an important tool for regulating federal facilities. **The State Water Board may issue a 13308 TSO if the violation or threatened violation involves requirements prescribed by a State Water Board Order.**

If the discharger fails to comply with a 13308 TSO, the discharger is subject to an ACL Complaint ~~complaint~~. ~~The State Water Board may issue a 13308 TSO if the violation or threatened violation involves requirements prescribed by a State Water Board Order.~~ If the amount of proposed liability in the ~~compliant~~ Complaint is less than the amount specified in the 13308 Order, the ~~Regional~~ Water Board is required by ~~California~~ Water Code section 13308, subdivision (c), to include specific findings setting forth the reasons for its action based on Water Code section 13327.

7. Cease and Desist Orders ~~(CDO)~~

~~Cease and Desist Orders (CDO)~~ CDOs are ~~adopted~~ issued pursuant to ~~California~~ Water Code sections 13301 and 13303. CDOs may be issued to dischargers violating or threatening to violate ~~waste discharge requirements (WDR)~~ WDRs or prohibitions prescribed by the Regional Water Board or the State Water Board. CDOs are often issued to dischargers with chronic non-compliance problems. These problems are rarely amenable to a ~~short term~~ short-term solution. Often, compliance involves extensive capital improvements or operational changes. The CDO will usually contain a compliance schedule, including interim deadlines, interim effluent limits, and a final compliance date. CDOs may also include restrictions on additional service connections to community sewer systems and combined stormwater/sewer systems.

Government Code ~~S~~section 4477 ~~of the California Government Code~~ prohibits all state agencies from entering into contracts of $5,000 or more for the purchase of supplies, equipment, or services from any nongovernmental entity who is the subject of a CDO that is no longer under review and that was issued for violation of WDRs, or which has been finally determined to be in violation of federal laws relating to air or water pollution. If the CDO contains a time schedule for compliance and the entity is adhering to the time schedule, the entity is not subject to disqualification under this section. A list of such entities is maintained by the State Water Board.

CDOs that require submission of technical and monitoring reports should ~~stat~~ state that the reports are required pursuant to Water Code section 13267 or 13383, or both. CDOs shall contain language describing likely enforcement options available in the event of noncompliance and shall specify that the ~~Regional~~ Water Board reserves its right to take any further enforcement action authorized by law. Such language shall include appropriate ~~California~~ Water Code citations. Violations of CDOs should trigger further enforcement in the form of an ACL, 13308 TSO, or referral to the Attorney

General for injunctive relief or monetary remedies, or both.

8. *Modification or Rescission of WDRs*

In accordance with the provisions of the ~~California~~ Water Code, a Regional Water Board may modify or rescind WDRs in response to violations. Depending on the circumstances of the case, rescission of WDRs may be appropriate for failure to pay fees, penalties, or liabilities; a discharge that adversely affects beneficial uses of the waters of the State; and violation of the State Water Board General WDRs for discharge of bio-solids due to violation of the Background Cumulative Adjusted Loading Rate. Rescission of WDRs generally is not an appropriate enforcement response where the discharger is unable to prevent the discharge, as in the case of a ~~publicly-owned treatment works (~~POTW~~)~~.

9. *Administrative Civil Liabilities ~~(ACL)~~*

ACLs are liabilities imposed by a Regional Water Board or the State Water Board. The ~~California~~ Water Code and Health and Safety Code authorize ~~authorizes~~ the imposition of an ACL for certain violations of law. The factors used to assess the appropriate penalties are addressed in Section VI.

In addition to those specific factors that must be considered in any ACL action, there is another factor that ought to be considered. When the underlying problem that caused the violation(s) has not been corrected, the Water Board should evaluate whether the liability proposed in the ACL Complaint ~~complaint~~ is sufficient to encourage necessary work by the discharger to address problems related to the violation. If not, the Water Board should consider other options. An ACL action may be combined with another enforcement mechanism such as a CAO, a CDO, or other order with a time schedule for obtaining compliance. The appropriate orders to bring a discharger into compliance via an enforcement action will vary with the circumstances faced by the Water Boards.

It is the policy of the State Water Board that any proposed order that would resolve the imposition of administrative or judicial civil liabilities through settlement be posted on the Board's website for a 30-day public comment period prior to adoption ~~shall be posted on the Board's website prior to the settlement or imposition of any ACL and prior to settlement of any judicial civil liabilities~~. In addition, for civil liabilities that are expected to generate significant public interest, the Board may consider mailing or emailing the notice to known interested persons ~~parties~~, or publishing the notice in a local newspaper. The notice should include a brief description of the alleged violations, the proposed civil liability, the deadline for comments, the date of any scheduled hearing, a process for obtaining additional information, and a statement that the amount of the civil liability may be revised. The Water Boards should also consider doing specific outreach to impacted communities and groups on a case-by-case basis. Outreach to impacted communities, particularly disadvantaged and environmental justice communities and California Native American Tribes, should occur consistent with the Policy's discussion on those topics. Only one notice need be posted for each civil liability.

Upon receipt of an ACL Complaint ~~complaint~~ (Complaint ~~complaint~~), the

discharger(s) may waive its right to a ~~public~~ hearing and pay the liability; **request to enter settlement negotiations** ~~negotiate a settlement~~; or appear at a ~~Board~~ hearing to dispute the **Complaint** ~~complaint~~. If the discharger waives its right to a ~~public~~ hearing and pays the liability, ~~a third party~~ **an interested person** may still comment on the **Complaint** ~~complaint~~ at any time during the public comment period. Following review of the comments **timely received, the Complaint may be withdrawn.** ~~the Executive Officer, or his or her delegate, may withdraw the Complaint complaint~~. A **Complaint** ~~complaint~~ may be redrafted and reissued as appropriate, but a new comment period would apply to any substantively different **Complaint** ~~complaint~~.

The State Water Board has established template hearing procedures, for use by the Regional Water Boards in administrative civil liability proceedings, provided in Appendix E. The Regional Water Boards shall use the template hearing procedures when conducting administrative civil liability hearings, modifying the procedures only as necessary based on the specific facts and circumstances of the case before it.

