

**2023 ENFORCEMENT POLICY  
KEY TO PUBLIC COMMENTERS**

<b>ID #</b>	<b>Commenter Name</b>	<b>Acronym</b>	<b>Written/Verbal or Both</b>	<b>Contact Name</b>	<b>Date Received</b>
1	LA Department of Power & Water	LADPW	Written	Katherine Rubin	4/19/2023
2	RDM Environmental, Inc.	RDM	Written	Richard Munsch	4/27/2023
3	California Stormwater Quality Association	CASQA	Written	Karen Cowan	4/28/2023
4	Association of California Water Agencies	ACWA	Written	Nicholas Blair	4/28/2023
5	DowneyBrand		Written	Melissa Thorne	4/28/2023
6	East Bay Municipal Utility District	EBMUD	Written	Chandra Johannesson	4/28/2023
7	California Coastkeeper Alliance*	CCKA	Both (Verbal comments by Benjamin Harris and Cody Phillips)	Sean Bothwell	4/28/2023
8	California Association of Sanitation Agencies	CASA	Both	Jared Voskuhl	4/28/2023
9	City of San Diego	CSD	Written	Kris McFadden	4/28/2023
10	Community Water Center	CWC	Both	Erick Orellana	4/28/2023

**April 18, 2023 - Board Meeting/Workshop Verbal Comments**

	<b>Commenter Name</b>	<b>Acronym</b>	<b>Written/Verbal or Both</b>	<b>Speaker Name</b>	<b>Date</b>
7	Los Angeles Waterkeeper*	CCKA	Both (Written provided as CCKA)	Benjamin Harris	4/18/2023
7	Coastkeepers Alliance*	CCKA	Both (Written provided as CCKA)	Cody Phillips	4/18/2023
8	California Association of Sanitation Agencies	CASA	Both	Jared Voskuhl	4/18/2023
10	Community Water Center	CWC	Both	Eric Orellana	4/18/2023
11	Central Valley Clean Water Association	CVCWA	Verbal	Michelle Chester	4/18/2023
7	*CCKA Benjamin Harris/Sean Bothwell (Cody Phillips) co-wrote/signed the written comment letter				

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
<b>2023 ENFORCEMENT POLICY - WRITTEN PUBLIC COMMENTS</b>				
I. INTRODUCTION - Fair, Firm, Consistent, and Transparent Enforcement			<b><u>I. INTRODUCTION - Fair, Firm, Consistent, and Transparent Enforcement</u></b>	<b><u>I. INTRODUCTION - Fair, Firm, Consistent, and Transparent Enforcement</u></b>
I. INTRODUCTION - Fair, Firm, Consistent, and Transparent Enforcement	4	1	<p>The Draft Enforcement Policy Update is intended to improve transparency in enforcement process for dictating progressive enforcement. Part of what will make the Draft Enforcement Policy Update successful is more effectively deducing where the State Water Board’s limited resources are most needed for progressive enforcement, while also determining where progressive enforcement can be successfully administered by public water agencies. Recognizing the local authority of public water agencies within the Draft Enforcement Policy Update is an opportunity to increase transparency and clarity in situations where public water agencies can proceed to achieve the goals sought by the State Water Board within their local authority without unnecessarily expending limited State Water Board resources to do so.</p> <p><b>Recommendation:</b> The State Water Board should include reference to local authority held by public water agencies within the Draft Enforcement Policy Update. Recommends the following language: The State's water quality requirements are not solely the purview of the Water Boards and their staff. Other agencies, including local government, <b>public water agencies</b>, and the California Department of Fish and Wildlife (DFW) <b>have separate authority to protect water quality and recover the costs of responding to contamination, as does every member of the public affected by contamination. In addition to enforcement by the Water Boards, these agencies and members of the public also have</b> the ability to enforce certain water quality provisions in state law <b>through litigation and their own local enforcement process, including citizen suits to enforce the water quality requirements of permits issued by the Water Boards or the federal government under the federal Clean Water Act (CWA). Additionally, state and federal law provides for public participation in the issuance of orders, policies, and water quality control plans and allows any member of the public to bring enforcement matters to the attention of the Water Boards, and State law authorizes aggrieved persons to petition the State Water Board to review most actions or failures to act of the Regional Water Boards. 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.</b> 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.</p>	<p>Staff agrees with the commenter that additional agencies have authority to initiate enforcement, however, it is unnecessary to expand the language in the Policy to discuss each of those authorities.</p>
I. INTRODUCTION - Fair, Firm, Consistent, and Transparent Enforcement	5	1	<p>The proposed Enforcement Policy should include discussion of codified defenses and recognize that not all potential I violations can be prevented. The recent wet season, bringing seventeen atmospheric rivers and multiple emergency declarations, demonstrates that Mother Nature is anything but predictable. While hindsight may be 20/20, those tasked with planning ahead cannot always anticipate all eventualities, and public sewer systems and/or wastewater treatment facilities cannot simply stop operating in the face of extraordinary circumstances, such as earthquakes or flooding that render infrastructure unable to operate as intended. The proposed Enforcement Policy should expressly acknowledge these types of situations and dissuade discretionary enforcement actions for events beyond the entities’ reasonable control. This would ensure that communities are not forced to shoulder the cost for both the repair of damaged systems and penalties. Instead, the Enforcement Policy should recommend that Water Board staff work with the regulated community to implement reasonable actions to minimize risk, where feasible. In addition, cases recognize that “[u]psets may be caused by external events, such as power failures or storms, or by unpreventable failures of effluent treatment equipment.” (Natural Resources Defense Council, Inc. v. U.S.E.P.A., 859 F.2d 156, 205 (D.C. Cir. 1988)(emphasis added); Weyerhaeuser Company v. Costle, 590 F.2d. 1011, 1056 (D.C. Cir. 1978)(“Waste treatment facilities occasionally release excess pollutants due to such unusual events as plant start-up and shutdown, equipment failures, human mistakes, and natural disasters.”)(emphasis added).) In addition, portions of the Water Code also acknowledge these types of defenses. (See accord Cal. Water Code §13350(c) and §13385(j)(1).)</p> <p><b>Recommendation:</b> The proposed Enforcement Policy should include discussion of codified defenses and recognize that not all potential violations can be prevented. Requests that the Enforcement Policy recognize the regulatory defenses of upset and bypass provided for under the Clean Water Act. (See 40 C.F.R. §§122.41(m) and (n).) A number of courts, including the Ninth Circuit Court of Appeals where California sits, have ruled that an upset defense must be provided, at the very least, for any technology-based standards (such as secondary treatment requirements and discharge prohibitions), because technology is inherently fallible. (See FMC Corp. v. Train, 539 F.2d 973 (4th Cir.1976) and Marathon Oil v. EPA, 564 F.2d 1253, 1273 (9th Cir. 1977).</p> <p>The Enforcement Policy should contain similar acknowledgements and provide explicit direction not to prosecute these events should the conditions satisfying upset or bypass exist, or the event occurred outside the reasonable control of the discharger.</p>	<p>The Water Boards have discretion when to initiate enforcement and may take into consideration the circumstances of the violation, including whether it was beyond the discharger's control. If enforcement is brought, the discharger's degree of culpability is already considered under Step 4, which allows for a downward adjustment to be made if the discharger exceeded the standard of care expected of a reasonably prudent person to prevent the violation. Staff also recognizes that there may be legal defenses that could be raised in response to an enforcement action. It is not necessary to discuss these defenses in the Policy.</p>

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
I. INTRODUCTION - Fair, Firm, Consistent, and Transparent Enforcement	5	2(a)	<p>Section I. should be amended to add timelines to the goals of the proposed Enforcement Policy.</p> <p><b>Recommendation:</b> Proposes the Enforcement Policy reads: "I. Fair, Firm, <u>Timely</u>, Consistent, and Transparent Enforcement."</p>	<p>Staff recognizes that bringing enforcement in a timely manner is important for a number of reasons. The Policy already recognizes this in the Introduction, which states, "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 concept of timely enforcement is also discussed in the Policy as it relates to progressive enforcement against facilities serving small communities. (P. 5, "the Water Boards recognize that timely initiation of progressive enforcement is important for a noncompliant facility serving a small community."). It is unnecessary to change the heading in this section.</p>
I.A. - Consistent Enforcement			<p><b><u>I.A. - Consistent Enforcement</u></b></p>	<p><b><u>I.A. - Consistent Enforcement</u></b></p>
I.A. - Consistent Enforcement	6	1	<p>The deletions of current sections I.A. "Standard Enforceable Orders" and I.B. "Determining Compliance" create a risk of inconsistent, unpredictable enforcement actions. The current policy's requirement that the Water Boards take a consistent approach to enforcement orders and related compliance determinations benefits both regulated entities and the Water Boards themselves. Adherence to precedent ensures a uniform, predictable application of governing law across all regions. The District acknowledges that factual circumstances may vary significantly between enforcement actions, and that the Water Board requires flexibility to address those varied circumstances. However, the current policy already grants flexibility in connection with the "specific circumstances related to the violation or discharge, and to accommodate differences in applicable water quality control plans." Removing the broad mandate of consistency creates a risk of divergent, contradictory orders where the underlying factual circumstances are similar, and decreases the ability of regulated entities and the Water Boards to rely on past enforcement orders for guidance to ensure similar situations do not end up with wildly different results.</p> <p><b>Recommendation:</b> The 2023 Policy should maintain the requirement that the Water Boards ensure consistency between enforcement orders and related compliance determinations.</p>	<p>The purpose of the proposed revisions was not to suggest that the Water Boards should not strive to ensure consistency in enforcement, as discussed in other parts of the Policy. Rather the proposed revision was intended to remove the requirement that there be consistency in the specific language contained in an enforcement order. Staff recognizes that this change may be achieved by removing only the language in Appendix A, Section A relating to "Standard Language." Deleting similar language under Section I.A relating to "Standard and Enforceable Orders" is unnecessary so staff proposes to restore the original language here.</p>
I.A. - Consistent Enforcement	8	1	<p>In the first section of the Draft Enforcement Update, entitled "Fair, Firm, Consistent, and Transparent Enforcement" the Draft Enforcement Update has struck the first two provisions. The first redline eliminates the requirement that "Water Board orders shall be consistent except as appropriate for the specific circumstances related to the violation or discharge," and the second strikes the proviso stating that "The Water Boards shall implement a consistent and valid approach to determine compliance with enforceable orders."</p> <p>One of the primary stated purposes for the Enforcement Policy's initial creation was to ensure such consistency throughout the nine Regional Water Quality Control Boards. This is a goal for CASA and the wastewater community that remains of critical importance in a state as large as California with nearly 1,100 sewer collection systems leading to approximately 700 publicly owned treatment facilities. Running counter to this goal, the Update proposes elimination of these top matters and their emphasis upon consistency in Water Board enforcement orders and when determining compliance. Moreover, the first provision already provides for an exception to an instance when unique and justifiable circumstances would need an enforcement order that is not fair, firm, consistent, or transparent. Thus as a policy, it is better to enshrine these principles of consistency in the 2023 Draft Policy Update rather than remove them entirely.</p> <p><b>Recommendation:</b> Undo the strike through of I.A and I.B so that the 2023 Draft Enforcement Update maintains the current requirements for Water Board orders to be consistent and for Water Boards to implement a consistent and valid approach when determining compliance for a permittee. In the alternative, if this strikethrough is retained, then the change should be added and classified as "Substantive" in Appendix D. This aspect of the Draft Enforcement Update may affect and expand a permittee's liability if an enforcement order did not have to be consistent with other enforcement actions or if a determination did not have to be consistent with other valid approaches for evaluating compliance.</p> <p><b>Text:</b> <u>I.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.</u></p> <p><b>I.B. Determining Compliance: The Water Boards shall implement a consistent and valid approach to determine compliance with enforceable orders.</b></p>	<p>See response to Commenter 6, Comment 1 regarding consistent enforcement. Regarding Section I.B, the original proposal to delete this language was based on the fact that there are a number of ways that the Water Boards determine compliance with enforceable orders, including, but not limited to: (1) conducting site inspections, (2) performing file reviews, (3) issuing investigative subpoenas, (4) interviewing witnesses, etc. The decision on which approach to use is based on many things, including the priority of the enforcement action and potential resource limitations. It is unnecessary to mandate that the approach to determining compliance be consistent, given these considerations. Rather than delete Section I.B., however, new proposed revisions below to Section I.B have been made: The Water Boards shall implement a consistent and <b>have a variety of valid approach approaches that can be used</b> to determine compliance with enforceable orders. <b>In utilizing these approaches, the Water Boards' interpretation of what constitutes compliance shall be consistent except as appropriate to accommodate differences in specific circumstances.</b></p>
I.A. - Consistent Enforcement	9	1	<p>The provisions proposed for elimination emphasize consistency in Water Board enforcement orders and in determining compliance; however, ensuring such consistency throughout the nine Regional Water Quality Control Boards is one of the primary purposes for the Enforcement Policy's initial creation and it is a goal that remains of tantamount importance. The City of San Diego recommends the SWRCB retain the provisions that promote consistency.</p> <p><b>Recommendation:</b> Retain former Provisions I.A and I.B that directly promote consistency.</p>	<p>See response to Commenter 8, Comment 1.</p>
I.B. - Fair Enforcement			<p><b><u>I.B. - Fair Enforcement</u></b></p>	<p><b><u>I.B. - Fair Enforcement</u></b></p>
I.C. - Progressive Enforcement			<p><b><u>I.C. - Progressive Enforcement</u></b></p>	<p><b><u>I.C. - Progressive Enforcement</u></b></p>

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I.D. - Transparency			<u>I.D. - Transparency</u>	<u>I.D. - Transparency</u>
I.D. - Transparency	5	2(b)	<p>Section I.D. should be amended to read:</p> <p>D. Transparency <b>and Timeliness</b></p> <p>Water Board enforcement orders should provide clear and consistent evidence and policy-based findings by decision makers to support order directives. <u>Discretionary Water Board enforcement should be brought within three (3) years of the event(s) at issue to avoid unnecessary delay and claims of laches. Timely enforcement of these laws is critical to the success of the water quality program.</u></p>	<p>See response to Commenter 5, Comment 2(a). Staff decline to make the change recommended by the commenter. While the defense of laches might be raised by the discharger in some cases where enforcement is not initiated within three years, it is not an absolute defense and may be rebutted by showing that the delay was reasonable and there was no undue prejudice resulting from the delay. It is unnecessary to amend the Policy to discuss these, and other, legal defenses that may be raised in response to enforcement.</p>
I.E. - Environmental Justice and Disadvantaged Communities			<u>I.E. - Environmental Justice and Disadvantaged Communities</u>	<u>I.E. - Environmental Justice and Disadvantaged Communities</u>
I.E. - Environmental Justice and Disadvantaged Communities+A21:B21	3	1	<p>Clarify or define what constitutes a disadvantaged or environmental justice community and what that means under the 2023 policy. The 2023 Policy proposed new language that would provide the State Water Resources Control Board and Regional Water Boards with discretion to designate additional geographic areas as being disadvantaged or environmental justice communities on a case-by-case basis after considering definitions provided in other statutes. CASQA appreciates and supports the need to consider the State's, and CalEPA's, environmental justice strategies when taking enforcement actions. However, the definitions referenced in the 2023 Policy were developed for different purposes and may not be appropriate for use in an enforcement action. Further, as written, the 2023 Policy appears to be very broad and subjective, which may hinder application of the policy in a manner that is fair, consistent, and transparent.</p> <p><b>Recommendation:</b> Develop clear, objective criteria for identifying disadvantaged or environmental justice communities on a case-by-case basis rather than relying on open-ended references to definitions from other, non-applicable statutes. Within the context of the 2023 Policy, clearly explain what it means if an area is identified as a disadvantaged or environmental justice community so that it is clear to the permittees and the public.</p>	<p>The Enforcement Policy recognizes the importance of enforcement in addressing environmental justice issues. Targeted enforcement can serve to remedy impacts from pollution to overburdened communities. At the same time, enforcement against POTWs, public water companies, and stormwater collection and sewage collection systems that serve these communities may create financial hardship as the costs of facility upgrades and paying penalties are passed to the ratepayers; in these circumstances, the Policy promotes informal enforcement and compliance assistance in order to avoid those financial impacts. The purpose of the proposed amendments is to allow the Water Boards to easily identify disadvantaged communities by using CalEnviroScreen, but also allow discretion for other communities to qualify for these Policy considerations on a case-by-case basis, using certain statutory definitions, even though those definitions may not be specifically tailored to water quality enforcement.</p>
I.E. - Environmental Justice and Disadvantaged Communities	3	2	<p>The 2023 Policy gives too broad a discretion for designating geographical areas as disadvantaged communities and refers to the definition of disadvantaged community per Health and Safe Code section 39711 as a definition for consideration, however, this statutory definition is related to investment opportunities for proceeds from the Greenhouse Gas Reduction Fund (GGRF) and directs CalEPA to identify disadvantaged communities for investment opportunities. When identifying disadvantaged communities based on this definition, CalEPA is required to hold at least one public workshop prior to identification of disadvantaged communities per this section. The WB are encouraged to apply this definition for enforcement related purposes, but no public workshop is required.</p> <p><b>Recommendation:</b> Develop clear, objective criteria for identifying disadvantaged or environmental justice communities on a case-by-case basis rather than relying on open-ended references to definitions from other, non-applicable statutes. Within the context of the 2023 Policy, clearly explain what it means if an area is identified as a disadvantaged or environmental justice community so that it is clear to the permittees and the public.</p>	<p>See response to Commenter 3, Comment 1.</p>
I.E. - Environmental Justice and Disadvantaged Communities	3	3	<p>What constitutes an environmental justice community. The policy refers to the definition from GC 65040.12, as land use planning purposes; and from Public Resource Code 30107.3, which applies to actions under the CA Coastal Act. These definitions are signed to ensure that land use planning and permitting decisions properly consider environmental justice impacts, but the Policy does not explain how this definition would be used on a case-by-case basis to designate areas as an environmental justice community when applying the policy.</p> <p><b>Recommendation:</b> Develop clear, objective criteria for identifying disadvantaged or environmental justice communities on a case-by-case basis rather than relying on open-ended references to definitions from other, non-applicable statutes. Within the context of the 2023 Policy, clearly explain what it means if an area is identified as a disadvantaged or environmental justice community so that it is clear to the permittees and the public.</p>	<p>See response to Commenter 3, Comment 1.</p>
I.E. - Environmental Justice and Disadvantaged Communities	3	4	<p>The Policy does not include clear, objective criteria for WB to follow when identifying disadvantaged or environmental justice communities on case-by-case basis. Nor does the policy explain what it means if a geographic area is designated as a disadvantaged or environmental justice community. Based upon CASQA's reading, such considerations may be part of prioritizing enforcement actions. It is less clear if such considerations impact the penalty calculation.</p> <p><b>Recommendation:</b> Develop clear, objective criteria for identifying disadvantaged or environmental justice communities on a case-by-case basis rather than relying on open-ended references to definitions from other, non-applicable statutes. Within the context of the 2023 Policy, clearly explain what it means if an area is identified as a disadvantaged or environmental justice community so that it is clear to the permittees and the public.</p>	<p>See response to Commenter 3, Comment 1. Additionally, Staff notes that the determination about whether a community is considered a "disadvantaged community" or "environmental justice" community pursuant to this section may be relevant to the penalty calculation methodology. For example, a penalty may be adjusted using the penalty methodology's consideration of "other factors as justice may require." In certain cases, the fact that the penalty may impact a "disadvantaged community" or "environmental justice" community may warrant a downward adjustment of the penalty using this factor.</p>

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I.E. - Environmental Justice and Disadvantaged Communities	10	1	<p>The Board must comply with California Water Code sections 189.7 and 13149.2 / AB 2108 (R. Rivas) amended the California Water Code to better account for Environmental Justice concerns and established rigorous requirements to such end. California Water Code § 189.7 outlines the Board must: “(a) Outreach to identify issues of environmental justice needs to begin as early as possible in state board or regional board planning, policy, and permitting processes. The state board and each regional board shall...(1) Engage in equitable, culturally relevant community outreach to promote meaningful civil engagement from potentially impacted communities of proposed discharges of waste that may have disproportionate impacts on water quality in disadvantaged communities or tribal communities and ensure that outreach and engagement shall continue throughout the waste discharge planning, policy, and permitting processes.”</p> <p>While the Board identified outreach to disadvantaged communities at its April 18th, 2023 Board workshop, the outreach efforts described – such as sharing the opportunity to comment through the Board’s ListServ contact is indistinguishable from the public comment periods prior to the enactment of AB 2108 (R. Rivas). Furthermore, the proposed Policy cites the California Environmental Health Screening tool as a method to identify Environmental Justice communities, yet there is not a sufficient, “programmatic finding on potential environmental justice, tribal impact, and racial equity considerations,” proposed in the amendments, as required by the law.</p> <p><b>Recommendation:</b> The findings listed in the proposed policy should spell out how the existing policy has not addressed racial disparities in access to drinking water, has not provided for long-term drinking water solutions for communities with polluted drinking water, and has not meaningfully deterred continued water quality degradation, in order for the Board to fulfill its duties under California Water Code(s) §§189.7 and 13149.2.</p>	<p>Staff disagrees with the Commenter’s characterization of the outreach efforts that were made and the requirement to make findings pursuant to Water Code sections 189.7 and 13149.2. The Water Board not only sent the proposed Policy revisions to its ListServe contacts, but also appeared at IVAN meetings to discuss the proposed revisions. The requirement to make findings applies to the State Board Resolution adopting the final proposed Policy revisions; the findings need not be made within the Policy itself.</p>
I.E. - Environmental Justice and Disadvantaged Communities	10	2	<p>The Board’s 2023 Drinking Water Needs Assessment identifies nearly 400 water systems failing to provide safe and clean drinking water to the Californians they serve and hundreds more are at-risk of failing. Latinos make up more than 58% of Californians served by failing water systems. The Needs Assessment finds Nitrate and 1,2,3-Trichloropropane account for nearly half of Primary Maximum Contaminant Level violations of those failing water systems. Without considering the other contaminants discharged into drinking water resources across the State, it is clear the Board’s efforts to enforce its existing Policy are inadequate.</p> <p>This failure amounts to disproportionate impacts to Latino communities, a violation of their water rights, the Human Right to Water, and a violation of the 14th Amendment’s Equal Protection Clause. (Footnote 1.) California Water Code §106 establishes domestic water use as the highest priority use of water in the State, yet discharges by polluters insufficiently addressed by the policy are inconsistent with such goal. California Water Code §13142 outlines, “The principles, guidelines, and objectives [of the Policy] shall be consistent with the state goal of providing a decent home and suitable living environment for every Californian”, yet the Board’s existing policy and proposed changes continue to allow for settlement agreements and alternative pathways for compliance that do not provide for suitable living conditions of Californians harmed by polluters for decades. Settlements and agreements the Board has undertaken do not account for the extensive resources needed, nor establish adequate performance benchmarks for connecting communities to drinking water solutions, while allowing for polluters to continue degrading water quality of critical drinking water resources. This is one example of the Board’s overall failures to equitably address drinking water contamination and ensure impacts to water quality do not continue.</p> <p><b>Recommendation:</b> The Board must remedy existing failures to equitably address drinking water contamination.</p>	<p>Comment Noted. The Policy currently recognizes the need to prioritize violations that impact drinking water. Specifically, the Policy provides, "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." The use of enforcement alone cannot solve the issues related to contaminated water supplies.</p>
I.E. - Environmental Justice and Disadvantaged Communities	10	3	<p>One of the major reasons Communities of Color disproportionately bear the majority of environmental pollution in addition to systemic racism is that the most successful groups in policy development have historically been well-resourced interest groups. (Footnote 2.) This notion is related to the California Legislature’s reasoning behind the passage of AB 2108 (R. Rivas), which conveys equitable policy must be intentional about bringing underrepresented voices to the table. For too long, the voices of powerful and wealthy business groups have dominated regulatory policy, which is evident in the tone of this policy when referencing polluters who poison and steal life from members of our communities. For example, the policy over-stresses the importance of ensuring businesses or groups do not receive economic benefits from non-compliance. While this is an important goal of enforcement, it pales in comparison with the importance of protecting the public’s health and environmental resources for current and future generations. Failing to keep the health and sustainability of the public and the environment is a symptom of regulatory policy that values economic interests above the well-being of communities.</p> <p><b>Recommendation:</b> The Board must change its Systematic Approach to Enforcement to better address Environmental Justice.</p>	<p>Comment Noted. New language is proposed to require that the Water Boards consider State Water Board Racial Equity Resolution 2021-0050 and prioritize the enforcement of violations that involve undue impact to communities where Black, Indigenous, and people of color reside.</p>
I.E. - Environmental Justice and Disadvantaged Communities	7	7	<p>The current Enforcement Policy discusses the Water Boards’ commitment to conducting enforcement in a manner that ensures the fair treatment of people of all races, cultures and income levels, giving consideration to the impacts from pollution on environmental justice and disadvantaged communities. We appreciate the proposed amendments to determine whether a community is disadvantaged and to establish a new subsection in Section I, titled “California Native American Tribes,” to encourage engagement with California Native American Tribes on a government-to-government basis when enforcement impacts or threatens to impact tribal lands, tribal interests, or tribal cultural resources. However, the State Water Board needs to make a better commitment to community outreach regarding enforcement priorities and outcomes pursuant to AB 2108.</p> <p><b>Recommendation:</b> Pursuant to AB 2108, the State Water Board must engage in community outreach to potentially impacted communities, regarding enforcement priorities, supplemental environmental projects, and other mitigation projects. The State Water Board needs to make a better commitment to community outreach regarding enforcement priorities and outcomes pursuant to Assembly Bill 2108.</p>	<p>Staff agrees that the Water Boards could enhance outreach as it relates to settlement agreements that involve projects located in, benefitting, or otherwise affecting impacted communities. Revisions to accomplish this have been proposed in section C.9 of Appendix A, related to settlement of ACL Complaints. The following language is added, "<b><u>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.</u></b>"</p>
I.F. - California Native American Tribes			<p><b>I.F. - California Native American Tribes</b></p>	<p><b>I.F. - California Native American Tribes</b></p>

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I.F. - California Native American Tribes	3	5	<p>The Policy proposes to add new language regarding the WB commitments to improving communication and working with California's Native American Tribes. In this section, the Policy states that the WBs will "communicate, engage, and consult with California Native American Tribes, however the proposed language is fairly broad and does not explain how and when such engagement or consultation will occur.</p> <p><b>Recommendation:</b> Clarify the process that the WBs will employ when communicating, engaging, and consulting with California Native American Tribes about water quality enforcement actions.</p>	<p>The proposed Policy revisions would incorporate the consultation and communication principles outlined in the State Water Board's Tribal Consultation Policy (Tribal Policy). The Tribal Policy provides best practices and guiding principles for communication and collaboration, but does not prescribe a mandated approach. The level of engagement as it relates to enforcement will differ based on the circumstances of each case. This framework gives flexibility to the Water Boards to allow the most efficient use of resources while still accomplishing the goals of cooperation and collaboration with tribes.</p>
I.G. - Facilities Serving Small Communities			<p align="center"><b><u>I.G. - Facilities Serving Small Communities</u></b></p>	<p align="center"><b><u>I.G. - Facilities Serving Small Communities</u></b></p>
I.G. - Facilities Serving Small Communities	5	3	<p>A proposed change in the "Facilities Serving Small Communities" section should be rejected. The proposed Enforcement Policy suggests the following change for enforcement actions affecting small communities: " Compliance assistance activities are based on an entity's commitment to achieve compliance and shall be <del>offered</del> <b>considered</b> in lieu of enforcement for communities which demonstrate that commitment when an opportunity exists to correct the violations." Compliance assistance should always be offered to small communities that do not possess the manpower or financial assets of larger communities. Changing the language from a requirement to "offer" compliance assistance, into a requirement to merely "consider" compliance assistance is antithetical to the stated reasons for this chapter, namely "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." (see proposed Enforcement Policy at Section I.G.)</p> <p><b>Recommendation:</b> The State Water Board should decline to make the proposed change for the same reasons the language was originally incorporated.</p>	<p>Staff disagrees with the recommendation and supports revising language in this section as originally proposed. The Water Boards' principal of progressive enforcement encourages compliance assistance where appropriate for all dischargers. However, there are circumstances, including cases involving small communities, where compliance assistance is not an appropriate first step. The proposed language recognizes that compliance assistance, while it should always be considered, is not an appropriate response in every enforcement context.</p>
II. ENFORCEMENT PRIORITIES FOR DISCRETIONARY ENFORCEMENT ACTIONS			<p align="center"><b><u>II. ENFORCEMENT PRIORITIES FOR DISCRETIONARY ENFORCEMENT ACTIONS</u></b></p>	<p align="center"><b><u>II. ENFORCEMENT PRIORITIES FOR DISCRETIONARY ENFORCEMENT ACTIONS</u></b></p>
II. ENFORCEMENT PRIORITIES FOR DISCRETIONARY ENFORCEMENT ACTIONS	2	6	<p>RDM understands that the Board has procedures for pursuing informal enforcement actions, which involve informal notice to a discharger that a violation has been identified. RDM also understands that the Board has identified specific instances in which informal enforcement is inappropriate, including, but not limited to: emergency situations requiring an 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. As RDM understands it, there is no formal procedure for determining which cases qualify for informal enforcement prior to a formal enforcement action. The lack of procedure for making such determination provides the Board with discretion to bypass informal enforcement without justifying the decision to not first pursue less intrusive and less disruptive informal enforcement.</p> <p><b>Recommendation:</b> Informal enforcement should always be available when appropriate, as it allows the Board to communicate the actual, threatened, or potential violation to the violator so that the violator can take steps to address these concerns without requiring the Board to spend substantial time and resources pursuing formal enforcement. Enforcement officers deciding whether to first pursue informal enforcement should have to justify the decision to jump straight into formal enforcement to a senior officer or a team of higher-ranking officials to ensure informal enforcement is pursued to the greatest extent possible. This additional procedure would ensure more timely, efficient, and consistent enforcement across the state.</p>	<p>There are many levels of communication regarding whether progressive enforcement as outlined in the Policy should take place, and many considerations that ultimately go into the decision on how to proceed. A decision to proceed directly to formal enforcement is reviewed by management. Each Regional Board may have its own internal procedures as to the logistics of how a decision to proceed directly to formal enforcement is reviewed by management. The issuance of formal enforcement orders, however are generally reviewed and signed by the Executive Officer or Assistant Executive Officer by delegation or sub delegation. Staff does not recommend making any additional changes to the Policy to define this review/approval process in more specificity.</p>
II.A. - Ranking Violations			<p align="center"><b><u>II.A. - Ranking Violations</u></b></p>	<p align="center"><b><u>II.A. - Ranking Violations</u></b></p>

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
II.A. - Ranking Violations	2	5	<p>RDM understands that the Board has an extensive procedure in place for ranking violations and prioritizing cases for formal discretionary enforcement actions (Section II "Enforcement Priorities for Discretionary Enforcement Actions"). However, RDM believes that the Board and the public could benefit from applying procedures before the investigation of an alleged violation. RDM is unaware of any standards or procedures that enforcement officers must follow in determining whether to investigate a potential violation. But in making that determination, enforcement officers should require multiple lines of evidence to show a reasonable suspicion that a violation occurred before the Board issues to a private party an investigation order. RDM understands that the investigation process—including responding to an order for information—is very disruptive and potentially very damaging to the target’s reputation.</p> <p><b>Recommendation:</b> Internal enforcement complaints should be reviewed (e.g., reviewed by a senior officer or a team) so that each complaint is fully vetted before the complaint undergoes the ranking procedure under Section II and before the Board issues any order. This additional procedure would safeguard against the Board wasting time, wasting resources, and risking harm to a target’s reputation by investigating frivolous complaints.</p>	<p>Staff does not feel additional processes for conducting investigations in response to complaints is necessary. There are existing legal standards for when the Water Boards can conduct an investigation. The requirement for the level of evidence necessary to issue an investigative order is set forth in law. For example, before the Water Boards can issue an investigation order under Water Code section 13267, there must be at least a suspicion of a discharge. The bar for issuing an investigative subpoena is even lower, where the Water Boards are authorized to compel production of documents and/or testimony merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. (Brovelli v. Superior Court of Los Angeles County, 15 Cal.Rptr 630 (1961)).</p>
II.A. - Ranking Violations	3	6	<p>The Policy proposes to revise the Class A violation description for unauthorized discharges that may impact a municipal drinking water supply. The language proposed is much broader than the intent and explanation provided. The Policy now removes reference to this class of violations being associated with sewage spills and instead broadens it to any unauthorized discharge. The new language also uses the term "impacting" without any qualifier regarding if the impact must result in causing some type of problem to the drinking water supply. By removing reference to the discharge being near a municipal water intake, the revised provision appears to include groundwater sources of municipal drinking water and not just surface water resources.</p> <p>Overall, CASQA appreciates that sewage spills that harm the use of municipal drinking supplies should potentially be consider a Class A violation. However, CASQA is concerned that the new language will result in greater confusion and uncertainty rather than meeting the stated intended purpose in the public notice.</p> <p><b>Recommendation:</b> Revise the proposed language to better clarify the category of Class A violations that this language is intended to capture (i.e., actual harm to municipal drinking water from a sewage spills.</p>	<p>Staff agrees that the proposed revisions should be amended to clarify the scope of this Class A violation by restoring the reference to sewage and location of the discharge and adding language regarding the potential impact to both municipal surface and groundwater supplies. Further language is added to retain the original purpose of the proposed revision to clarify that discharges of sewage to land that do not threaten municipal water supplies need not be characterized as Class A violations. The new proposed revision reads, "Unauthorized discharges of sewage, regardless of level of treatment, within 1,000 feet of a municipal water <del>intake</del> <b>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;</b>"</p>
II.A. - Ranking Violations	5	4	<p>Page 8 of the proposed Enforcement Policy, suggests new language in the second bullet: "Unauthorized discharges impacting the use of municipal drinking water supply." This situation is too vague and broad to be used to determine enforcement priorities, since most all waters (surface and ground waters) in the State are designated as presumed to be a municipal drinking water supply (MUN) use.</p> <p><b>Recommendation:</b> To avoid this problem, the language should be modified to state: "Unauthorized discharges impacting the use of municipal drinking water supply <b>well(s) or intake(s).</b>"</p>	<p>See response to Commenter 3, Comment 6.</p>
II.A. - Ranking Violations	7	10	<p>The current Enforcement Policy requires the Water Boards to prioritize cases for formal discretionary enforcement and sets forth a list of certain violations that qualify as "Class A" priority violations. One of the categories of Class A violations are "unauthorized discharges of sewage regardless of level of treatment, within 1,000 feet of a municipal water intake." The draft Enforcement Policy changes this prioritization for only unauthorized discharges which impact the use of municipal drinking water supply should be prioritized for enforcement as a Class A violation.</p> <p><b>Recommendation:</b> We urge the State Water Board to delete this amendment and continue to enforce Sanitary Sewer Overflows (SSOs) regardless of the impact to municipal drinking water.</p>	<p>Sanitary Sewer Overflows (SSO) are generally a priority for enforcement because they are, for the most part, not susceptible to cleanup, and harm or have the potential to harm beneficial uses. However, in the rare circumstance that an SSO is discharged to land and is cleaned up entirely, there is no current enforcement remedy under the Water Code. Therefore, it is unnecessary to categorize these spills as Class A violations. The new proposed revisions described above in response to Commenter 3, Comment 6, clarifies this point.</p>
II.A. - Ranking Violations	8	2	<p>The Draft Enforcement Update Should Not Expand Class A Violations Pertaining to Municipal Water Intakes Beyond Instances When a Violation Impacts a Drinking Water Supply. In Section II.A of the Draft Enforcement Update pertaining to enforcement and ranking violations, there is a proposed change in strikethrough below. There are two issues on which we provide comment. Unauthorized discharges <del>of sewage, regardless of level of treatment, within 1,000 feet of a municipal water intake</del> impacting the use of municipal drinking water supply;</p> <p>First, by removing the reference to "sewage," the SWRCB is also expanding the scope of the provision to all types of discharges, not just of wastewater. This change should be marked as "Substantive" in Appendix D. Second, many surface and ground waters are designated with at least a potential municipal (MUN) beneficial use, equivalent to the "municipal drinking water supply" language proposed in the Draft Enforcement Update, though this was a blanket designation and not all of those waters are actually used for this purpose. The qualifier "intake or well" should be added to indicate an actual impact to water operations. Without this additional qualifier, the proposed language would significantly increase the scope and number of Class A violations, regardless of whether the alleged violation impacts the actual use of a drinking water supply. Retaining the distance metric also is recommended to this point, in lieu of how mixing zones can several miles long.</p> <p><b>Recommendation:</b> Specify impacts to be upon an actual use of a municipal water supply intake or well. Unauthorized discharges <del>of sewage, regardless of level of treatment, within 1,000 feet of and of a municipal water intake</del> impacting the use of a municipal drinking water supply <b>intake or well;</b></p> <p>*Additionally, the <b>change should be classified as "Substantive" in Appendix D</b>, because this aspect of the Draft Enforcement Update could affect and expand a permittee's liability by eliminating the qualifier of discharges of sewage. (*Also see Comment No. 8.2(a) below in Appendix D section.)</p>	<p>See response to Commenter 3, Comment 6.</p>