D. Petitions of Enforcement Actions

Persons affected by most formal enforcement actions or failures to act by a Regional Water Board may file a petition with the State Water Board for review of such actions or failures to act **in accordance with Water Code section 13320 and the State Water Board's regulations governing petitions for review**. The petition must be received by the State Water Board within 30 days of the Regional Water Board action. A petition on a Regional Water Board's failure to act must be filed within 30 days of either the date the Regional Water Board refuses to act, or a date that is 60 days after a request to take action has been made to the Regional Water Board. Actions taken by the Executive Officer of a Regional Water Board, if pursuant to authority delegated by the Regional Water Board (e.g., CAOs, ACL orders), are considered final actions by the Regional Water Board and are also subject to the 30-day time limit. In addition, significant enforcement actions by a Regional Water Board Executive Officer may, in some circumstances, be reviewed by the Regional Water Board at the request of the discharger, though such review does not extend thetime to petition the State Water Board. The State Water Board may, at any time and on its own motion, review most actions or failures to act by a Regional Water Board. When a petition is filed with the State Water Board challenging an ACL assessment, the assessment is not due or ~~owing~~ **owed** during the State Water Board review of the petition. In all other cases, the filing of a petition does not automatically stay the obligation to comply with the Regional Water Board order; a stay must be requested **and granted** from the State Water Board or a court **to stay the obligation**.

APPENDIX B: ENFORCEMENT REPORTING

In order to inform the public of the State and Regional Water Boards' performance with regard to enforcement activities, there are a number of legislatively mandated and elective reports the Water Boards are committed to producing on a regular basis.

A. Legislatively Mandated Enforcement Reporting

The following list summarizes legislatively mandated enforcement reporting requirements and State Water Board interpretations thereof:

- Section 13167 requires the State Water Board to place and maintain information on enforcement and enforcement actions on its website.
- Section 13225, subdivision (e), requires each Regional Water Board to report rates of compliance with the requirements of this Division. Compliance rates will be reported inthe Annual Performance Report.
- Section 13225, subdivision (k), requires each Regional Water Board, in consultation with the State Water Board, to identify and post on the Internet a summary list of all enforcement actions undertaken in that region and the disposition of each action, including any civil penalty assessed. This list must be updated at least quarterly.
- Section 13323, subdivision (e), requires information related to hearing waivers and the imposition of administrative civil liability, as proposed, and as finally imposed, to be posted on the Internet.
- Section 13385, subdivision (o), requires the State Water Board to continuously report and update information regarding its enforcement activities on its website, but at a minimum, annually on or before January 1. The required information includes all of the following:
  1. A compilation of the number of violations of waste discharge requirements in the previous calendar year, including ~~storm water~~ stormwater enforcement violations;
  2. A record of the formal and informal compliance and enforcement actions taken for each violation, including ~~storm water~~ stormwater enforcement actions; and,
  3. An analysis of the effectiveness of current enforcement policies, including mandatory minimum penalties or MMPs.
- **Section 13399.3 requires that the State Water Board submit an annual report to the Legislature on actions taken by the Water Boards to implement Water Code sections 13399, 13399.1, and 13399.2, which relate to issuance of Notices to Comply.**
- Section 13399.27, subdivision (a), requires a list of persons that were notified of their duty to comply with the general ~~storm water~~ stormwater NPDES permits

and a description of the responses received to those notifications.

- Section 13399.27, subdivision (b), requires a list of persons that failed to submit an annual report or construction certification required by a regional water board and any penalties assessed therefor.
- Government Code section 65962.5, subdivision (c), requires that the State Water Board annually compile and submit to CalEPA a list of:
  1. All underground storage tanks for which an unauthorized release report is filed pursuant to Health and Safety Code section 25295;
  2. All solid waste disposal facilities from which there is a migration of hazardous waste and for which a Regional Water Board has notified ~~the Department of Toxic Substances Control~~ DTSC pursuant to section 13273, subdivision (e), of ~~California~~ the Water Code.
  3. All CDOs issued after January 1, 1986, pursuant to ~~California~~ Water Code section 13301, and all CAOs issued after January 1, 1986, pursuant to ~~California~~ Water Code section 13304, which concern the discharge of wastes that are hazardous materials.

B. Elective Enforcement Reporting

To present a comprehensive view of the Water Boards' enforcement activities and to identify enforcement goals and priorities, the Water Boards prepare the Annual Performance Report. The report should address the following subjects:

1. Budgetary and staff resources available for water quality enforcement at the Water Boards, as compared with the total resources for the regulatory programs and activities that they support, and the types of enforcement actions taken with those enforcement resources during the reporting period.
2. The effectiveness of the Water Boards' compliance and enforcement functions using metrics, such as those identified below:

Recommended Performance Measures for the Water Boards' Enforcement Programs

Measure Name	Measure Description
Self-Monitoring Report Evaluation	Number of self-monitoring reports due, received, and reviewed and percentage of reports reviewed
Inspection Monitoring	Number of inspections and the percentage of facilities inspected
Violations	Number of violations identified
Compliance Rates	Percentage of facilities in compliance, based upon the number of facilities evaluated

Enforcement Response	Percentage of violations that received an enforcement action
Enforcement Activities	Number and type of enforcement actions
Penalties Assessed and Collected	The number of penalties assessed and collected, SEPs approved, and injunctive relief
MMP Violations Addressed	Number of facilities with MMP violations receiving a penalty
Recidivism	Number and percentage of facilities returning to non-compliance for the same violation(s) addressed through an enforcement action
Environmental Benefits *(as a result of an enforcement action)*	Estimated pounds of pollutants reduced/removed through cleanup (soil or water), and wetlands/stream/beach/creek/ river miles protected/restored (acres, miles, etc.)

3. Proposed enforcement priorities for the State Water Boards for the next reporting period and staff's basis for these proposals;
4. The extent of progress on enforcement priorities identified in prior reports; and,
5. Recommendations for improvements to the Water Boards' enforcement capabilities.

APPENDIX C: REFERENCES

Water Code section authorizing the imposition of liability	Entity authorized to impose liability	Description	Water Code section directing deposit of funds	Account
§ 13261(b)(1)	Water Boards	Civil liability up to $1,000 per day for failure to furnish reports of waste discharge or failure to pay annual program fees.	§ 13441~~(c)~~(a)(3)	CAA
§ 13261(b)(2)	superior court	Civil liability up to $5,000 per day for failure to furnish reports of waste discharge or failure to pay annual program fee	§ 13441~~(c)~~(a)(3)	CAA
§ 13261(d)(1)	Regional Water Board	Civil liability up to $5,000 per day for knowingly furnishing a false report of waste discharge, willfully failing to furnish a report of waste discharge, or willfully withholding material information on a report of waste discharge, against any person discharging or proposing to discharge hazardous waste, as defined by the Health and Safety Code.	§ 13441~~(c)~~(a)(3)	CAA
§ 13261(d)(2)	superior court	Civil liability up to $25,000 for knowingly furnishing a false report of waste discharge, willfully failing to furnish a report of waste discharge, or willfully withholding material information on a report of waste discharge, against any person discharging or proposing to discharge hazardous waste, as defined by the Health and Safety Code.	§ 13441~~(c)~~(a)(3)	CAA

Water Code section authorizing the imposition of liability	Entity authorized to impose liability	Description	Water Code section directing deposit of funds	Account
§ 13263.3(g); § 13385(c)(1)	Water Boards	Civil liability may be imposed in an amount not to exceed ten thousand dollars ($10,000) for each day in which the violation occurs for failure to for failure to complete a pollution prevention plan required by the State Water Board or a regional water board, for submitting a plan that does not comply with the act, or for not implementing a plan.	§ 13385(n)(1)	CAA
§ 13264 (a)(2); § 13265(a) & (b)(1)	Regional Water Board	Civil liability up to $1,000 per day for initiating a new discharge of waste, or making a material change to a discharge of waste, or initiating a new discharge to, making a material change in a discharge to, or constructing an injection well after filling a report of waste discharge but before 140 days has expired, where no WDRs have been issued and where the violation has been called to the discharger's attention, in writing, by the regional water board.	§ 13264(c)(1)	WDPF
§ 13265(b)(1)	Regional Water Board	Civil liability up to $1,000 per day for dischargingwaste in violation of section 13264, after such violationhas been called to the discharger's attention, in writing, by the regional water board.	§ 13441~~(c)~~(a)(3)	CAA
§ 13265(b)(2)	superior court	Civil liability up to $5,000 per day for dischargingwaste in violation of section 13264, after such violation has been called to the discharger's attention, in writing, by the regional water board.	§ 13441~~(c)~~(a)(3)	CAA

Water Code section authorizing the imposition of liability	Entity authorized to impose liability	Description	Water Code section directing deposit of funds	Account
§ 13265(d)(1)	Regional Water Board	Civil liability up to $5,000 per day for negligentlydischarging hazardous waste, as defined by the Health and Safety Code, in violation of section 13264.	§ 13441~~(c)~~(a)(3)	CAA
§ 13265(d)(2)	superior court	Civil liability up to $25,000 per day for negligentlydischarging hazardous waste, as defined by the Health and Safety Code, in violation of section 13264.	§ 13441~~(c)~~(a)(3)	CAA
§ 13268(b)(1)	Regional Water Board (or State Water Board if no duplication of efforts)	Civil liability up to $1,000 per day for failing or refusing to furnish technical or monitoring reports or falsifying information therein.	§ 13441~~(c)~~(a)(3)	CAA
§ 13268(b)(2)	superior court	Civil liability up to $5,000 per day for failing or refusing to furnish technical or monitoring reportsor falsifying information therein.	§ 13441~~(c)~~(a)(3)	CAA
§ 13268(d)(1)	Regional Water Board (or State Water Board if no duplication of efforts)	Civil liability up to $5,000 per day against any person discharging hazardous waste, as defined in the Health and Safety Code, for failure to furnish technical report or knowingly falsifying information therein.	§ 13441~~(c)~~(a)(3)	CAA
§ 13268(d)(2)	superior court	Civil liability up to $25,000 per day against any person discharging hazardous waste, as defined in the Health and Safety Code, for failure to furnish technical reports or knowingly falsifying information therein.	§ 13441~~(c)~~(a)(3)	CAA

Water Code section authorizing the imposition of liability	Entity authorized to impose liability	Description	Water Code section directing deposit of funds	Account
§ 13268(e)(1)	superior court	Criminal penalties up to $25,000 for knowingly failing or refusing to furnish technical or monitoring program reports, or failing or knowingly falsifying information therein.	§ 13268(f)(1)	WDPF
§ 13268(e)(2)	superior court	If person previously violated section 13268(a) or (c), up to $25,000 per day in criminal penalties for knowingly failing or refusing to furnish technical or monitoring program reports, or knowingly falsifying information therein.	§ 13268(f)(1)	WDPF
§ 13271(c)	superior court	Criminal penalties up to $20,000 in criminal penalties for failure to provide notice after causing or permitting hazardous substance or sewage to be discharged in or on any waters of the state or discharged or deposited where it is, or probably will be, discharged in or on any waters of the state.	§ 13441~~(c)~~(a)(3)	.5 to CAA
§ 13272(c)	superior court	No less than $500 or more than $5,000 per day for failure to provide notice after causing or permitting oil or petroleum product to be discharged in or on any waters of the state or discharged or deposited where it is, or probably will be, discharged in or onany waters of the state.	§ 13441~~(c)~~(a)(3)	.5 to CAA
§ 13308	Regional Water Board (or State Water Board if violation of StateWater Board order)	Civil liability up to $10,000 per day for violation of a time schedule order.	§ 13308(e)	CAA

Water Code section authorizing the imposition of liability	Entity authorized to impose liability	Description	Water Code section directing deposit of funds	Account
§ 13350(d)	superior court	Civil liability up to $15,000 per day or $20 per gallon for violation pursuant to section 13350(a) or (b).	§ 13350(k)	WDPF
§ 13350(e)	Water Boards	Civil liability up to $5,000 per day* or $10 per gallon for violation pursuant to section 13350(a) or (b). * When there is a discharge and a CAO is issued, civil liability shall not be less than $500 per day in which the discharge occurs and the CAO is violated. When there is no discharge, but an order issued by the regional water board is violated, the civil liability shall be not less than $100 per day.	§ 13350(k)	WDPF
§ 13385(b)	superior court	Civil liability not to exceed $25,000 per day for violations of section 13385(a)(1)(2*)[*other than a violation of a water quality certification] (3)(4)(5*) [*other than violations of CWA section 401] or (6), and up $25 per gallon for discharge in excess of 1,000 gallons that is not cleaned up or is not susceptible to cleanup.	§ 13385(n)(1)	CAA
§ 13385(b)	superior court	Civil liability not to exceed $25,000 per day for section 13385 (a)(2*)[*only for a violation of a water quality certification] or (5*)[*only for violations of CWA section 401], and up to $25 per gallon for discharge in excess of 1,000 gallons that is not cleaned up or is not susceptible to cleanup.	§ 13385(n)(2)	WDPF