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
II.A. - Ranking Violations	9	3	<p>In Section II.A., entitled "Ranking Violations," the SWRCB proposes to modify language defining the municipal water intake Class A violation. The proposed modifications now define the Class A Violation as "unauthorized discharges impacting the use of municipal drinking water supply." Pursuant to SWRCB Resolution No. 88-63 and San Diego Regional Water Quality Control Board, Resolution 89-33, many surface and ground waters in the San Diego Region are designated with at least a potential municipal (MUN) beneficial use, equivalent to the "municipal drinking water supply" language proposed in the Enforcement Policy, though not all of those waters are actually used for that purpose. The proposed language could significantly increase the scope and number of Class A violations regardless of whether the alleged violation impacts an actual drinking water supply.</p> <p>The scope and number Class A violations is also increased by eliminating the reference to sewage, which appears to expand the scope of this provision to all types of discharges.</p> <p><b>Recommendation:</b> Re-including "sewage" between "Unauthorized" and "discharges" in the suggested language: Modify the revised language as follows (suggested modification in <b>bold</b>): "Unauthorized sewage discharges impacting <del>the</del> <b>an actual</b> use of a municipal water supply intake or well."</p>	See response to Commenter 3, Comment 6.
II.B. - Case Prioritization for Individual Entities			<p><b><u>II.B. - Case Prioritization for Individual Entities</u></b></p>	<p><b><u>II.B. - Case Prioritization for Individual Entities</u></b></p>
II.C. - Setting Statewide and Regional Priorities			<p><b><u>II.C. - Setting Statewide and Regional Priorities</u></b></p>	<p><b><u>II.C. - Setting Statewide and Regional Priorities</u></b></p>
II.C. - Setting Statewide and Regional Priorities	2	2	<p>RDM is concerned that the proposed amendments do not reflect the need for safeguarding against excessive discretion in enforcement actions. RDM has seen how excessive discretion can lead to inconsistent and unfair enforcement against alleged violators. One example of the Board expanding its discretion is the proposed amendment to Section II.C. "Setting Statewide and Regional Priorities." The suggested changes would allow the Board to set statewide and regional priorities as necessary, which is a change from the former biennial basis. The proposed amendments provide the Office of Enforcement with greater flexibility to formulate priorities. While the Board believes greater flexibility will better inform the regulated community and the public, we disagree. Setting priorities on an as-needed-basis could conceivably result in greater confusion among the public as to what are the current priorities if they constantly change. Further, the proposed amendments do not specify a reporting method or other means to provide the public with the prioritization information. Accordingly, there is no procedural guarantee that the public will be informed of the priorities or initiatives.</p> <p><b>Recommendation:</b> RDM highlights this proposed amendment to Section II.C. as one example of an expansion of the Board's discretion without a corresponding safeguard to ensure uniformity in enforcement.</p>	Staff disagrees that the proposed language results in a broadening of the State Board's enforcement discretion or a change in the procedure for adopting or reporting such priorities. The Water Boards retain discretion to investigate complaints and to determine which complaints merit enforcement with or without the amendment being proposed for this section. The proposed revisions would not prevent dischargers from raising any valid defenses to an alleged violation. Also see response to Commenter 7, Comment 15. Staff recommends adopting the revisions as originally proposed.
II.C. - Setting Statewide and Regional Priorities	2	3	<p>The proposed amendments provide that the statewide initiative <i>should</i> be documented in an annual enforcement report, which is a change from the current requirement more clearly mandating such documentation. The proposed amendments add that the initiatives, if not documented, should otherwise be reported out to the public, but do not specify a reporting method or other means to provide the public with this information. Accordingly, there is no procedural guarantee that the public will be informed of the priorities or initiatives.</p> <p><b>Recommendation:</b> Setting priorities on an as-needed-basis could conceivably result in greater confusion among the public as to what are the current priorities if they constantly change. RDM highlights this proposed amendment to Section II.C. as one example of an expansion of the Board's discretion without a corresponding safeguard to ensure uniformity in</p>	Staff disagrees that this change is a broadening of discretion. Regarding publication of statewide enforcement priorities and initiatives, it is important to create flexibility so that the public has timely access to the most up to date information. The current Policy requirement to document this information in its annual enforcement report does not reflect current practice of providing public access to those priorities and initiatives on the State Board's website and updating those priorities on a rolling basis as the State or Regional Boards update and revise those priorities. A once a year annual report is not the most effective or efficient means of publication.
II.C. - Setting Statewide and Regional Priorities	7	15	<p>Section II.C. of the Enforcement Policy requires that the State Water Board Office of Enforcement propose statewide enforcement priorities every two years—some of which may become statewide enforcement initiatives—and mandates that the initiatives be documented in an annual enforcement report. The proposed amendments to the Enforcement Policy would direct the designation of statewide enforcement priorities to occur as needed rather than every two years, along with the communication of those priorities being relaxed.</p> <p><b>Recommendation:</b> The State Water Board should continue to require enforcement goals be set every two years and for robust public communication of enforcement goals and actions to be retained. We recommend the State Water Board continue to hold itself accountable by requiring enforcement goals to continue to be set every two years and for there to be robust communication of those priorities and enforcement actions to the public.</p>	See response to Commenter 2, Comment 3. In addition, Staff disagrees with the Commenter that there needs to be a requirement to set enforcement priorities every two years rather than as needed. When establishing enforcement priorities, the Water Board takes many things into account, some of which may arise unexpectedly. For example, the recent US Supreme Court Sackett decision has the potential to affect the need for heightened enforcement for certain wetlands that are no longer protected under the Clean Water Act. The Water Board needs to be nimble in how it responds to the current landscape and be able to adapt and set priorities as needed, rather than on an arbitrary schedule.
II.D. - Mandatory Enforcement Actions			<p><b><u>II.D. - Mandatory Enforcement Actions</u></b></p>	<p><b><u>II.D. - Mandatory Enforcement Actions</u></b></p>



Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
<u>II.E. - Multiple Violations Resulting from the Same Incident</u>			<u>II.E. - Multiple Violations Resulting from the Same Incident</u>	<u>II.E. - Multiple Violations Resulting from the Same Incident</u>
<u>III. ENFORCEMENT ACTION</u>			<u>III. ENFORCEMENT ACTION</u>	<u>III. ENFORCEMENT ACTION</u>
<u>III. ENFORCEMENT ACTION</u>	6	7	<p>In some instances, a discharge may be attributable to events that the regulated entity had no ability to reasonably or feasibly control or prevent. The Policy should acknowledge this reality and grant the Board discretion to forego enforcement where the violation is attributable to a force majeure, such as an extreme wet weather event, declared emergency, or other natural disaster. The Water Code acknowledges that liability for discharges of hazardous substances is not appropriate under such circumstances. Cal. Wat. Code § 13350(c). The same is true for mandatory minimum penalties. Cal. Wat. Code § 13385(j).</p> <p><b>Recommendation:</b> The Policy should acknowledge that enforcement may not be appropriate or necessary in connection with violations beyond the discharger's reasonable ability to control. This principle should apply with equal force to violations generally. Where a violation is attributable to extraneous events that the discharger could not prevent, an enforcement action will achieve no deterrent effect and will not serve the Policy's goal of preventing future violations.</p>	<p>The Policy provides for violations to be discussed during regular enforcement prioritization meetings and prioritized based on the unique facts and circumstances of each case. The Water Boards currently consider the relative culpability of the violator when deciding whether to bring enforcement, and if so, whether the conduct should result in any change to the proposed liability (See Step 4 of the Enforcement Policy Penalty Calculation Methodology). Many violations are not pursued because of the circumstances, including cases where the violations were entirely accidental and not preventable. It would be inappropriate, however, for the Policy to remove prosecutorial discretion and dictate the circumstances an enforcement action should not be brought. The Policy does not prevent a discharger from raising any legal defenses that may apply.</p>
<u>IV. STATE WATER BOARD ENFORCEMENT ACTIONS</u>			<u>IV. STATE WATER BOARD ENFORCEMENT ACTIONS</u>	<u>IV. STATE WATER BOARD ENFORCEMENT ACTIONS</u>
<u>V. COORDINATION WITH OTHER REGULATORY AGENCIES</u>			<u>V. COORDINATION WITH OTHER REGULATORY AGENCIES</u>	<u>V. COORDINATION WITH OTHER REGULATORY AGENCIES</u>
<u>V.A. - Hazardous Waste Facilities</u>			<u>V.A. - Hazardous Waste Facilities</u>	<u>V.A. - Hazardous Waste Facilities</u>
<u>V.B. - Oil Spills</u>			<u>V.B. - Oil Spills</u>	<u>V.B. - Oil Spills</u>
<u>V.C. - General</u>			<u>V.C. - General</u>	<u>V.C. - General</u>

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
VI. MONETARY ASSESSMENTS IN ADMINISTRATIVE CIVIL LIABILITY ACTIONS			VI. MONETARY ASSESSMENTS IN ADMINISTRATIVE CIVIL LIABILITY ACTIONS	VI. MONETARY ASSESSMENTS IN ADMINISTRATIVE CIVIL LIABILITY ACTIONS
VI.A. - Penalty Calculation Methodology			VI.A. - Penalty Calculation Methodology	VI.A. - Penalty Calculation Methodology
VI.A. - Step 1 - Actual or Potential for Harm for Discharge Violations			VI.A. - Step 1 - Actual or Potential for Harm for Discharge Violations	VI.A. - Step 1 - Actual or Potential for Harm for Discharge Violations
VI.A. - Step 2 - Assessment for Discharge Violations			VI.A. - Step 2 - Assessment for Discharge Violations	VI.A. - Step 2 - Assessment for Discharge Violations
VI.A. - Step 2 - Table 1 Per Gallon Factor for Discharges			VI.A. - Step 2 - Table 1 Per Gallon Factor for Discharges	VI.A. - Step 2 - Table 1 Per Gallon Factor for Discharges
VI.A. - Step 2 - Table 1 Per Gallon Factor for Discharges	5	5	<p>The proposed Enforcement Policy includes new, presumably explanatory, language regarding the application of a High Volume, “per gallon” penalty that actually creates more confusion than it helps. The Water Boards possess authority under the Water Code to impose any amount up to \$10.00 per gallon for any discharge violation. The proposed Enforcement Policy seeks to provide guidance for when lower range “per gallon” values should be considered, e.g., for “high volume discharges.”</p> <p><b>Recommendation:</b> The State Water Board should reject the proposed changes and instead, modify the language as follows: “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 generally between 100,000 gallons and 2,000,000 gallons for each discharge event, whether it occurs on one or more days.</p>	<p>Staff asserts that it is useful to retain the existing language in the Policy regarding the gallon range for what constitutes a high volume discharge. The additional proposed language is intended to encourage the Water Boards to be thoughtful in how they utilize the Policy to reduce the per-gallon liability for high volume discharges so that: (1) they do not disincentivize proactive mitigation efforts, and (2) more egregious violations are consistently assessed a higher liability than less egregious violations. Staff recognizes the original proposed language, in particular, the example, may result in confusion because it fails to recognize there are a multitude of considerations that go into whether it is appropriate to allow for a high volume reduction and if so, what per-gallon liability amount between \$2 and \$10 is appropriate. Therefore, staff suggests replacing the original proposed language with the following: "<b><u>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.</u></b>"</p>

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
VI.A. - Step 2 - Table 1 Per Gallon Factor for Discharges	7	2	<p>The State Water Board should require the Regional Water Boards to apply the \$10 per gallon statutory maximum when calculating initial liability amounts for high volume discharges. The considerations currently discussed in the high volume section, including the severity of impacts to beneficial uses and the discharger's degree of culpability, are already considered in Step 4 of the penalty calculation methodology; those considerations are inappropriate in the initial liability calculation. A consistent penalty calculation methodology is necessary to hold dischargers accountable for their impacts, and that includes both a consistent starting point for calculating liability and a requirement to fully explain and justify any deviations from that starting point.</p> <p><b>Recommendation:</b> The State Water Board must standardize the initial valuation of liability for "High Volume Discharges" to guarantee adequate and consistent penalties. We urge the State Water Board to require the Regional Boards to apply the \$10 per gallon statutory maximum when calculating initial liability amounts for high volume discharges.</p>	<p>The Enforcement Policy allows for a reduction in the per gallon liability for high volume discharges because the resulting penalties using the statutory maximum amount of \$10 per gallon can result in excessively high penalties. This language is not new and has been in the Policy for many years. The statutory maximum is a ceiling, not a floor and the Water Boards need to maintain discretion to reduce the per gallon penalty in appropriate circumstances.</p>
VI.A. - Step 2 - Table 1 Per Gallon Factor for Discharges	7	3	<p>The new paragraph added to this section of the Enforcement Policy further illustrates the arbitrary nature of reducing the per gallon starting point for high volume discharges. That paragraph provides:</p> <p>"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 used was \$10.00"</p> <p>This new paragraph acknowledges the arbitrary opportunity to reduce an initial calculation of civil liability by 80% of the statutory maximum simply because the number of gallons discharged reached an arbitrary threshold, when such a reduction would not be warranted if the discharge was 10,000 gallons less. The new paragraph does not add any additional guidance to Regional Boards to ensure they know when to use a lower amount for the initial liability calculation for large discharges, and merely serves to tell Regional Boards not to misuse their discretion.</p>	<p>See response to Commenter 5, Comment 5, and response to Commenter 7, Comment 2.</p>
VI.A. - Step 2 - Table 1 Per Gallon Factor for Discharges	8	3	<p>We understand the intent behind this addition and support not rewarding and not incentivizing proactive mitigation efforts to limit the number of gallons discharged. However, we are concerned with the paragraph, as it would result in inconsistent assessments of penalties as a matter of course, which does not comport with intent of the Draft Enforcement Update to be fair, consistent, firm, and transparent. Referencing a hypothetical violation that lacks specific information about the occurrence in a policy document makes it inherently difficult to evaluate and understand where a monetary penalty "breaks even" for the per gallon value of a higher volume discharge in order to not result in a lower overall penalty than a hypothetical lower volume discharge with a different per gallon value. Such an approach creates a moving target that undermines clarity and consistency in enforcement by otherwise precluding the purpose of evaluating conduct factors when setting a penalty amount.</p> <p><b>Recommendation:</b> Remove the new language added to Section VI under "High Volume Discharges."  <del>"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 used was \$10.00"</del></p> <p>*In the alternative, if the additional paragraph is kept, this would signify a major change in the Board's approach for considering and calculating penalties for high volume discharges, thus this paragraph should be designated as a <b>"Substantive" change in Appendix D</b> as this change may affect a violator's liability or create new obligations for violations. (* Also see Comment No. 8.3(a) below in Appendix D section.)</p>	<p>See response to Commenter 5, Comment 5. See also response to Commenter 8, Comment 3(a).</p>
VI.A. - Step 2 - Table 1 Per Gallon Factor for Discharges	9	9	<p>The proposed changes artificially increase high volume discharge penalties and disregard the impacts of the other factors in setting the penalty amount. It is unclear (and therefore difficult to determine) at what point a monetary penalty "breaks even" to the point where a higher volume discharge using the \$2.00 per gallon value would not result in a lower penalty than a hypothetical, lower volume discharge at \$10.00 per gallon; as such, the proposed Enforcement Policy seeks to reset the 100,000 gallon value for high volume discharges without specifying what that volume is and creates a constantly shifting target that undermines clarity and consistency in enforcement. If it is maintained in the Enforcement Policy, this change should be considered Substantive rather than a Clarification.</p> <p><b>Recommendation:</b> Remove the following new language added to Section VI under "High Volume 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 used was \$10.00."</p> <p>Change from Clarification to Substantive in the Type column of the Appendix D 2023 Policy Update Summary Table. (* Also noted in Appendix D section as Comment No. 9.9(a).)</p>	<p>See response to Commenter 5, Comment 5. See also response to Commenter 8, Comment 3(a).</p>
VI.A. - Step 2 - Table 2 Per Day Factor for Discharges			<p><u>VI.A. - Step 2 - Table 2 Per Day Factor for Discharges</u></p>	<p><u>VI.A. - Step 2 - Table 2 Per Day Factor for Discharges</u></p>