Water Code section authorizing the imposition of liability	Entity authorized to impose liability	Description	Water Code section directing deposit of funds	Account
§ 13385(c)	Water Boards	Civil liability not to exceed $10,000 per day for violations of section 13385(a)(1)(2*)[*other than a violation of a water quality certification] (3)(4)(5*) [*other than violations of CWA section 401] or (6), and up $10 per gallon for discharge in excess of 1,000 gallons that is not cleaned up or is not susceptible to cleanup.	§ 13385(n)(1)	CAA
§ 13385(c)	Water Boards	Civil liability not to exceed $10,000 per day for section 13385 (a)(2*)[*only for a violation of a water quality certification] or (5*)[*only for violations of CWA section 401], and up to $10 per gallon for discharge in excess of 1,000 gallons that is not cleaned up or is not susceptible to cleanup.	§ 13385(n)(2)	WDPF
§ 13385 (h) through (l)	superior court or State or Regional Water Board	MMPs of $3,000 for certain NPDES violations. Compliance with a ~~cease and desist order~~ CDO or time schedule or violations from a single operational upset of a biological treatment process will, in some instances, limit the imposition of penalties. Violations occurring at a new or reconstructed POTW and from POTWs in Orange County may be exempt from MMPs. Compliance projects for POTWs serving small communities may be considered in lieu of penalties. SEPs maybe funded in lieu of an MMP	§ 13385(n)(1)	CAA

Water Code section authorizing the imposition of liability	Entity authorized to impose liability	Description	Water Code section directing deposit of funds	Account
§ 13385(h) through (l)	superior court or State or Regional Water Board	MMPs of $3,000 for violations falling under section 13385(a)(2*) [*only for a violation of a water quality certification] or (5*)[*only for violations of CWA section 401].	§ 13385(n)(2)	WDPF
§ 13385.1; § 13385(h)	superior court or State or Regional Water Board	MMPs of $3,000 for failure to timely file a discharge monitoring report required pursuant to section 13383 for each complete period of 30 days following the deadline for submitting the report, if the report is designed to ensure compliance with limitations contained in WDRs thatcontain effluent limitations.	§ 13385.1~~(b)~~(c)(1)	~~WDPF~~ CAA
§ 13387(b), (c), & (d)	superior court	Criminal penalties for knowing or negligent violation of various sections of the Water Code resulting in fines ranging from $5,000 per day for a negligent violation to $1,000,000 for knowingly putting another person in imminent danger of death or serious bodily injury (not including a violation ofwater quality certification, or violations of CWA section 401)	§ 13387(h)(1)	CAA
§ 13387(b), (c), & (d)	superior court	Criminal penalties for a violation of water quality certification or violations of CWA section 401.	§ 13387(h)(2)	WDPF
§ 13399.33(a)	Regional Water Board	Civil liability of not less than $5,000 per year of noncompliance for failure to submit a notice of intent to obtain coverage under the ~~storm water~~ stormwater NPDES permit in accordance with section 13399.30.	§ 13399.37(a)	WDPF

Water Code section authorizing the imposition of liability	Entity authorized to impose liability	Description	Water Code section directing deposit of funds	Account
§ 13399.33(b)	Regional Water Board	Civil liability of $1,000 for failure to submit the required notice of non-applicability in accordance with section 13399.30.	§ 13399.37(a)	WDPF
§ 13399.33(c)	Regional Water Board	Civil liability of not less than $1,000 for failure to submit an annual report or construction certification in accordance with section 13399.1.	§ 13399.37(a)	WDPF
§ 13529.4(a)	Regional Water Board	Civil liability ranging from $5,000 to $25,000 (depending on whether the violation is the first, second, third, or more) for refusing or failing to provide notice required under section 13529.2, or as required by a condition of WDRs requiring notification of unauthorized releases of recycled water.	§ 13441~~(c)~~(a)(3)	CAA
§ 13611(c)(1)	Regional Water Board	Civil liability up to $1,000 per day for failure to provide the notifications required by section 13271 relating to ~~perclorate~~ perchlorate or by section 13611.5.	§ 13611(d)	CAA (available upon appropriation by the Legislature)
§ 13611(c)(2)	superior court	Civil liability not less than $500 and not more than $5,000 for failure to provide the notifications required by section 13271 relating to ~~perclorate~~ perchlorate or by section 13611.5.	§ 13611(d)	CAA available upon appropriation by the Legislature)
§ 13627.1(a)	State Water Board	Civil liability of not more than $100 against any person who operates a wastewater treatment plant who does not hold a valid, unexpired certificate of the appropriate grade.	§ 13441~~(c)~~(a)(3)	CAA

Water Code section authorizing the imposition of liability	Entity authorized to impose liability	Description	Water Code section directing deposit of funds	Account
§ 13627.1(b)	State Water Board	Civil liability of not more than $100 per day against any person that owns or operates a wastewater treatment plant that employs, or allows the employment of, any person as a wastewater treatment plant operator who does not hold a valid, unexpired certificate of the appropriate grade.	§ 13441~~(c)~~(a)(3)	CAA
§ 13627.1(c)	State Water Board	Civil liability up to $5,000 for each violation of certain specified acts related to wastewater treatment plant operators.	§ 13441~~(c)~~(a)(3)	CAA
§ 13627.2	State Water Board	Civil liability up to $5,000 against any person who submits false or misleading information on an application for certification as a wastewater treatment plant operator or on an application for registration as a contract operator.	§ 13441~~(c)~~(a)(3)	CAA
§ 13627.3	State Water Board	Civil liability up to $1,000 against any person who contracts to operate a wastewater treatment plant without having valid registration as a contract operator.	§ 13441~~(c)~~(a)(3)	CAA

APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY

Generally, the Water Boards should use the version of the Policy in effect on the date of the violation at issue. The Policy is considered to be in effect after it has been adopted by the State Water Board and approved by the Office of Administrative Law (OAL). To date, the State Water Board has adopted three versions of the Policy: 2010 Policy, 2017 Policy, and ~~2023~~2024 Policy. The 2010 Policy was in effect from May 20, 2010 to October 4, 2017. The 2017 Policy became effective on October 5, 2017, and remains in place until OAL approval of the ~~2023~~2024 Policy.

Amendments in the ~~2023~~2024 Policy that are mere clarifications may be used immediately upon adoption by the State Water Board (and prior to approval by the Office of Administrative Law) to assist the Water Boards in interpreting previous versions of the Policy. Procedural changes may be applied to new or pending enforcement matters once the Policy is ~~effective~~approved by the Office of Administrative Law. Substantive changes can only be applied prospectively to violations which occur on or after the Policy's effective date unless a discharger consents to their retroactive application.

ANALYSIS

The standard presumption is that the law in place at the time of a violation is controlling. (*Consumer Financial Protection Bureau v. Gordon* (2016) 819 F.3d 1179, 1197-1198.) Therefore, in most instances the version of the Policy in place at the time of the violation will be controlling.

In determining what version should be applied, the date of "the last act or event necessary to trigger application of the statute," is determinative. (*People v. Grant* (1990) 20 Cal.4th 150, 157.) When the last act or event occurs after the effective date, even if "some of the facts or conditions … came into existence prior to its enactment," a new law may be applied to some portion of conduct that occurred prior to its effective date. (*Id.* at p. 158.) Thus, the Policy could be applied to conduct that begins before but ends after the effective date of the Policy, as long as the final triggering event occurred after the effective date of the Policy.