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
<a href="#">VI.A. - Step 3 - Per Day Assessments for Non-Discharge Violations</a>			<a href="#">VI.A. - Step 3 - Per Day Assessments for Non-Discharge Violations</a>	<a href="#">VI.A. - Step 3 - Per Day Assessments for Non-Discharge Violations</a>
<a href="#">VI.A. - Step 3 - Per Day Assessments for Non-Discharge Violations</a>	5	6	<p>The proposed Enforcement Policy proposes new language, which states: "It is never appropriate to collapse days for a discharge violation."</p> <p><b>Recommendation:</b> The State Water Board should elect to reject this addition, as there can be good reason to collapse from time to time (e.g., if a 2-hour event starts at 10:01 p.m. and end at 12:01 a.m., should two (2) days of alleged violation be assessed?). Removal of this proposed language would preserve needed flexibility, avoid overly harsh results, and support the State Water Board's statutory requirement that Water Board action must be "reasonable." (Water Code §13000).</p>	<p>Staff notes that the example provided by the Commenter would not qualify for collapsing days since the Policy only allows violations that continue for longer than 30 days to be collapsed. Discharge violations create a more significant threat to the environment than non-discharge violations, and it is important that significant daily and per gallon penalties be assessed for each day of discharge to create a sufficient general and specific deterrence.</p>
<a href="#">VI.A. - Step 3 - Table 3 Per Day Factor for Non-Discharge Violations</a>			<a href="#">VI.A. - Step 3 - Table 3 Per Day Factor for Non-Discharge Violations</a>	<a href="#">VI.A. - Step 3 - Table 3 Per Day Factor for Non-Discharge Violations</a>
<a href="#">VI.A. - Step 3 - Table 3 Per Day Factor for Non-Discharge Violations</a>	3	7	<p>The Policy proposes to move the Multiple Day Violations language from Step 4, which are adjustment factors, to Step 3 that discusses Per Day Assessments for Non-Discharge Violations. According to the background and summary of the proposed revisions, the change is to improve readability and ease of use of the policy. The Public Notice indicates that the additional language is being added to " . . . clarify that collapsing days of violation in accordance with the 'Multiple Day Violations' provisions only applies to non-discharge violations, not discharge violations." However, beyond this statement, no further explanation or justification is provided to support the claim that this is merely a clarification. This appears to be a fairly significant substantive change in that no longer can multiple day discharge violations be collapsed in the manner as provided within the Policy.</p> <p><b>Recommendation:</b> Retain the Multiple Day Violation language under Step 4 as an adjustment factor and maintain Water Board discretion to apply the Multiple Day Violation language to discharge violations as well as non-discharge violations.</p>	<p>Proposed revisions have been added to Appendix D to make it clear that the prohibition on collapsing days for discharge violations is a substantive revision.</p>
<a href="#">VI.A. - Step 3 - Table 3 Per Day Factor for Non-Discharge Violations</a>	3	8	<p>The Policy maintains the express findings that must be made for this provision to be applied, which includes ensuring that the violation is not causing daily detrimental impacts to the environment. The 2023 Policy continues to maintain the Water Board's discretion to decline collapsing days. With these stated caveats, it is unnecessary for the Policy to explicitly deny application of the multiple day collapsing approach to discharge violations. Rather the 2023 Policy should leave in the option and allow Water Boards to use their discretion to determine if and when it may be appropriate to collapse days for multiple day discharge violations. Based on the current structure of the 2023 Policy, this may mean that section should not be moved under Step 3 but remain as an adjustment factor under Step 4.</p> <p><b>Recommendation:</b> Retain the Multiple Day Violation language under Step 4 as an adjustment factor and maintain Water Board discretion to apply the Multiple Day Violation language to discharge violations as well as non-discharge violations.</p>	<p>See response to Commenter 5, Comment 6.</p>
<a href="#">VI.A. - Step 4 - Adjustment Factors</a>			<a href="#">VI.A. - Step 4 - Adjustment Factors</a>	<a href="#">VI.A. - Step 4 - Adjustment Factors</a>

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
VI.A. - Step 4 - Table 4 Violator's Conduct Factors			<u>VI.A. - Step 4 - Table 4 Violator's Conduct Factors</u>	<u>VI.A. - Step 4 - Table 4 Violator's Conduct Factors</u>
VI.A. - Step 4 - Table 4 Violator's Conduct Factors	3	9	<p>Including "self-reported" violations in what is considered a history of violation, combined with the new proposed language of "at least one" violation, will result in creating a near impossible standard for dischargers and the failure to meet this standard should not constitute a "history of violations." The term itself, "history of violations" conjures up something far more significant than 1 violation in a 5 year period. Further, considering the natural variability in water quality, the practical reality that stormwater inherently is not a contained, controlled, closed treatment system, and the impacts of potentially infeasible numeric water quality based effluent limitations on municipal stormwater permittees, this provision likely would result in nearly every stormwater permittee being considered to have a history of violations even though permittees are implementing their programs aggressively and in good faith.</p> <p><b>Recommendation:</b> Delete reference to "at least one" prior violation as being the applicable standard for what constitutes a "history of violations." Redefine "violation" for the purposes of Table 4 to mean a stipulated or adjudicated violation of the Water Code.</p>	<p>Staff agrees that the proposed revision to history of violation expands too far the scope of what constitutes a history of violations. The Water Boards should have discretion to consider what is or is not a history of violations within a general framework. In some instances, a single prior violation may warrant a history of violations, where in other instances it may not. Therefore, staff propose the following revisions to the prior proposed language, "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 <del>at least one</del> prior violations 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 <b>(when monitoring and reporting of violations is required and not part of a voluntary compliance assessment)</b>, stipulated, or adjudicated violation of the Water Code, Health and Safety Code, or similar <b>other</b> environmental protection statute <b>for which the Water Boards have enforcement authority. Under no circumstances shall this factor ever be below 1.0."</b></p>
VI.A. - Step 4 - Table 4 Violator's Conduct Factors	3	12	<p>The proposed new definition of "violations" expands to not just violations under the Water Code but also to violations under the Health and Safety Code or similar environmental protection statutes. Does this mean that a permittee that self-reported unrelated, air quality violations is now subject to increased penalties for water quality violations? This does not seem appropriate, and again becomes punitive.</p>	<p>Staff agrees that only violations of the Water Code, Health and Safety Code, or other statutes for which the Water Boards have enforcement authority should be considered. See response to Commenter 3, Comment 9.</p>
VI.A. - Step 4 - Table 4 Violator's Conduct Factors	3	13	<p>Table 4 of the 2023 Policy includes cleanup and/or cooperation as a conduct factor for calculation of penalties, and proposes to include new language that states as follows: "Failure to timely respond to a Water Board's 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." (2023 Policy, p. 25.) CASQA disagrees that this language is appropriate for determining the degree of culpability because it is vague and subject to varying interpretation.</p> <p><b>Recommendation:</b> Delete new proposed sentence to the cleanup and/or cooperation factor that references that failure to respond to Notices of Violation may be considered when determining degree of culpability.</p>	<p>Staff proposes language to better clarify when the failure to correct a violation that has been called to the discharger's attention should be considered in both the culpability and cleanup and cooperation factors. New language has been added to the culpability section to specify that a discharger's failure to correct a violation that has been identified by the Water Boards, either through an "informal enforcement action", as described in the Policy in Appendix A, Section A, or through a "formal enforcement action", as defined in the Policy in Appendix A, Section B, may result in a culpability greater than 1 when the violation continues or when a subsequent, related violation occurs. This same language is carried over into the cleanup and cooperation section. As an example, consider a discharger that fails to install erosion and sediment control BMPs at construction site, as required by Construction General Permit (CGP). The standard of care for installing BMPs is specified in the CGP, so the failure to meet that standard of care should result in a culpability score greater than 1 for the BMP violation(s). The Regional Board subsequently performs an inspection and notifies the discharger of the failure to have BMPs. An NOV is issued, but the discharger does nothing for months to correct the deficiencies. A rain event occurs and there is an unlawful discharge. The culpability score for the discharge violation (and the continuing BMP violations after the Regional Board inspection) should consider the fact that the discharger not only failed to install BMPs as required by the CGP, but was informed of the deficiencies by the Regional Board and still failed to correct the deficiencies. The lack of a response to the NOV may also be considered as a failure to cooperate with the Regional Board after the violation has been brought to the discharger's attention, under the cleanup and cooperation factor.</p>
VI.A. - Step 4 - Table 4 Violator's Conduct Factors	3	14	<p>The Water Boards issue Notices of Violation for many reasons. Some are for fairly small, inconsequential violations that put a permittee on notice, and others may be for much larger substantive issues. Further, there may be disagreement between a permittee and the enforcement staff regarding the alleged violation and if it in fact is a violation under the applicable order. Some Notices of Violation request a written response or specific action, others are merely Notices that request corrections to avoid future alleged violations. The term "failure to timely respond to a Water Board Notice of Violation" is vague in that it does not indicate if this means respond by correcting the alleged violation, respond in writing to the Notice of Violation even if no such request is included in the Notice, or respond in some other manner. Further, the term "timely" may be subjective if the Notice of Violation does not include a specific time frame for any requested action.</p> <p><b>Recommendation:</b> Delete new proposed sentence to the cleanup and/or cooperation factor that references that failure to respond to Notices of Violation may be considered when determining degree of culpability.</p>	<p>See response to Commenter 3, Comment 13. Staff assert that there needs to be flexibility for the Water Boards to consider a discharger's response to either a formal or informal enforcement action when determining whether an increase in liability is appropriate, given the facts and circumstances of each case. Therefore, it would be overly restrictive to define specifically what "timely" means. In addition, the proposed language does not prohibit dischargers from raising any legal defenses that may apply.</p>
VI.A. - Step 4 - Table 4 Violator's Conduct Factors	3	15	<p>Considering the variability with respect to the content and expectations that may be included in Notices of Violation, and uncertainty with the proposed language, we recommend that this sentence be deleted from Table 4.1. Further, we do not believe that this additional sentence is necessary for the Water Boards to evaluate cleanup and/or cooperation for application of the conduct factors.</p> <p><b>Recommendation:</b> Delete new proposed sentence to the cleanup and/or cooperation factor that references that failure to respond to Notices of Violation may be considered when determining degree of culpability.</p>	<p>See response for Commenter 3, Comments 13 and 14.</p>

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VI.A. - Step 4 - Table 4 Violator's Conduct Factors	5	7	<p>History of Violations section should be modified.</p> <p><b>Recommendation:</b> The history of violations should address and apply only to violations similar in nature (e.g., previous sewer spills in a sewer spill enforcement matter) instead of using completely unrelated violations (i.e., a late report). (See proposed Enforcement Policy at p. 25). Further, we recommend that the timeframe for history of violations extend back to three (3) years, not five (5), since three years represents the applicable period of time by which a judicial or administrative enforcement action must be commenced. (CCP §338(i); Malaga, 58 Cal.App.5th at 467.) To remedy these issues, we propose the following changes:</p> <p>“Where the discharger has at least one prior <u>similar</u> violation within the last <del>five</del> <u>three</u> years, the Water Boards should use a multiplier of 1.1.”</p>	<p>Staff disagrees with the Commenter's assertion that there is a three year statute of limitations for administrative actions. The Malaga decision cited by the Commenter does not stand for that proposition; rather, it stands for the proposition that if an administrative action is initiated after three years and a defense of laches is raised, the burden shifts to the prosecuting agency to show that the delay was reasonable and there was no prejudice caused by the delay. The Enforcement Policy was revised in 2017 to include a 5-year timeframe for considering a history of violations and there is no need to revise that timeframe now. In addition, the Policy has never been so restrictive as to limit the history of violations determination to "similar" violations, as proposed by the Commenter. Similar comments were made during the prior update to the Policy and rejected.</p>
VI.A. - Step 4 - Table 4 Violator's Conduct Factors	5	8	<p>Self-reported events that have not been adjudicated should not be included in this factor. While such events may be exceedances or purported violations, defenses or other factors might apply such that the event is not, in fact, a “violation.”</p> <p><b>Recommendation:</b> History of Violations should also be confined to statutes under which the Water Boards have enforcement authority. Thus, the proposed language of the History of Violations Section should read: “For the purpose of this factor, “violation” means a <del>self-reported</del>, stipulated, or adjudicated violation of the Water Code, <u>or</u> Health and Safety Code, <del>or similar environmental protection statute.</del></p> <p>In addition, <b>throughout the document</b> whenever discussing “violations,” the proposed Enforcement Policy should reference “<b>alleged</b> violation(s)” unless the “violation” means a stipulated or adjudicated violation.</p>	<p>See response to Commenter 3, Comments 9 and 12. It is unnecessary to refer to each reference to "violation" in the Policy as an "alleged violation." The context and use of the term is clear regarding those violations that are alleged and those that have been adjudicated.</p>
VI.A. - Step 4 - Table 4 Violator's Conduct Factors	6	3	<p>The proposed Policy would subject a discharger to an increased multiplier where they had “at least one” violation within the last five years, as opposed to multiple violations within the last five years. By mandating that a discharger with “at least one prior violation within the past five years” be assigned a multiplier of 1.1, the Water Board will be uniformly inflating the conduct factor for all entities that diligently self-report violations, no matter how small the infraction. The District recommends that this factor retain discretion to determine whether a single past violation constitutes a “history of violations.”</p> <p><b>Recommendation:</b> The Policy should recognize that not all violations are the same even where the discharge may be similar, and this should be considered when evaluating what constitutes a “history” of violations.</p>	<p>See response to Commenter 3, Comment 9.</p>
VI.A. - Step 4 - Table 4 Violator's Conduct Factors	6	4	<p>The District acknowledges that in some cases, even one egregious prior violation within the last five years would warrant a multiplier greater than 1.0; however, this is not necessarily always the case.</p> <p><b>Recommendation:</b> The Policy should acknowledge that a prior violation within the last five years will not always evidence a “history” of violations, and may not necessarily require utilizing a multiplier greater than 1.0, particularly if the violations are unrelated. For example, someone might have received an ACL previously for a sewer spill and now is proposed to receive an ACL for an effluent limit exceedance not subject to Mandatory Minimum Penalties (MMPs) or for a reporting error, these “violations” are completely unrelated and should not automatically require a multiplier greater than 1.0.</p>	<p>See response to Commenter 3, Comment 9. See response to Commenter 5, Comment 7.</p>
VI.A. - Step 4 - Table 4 Violator's Conduct Factors	6	5	<p>The proposed Policy would define “violation” (for purposes of assessing the violator’s history) as a “self-reported, stipulated, or adjudicated violation of the Water Code, Health and Safety Code, or <i>similar environmental protection statute</i>” (emphasis added). The inclusion of the “similar environmental protection” statute is vague and confusing, and it is unclear what manner of violations the Water Board intends to consider beyond violations of the Water Code and the Health and Safety Code.</p> <p><b>Recommendation:</b> If the Water Board is intending to encompass other statutes such as the Clean Water Act, then such statutes should be enumerated to ensure the Water Boards do not veer outside their statutory authority.</p>	<p>See response to Commenter 3. Comment 12.</p>
VI.A. - Step 4 - Table 4 Violator's Conduct Factors	6	6	<p>The proposed Policy would revise the “cleanup and cooperation” factor to state that “[f]ailure 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.” This addition creates a confusing overlap between the “degree of culpability” and “cleanup and cooperation” factors, as well as the potential for an increased multiplier as a result of double-counting a failure to timely respond as both an indicator of culpability and a failure to cooperate.</p> <p><b>Recommendation:</b> The Policy should clearly delineate the analysis to be applied under each factor.</p>	<p>See response to Commenter 3, Comments 13 and 14.</p>

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VI.A. - Step 4 - Table 4 Violator's Conduct Factors	8	4	<p>In Section VI, Table 4, there are two distinct additions to the "History of Violations" section: 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 <u>at least one</u> prior violations 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. <u>For the purpose of this factor, "violation" means a self reported, stipulated, or adjudicated violation of the Water Code, Health and Safety Code, or similar environmental protection statute. Under no circumstances shall this factor ever be below 1.0.</u></p> <p>The first change to this section is updating the phrase "Where the discharger has prior violations within the last five years" to the new phrase "Where the discharger has at least one prior violation within the last five years." This additional phrase functions to expand the application of a 1.1 multiplier when conduct factors are being considered. Rather than make this addition and subject a one-time or first-time violator to a higher multiplier for their first offense, we request the phrase "at least one" not be added to the Draft Enforcement Update. The second change to this section is the final sentence regarding what a "violation" means. A violation should refer only to a stipulated or adjudicated violation of Division 7 of the Water Code or Health and Safety Code violations related to the Underground Storage Tank program (Health &amp; Safety Code § 25280 - 25299.8). References to other statutes and self-reported exceedances should be eliminated; to be sure, self-reporting is a critical step in any enforcement framework, but it is improper to characterize and conclude that all self-reported incidents are violations.</p> <p><b>Recommendation:</b> The draft Enforcement Update should modify the additions to the "History of Violations" section in Table 4. We request the clause "at least one" not be added, and instead to leave intact the current policy. We request modified language to specify the pertinent section of the Health and Safety Code for which this relates. We request the phrase "water quality" instead of the overly broad "environmental."</p> <p><b>Text:</b> <i>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 <u>at least one</u> prior violations 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. <u>For the purpose of this factor, "violation" means a self-reported, stipulated, or adjudicated violation of the Water Code, Health and Safety Code (applicable to the Underground Storage Tank program only), or similar environmental water quality protection statute. Under no circumstances shall this factor ever be below 1.0.</u></i></p> <p>*If either of these recommendations are not accepted, then the proposed additions should be re-classified from "Clarification" to "Substantive" in Appendix D as these changes will result in the expansion of a first-time or one-time violator's liability and create no obligations not otherwise provided for in the existing policy. (*Also see Comment No. 8.4(a) below in Appendix D section.)</p>	See response to Commenter 3, Comment 9. See response to Commenter 5, Comment 7.
VI.A. - Step 4 - Table 4 Violator's Conduct Factors	8	5	<p>In Section VI, Table 4, there is an additional sentence added to the end of the "Cleanup and/or Cooperation" section that reads, "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." Placing this text in the "Cleanup and/or Cooperation" section would result in a Discharger being assessed greater penalties by elevating this issue as a factor in two separate categories, which seems contrary to the intent of evaluating the three conduct factors for modifying an initial amount.</p> <p><b>Recommendation:</b> Remove the additional consideration from the "Cleanup and/or Cooperation" section to the "Degree of Culpability" section in Table 4. If this change is not made, then in Appendix D, the Water Board should change the classification of the proposed additions from "Clarification" to "Substantive" due to how the proposed change could result in the expansion of a violator's liability or create new obligations which currently are not provided for in the existing policy.</p> <p><b>Text:</b> <i>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 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. <u>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.</u></i></p>	See response to Commenter 3, Comments 13 and 14.
VI.A. - Step 4 - Table 4 Violator's Conduct Factors	9	10	<p>Additional language in History of Violations.</p> <p><b>Recommendation:</b> Violation should only refer to a stipulated or adjudicated violation of the Division 7 of the Water Code. References to other statutes and self-reported exceedances should be eliminated. Clarify that Health and Safety Code violations are limited to the Underground Storage Tank program (Health &amp; Safety Code sections 25280 - 25299.8).</p> <p>Modify proposed language as follows (suggested modification in bold): "For the purpose of this factor, "violation" means a self-reported, stipulated, or adjudicated violation of the Water Code, Health and Safety Code (applicable to the Underground Storage Tank program only), or similar environmental protection statute. Under no circumstances shall this factor ever be below 1.0." Change from Clarification to Substantive in the Type column of the Appendix D 2023 Policy Update Summary Table. (*Also noted in Appendix D section as Comment No. 9.10(a).)</p>	See response to Commenter 5, Comment 7.
VI.A. - Step 4 - Table 4 Violator's Conduct Factors	9	11	<p>In Section VI.A, the SWRCB proposes adding language to the adjustment factor Cleanup and/or Cooperation. The proposed amendment states that "[f]ailure 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."</p> <p>The added language confuses Culpability and Cleanup and Cooperation when Cleanup and Cooperation (for most cases) addresses a Discharger's responsiveness to the event whereas culpability addresses Discharger's actions prior to/leading up to the event. By including the proposed language, a Discharger is likely to be assessed elevated factors in both categories, thereby unnecessarily increasing proposed penalties.</p> <p><b>Recommendation:</b> Remove the added language from Cleanup and Cooperation and move it to Degree of Culpability: "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."</p>	See response to Commenter 3, Comments 13 and 14.

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VI.A. - Step 5 - Determination of Total Base Liability Amount			<p><b><u>VI.A. - Step 5 - Determination of Total Base Liability Amount</u></b></p>	<p><b><u>VI.A. - Step 5 - Determination of Total Base Liability Amount</u></b></p>
VI.A. - Step 5 - Determination of Total Base Liability Amount	8	6	<p>In the steps for the General Approach of Section VI related to monetary assessments in administrative civil liability actions, the current policy's language: The Draft Enforcement Update however strikes and removes the last sentence from this paragraph, then keeps this section in Step 6 while moving the rest of the section in the current policy to Step 8 in the Draft Enforcement Update, resulting in this text: "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. <del>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.</del>"</p> <p>The removal of this proviso that a monetary penalty may be imposed below the calculated economic benefit is inconsistent with the Water Code and detrimental for the Draft Enforcement Update. The current language in the Draft Enforcement Update should be restored. There are instances prescribed by statute where liability imposed may be less than the economic benefit (e.g., discharges to waters of the State per Water Code section 13327). The Draft Enforcement Update to the policy cannot function to abrogate the statutory laws it is meant to enforce.</p> <p><b>Recommendation:</b> Restore the original language in the current policy by adding back the sentence struck in the Draft Enforcement Update to the new position on page 30 for the paragraph that sentence is part of in the current policy.</p> <p><b>Text:</b> <i>"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. <u>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.</u> Absent express findings of..."</i></p>	<p>The proposed Policy revisions address this issue in Footnote 1, which states, in the red language below, that:</p> <p>"When liability is imposed under <a href="#">California</a> Water Code <a href="#">§ section 13385</a>, 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 <b>plus 10 percent</b> to all discretionary ACL actions, <b>except when decision makers make specific, evidence-based or policy-based findings, or both, under <a href="#">Step 7 8</a>, 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.</b>"</p>
VI.A. - Step 5 - Determination of Total Base Liability Amount	9	12	<p>Alterations to Economic Benefit: The alterations deleting that a monetary penalty may be imposed below the calculated economic benefit is inconsistent with the Water Code. The Enforcement Policy must recognize instances, prescribed by statute, where liability imposed may be less than the economic benefit (e.g., discharges to waters of the State per Water Code section 13327).</p> <p><b>Recommendation:</b> Reinsert the following deleted language: "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."</p>	<p>See response to Commenter 8, Comment 6.</p>
VI.A. - Step 5 - Determination of Total Base Liability Amount	9	13	<p>Alterations to Economic Benefit: The addition of "or mitigate" vaguely and ambiguously broadens this section. While it is generally clear what actions are necessary to mitigate a violation of the Water Code it is not always clear in advance of a violation what actions are necessary, and to what level, to mitigate a violation.</p> <p><b>Recommendation:</b> Delete "or mitigate": "determine actions that were required to comply with a permit or order of the Water Boards . . . or that were necessary in the exercise of reasonable care, to prevent or mitigate a violation of the Water Code."</p>	<p>The addition of "or mitigate" is a clarifying amendment that is intended to reflect that compliance actions for the purposes of the economic benefit analysis don't always ensure 100% prevention of a violation or the harm that it causes. For example, the deployment of BMPs at a construction site may not completely prevent an unauthorized discharge, however, it may significantly mitigate the damage/harm caused if otherwise not in place. The costs of failing to install and maintain these BMPs should to be considered when calculating economic benefit for a discharge violation.</p>
VI.A. - Step 6 - Economic Benefit			<p><b><u>VI.A. - Step 6 - Economic Benefit</u></b></p>	<p><b><u>VI.A. - Step 6 - Economic Benefit</u></b></p>
VI.A. - Step 7 - Other Factors As Justice May Require			<p><b><u>VI.A. - Step 7 - Other Factors As Justice May Require</u></b></p>	<p><b><u>VI.A. - Step 7 - Other Factors As Justice May Require</u></b></p>



Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
VI.A. - Step 7 - Other Factors As Justice May Require	3	16	<p>The 2023 Policy proposes to include a new sentence that strongly encourages Water Boards to recover staff costs related to the investigation and issuance of an enforcement action. (2023 Policy, p. 32.) CASQA appreciates the Water Boards desire to recover costs associated with preparing and issuing an enforcement action. CASQA also appreciates that the 2023 Policy provides direction with respect to the Water Boards discretion for including such costs as part of an administrative civil liability. However, the proposed new sentence goes beyond providing direction with respect to Water Board discretion and appears to be a policy position. The problem is that the policy position as proposed is broad, and as written appears to apply to all enforcement actions generically. It does not take into consideration if the entity is a municipality or a private party; if violations are unavoidable despite all best efforts to comply with permit terms; or, any other potentially relevant factors or criteria.</p> <p>Further, the inclusion of the word “strongly” places additional emphasis on what should be a discretionary determination for each Water Board. The sentence is not necessary nor does it alter or change the Water Board’s authority to recover staff costs when a Water Board determines that it is appropriate.</p> <p><b>Recommendation:</b> Delete the sentence that strongly encourages Water Boards to recover staff costs that reflect effort for investigating and issuing enforcement orders.</p>	<p>The considerations raised by the commenter relating to whether the violations are "unavoidable" or against a municipality vs. a private party are already considered in the Enforcement Policy penalty methodology under several factors, including the degree of culpability and ability to pay. The proposed revision to strongly encourage recovery of staff costs is intended to apply broadly.</p>
VI.A. - Step 7 - Other Factors As Justice May Require	7	22	<p>The existing Policy grants the Water Boards discretion to add the costs of investigation and enforcement to the total liability. The draft Enforcement Policy would strongly encourage recovery of staff costs in the administrative civil liability action. We strongly agree and recommend the State Water Board retain this amendment to strongly encourage recovery of staff costs. This amendment is necessary because staff costs related to investigation of enforcement of violations should be borne by the discharger(s), and recovery of staff costs will enhance the Water Boards ability to pursue enforcement actions and create a sufficient deterrent against future violations.</p> <p><b>Recommendation:</b> The State Water Board should retain the amendment strongly encouraging staff to recover costs in a civil liability action. We strongly support the amendment to encourage the recovery of staff costs for the administrative civil liability action. We also recommend the State Water Board to encourage recovery of all legal costs to ensure the cost of enforcement is borne by the dischargers so that Water Board enforcement is not a burden on the General Fund and taxpayer dollars.</p>	<p>Staff agrees with the commenter regarding the need to recover staff costs. The commenter also suggests that staff costs should include legal costs, however, in order to recover legal costs, there must be express authority in statute or contract (Glynn v. Marquette (1984) 152 Cal.App.3d 277, 280.)</p>
VI.A. - Step 8 - Ability to Pay and Ability to Continue in Business			<p align="center"><b><u>VI.A. - Step 8 - Ability to Pay and Ability to Continue in Business</u></b></p>	<p align="center"><b><u>VI.A. - Step 8 - Ability to Pay and Ability to Continue in Business</u></b></p>
VI.A. - Step 8 - Ability to Pay and Ability to Continue in Business	7	14	<p>The proposed amendments to this section include reorganizing certain elements of the Enforcement Policy for readability and ease of use. One of the proposed amendments would switch Step 6 (Ability to Pay) in the penalty calculation methodology with Step 8 (Other Factors as Justice May Require). We disagree with how this amendment sets up the ability to pay analysis and consideration in setting the penalty amount. We are concerned that the State Water Board has created a situation where staff is supposed to address ability to pay in the first instance if they think it will be a contested issue but not if staff does not think it will be an issue. It does not make sense that staff should only analyze the ability to pay in the first place if they think it will be an issue. Staff should not be required to guess whether ability to pay is an issue. Nor does it make sense that the result of staff’s guess would define the State Water Board’s duty. The State Water Board either needs to make findings about ability to pay or they do not – but they should not have to guess.</p> <p><b>Recommendation:</b> The State Water Board should only adjust penalty based on consideration ability to pay if raised by discharger. Would recommend the following approach:</p> <ol style="list-style-type: none"> <li>Determine the amount of penalty;</li> <li>Make a finding that the ability to pay is a factor to be considered but that it requires complete transparency from the discharger;</li> <li>Require complete transparency from dischargers - including making all financial records publicly available (subject to appropriate redactions - if they want to assert penalty should be reduced based on ability to pay;</li> <li>Give dischargers opportunity to make the showing;</li> <li>Adjust the penalty if appropriate; then</li> <li>Provide public opportunity to comment on the adjustment with all information available.</li> </ol>	<p>Staff disagrees with the commenter's assertion that switching Steps 6 and 8 will change how ability to pay is currently considered. The comment appears to apply to existing language in the policy that directs staff to conduct a preliminary ability to pay analysis when it anticipates the discharger's ability to pay will be an issue. Staff proposes amending the ability to pay language to clarify that, prior to issuing an ACL complaint, prosecution staff should conduct a simple preliminary financial investigation based upon publicly available information, regardless of whether staff anticipates that the discharger's ability to pay or continue in business will be a contested issue in the proceeding. Specifically, staff propose deleting the phrase, "If staff anticipates that the discharger's ability to pay or ability to continue in business will be a contested issue in the proceeding,". This change reflects the existing practice where a preliminary financial investigation is always conducted prior to issuing an ACL complaint, regardless of whether ability to pay is expected to be contested or not.</p>
VI.A. - Step 9 - Maximum and Minimum Liability Amounts			<p align="center"><b><u>VI.A. - Step 9 - Maximum and Minimum Liability Amounts</u></b></p>	<p align="center"><b><u>VI.A. - Step 9 - Maximum and Minimum Liability Amounts</u></b></p>