There are some exceptions to the general rule that the version in place at the time of the violation is the version that controls in prosecuting an action. However, applying the Policy to violations that predate its effective date raises concerns regarding the presumption against retroactivity. A law is considered retroactive when it "relates back to a previous transaction and gives it a different legal effect from that which it had under the law when it occurred." (*Bear Valley Mut. Wat. Co v. County of San Bernardino* (1966) 242 Cal.App.2d 68, 72.) The presumption against retroactivity holds that in most instances a new law is not relevant to the adjudication of conduct that occurred before the law was officially adopted. (*Georgia-Pacific Corp. v. California Coastal Com.* (1982)132 Cal.App.3d 678, 694.)

Several aspects of the Policy can be utilized when bringing enforcement actions that are related to conduct prior to the Policy's effective date. Changes that are clarifications can be applied to all new and pending matters following adoption by the State Water Board and ~~or~~procedural changes can be applied to all new and pending matters ~~immediately~~ upon approval by the Office of Administrative Law. Substantive changes, in contrast, can only be applied to violations that occur after the effective date of the Policy unless a party consents to its application. For example, in settlement agreements dischargers may consent to the application of the Policy to conduct that occurred prior to its effective date.

A change in law is considered substantive when "it imposes a new or additional liability and substantially affects existing rights and obligations." (*Aetna Cas. Sur. Co. v. Industrial Acc. Commission* (1947) 30 Cal.2d 388, 395 [holding that an amendment to worker's compensation law that expanded compensation for plaintiffs was substantive because it increased employer liability].) Therefore, when an aspect of the Policy affects liability or creates new rights or obligations it will be considered a substantive change and can only be applied to violations that occur after the effective date.

The chart below categorizes the amendments to the 2023 Policy as either clarifications, procedural changes, or substantive changes. Questions regarding which Policy applies should be made on a case-by-case basis in consultation with legal counsel.

~~2023 Policy Update~~ Categorization of Amendments			
Page	Section	Topic	Type
X	Section I.F [*Note: will be I.F. when I.A is restored*]	Additional language added to determine whether a community is a disadvantaged or environmental justice community.	Clarification
X	Section I.G [*Note: will be I.G. when I.A is restored*]	Language added to describe outreach to California Native American Tribes.	~~Clarification~~ Procedural
X	Sections II.A and II B.	Language changes in Section II.A "Ranking Violations" and Section II.B "Case Prioritization for Individual Entities."	Procedural
X	Section II.E.	Moving "Multiple Violations Resulting from the Same Incident" from the penalty calculation methodology to Section II.	Procedural
X	Section IV.	Modifying State Water Board's ability to take the lead in an enforcement	Procedural

		action by eliminating the requirement that "water rights are predominant."	
X	Section VI.A.	Under Step 1 (Actual or Potential Harm): For degree of toxicity, clarifying that examples of "potential receptors" include human health, aquatic life, habitat, etc.	Clarification
X	Section VI.A.	Under Step 2 (Assessments for Discharge Violations): Additional language in High Volume Discharges.	Clarification
X	Section VI.A.	Under Step 3 (Per Day Assessments for Non-Discharge Violations): Language allowing for consideration of "whether to collapse days for multiple day violations" is moved to determining the initial liability amount.	Procedural
X	Section VI.A.	Under Step 3 (Per Day Assessments for Non-Discharge Violations); Prohibition on collapsing days of violation for discharge violations.	Substantive
X	Section VI.A.	Changes to order in which Other Factors as Justice May Require and Ability to Pay and Ability to Continue in business are considered (methodology steps 7 and 8).	Procedural
X	Section VI.A.	Under Step 4 (Adjustment Factors): Additional language in Degree of Culpability.	Clarification
X	Section VI.A.	~~Additional language in~~ Under Step 4 (Adjustment Factors): History of Violations shall never be below 1.0.	Clarification
X	Section VI.A.	Under Step 4 (Adjustment Factors): Definition of "violation" in History of Violations.	Substantive
X	Section VI.A.	Under Step 4 (Adjustment Factors): Additional language in Cleanup and Cooperation.	Clarification
X	Section VI.A.	Under Step 7 (Other Factors As Justice May Require): Additional language in Costs of Investigation and Enforcement Adjustment.	Clarification
X	Section VII	Changing the name of "non serious" violation to "chronic" violation.	Clarification
X	Section VII.A.	Timeframe for issuance of MMPs for dischargers regulated by generally applicable stormwater permits.	Procedural

X	Section VII.B.	Modified language in MMPs for Small Communities with Financial Hardship.	Clarification
X	Section VIII.	Modified language in Compliance Projects.	Clarification
X	Section IX.	Modified language in Enhanced Compliance Actions.	Clarification
		~~Corrective Action Projects (CAPs).~~	~~Substantive~~
X	Appendix A Section A	Deleted reference to model enforcement orders.	Procedural
X	Appendix A Section B.2.	Separating Orders requiring technical or monitoring reports from NOV.	Clarification
X	Appendix A Section C.1.	Modified language in Appendix A.1: Notices to Comply.	Clarification
X	Appendix A Section C.4.	Cleanup and Abatement Orders, expanding the definition of discharger to include "responsible party" from UST regulations.	Clarification
X	Appendix B.A.	Appendix B.A: Legislatively Mandated Enforcement Reporting.	Clarification
X	Appendix E	Appendix E: Template Hearing Procedure.	Procedural

APPENDIX E: TEMPLATE HEARING PROCEDURE

Introduction/Background for Hearing Procedure Template

The following Hearing Procedure template (Template) provides a default set of procedures for an evidentiary hearing on an administrative civil liability complaint (Complaint) pursuant to Water Code section 13323. The Template is intended for use for Complaints heard by a Regional Water Board, a hearing panel of a Regional Water Board, or a Regional Water Board Executive Officer. For hearings on Complaints heard by the State Water Board, the Template may be modified for use (e.g., change applicable statutory authority and update the titles of people involved in the hearing) with approval by the Advisory Team.

Prior to its issuance of a Complaint, the Prosecution Team should contact the Advisory Team to receive guidance on how to fill in the Template (e.g., to reflect the hearing date and who will hear the Complaint) to complete a case-specific hearing procedure. Generally, the Prosecution Team will reach out directly to the Advisory Team, without including third parties in its communication; such communication must be limited to non-controversial procedural matters. (Govt. Code, § 11430.20, subd. (b).)

The Prosecution Team will issue the hearing procedure, completed consistent with the Template and guidance from the Advisory Team, at the same time as the Complaint. As specified in Section VIII.A of the Template, the Presiding Officer may subsequently revise the hearing procedure for good cause after the issuance of the Complaint.

Other regulations, such as California Code of Regulations, title 23, sections 648 through 648.8, may also apply to the hearing on a Complaint. Where the hearing procedure conflicts with other applicable regulations, and where the regulations allow for discretion, the hearing procedure issued with the Complaint, and as amended by the Presiding Officer, controls.

California Regional Water Quality Control Board, [Insert Region]
HEARING PROCEDURE
FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT
[INSERT COMPLAINT NUMBER]

ISSUED TO
[INSERT NAME OF RESPONDENT(S)]
[INSERT COUNTY]

HEARING SCHEDULED FOR [DATE OF HEARING]

PLEASE READ THIS HEARING PROCEDURE CAREFULLY. FAILURE TO COMPLY WITH THE DEADLINES AND OTHER REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF YOUR SUBMITTAL.

California Water Code section 13323 authorizes the California Regional Water Quality Control Board, [Insert region] (Regional Water Board) to impose a fine, called administrative civil liability, against any person who violates water quality requirements. The Regional Water Board's Prosecution Team has issued an Administrative Civil Liability (ACL) Complaint that proposes the Regional Water Board impose civil liability against [Insert name of Respondent(s)] (Respondent(s)) for the violations alleged in the ACL Complaint.

I. HEARING DATE AND LOCATION

[Following direction from the Advisory Team, insert one of the following hearing options:]

[*Option 1: Regional Water Board Hearing*]

The Regional Water Board has scheduled a hearing to consider this matter on [Insert date(s) of Board meeting]. At the hearing, the Regional Water Board will consider evidence regarding the violation(s) alleged in the ACL Complaint. After considering the evidence, the Regional Water Board may impose the proposed civil liability, impose a higher or lower amount, or decline to impose any liability.

The hearing will be held at the following location:

[Insert hearing location]

The Regional Water Board's meeting agenda will be issued at least ten days before the meeting and posted on the Regional Water Board's website at [Insert website link]. The hearing may be rescheduled or continued to a later date. Please check the Regional Water Board's website for the most up-to-date information.

[*Option 2: Hearing Panel]*

A Hearing Panel has scheduled a hearing to consider this matter on [Insert date]. Water Code section 13228.14 authorizes a Hearing Panel of three or more Regional Water Board members to conduct a hearing to consider evidence regarding the alleged violation(s) in the ACL Complaint. After considering the evidence, the Hearing Panel may recommend that the Regional Water Board impose the proposed civil liability, impose a higher or lower amount, or decline to assess any liability. The Hearing Panel will report its recommendation and proposed ACL Order to the Regional Water Board at a future meeting.

The hearing will be held at:

[Insert hearing location]

The Hearing Panel's meeting agenda will be issued at least ten days before the meeting and posted on the Regional Water Board's website at [Insert website

link]. The hearing may be rescheduled or continued to a later date. Please check the Regional Water Board's website for the most up-to-date information.

[*Option 3: Executive Officer Hearing*]

The Executive Officer has scheduled a hearing to consider this matter on [Insert date]. Under Resolution [Insert Resolution Number], the Regional Water Board has authorized the Executive Officer to [Insert summary of Executive Officer ACL delegation authority]. At the hearing, the Executive Officer will hear evidence regarding the alleged violation(s) in the ACL Complaint. After considering the evidence, the Executive Officer may impose the proposed civil liability, impose a higher or lower amount, or decline to impose any liability.

The hearing will be held at:

[Insert hearing location]

The hearing may be rescheduled or continued to a later date.

II. PRESIDING OFFICER

[Following direction from the Advisory Team, insert one of the following hearing options:]

[*Option 1: Regional Water Board Hearing*]

For the purposes of this Hearing Procedure, the Presiding Officer is the Chair of the Regional Water Board or another member of the Regional Water Board designated in writing by the Chair of the Regional Water Board.

[*Option 2: Hearing Panel Hearing*]

For the purposes of this Hearing Procedure, the Presiding Officer is the Chair of the Regional Water Board or a member of the Hearing Panel designated in writing by the Chair of the Regional Water Board.

[*Option 3: Executive Officer Hearing*]

For the purposes of this Hearing Procedure, the Presiding Officer is the Executive Officer.

III. HEARING WAIVER

Water Code section 13323, subdivision (b), requires a hearing on the ACL Complaint within 90 days of service of the ACL Complaint; however, the Respondent(s) may waive this right. The Respondent(s) may decide to waive the hearing requirement and pay the full proposed liability amount and settle the ACL Complaint, contingent on the Regional Water Board's approval of the settlement.

Alternatively, the Respondent(s) may decide to waive the right to a hearing within 90 days to (1) engage in settlement discussions or (2) seek additional time to prepare for the hearing.

To waive the hearing requirement for any of the above reasons, the Respondent(s) should complete and submit the *Waiver Form for Administrative Civil Liability Complaint* (*Waiver Form*), included with the ACL Complaint, by the deadline listed under "Important Deadlines" below. If there are multiple Respondents, each of them must submit a separate waiver. Any request to postpone the hearing must be approved by the Presiding Officer.

IV. ADJUDICATORY HEARING REGULATORY FRAMEWORK

A. Applicable Statutes and Regulations

The following statutes and regulations, as implemented by this Hearing Procedure, govern the hearing on the ACL Complaint:

1. California Water Code section 13323.
2. Chapter 4.5 of the Administrative Procedure Act (Gov. Code, § 11400 et seq.), excluding Article 8 (*Language Assistance*), Article 13 (*Emergency Decision*), Article 14 (*Declaratory Decision*) and Article 16 (*Administrative Adjudication Code of Ethics*).
3. Evidence Code sections 801 through 805.
4. Government Code section 11513.
5. California Code of Regulations, title 23, section 648 et seq.
6. State Water Resources Control Board's Water Quality Enforcement Policy (Enforcement Policy).

These statutes and regulations are available online at https://www.waterboards.ca.gov/laws_regulations. Except for Government Code section 11513, chapter 5 of the California Administrative Procedure Act (Gov. Code, § 11500 et seq.) does not apply to this hearing.

B. Separation of Prosecutorial and Advisory Functions

Regional Water Board staff and attorneys that have prepared the ACL Complaint (Prosecution Team) have been separated from Regional Water Board staff and attorneys that will advise the [Regional Water Board, Hearing Panel, or Executive Officer] on the ACL Complaint (Advisory Team). The Prosecution Team will present evidence for consideration by the [Regional Water Board, Hearing Panel, or Executive Officer]. The Advisory Team provides legal and technical advice to

the [Regional Water Board, Hearing Panel, or Executive Officer]. Members of the Advisory Team and Prosecution Team are identified below.