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
VI.A. - Step 9 - Maximum and Minimum Liability Amounts	8	7	<p>In the steps for the General Approach of Section VI related to monetary assessments in administrative civil liability actions, Step 9 includes the following language about the lower bound for liability as it relates to a multiple day incident: "For purposes of this step, the minimum and maximum liabilities liability does 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."</p> <p>By altering minimum liabilities to not include any reduction in the number of days for multiple violations, this addition ignores the Draft Enforcement Update's provisions providing Regional Board discretion to collapse violations, and leads to an internal inconsistency and confusion. For example, a five-day violation that a Regional Water Board chooses to collapse into a single day that might merit a \$10,000 penalty would have to be described as having a minimum liability of \$50,000.</p> <p><b>Recommendation:</b> The Draft Enforcement Update should restore the current Policy's Provision Regarding what maximum liability amounts include so the Policy is internally consistent. Restore the original language in the current policy and remove "minimum" from the Draft Enforcement Update.</p> <p><b>Text:</b> For purposes of this step, the <del>minimum-and</del> maximum liabilities <i>liability</i> do <i>es</i> 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.</p>	<p>Staff disagrees with the Commenter's recommendation. The purpose of the proposed revision is to make it clear that the Policy's allowance for collapsing days of violation does not change any statutory minimum penalty amount. As a matter of law, the Policy cannot change a statutory requirement. For example, a violation that lasts for 90 days, where the statute requires a \$500 day minimum liability per day, results in a mandatory minimum liability of \$45,000 (90 x \$500), regardless of whether the 90 day violation was collapsed to 37 days. In other words, a violation lasting 90 days that is collapsed to 37 days using the penalty methodology where the statute requires a mandatory minimum penalty of \$500 per day does <u>not</u> result in a mandatory minimum penalty of \$18,500 (37 x \$500), but rather is still subject to a mandatory minimum penalty of \$45,000 (90 x \$500).</p>
VI.A. - Step 9 - Maximum and Minimum Liability Amounts	9	14	<p>Alterations to Maximum and Minimum Liability Amounts: The language altering minimum liabilities to not include any reduction in the number of days for multiple violations ignores the Enforcement Policy's provisions providing Regional Board discretion to collapse violations and leads to an internal inconsistency that could prove awkward and confusing to the public in an enforcement proceeding (e.g.,, a five day violation that the Regional Board chooses to collapse into a single day that might merit a \$10,000 penalty would have to be described as having minimum liability of \$50,000.)</p> <p><b>Recommendation:</b> Strike "minimum" from the language.</p>	<p>See response to Commenter 8, Comment 7.</p>
VI.A. - Step 10 - Final Liability Amount			<p><b><u>VI.A. - Step 10 - Final Liability Amount</u></b></p>	<p><b><u>VI.A. - Step 10 - Final Liability Amount</u></b></p>
VI.B. - Settlement Considerations			<p><b><u>VI.B. - Settlement Considerations</u></b></p>	<p><b><u>VI.B. - Settlement Considerations</u></b></p>
VI.B. - Settlement Considerations	5	2	<p>While we support the proposed removal of footnote 4 (p. 34 of the proposed Enforcement Policy), we believe a more robust, transparent discussion of the how laches must be interpreted and applied by the Water Boards is warranted in the proposed Enforcement Policy. We recommend the proposed Enforcement Policy clearly explain the concept of laches, and state that enforcement actions must be taken within three (3) years of the alleged violation consistent with the recent appellate case, Malaga Cnty. Water Dist. v. State Water Res. Control Bd. ("Malaga"), 58 Cal.App.5th 447, 467 (Cal. Ct. App. 2020) (confirming that the common law defense of laches necessitates application of the same three (3) year statute of limitations in administrative enforcement actions that is applicable to judicial enforcement actions of the same alleged violation pursuant to Code of Civil Procedure section 338(i)). In that case, the Court of Appeal ruled that: "Nothing in the statutory scheme or the case law suggests that the Legislature intended to limit potentially stale actions brought in court but permit those same actions to proceed through administrative hearings."</p> <p><b>Recommendation:</b> Because of the importance of timely enforcement, where facts are still fresh in people's minds and witnesses are still available, the Enforcement Policy should expressly recognize the importance of prompt action as is done in Section VII.A. with Mandatory Minimum Penalties (MMPs), and not just as a general statement in the introduction or as a settlement consideration in Section VI.B.</p>	<p>Staff disagrees with the recommendation. The commenter's statement that the Malaga decision stands for the proposition that administrative enforcement actions "must" be taken within three years is incorrect. The Malaga decision holds that if an administrative action is initiated after three years and a defense of laches is raised, the burden shifts to the prosecuting agency to show that the delay was reasonable and there was no prejudice caused by the delay. The application of laches is not a universal or easily applied rule, but a fact specific inquire that must be made on a case by case basis because it is a fact specific inquiry.</p>
VI.C. - Other ACL Settlement Components			<p><b><u>VI.C. - Other ACL Settlement Components</u></b></p>	<p><b><u>VI.C. - Other ACL Settlement Components</u></b></p>

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
VII. MANDATORY MINIMUM PENALTIES FOR NPDES VIOLATIONS			<b><u>VII. MANDATORY MINIMUM PENALTIES FOR NPDES VIOLATIONS</u></b>	<b><u>VII. MANDATORY MINIMUM PENALTIES FOR NPDES VIOLATIONS</u></b>
VII. MMPS f	3	17	<p>Section VII of the 2023 Policy uses the term “effluent limitation” for application of mandatory minimum penalties. However, nowhere in Section VII does the 2023 Policy clarify that an effluent limitation for the purposes of mandatory minimum penalties that are imposed under Water Code section 13385 is limited to a numeric effluent limitation. Water Code section 13385.1(d) defines effluent limitation to mean “a numeric restriction or a numerically expressed narrative restriction, on the quantity, discharge rate, concentration, or toxicity units of a pollutant or pollutants that may be discharged from an authorized location.” Importantly, effluent limitations in municipal stormwater permits may be expressed numerically or as a best management practice (BMP) based effluent limitation. Since BMP-based effluent limitations are not expressed numerically, they are not subject to mandatory minimum penalties. While we expect that implementing Water Board staff are aware of the statutory restrictions for imposing mandatory minimum penalties, the 2023 Policy can be improved by including this information so that the policy is more complete as a stand-alone document.</p> <p><b>Recommendation:</b> Clarify the definition of “effluent limitation” for purposes of applying mandatory minimum penalties in accordance with Water Code section 13385.1(d).</p>	Staff disagrees with the Commenter's recommendation. The Enforcement Policy is intended to work in tandem with the statute. There is no need to repeat the definition of "effluent limitation" which is provided in Water Code section 13385.1(d).
VII.A. - Timeframe for Issuance of MMPs			<b><u>VII.A. - Timeframe for Issuance of MMPs</u></b>	<b><u>VII.A. - Timeframe for Issuance of MMPs</u></b>
VII.A. - Timeframe for Issuance of MMPs	1	1	<p>LADWP recommends further clarification of the following statement: "The Water Boards should issue MMPs within eighteen months of the time that the Water Boards discovered the qualifying violation or within the eighteen months from the time that the qualifying violation was reported to the Water Boards, whichever is earlier."</p> <p><b>Recommendation:</b> Requests clarification and recommends "should" be replaced with "shall" or "must be" for the draft language to be applied effectively.</p>	Staff disagrees with this comment. Replacing "should" with "shall" or "must be" would conflict with the applicable three year statute of limitations for actions filed civilly. In addition, there is no statute of limitations for administrative actions, and the suggested change would impose an unnecessary mandate that could impede the Water Boards from meeting their statutory obligation to impose MMPs. Staff recommendation is to leave this language unchanged.
VII.A. - Timeframe for Issuance of MMPs	1	2	<p>LADWP recommends reinstatement of timeframe for issuance in the following statement: This 18-month period shall not apply to MMPs assessed for discharges regulated by state or regional municipal separate storm sewer systems (MS4) permits or state general permits for stormwater discharges that include numeric effluent limitations." LADWP understands that SWRCB staff are having to manually search the SMARTS database for stormwater violations unlike the CIWQS database where violations are readily generated, yet a defined timeframe should be established.</p> <p><b>Recommendation:</b> Recommends reinstatement of timeframe for issuance by adding another 6 months to the current 18-month timeframe for a total of 24 months should be more than adequate.</p>	Staff disagrees and recommends adopting the original proposed language excluding discharges regulated by state or regional municipal separate storm sewer systems (MS4) permits or state general permits for stormwater discharges that include numeric effluent limitation from the recommended 18 month period. 24 months may not be sufficient time to address MMPs for stormwater given the difficulty with accessing MMP data in SMARTS and the limited resources assigned to this task.
VII.A. - Timeframe for Issuance of MMPs	3	18	<p>LADWP recommends reinstatement of timeframe for issuance in the following statement: This 18-month period shall not apply to MMPs assessed for discharges regulated by state or regional municipal separate storm sewer systems (MS4) permits or state general permits for stormwater discharges that include numeric effluent limitations." LADWP understands that SWRCB staff are having to manually search the SMARTS database for stormwater violations unlike the CIWQS database where violations are readily generated, yet a defined timeframe should be established.</p> <p><b>Recommendation:</b> Revise Section VII.A. of the 2023 Policy to incorporate the Malaga holding, in particular as it applies to the issuance of mandatory minimum penalties on dischargers regulated under state and regional stormwater permits. Include a reasonable timeframe for the issuance mandatory minimum penalties for stormwater numeric effluent limitation violations that does not exceed three years.</p>	Staff disagrees and recommends adopting the original proposed language excluding discharges regulated by state or regional municipal separate storm sewer systems (MS4) permits or state general permits for stormwater discharges that include numeric effluent limitation from the recommended 18 month period. The Water Boards always endeavor to issue timely enforcement, especially for mandatory minimum penalties. Office of Enforcement works with the State Water Board and the regional boards to encourage timely enforcement and enhancement of technology, including SMARTS, to streamline the process. It is also worth noting, that all MMPs are based on self monitoring data allowing the regulated community to always be aware of their own compliance status.

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VII.A. - Timeframe for Issuance of MMPs	3	19	<p>The 2023 Policy correctly proposes to delete footnote 4 on page 34 because of the Fifth District Court of Appeal’s decision in Malaga County Water District v. State Water Resources Control Board (Malaga), 58 Cal.App.5th 447, which held that the equitable defense of laches is available to those subject to mandatory minimum penalties and that when violations are known for more than three years before the initiation of an enforcement action then the burden shifts to the Water Boards to demonstrate that the delay was reasonable or without prejudice. (Malaga, 58 Cal.App.4th, 471.) But, nowhere in the 2023 Policy does it recognize that enforcement actions for mandatory minimum penalties brought three years after violation is known shifts the presumption to the Water Boards to demonstrate that the delay is reasonable and without prejudice. This legal precedent has significant implications for stormwater permittees that may be subject to mandatory minimum penalties – especially since they are being excluded from the 18-month timeframe applied to others subject to mandatory minimum penalties.</p> <p><b>Recommendation:</b> Revise Section VII.A. of the 2023 Policy to incorporate the Malaga holding, in particular as it applies to the issuance of mandatory minimum penalties on dischargers regulated under state and regional stormwater permits. Include a reasonable timeframe for the issuance mandatory minimum penalties for stormwater numeric effluent limitation violations that does not exceed three years.</p>	See also response to Commenter 1, Comments 1 and 2 and Commenter 5, Comment 2.
VII.A. - Timeframe for Issuance of MMPs	7	19	<p>The existing Enforcement Policy specifies that the Water Boards should issue mandatory minimum penalties (MMPs) within eighteen months of the time that the MMPs “qualify” as MMP violations. The proposed amendments would create an exception to this general expectation for MMPs assessed for stormwater violations. The State Water Board states that this revision is necessary because violations of stormwater permits are reported to the SMARTS database rather than the CIWQS database, and the SMARTS database does not readily generate reports of violations that qualify for MMPs, like the CIWQS database. This results in staff having to manually search the SMARTS database for MMP violations, which can take a significant amount of time.</p> <p><b>Recommendation:</b> The State Water Board should include a sunset clause for the MMP Stormwater exception if and when backend database barriers are resolved. We understand the need for this amendment but recommend the State Water Board include a sunset clause for when the SMARTS database can be updated to readily generate MMP reports similar to the CIWQS database.</p>	Staff’s recommendation is that a sunset clause is unnecessary and no changes are recommended. The Enforcement Policy is set to be reviewed every five years. If the SMARTS database is updated to make it easier to access MMP data, the Policy can be revised during the next iteration.
VII.A. - Timeframe for Issuance of MMPs	7	20	<p>California Legislature required that certain permit violations under the Water Code be subject to mandatory minimum penalties (MMPs). For violations that are subject to these MMPs, the Regional Water Boards must either assess an Administrative Civil Liability (ACL) for the MMP or assess an ACL of a greater amount. Each year, under section 13385(o) of the California Water Code, the State Water Board must prepare a report that includes a compilation of the number of violations of waste discharge requirements in the previous calendar year, a record of the formal and informal compliance and enforcement actions taken for each violation, and an analysis of the effectiveness of current enforcement policies, including MMPs.</p> <p>Despite the requirement of MMPs to address chronic or serious water quality violations, Regional Water Boards are failing to enforce or assign these penalties. For example, there were 36,542 wastewater effluent and reporting violations that occurred between 2018 and 2019. Over a third of these violations (12,437) took place in the Los Angeles Region, yet only 287 wastewater violations resulted in a penalty and over 1,800 violations received no enforcement action at all.</p> <p><b>Recommendations:</b> The State Water Board should direct the Regional Water Boards to enforce the statutory MMPs for chronic or serious water quality violations. Additionally, the Office of Enforcement should provide informational briefings to Regional Board members and staff on the results of the annual MMPs report, including a summary of violations and actions taken by that region, and inform the Regional Water Boards of the role and purpose of these MMPs to eliminate a backlog of uncollected – or simply unassessed – MMPs that would otherwise benefit the cleanup and abatement of pollution statewide, or fund compliance projects for facilities serving small communities with financial hardship.</p>	This comment does not propose revision to the Policy language specifically and staff do not recommend any revisions to the Policy in response to this comment.
VII.B. - MMPs for Small Communities with a Financial Hardship			<p><b>VII.B. - MMPs for Small Communities with a Financial Hardship</b></p>	<p><b>VII.B. - MMPs for Small Communities with a Financial Hardship</b></p>

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
VII.B. - MMPs for Small Communities with a Financial Hardship	5	9	<p>We support the proposal to remove footnote 5 on page 37 from the proposed Enforcement Policy. Previous footnote 5 stated: “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.” However, similar language is being proposed for addition on pages 36-37 stating: “In order to be eligible for a Compliance Project, a POTW must be serving a small community with a financial hardship <u>as of the date of the adoption of the administrative civil liability order imposing MMPs.</u>” We disagree with this proposed addition, and believe the more sound approach is to assess qualification of a small community at the time events occurred, not at the time enforcement is brought, as very recent changes in demographics and economics could significantly affect the ability of a small community to qualify. For this reason, delay in bringing an enforcement action could seriously prejudice small communities.</p> <p><b>Recommendation:</b> The deletion of the underlined language above and addition of language requiring qualification as of the date of the events in question would be consistent with the proposed change to Appendix D, Page one (1), that states: “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.)”</p> <p>In addition, the list on page 37-38 of what qualifies as a POTW with a financial hardship must also include the other statutory criteria currently missing, namely “low population density in the service area of the publicly owned treatment works.” (Cal. Water Code §13385(k)(2).)</p>	<p>No change. It is appropriate to consider the discharger's financial status at the time of settlement, not at the time of violation since Water Code section 13385(k) is intended to benefit communities who are financially unable to invest in both compliance and payment of Mandatory Minimum Penalties. If a financial hardship does not exist at the time of settlement, this policy is not served by allowing dischargers to utilize a Compliance Project as an element of a settlement agreement. The applicable statutory language is " in lieu of assessing...". Assessment at the time of settlement encourages timely resolution of enforcement proceedings because dischargers who are currently eligible for Compliance Projects will be incentivized to resolve MMPs before any potential changes to their financial status. Additionally, timely resolution of MMPs is addressed elsewhere in the Policy and does not need to be specifically articulated here. Low population density is not a financial hardship in and of itself - other criteria which indicate financial hardship, such as median household income, need to be present in order to support a finding that a Compliance Project is appropriate. When an enforcement action results in raised rates for a community, low population density communities may bear a more significant burden. However, unless those communities can also demonstrate a financial hardship, extension of a Compliance Project, is not consistent with the language and intent of this provision. The following clarifying language has been added to the Policy: "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."</p>
VII.C. - Single Operational Upset			<p><b>VII.C. - Single Operational Upset</b></p>	<p><b>VII.C. - Single Operational Upset</b></p>
VII.D. - Defining a "Discharge Monitoring Report" in Special Circumstances Under Water Code Section 13385.1			<p><b>VII.D. - Defining a "Discharge Monitoring Report" in Special Circumstances Under Water Code Section 13385.1</b></p>	<p><b>VII.D. - Defining a "Discharge Monitoring Report" in Special Circumstances Under Water Code Section 13385.1</b></p>
VII.E. - Defining a "Serious Violation" Report Where the Effluent Limitation is Less Than or Equal to the Quantitative Limit			<p><b>VII.E. - Defining a "Serious Violation" Report Where the Effluent Limitation is Less Than or Equal to the Quantitative Limit</b></p>	<p><b>VII.E. - Defining a "Serious Violation" Report Where the Effluent Limitation is Less Than or Equal to the Quantitative Limit</b></p>