Advisory Team:

[Insert Names and Titles]

Prosecution Team:

[Insert Names and Titles]

Any members of the Advisory Team who normally supervise any members of the Prosecution Team are not acting as their supervisors in this proceeding, and vice versa. Further, members of the Advisory Team have not exercised any authority over the Prosecution Team or advised them with respect to this matter, or vice versa. [Insert applicable names of Prosecution Team members] regularly advise the [Regional Water Board, Hearing Panel, or Executive Officer] in other, unrelated matters, and other members of the Prosecution Team may have previously acted as advisors to the [Regional Water Board, Hearing Panel, or Executive Officer] in other, unrelated matters, but no members of the Prosecution Team are advising the [Regional Water Board, Hearing Panel, or Executive Officer] in this proceeding. Members of the Prosecution Team have not had any substantive ex parte communications with the [Regional Water Board, Hearing Panel, or Executive Officer] or the Advisory Team regarding this proceeding.

C. Ex Parte Communications

Any communication regarding any issue in this proceeding to [a Regional Water Board member or the Executive Officer] or member of the Advisory Team by a Party or Interested Person that is made without notice and opportunity for all Parties to participate in the communication is considered an "ex parte" communication. Ex parte communications are prohibited, except as authorized by statute (e.g., communications regarding non-controversial procedural matters). (Gov. Code, § 11430.10 et seq.)

D. Evidentiary Standards

Government Code section 11513 and Evidence Code sections 801 through 805 apply to this proceeding.

The technical rules of evidence do not apply to this proceeding. The Parties may submit any relevant evidence that is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before conclusion of all testimony or closing statement if one is provided.

V. HEARING PARTICIPANTS

A. Parties

Parties are the primary participants in the hearing. Parties may present written evidence, offer witness testimony, cross-examine witnesses, and provide closing statements. Parties may be asked to respond to questions from the [Regional Water Board, Hearing Panel, or Executive Officer] and Advisory Team.

The following are Parties to this proceeding:

1. Regional Water Board Prosecution Team
2. [Insert Respondent(s)]
3. Any other person or entity designated as a party by the Presiding Officer in accordance with Section V.C.

B. Interested Persons (Non-Parties)

Interested Persons include any persons or entities that are interested in the outcome of the proceeding but that have not been designated as a party. Interested Persons may present written or oral non-evidentiary policy statements. Interested Persons are not subject to cross-examination but may be asked to respond to clarifying questions from the [Regional Water Board, Hearing Panel, or Executive Officer] and Advisory Team.

Interested Persons may not submit evidence (e.g., photographs, eye-witness testimony, and monitoring data). Any person or entity that would like to submit evidence should request to be designated as a party pursuant to Section V.C.

C. Requesting Party Status

Any Interested Person who wishes to participate in the hearing as a party must submit a request in writing by the deadline listed under "Important Deadlines" below. The request must include the following information at a minimum:

1. How the issues to be addressed at the hearing substantially affect the requestor's interests; and,
2. Why the existing Parties do not adequately represent the requestor's interests.

The request for party status must also include any requested revisions to the Hearing Procedure.

A Party must submit any written objection to a request for party status by the deadline listed under "Important Deadlines" below.

Following the deadline to submit objections to party status requests, the Presiding Officer will promptly respond to any timely written requests for party status. The Presiding Officer will not grant a request for party status if the Presiding Officer determines the designation of the requestor as a party will impair the interests of justice or the orderly and prompt conduct of the proceeding. The Presiding Officer, when granting a request for party status, may impose restrictions on the requestor's hearing participation, including limiting or excluding the use of cross-examination and other procedures, to promote the orderly and prompt conduct of the proceeding. Unless and until an Interested Person is granted party status, the deadlines for Interested Persons shall continue to apply.

VI. PREHEARING SUBMITTAL OF NON-EVIDENTIARY POLICY STATEMENTS BY INTERESTED PERSONS

A. Non-Evidentiary Policy Statements

Interested Persons must submit any written non-evidentiary policy statements regarding the ACL Complaint by the deadline listed under "Important Deadlines" below.

Interested Persons are not required to submit written statements to speak at the hearing.

B. Responding to Interested Person Non-Evidentiary Policy Statements

A Party must submit any response to Interested Person written policy statements by the deadline listed under "Important Deadlines" below.

VII. PREHEARING SUBMITTALS BY PARTIES

A. Prehearing Evidence and Argument Submittals (Excluding Rebuttal Evidence)

The Parties must submit the following information in advance of the hearing by the deadline listed under "Important Deadlines" below:

1. All evidence, excluding witness testimony to be presented orally at the hearing, and an exhibit list providing an exhibit number and brief description of each exhibit. Evidence already in the Regional Water Board's public files may be submitted by reference as long as the evidence and location are clearly identified. The file names of any

electronic copies of exhibits must identify the Party submitting the exhibit, the exhibit number, and a brief identification of the exhibit (e.g., "Resp Ex. 1 - Permit.pdf").

2. All legal and technical arguments or analysis.
3. The name of each witness, if any, whom the Party intends to call at the hearing; the subject of each witness' proposed testimony; and the estimated time required by each witness to present direct testimony.
4. The qualifications of each expert witness, if any.

B. Prehearing Rebuttal Evidence Submittals

Rebuttal evidence is evidence offered to disprove or contradict evidence presented by an opposing Party.

The Parties must submit any rebuttal evidence in advance of the hearing by the deadline listed under "Important Deadlines" below. Rebuttal evidence shall be limited to rebutting the scope of previously submitted materials; rebuttal evidence that is not responsive to previous submittals may be excluded by the Presiding Officer.

The requirement to submit rebuttal evidence in advance of the hearing applies only to rebut timely-submitted written evidence. Rebuttal evidence pertaining to an issue raised solely during oral testimony need not be submitted in advance of the hearing.

C. Prehearing Objections to Evidentiary Submittals

A Party must submit any objections to prehearing evidentiary submittals by the deadlines listed under "Important Deadlines" below.

These deadlines do not apply to objections to late-submitted evidence. Objections to late-submitted evidence must be made within seven days of the late submittal or at the hearing, whichever is earlier.