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
<b>VIII. COMPLIANCE PROJECTS</b>			<b>VIII. COMPLIANCE PROJECTS</b>	<b>VIII. COMPLIANCE PROJECTS</b>
VIII. COMPL	9	19(a)	<p>Modified Language in Compliance Projects: In Section VIII entitled "Compliance Projects," the SWRCB inserts language that Compliance Projects are authorized by statute only in connection with "settlement of" MMPs., which limits the application of Compliance Projects beyond what is prescribed in statute.</p> <p><b>Recommendation:</b> Delete "<del>settlement of</del>" that was added to the first paragraph of Section VIII on page 43.</p>	<p>Staff agrees with the commenter. The proposed addition of "settlement of" should be deleted. The statute does not require the concurrence of the discharger to perform the compliance project (like it does for SEPs) and allows the water boards to "elect to require" a publicly owned treatment works to perform a compliance project. Staff notes, however, that in most instances, compliance projects will occur through settlement since the statute provides that the compliance project is "proposed by" the discharger.</p>
VIII. COMPL	9	19	<p>Reinsert the struck language with the preference that the State encourage implementation of Compliance Projects through non-monetary avenues first.</p> <p><b>Recommendation:</b> Maintain the struck language from the second paragraph of Section VIII on page 43 and top of page 44: <u>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 2017 Enforcement Policy, Page 44 such as a Cleanup and Abatement Order (CAO), Cease and Desist Order (CDO), or Time Schedule Order (TSO).</u></p>	<p>Staff agrees with the commentor and the language regarding CAOs, CDOs, and TSOs that was previously proposed to be deleted is restored and the reference to Corrective Action Projects is deleted. The purpose of restoring the language is to make it abundantly clear than Compliance Projects may only be used in cases involving MMPs against a small community with a financial hardship. It is never appropriate for the Water Boards to suspend a portion of the liability imposed conditioned on the discharger returning to compliance in any other context. As the original language makes clear, if the discharger is out of compliance, the appropriate enforcement mechanism to compel a return to compliance is a CAO, CDO, or TSO.</p>
<b>IX. ENHANCED COMPLIANCE ACTIONS</b>			<b>IX. ENHANCED COMPLIANCE ACTIONS</b>	<b>IX. ENHANCED COMPLIANCE ACTIONS</b>
IX. ENHANCED COMPLIANCE ACTIONS	7	5	<p>We appreciate the State Water Board's clarifications [in] the section of the Enforcement Policy describing Enhanced Compliance Actions (ECAs), which are capital or operational improvements above and beyond those required by law following a discharge violation. We particularly approve of the limitation that ECAs are never allowed to offset a mandatory minimum penalty, which will ensure that dischargers are held accountable under the law for their violations. We also are grateful to see that while ECAs are subject to the same 50% limit in settlements as provided in the Supplemental Environmental Projects Policy (SEP Policy), the Director of the Office of Enforcement maintains discretion to allow "deviations" from the 50% rule in certain circumstances. We generally support the possibility for settlements to dedicate more than 50% of the assessed liability amount toward both SEPs and ECAs to ensure that penalties assessed for discharges remain local in the form of environmental projects to mitigate the harm caused and infrastructure upgrades to prevent future violations.</p> <p><b>Recommendation:</b> The State Water Board must provide guidance regarding when enhanced compliance actions may exceed 50% of the assessed liability. We request that the State Water Board provide additional guidance to Regional Boards and the public regarding when deviations from the 50% rule are warranted for ECAs. While we acknowledge that Regional Boards are likely in contact with the Office of Enforcement when entering settlement discussions with dischargers, and thus have the opportunity to understand whether a deviation from the 50% rule is warranted in a particular case, the general public lacks transparency as to when those decisions can or should be made. In particular, for high volume discharges from large collection systems, such as the Hyperion sewage spill in July 2021 (described above), we note that local reinvestment above and beyond the required corrective actions in a cleanup and is crucial to hold wastewater agencies accountable to prevent future sewage spills. While these agencies must be required to make the necessary capital and operational improvements to remedy the issues that directly led to the discharge subject to enforcement, ECAs are a key opportunity to make sure wastewater agencies take the next step to improve infrastructure generally, for the benefit of local residents. Members of the public should be informed as to when expanded ECAs are appropriate for local reinvestment following major spill events.</p>	<p>Staff disagrees with the recommendation. The circumstances regarding when a SEP or ECA may exceed 50% of the liability are provided in the SEP Policy, and in guidance issued by the Director of the Office of Enforcement. (See April 30, 2021 Memorandum (revised August 8, 2023) from Yvonne West to Water Board Directors and Officers regarding approval of DAC/EJ SEPs greater than 50% of total monetary liability, located here: <a href="https://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/seps/sep-over-50-memo-updated-august-8-2023.pdf">https://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/seps/sep-over-50-memo-updated-august-8-2023.pdf</a>) There is no need to include that guidance in the Enforcement Policy.</p>
IX. ENHANCED COMPLIANCE ACTIONS	9	20	<p>Modified language in Enhance Compliance Actions: In Section IX regarding Enhanced Compliance Actions (ECAs), the Board proposes a modification to eliminate ECAs from use to offset a mandatory minimum penalty. Enhanced compliance actions (ECAs) are a valuable tool for agencies to consider in settling liabilities and should be allowed for settling mandatory minimum penalties as well as other liabilities. There is no statutory or regulatory prohibition on use of ECA in the mandatory minimum penalty context; thus, this change appears to unreasonably restrict the ECA option already guided by existing, clear Enforcement Policy requirements.</p> <p><b>Recommendation:</b> Remove the following sentence that has been added: "ECAs are never allowed to offset a mandatory minimum penalty." <b>Change from Clarification to Substantive</b> in the Type column of the Appendix D 2023 Policy Update Summary Table. (*Also noted in Appendix D, Pgs. 2 - 3, as Comment No. 9.20(a).)</p>	<p>Staff disagrees. Water Code section 13385 specifies what types of projects may be allowed in lieu of imposition of MMPs and includes only CPs and SEPs. ECAs are not included. The existing Enforcement Policy also specifies that ECAs are allowed in settlement of "discretionary" liability. The proposed revision is merely a clarification of existing Policy, consistent with Water Code section 13385.</p>
<b>X. CORRECTIVE ACTION PROJECTS</b>			<b>X. CORRECTIVE ACTION PROJECTS</b>	<b>X. CORRECTIVE ACTION PROJECTS</b>

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
X. CORRECT	5	10	<p>The proposed Enforcement Policy discusses Corrective Action Projects (“CAPs”), but appears to apply to only Cleanup and Abatement Orders (“CAOs”) issued under the Water Code or Health and Safety Code. We recommend expanding the applicability of CAPs to discretionary enforcement actions since Compliance Projects apply only to MMPs.</p> <p><b>Recommendation:</b> Because any enforcement action besides MMPs are discretionary, the Water Boards should have the discretion to allow a CAP in lieu of penalties to authorize projects to come back into compliance instead of just Enhanced Compliance Actions (“ECAs”). This additional flexibility would be greatly appreciated particularly by smaller entities.</p>	<p>Staff proposes deleting this Section. Upon reflection, allowing for a discharger to suspend liability conditioned on returning to compliance, even in the limited circumstances proposed (relating only to CAOs and only when the discharger demonstrates an inability to pay for cleanup and penalties) conflicts with the section on Compliance Projects, which expressly prohibits the use of compliance projects in all ACLs other than MMPs against a small community with a financial hardship. The issue of whether compliance projects should be expanded beyond this limited scope was discussed (and ultimately rejected) when the Policy was revised in 2010, as evidenced by the following comment from the Central Valley Water Board and the State Water Board's Response: <b>Comment:</b> "Issuance of an ACL complaint is often the mechanism by which the Board grabs the attention of the recalcitrant, and the forces them to come into compliance. In circumstances where a discharger is receptive to performing the tasks required under the order, and where the decision to ignore the order was based on both a failure to appreciate the consequences of non-compliance and a lack of available resources, the Board would rather have the discharger perform the past-due tasks than impose penalties. The Central Valley Water Board accomplishes this by settling the Complaint through the issuance of an ACL Order that suspends the assessed liability, provided that the discharger comes into full compliance with the order in a reasonable timeframe. Although the current Enforcement Policy allows the Board to use this tool, the Draft Enforcement Policy does not. The Board believes that this is an oversight that should be corrected." <b>Response:</b> "We acknowledge that many facilities are often competing for limited financing. However, allowing a discharger to use penalty moneys for such compliance projects, except where allowed by statute, creates a perverse incentive whereby violations and the resulting penalties may be viewed either as a necessary way secure needed funding, or a disincentive to comply until caught. Certain communities may become content to wait until they receive a sizable penalty before addressing needed improvements, if they believe that such penalties will be suspended to bring such facilities back into compliance. This comment is contrary to the concept of deterring violations through issuance of appropriate penalties. Moreover, if a Regional Water Board believes that a penalty action, in and of itself, is too harsh under the circumstances, it can ameliorate the penalty pursuant to the factors in the proposed penalty calculation methodology, and/or issue orders such as CDOs, CAOs, and TSOs to put the facility on a compliance track with the threat of penalties if noncompliance is not corrected." Staff have proposed revisions to make it abundantly clear that it is inappropriate to suspend penalties as a mechanism to compel compliance unless specifically authorized by statute.</p>
X. CORRECT	7	6	<p>We similarly appreciate the addition of a section to the Enforcement Policy authorizing Corrective Action Projects (“CAPs”) that suspend up to 50% of assessed liability if a discharger is unable to pay the full liability amount in addition to performing the required corrective actions under a Cleanup and Abatement Order. Nevertheless, we are concerned about the lack of clarity as to what evidence is required to prove a discharger is unable to pay the full liability and complete the necessary corrective actions; the Enforcement Policy merely states that the discharger must demonstrate such inability to pay “to the satisfaction of the Water Board.”<sup>16</sup> While we understand State Water Board staff’s position from the April 18, 2023 hearing that such evidence is unlikely to be available for large corporations or large municipal agencies such as wastewater collection operators, we remain concerned that some such dischargers may attempt to offer such a showing when it is inappropriate to do so, in order to reduce the assessed liability by half, and the public will have less certainty about the outcome of any application for a CAP.</p> <p><b>Recommendation:</b> Corrective Action Projects must include guidance regarding the evidence required to show a discharger is unable to both pay the full liability and complete corrective action projects. We request that the State Water Board provide additional guidance to Regional Boards and the public regarding what type of evidence a discharger must provide “to the satisfaction of” the State Water Board in order to benefit from CAPs. Such guidance will ensure that all dischargers and members of the public have the same expectations about the application of CAPs and the types of dischargers that would qualify.</p>	<p>See response to Commenter 5, Comment 10.</p>
XI. DISCHARGER VIOLATION REPORTING			<p align="center"><b>XI. DISCHARGER VIOLATION REPORTING</b></p>	<p align="center"><b>XI. DISCHARGER VIOLATION REPORTING</b></p>
XII. VIOLATION AND ENFORCEMENT DATA			<p align="center"><b>XII. VIOLATION AND ENFORCEMENT DATA</b></p>	<p align="center"><b>XII. VIOLATION AND ENFORCEMENT DATA</b></p>
XIII. ENFORCEMENT REPORTING			<p align="center"><b>XIII. ENFORCEMENT REPORTING</b></p>	<p align="center"><b>XIII. ENFORCEMENT REPORTING</b></p>
XIV. POLICY REVIEW AND REVISION			<p align="center"><b>XIV. POLICY REVIEW AND REVISION</b></p>	<p align="center"><b>XIV. POLICY REVIEW AND REVISION</b></p>
APPENDIX A: ENFORCEMENT ACTION			<p align="center"><b>APPENDIX A: ENFORCEMENT ACTIONS</b></p>	<p align="center"><b>APPENDIX A: ENFORCEMENT ACTIONS</b></p>
APPENDIX A: Progressive Enforcement			<p align="center"><b>APPENDIX A: A. Progressive Enforcement</b></p>	<p align="center"><b>APPENDIX A: A. Progressive Enforcement</b></p>

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
APPENDIX A: A. Progressive Enforcement	2	4	<p>The proposed amendments would deleted Section A of Appendix A "Standard Language." This section provided for the standardization of enforcement orders and hearing procedures to ensure consistent enforcement throughout the state. While the language pertaining to standardized hearing procedures has been moved to the new Appendix E, the proposed amendments do away entirely with the model enforcement orders.</p> <p><b>Recommendation:</b> We understand the Board believes standardized enforcement order are unnecessary because each order should be based on unique evidence and contain language that explains the rationale for enforcement of each individual violations. A lack of uniformity to enforcement orders provides no assurance that comparable violations will receive the same treatment. In this sense, the proposed amendments to Section A of Appendix A give the Board more discretion without any assurance of consistency. The proposed amendments expand the Board's discretion to carry out enforcement actions without any corresponding safeguard to protect against the risk of inconsistent and non-uniform enforcement.</p>	<p>Staff disagrees with the assertion that the proposed revision expands the Board's discretion. The proposed revision does not change the Existing Policy's direction on consistency in enforcement, but rather simply removes the requirement that orders be based on "model" language. The existing section discussing consistency in enforcement found in Section I.A. clearly states that consistency is achieved by applying the penalty calculation methodology.</p>
APPENDIX A: A. Progressive Enforcement	6	2	<p>Like the proposed revisions addressed in the prior comment, the deletion of the "Standard Language" section of Appendix A may result in inconsistent enforcement actions across regions. It is constitutionally required that the governing body must treat an individual in the same manner as others in similar conditions and circumstances. Therefore, it is unclear what benefit will result from removing basic requirements for consistency and standardization, given that the Water Quality Enforcement Policy's stated intentions are to define "an enforcement process that addresses water quality problems in the most fair, efficient, effective, and consistent manner" on a State-wide basis, and ensure "that the Regional Water Boards' decisions be consistent with this Policy" (2023 Policy Introduction). The operative version of Appendix A already grants the flexibility to address unique factual circumstances, by requiring standardization "only as appropriate to fit the specific circumstances related to a discharge and to be consistent with Regional Water Board plans and policies."</p> <p><b>Recommendation:</b> The 2023 Policy should not omit the fundamental requirement that enforcement actions be pursued and resolved in a consistent fashion across all regions.</p>	<p>See response to Commenter 2, Comment 4.</p>
APPENDIX A: A. Progressive Enforcement	9	21	<p>With respect to enforcement orders, the regulated community has found the standardized form to be helpful (especially the ACLC) and uniformity conserves scarce resources in negotiating standardized terms from one ACL to the next. The City requests that the standardized form be maintained.</p> <p><b>Recommendation:</b> Maintain Section A. Standard Language in Appendix A and the associated standard forms. Identify this as Clarification in the Type column of the Appendix D 2023 Policy Update Summary Table. (*Also noted in Appendix D, Pgs. 2 - 3, as Comment No. 9.21(a).)</p>	<p>See response to Commenter 2, Comment 4.</p>
APPENDIX A: B. Informal Enforcement Actions			<p><b>APPENDIX A:</b> <b>B. Informal Enforcement Actions</b></p>	<p><b>APPENDIX A:</b> <b>B. Informal Enforcement Actions</b></p>
APPENDIX A: C. Formal Enforcement Actions			<p><b>APPENDIX A:</b> <b>C. Formal Enforcement Actions</b></p>	<p><b>APPENDIX A:</b> <b>C. Formal Enforcement Actions</b></p>
APPENDIX A: C. Formal Enforcement Actions	5	11	<p>Appendix A currently cites just Water Code section 13267(b) and 13383.</p> <p><b>Recommendation:</b> Water Code 13225(c) should also be added to Appendix A, Section B.3 since this section also authorizes investigations and reports similar to section 13267(b).</p>	<p>It is unnecessary to include reference to Water Code section 13225(c) in Appendix A, Section B.3. because section 13325 discusses the Regional Board's responsibilities to require certain reports, but does not authorize issuance of an order requiring such reports. Any order requiring submittal of the reports shall be made pursuant to authority granted in Water Code section 13267 or 13383.</p>
APPENDIX A: C. Formal Enforcement Actions	8	8	<p>Staff report should clarify that "records not being physically available" is no longer a violation. Appendix A (Enforcement Actions) of the Draft Enforcement Update strikes out text that defines the lack of records as a "minor violation." It is not clear from the text whether this is no longer a violation, although that change would be logical in the digital age. We request that this issue be clarified in a response-to-comments document or other documentation prepared for the adoption hearing.</p> <p><b>Recommendation:</b> Clarify that the lack of physical records is no longer a violation, which is why it is not included in the Draft Enforcement Update.</p>	<p>The purpose of the revision is not to say that the lack of physical records on site is no longer a violation, but rather that it should not be considered a "minor" violation for purposes of Water Code section 13399. Many Water Board permits require that physical records be kept on site so that they may be available for review by Water Board inspectors. These violations should not always be considered minor because it can be important that these records be referenced during the inspection or the reason that they aren't accessible can be because they don't exist which is a more substantive violation.</p>
APPENDIX A: C. Formal Enforcement Actions	9	23	<p>Eliminating "availability of records" from being considered a "minor" violation.</p> <p><b>Recommendation:</b> Reinstate the records language as a "minor" violation for Notices to Comply. Recommend the SWRCB clarify that "physically available" includes electronic copies of records, unless hard copies are specifically required in regulatory orders.</p>	<p>See response to Commenter 8, Comment 8. The issue of whether it is permissible to have an electronic copy on site versus a paper copy should be addressed in the applicable permit.</p>



Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
APPENDIX A: D. Petitions of Enforcement Actions			<b>APPENDIX A: D. Petitions of Enforcement Actions</b>	<b>APPENDIX A: D. Petitions of Enforcement Actions</b>
APPENDIX B: ENFORCEMENT REPORTING			<b>APPENDIX B: ENFORCEMENT REPORTING</b>	<b>APPENDIX B: ENFORCEMENT REPORTING</b>
APPENDIX B: A. Legislatively Mandated Enforcement Reporting			<b>APPENDIX B: A. Legislatively Mandated Enforcement Reporting</b>	<b>APPENDIX B: A. Legislatively Mandated Enforcement Reporting</b>
APPENDIX B: B. Elective Enforcement Reporting			<b>APPENDIX B: B. Elective Enforcement Reporting</b>	<b>APPENDIX B: B. Elective Enforcement Reporting</b>
APPENDIX C: REFERENCES			<b>APPENDIX C: REFERENCES</b>	<b>APPENDIX C: REFERENCES</b>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY			<b>APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY</b>	<b>APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY</b>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	6	8	<p>The newly-created Appendix D classifies the amendments as clarifications, procedural changes, or substantive changes. The classification dictates how and when the Water Boards can utilize the changes—either retroactively, immediately, or prospectively. Inadvertently classifying a material change as a mere clarification could have significant implications, in that retroactive application of the Policy could, in some circumstances, violate fundamental due process principles. More generally, applying portions of different policies to past, pending, and future violations could create confusion and contradiction in the enforcement process.</p> <p><b>Recommendation:</b> The designations of procedural, substantive, and clarifying changes in Appendix D should be revised. To mitigate these concerns, the District recommends that the Board instead continue to adhere to its long-standing practice of applying the operative policy in place at the time of the subject violation.</p>	<p>Staff disagrees with this recommendation and supports including Appendix D, as proposed. Similar guidance to what is included in Attachment D was issued after the adoption of the 2017 Enforcement Policy. Attachment D provides important guidance to staff on how to apply changes in the Policy in accordance with applicable legal principles.</p>