D. Prehearing Proposed Findings of Fact and Conclusions of Law

The Prosecution Team must submit, and the other Parties may submit, Proposed Findings of Fact and Conclusions of Law for consideration by the [Regional Water Board, Hearing Panel, or Executive Officer] and Advisory Team. [Insert the following for discretionary enforcement actions, as that term is used in the Enforcement Policy, only: The Proposed Findings of Fact and Conclusions of Law must include the Party's proposed penalty calculation, using the methodology prescribed by the Enforcement Policy.] The Parties may use this opportunity to highlight specific evidence and argument for the [Regional Water Board's, Hearing Panel's, or Executive Officer's] consideration.

Proposed Findings of Fact and Conclusions of Law must be submitted in Microsoft Word format by the deadline listed under "Important Deadlines" below. The Presiding Officer may prescribe a page limit for the Proposed Findings of Fact and Conclusions of Law.

E. Prohibition on Surprise Evidence

It is the policy of the Regional Water Board to discourage the introduction of surprise testimony and exhibits. The Presiding Officer may refuse to admit proposed exhibits or testimony into evidence that are not submitted in accordance with this Hearing Procedure and shall refuse to do so when there is a showing of prejudice to any Party or the Regional Water Board, except where the party seeking to introduce the proposed exhibits or testimony demonstrates that compliance with this Hearing Procedure would create severe hardship. Excluded material will not be considered.

VIII. REVISIONS TO HEARING PROCEDURE AND PREHEARING CONFERENCE

A. Revisions to Hearing Procedure

The Presiding Officer may revise this Hearing Procedure for good cause (1) on the Presiding Officer's own motion or (2) upon request from any Party or Interested Person seeking party status. A Party or Interested Person seeking party status requesting revisions to this Hearing Procedure must submit the request in writing by the deadline listed under "Important Deadlines" below. Before revising this Hearing Procedure, the Presiding Officer will provide the Parties an opportunity to comment.

B. Prehearing Conference

The Presiding Officer [Insert the following for Regional Water Board or Hearing Panel proceedings only, or its designee], upon its own motion or upon request from a Party, may schedule a Prehearing Conference with the Parties to discuss any prehearing matter, such as revisions to this Hearing Procedure, designation of additional parties, or evidentiary objections.

IX. HEARING

A. Order of Proceeding

The Presiding Officer will conduct the hearing on the ACL Complaint generally in the order listed under California Code of Regulations, title 23, section 648.5. The Presiding Officer may modify the order of proceeding for good cause.

B. Administration of Oath

All persons intending to testify at the hearing must take the oath administered by the Presiding Officer.

C. Witnesses

Any witness providing written testimony must appear at the hearing and affirm that the written testimony is true and correct and be available for cross-examination.

D. Hearing Time Limits

Parties: Each Party will have a combined total of 30 minutes to present evidence (including examining witnesses), cross-examine witnesses, and provide a closing statement.

Interested Persons: Each Interested Person will have 3 minutes to present oral, non-evidentiary comments or policy statements.

Questions from the [Regional Water Board, Hearing Panel, or Executive Officer] and the Advisory Team, responses to such questions, and discussion of procedural issues do not count against these time limits.

E. Requesting Additional Hearing Time

Hearing participants who would like additional time must submit their request by the deadline listed under "Important Deadlines" below. Additional time may be provided at the discretion of the Presiding Officer upon a showing that additional time is necessary.

F. Visual Presentations

Each Party may use PowerPoint and other visual presentations at the hearing. The presentation content shall not exceed the scope of previously submitted written material. The Parties must submit their presentations, if any, by the deadline listed under "Important Deadlines" below.

Interested Persons may use a visual presentation as an aid to their oral, non-evidentiary comments or policy statements only with the Presiding Officer's prior approval.

X. MISCELLANEOUS

A. Submittal Timing and Format

All submittals made pursuant to this Hearing Procedure must be received by 5:00 p.m. on the respective due date within the "Important Deadlines" below. All submittals must be sent to the "Primary Contacts," identified below. Electronic copies are encouraged. Parties without access to computer equipment are

strongly encouraged to have their materials scanned at a copy or mailing center. The Presiding Officer will not reject materials solely for failure to provide electronic copies.

B. Availability of Documents

The ACL Complaint and all submittals made in accordance with this Hearing Procedure are available upon request by contacting the Prosecution Team, identified in the "Primary Contacts" below.

Interested Persons may request to be included in the transmission of all submittals by contacting the Advisory Team.

C. Questions

Questions concerning this Hearing Procedure may be addressed to the Advisory Team attorney, identified in the "Primary Contacts" below.

PRIMARY CONTACTS

Advisory Team:

[Insert Lead Advisory Team's Name, Title, Address, Phone, and Email]

[Insert Advisory Team Attorney's Name, Title, Address, Phone, and Email]

[Insert additional contacts as needed]

Prosecution Team:

[Insert Lead Prosecution Team's Name, Title, Address, Phone, and Email]

[Insert Prosecution Attorney's Name, Title, Address, Phone, and Email]

[Insert additional contacts as needed]

Respondent(s):

[Insert Name of Respondent(s) and Contact Information]

[Insert additional contacts as needed]

IMPORTANT DEADLINES

Note: Where a deadline falls on a weekend or state holiday, the deadline is extended to the following business day.

Deadline	Event	Hearing Procedure Section
[Day 1]	Prosecution Team issues ACL Complaint, Hearing Procedure, and other related materials	
[Day 11]	Parties' deadline to request revisions to Hearing Procedure	Section VIII.A
	Interested Persons' deadline to request party status (If requesting party status, this is also the deadline to request revisions to Hearing Procedure)	Section V.C
[Day 16]	Parties' deadline to submit objections to party status requests	Section V.C
	Respondent's deadline to submit *Waiver Form*	Section III
[Day 31]	Interested Persons' deadline to submit written non-evidentiary policy statements	Section VI.A
[Day 45]	Prosecution Team's deadline to submit prehearing evidence and argument (excluding rebuttal evidence)	Section VII.A
[Day 57]	Remaining Parties' (including the Respondent(s)) deadline to submit prehearing evidence and argument (excluding rebuttal evidence)	Section VII.A
[Day 69]	Parties' deadline to submit prehearing rebuttal evidence	Section VII.B
	Parties' deadline to submit responses to Interested Person non-evidentiary policy statements	Section VI.B
	Parties' deadline to submit objections to prehearing evidence submittals (excluding rebuttal evidence)	Section VII.C
	Deadline to submit requests for additional hearing time	Section IX.E
[Day 76]	Parties' deadline to submit objections to prehearing rebuttal evidence	Section VII.C
	Parties' deadline to submit Proposed Findings of Fact and Conclusions of Law	Section VII.D
[Day 88]	Parties' deadline to submit copy of visual presentations	Section IX.F
[Day 90]	Hearing Date(s)	