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	2(a)	<p>The draft Enforcement update should not expand Class A violations pertaining to Municipal Water intakes beyond instances when a violation impacts a drinking water supply. (*Also noted above in Comment No. 8.2, Pg. 8.)</p> <p><b>Recommendation:</b> <u>Change should be classified as "Substantive" in Appendix D</u>, because this aspect of the Draft Enforcement Update could affect and expand a permittee's liability by eliminating the qualifier of discharges of sewage.</p>	<p>See response to Commenter 3, Comment 6. In addition, the process for prioritizing violations, including the identification of violations that should be prioritized for enforcement, is a procedural change; it is not substantive because it does not impose new liability or substantially affect existing rights or obligations.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	3(a)	<p>The draft Enforcement update should remove the new paragraph on High Volume Discharges because it otherwise will result in inconsistency in enforcement actions. (*Also noted above in Comment No. 8.3, Pg. 20.)</p> <p><b>Recommendation:</b> In the alternative, if the additional paragraph is kept, this would signify a major change in the Board's approach for considering and calculating penalties for high volume discharges, thus this paragraph <u>should be designated as a "Substantive" change in Appendix D</u> as this change may affect a violator's liability or create new obligations for violations.</p>	<p>See response to Commenter 5, Comment 5. The revised proposed language is a clarification of the Water Boards' consideration of reducing liability for high volume discharges and being consistent in enforcement; it is not substantive because it does not impose new liability or substantially affect existing rights or obligations.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	4(a)	<p>The draft Enforcement should modify the additions to the "History of Violations" section in Table 4 (*Also noted above in Comment No. 8.4, Pg. 25.)</p> <p><b>Recommendation:</b> If either of these recommendations are not accepted, then the proposed additions should be re-classified from "<u>Clarification</u>" to "<u>Substantive</u>" in Appendix D as these changes will result in the expansion of a first-time or one-time violator's liability and create new obligations not otherwise provided for in the existing policy.</p>	<p>See response to Commenter 3, Comment 9. The revised proposed language relating to the history of violations factor never being below 1.0 is a clarification of existing Policy. The new definition of what constitutes a "violation" is substantive. Both changes have been separately noted in the revised Appendix D.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	9	<p>Several changes in the Draft Policy should be reclassified in Appendix D from their Draft Designation because of how the draft policy intends for them to be effective retroactively or for new or pending matters. The draft Enforcement Update includes a new section, Appendix D, which states that: "Amendments in the 2023 Policy that are mere clarifications may be used immediately 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. 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."</p> <p>In essence, this language can be taken to mean that after the adoption of the Draft Enforcement Update, "clarifications" may be relied upon immediately and retroactively, while "procedural changes" may be applied retroactively to ongoing enforcement matters so long as it is after the Draft Enforcement Update's effective date, and "substantive changes" are applicable to violations which occur after the effective date.</p>	<p>Staff appreciated the importance of correctly identifying changes to the Policy as clarifications, procedural changes, or substantive changes in Appendix D. See staff's responses to specific comments on Appendix D from Commenter 8 below.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	10	<p>Section I. Topic: Language added to describe outreach to California Native American Tribes. (Pgs. 6 - 7 in the EP.)</p> <p><b>Recommendation:</b> <u>Change from Clarification to Procedural</u> in the Type column of the Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff agrees with this comment and has proposed conforming revisions</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	11	<p>Section II. Topic: Moving "Multiple Violations Resulting from the Same Incident" from the penalty calculation to Section II. (Pg. 11 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify as Procedural</u> in the Type column of the Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff agrees with this comment and has proposed conforming revisions</p>

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APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	12	<p>Section IV. Topic: Modifying State Water Board's ability to take the lead in an enforcement action by eliminating requirement that "water rights violations are predominant." (Pg. 12 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify as Substantive</u> in the Type column of the Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff agrees that this change should be included in Appendix D, but disagrees with identifying it as a substantive change. This is a procedural change; it is not substantive because it does not impose new liability or substantially affect existing rights or obligations. Appendix D has been revised to include this revision.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	13	<p>Section VI. Topic: Language allowing for consideration of "whether to collapse days for multiple day violations" is moved to determining the initial liability about. (Pg. 13 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify as Procedural</u> in the Type column of the Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff agrees with this comment and has proposed conforming revisions.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	14	<p>Section VI. Topic: Under Step One (Actual or Potential Harm): for Degree of Toxicity clarifying that examples of "potential receptors" include human health, aquatic life, habitat etc. (Pg. 14 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify as Clarification</u> in the Type column of the Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff agrees with this comment and has proposed conforming revisions.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	15	<p>Section VI. Topic: Under Step Two (Assessments for Discharge Violations) deleting the following: " ...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 high liability via discretionary action in accordance with the outcome of the enforcement prioritization processes described in Section II, above." (Pg. 19 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify as Clarification</u> in the Type column of the Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff disagrees. The language that is proposed to be deleted is out of place in Step 2 and is unnecessary. In Section VII, the Policy already provides that violations that give rise to MMPs may be subject to higher liability, up to the maximum allowed by statute. Because this is simply a deletion of duplicative language, it is not necessary to include it in Appendix D.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	16	<p>Section VI. Topic: Adding language in High Volume Discharges, if requested changes is not accepted. (Pg. 20 in the EP.)</p> <p><b>Recommendation:</b> <u>Change from Clarification to Procedural</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>See response to Commenter 8, Comment 3(a).</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	17	<p>Section VI. Topic: Additional language in History of Violations, if requested changes is not accepted. (Pg. 25 in the EP.)</p> <p><b>Recommendation:</b> <u>Change from Clarification to Substantive</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>See response to Commenter 8, Comment 4(a).</p>

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	18	<p>Section VI. Topic: Additional language in Cleanup and Cooperation. (Pg. 25 in the EP.)</p> <p><b>Recommendation:</b> <u>Change from Clarification to Substantive</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff disagrees. The revised proposed language is a clarification of the Water Boards' existing practice to consider a discharger's response to an enforcement action, such as a verbal directive to correct a violation, or an NOV, when considering the appropriate score for cleanup and cooperation.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	19	<p>Section VI. - Adding language stating penalties not paid thirty (30) days after ACL order to adopted and all appeals exhausted may result in referral to collections, placement of liens, or other judicial remedial actions. (Pg. 34 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify as Procedural</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff disagrees. The proposed language is a clarification of existing legal authorities. It is not a change in procedure. No reference in Appendix D is necessary.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	20	<p>Section VI. - Deleting footnote that limited laches as a defense to enforcement. (Pg. 34, fn. 4 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify as Clarification</u> in the Type column of Appendix D 2023 Policy Update Summary Table so that it is effective immediately.</p>	<p>Staff disagrees. This is a change to conform with existing case law. No reference in Appendix D is necessary.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	21	<p>Section VII. - Adding language referencing defenses. Water code requires an MMP be assessed for each serious violation "<u>unless any of the defenses in section 13385(j) apply.</u>" (Pg. 35 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify as Clarification</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff disagrees. This is a change to conform with existing statute. No reference in Appendix D is necessary.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	22	<p>Section VII. - Changing the name of "non serious" to "chronic violation." (Pg. 36 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify as Clarification</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff agrees with this comment and has proposed conforming revisions</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	23	<p>Appendix A - Separating orders requiring technical or monitoring reports from NOV. (Appendix A, Pgs. 2 - 4 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify this as Clarification</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff agrees with this comment and has proposed conforming revisions</p>

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	24	<p>Appendix A - Cleanup and Abatement Orders, expanding the definition of discharger to include "responsible party" from UST regulations in the Health &amp; Safety Code. (Appendix A, Pg. 5 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify this as Clarification</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	Staff agrees with this comment and has proposed conforming revisions
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	25	<p>Appendix A - Time Schedule Order - adding language to the State Water Board issuance. (Appendix A, Pg. 6 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify this as Clarification</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	Staff disagrees. This is a change to conform with existing statute. No reference in Appendix D is necessary.
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	26	<p>Appendix A - ACLs are also authorized by the Health and Safety Code. (Appendix A, Pg. 7 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify this as Clarification</u> in the Type column of Appendix D 2023 Policy Update Summary Table. Further, clarify purpose of Health &amp; Safety Code enforcement (Underground Storage Takes).</p>	Staff disagrees. This is a change to conform with existing statute. No reference in Appendix D is necessary.
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	27	<p>Appendix A - Changing ACL public comment from "a third party" to "an interested person." (Appendix A, Pg. 8 in the EP)</p> <p><b>Recommendation:</b> <u>Identify this as Procedural</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	Staff disagrees. This is a change to correct an error and to ensure consistency within the Policy. The reference to "third parties" in the existing Policy conflicts with other provisions in the Policy that require solicitation of public comments on settlements more broadly from any interested person. No reference in Appendix D is necessary.
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	2	<p>Language added to describe outreach to California Native American Tribes. (Pgs. 6 - 7 in the EP.)</p> <p><b>Recommendation:</b> <u>Change from Clarification to Procedural</u> in the Type column of Appendix D of the 2023 Policy Update Summary Table.</p>	Staff agrees with this comment and has proposed conforming revisions.
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	4	<p>Moving "Multiple Violations Resulting from the Same Incident" from the penalty calculation to Section II. (Pg. 11 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify as Procedural</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	Staff agrees with this comment and has proposed conforming revisions

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	5	<p>Modifying the State Water Board's ability to take the lead in an enforcement action by eliminating requirement that "water rights violations are predominate." (Pg. 12 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify as Substantive</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff agrees that this change should be included in Appendix D, but disagrees with identifying it as a substantive change. This is a procedural change; it is not substantive because it does not impose new liability or substantially affect existing rights or obligations. Appendix D has been revised to include this revision.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	6	<p>Language allowing for consideration of "whether to collapse days for multiple day violations" is moved to determining the initial liability amount. (Pg. 15 in EP.)</p> <p><b>Recommendation:</b> <u>Identify as Procedural</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff agrees with this comment and has proposed conforming revisions</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	7	<p>Under Step One (Actual or Potential Harm): for Degree of Toxicity clarifying that examples of "potential receptors" include human health, aquatic life, habitat etc. (Pg. 17 in EP.)</p> <p><b>Recommendation:</b> <u>Identify as Clarification</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff agrees with this comment and has proposed conforming revisions</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	8	<p>Under Step Two (Assessments for Discharge Violations) deleting the following: "...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." (Pg. 19 in EP.)</p> <p><b>Recommendation:</b> <u>Identify as Clarification</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff disagrees. The language that is proposed to be deleted is out of place in Step 2 and is unnecessary. In Section VII, the Policy already provides that violations that give rise to MMPs may be subject to higher liability, up to the maximum allowed by statute. Because this is simply a deletion of duplicative language, it is not necessary to include it in Appendix D.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	9(a)	<p>Adding language in High Volume Discharges (*Also noted above in Comment No. 9.9 - Pg. 20.)</p> <p><b>Recommendation:</b> <u>Change from Clarification to Substantive</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>See response to Commenter 8, Comment 3(a).</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	10(a)	<p>Additional language in History of Violations (*Also noted above in Comment No. 9.10 - Pg. 25.)</p> <p><b>Recommendation:</b> <u>Change from Clarification to Substantive</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>See response to Commenter 8, Comment 4(a).</p>

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	11(a)	<p>Additional language in Cleanup and Cooperation (*Also noted above in Comment No. 9.11 - Pg. 25.)</p> <p><b>Recommendation:</b> <u>Change from Clarification to Substantive</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff disagrees. The revised proposed language is a clarification of the Water Boards' existing practice to consider a discharger's response to an enforcement action, such as a verbal directive to correct a violation, or an NOV, when considering the appropriate score for cleanup and cooperation.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	15	<p>Adding language stating penalties not paid thirty (30) days after ACL order is adopted and all appeals exhausted may result in referral to collections, placement of liens, or other judicial remedial actions. (Pg. 34 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify as Procedural</u> in the Type column of the Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff disagrees. The proposed language is a clarification of existing legal authorities. It is not a change in procedure. No reference in Appendix D is necessary.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	16	<p>Deleting footnote that limited laches as a defense to enforcement. (Pg. 34, fn. 4 in EP.)</p> <p><b>Recommendation:</b> <u>Identify as Clarification</u> in the Type column of the Appendix D 2023 Policy Update Summary Table so that it is effective immediately.</p>	<p>Staff disagrees. This is a change to conform with existing case law. No reference in Appendix D is necessary.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	17	<p>Adding language referencing defenses. Water code requires an MMP be assessed for reach serious violation "unless any of the defenses in section 13385(j) apply." (Pg. 35 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify as Clarification</u> in the Type column of the Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff disagrees. This is a change to conform with existing statute. No reference in Appendix D is necessary.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	18	<p>Changing the name of "non-serious" violation to "chronic violation." (Pg. 36 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify as Clarification</u> in the Type column of the Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff agrees with this comment and has proposed conforming revisions</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	19(b)	<p>Modified language in Compliance Projects (*Also noted above in Comment No. 9.19 - Pgs. 43 - 44 in the EP.)</p> <p><b>Recommendation:</b> <u>Change from Clarification to Substantive</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff disagrees. See response to Commenter 9, Comment 19. The final proposed revisions to the section relating to Compliance Projects clarifies the existing language in the Policy; the changes are not substantive because they do not impose new liability or substantially affect existing rights or obligations.</p>

Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	20(a)	<p>Modified language in Enhanced Compliance Actions (*Also noted above in Comment No. 9.20 - Pg. 45 in the EP.)</p> <p><b>Recommendation:</b> <u>Change from Clarification to Substantive</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff disagrees. The final proposed revisions to the section relating to Enhanced Compliance Actions clarifies the existing language in the Policy, and deletes unnecessary language.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	21(a)	<p>Modified language in Appendix A. Standard Language (*Also noted above in No. Comment 9.21 - Appendix A, Pg. 1 in the EP.)</p> <p><b>Recommendation:</b> <u>Change this from Clarification to Procedural</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>The discussion of model hearing procedures from Appendix A, Section A, "Standard Language" has been moved to Appendix E, which is shown in Appendix D as a procedural change. The deletion of reference to "model enforcement orders" will be separately noted as a procedural change in Appendix D.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	22	<p>Separating orders requiring technical or monitoring reports from NOV. (Appendix A, Pgs. 2 - 3 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify this as Clarification</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff agrees with this comment and has proposed conforming revisions</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	24	<p>Cleanup and Abatement Orders, expanding the definition of discharger to include "responsible party" from UST regulations in the Health &amp; Safety Code. (Appendix A, Pg. 5 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify this as Clarification</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff agrees with this comment and has proposed conforming revisions</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	25	<p>Time Schedule Order - adding language to State Water Board issuance. (Appendix A, Pg. 6 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify this as Clarification</u> in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff disagrees. This is a change to conform with existing statute. No reference in Appendix D is necessary.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	26	<p>ACLs are also authorized by the Health &amp; Safety Code. (Appendix A, Pg. 7 in the EP.)</p> <p><b>Recommendation:</b> <u>Identify this as Clarification</u> in the Type column of Appendix D 2023 Policy Update Summary Table. Further, clarify purpose of Health &amp; Safety Code enforcement (Underground Storage Tanks).</p>	<p>Staff disagrees. This is a change to conform with existing statute. No reference in Appendix D is necessary.</p>



Comment Category	Commenter ID	Comment ID	Comment Summary and Recommendation	Staff Response to Comment
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	27	<p>Changing ACL public comment from "a third party" to "an interested party." (Appendix A, Pg. 8 in the EP.)</p> <p><b>Recommendation:</b> Identify this as Procedural in the Type column of Appendix D 2023 Policy Update Summary Table.</p>	<p>Staff disagrees. This is a change to correct an error and to ensure consistency within the Policy. The reference to "third parties" in the existing Policy conflicts with other provisions in the Policy that require solicitation of public comments on settlements more broadly from any interested person.</p>
APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	9	28	<p>Determining when various changes apply. This Appendix has contradictory language on pages 1 and 2 regarding when changes in the Enforcement Policy can be used: Procedural changes may be applied to new or pending enforcement actions once the Policy is effective. (Page 1.) Changes that are clarifications or procedural changes can be applied immediately. (Page 2.)</p> <p><b>Recommendation:</b> Conform the language so that only Clarifications are effective immediately, as stated in the earlier paragraph.</p>	<p>Revisions have been proposed to resolve any ambiguity that clarifications to the Policy may be used following approval by the State Water Board and procedural changes may be used following adoption by the Office of Administrative Law.</p>
APPENDIX E: TEMPLATE HEARING PROCEDURE			<p><b>APPENDIX E: TEMPLATE HEARING PROCEDURE</b></p>	<p><b>APPENDIX E: TEMPLATE HEARING PROCEDURE</b></p>
APPENDIX E: TEMPLATE HEARING PROCEDURE	9	29	<p>Default set of procedures for an evidentiary hearing on an ACL. The following language in Appendix E is contrary to administrative law principles: "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, the hearing procedure issued with the Complaint, and as amended by the Presiding Officer, controls."</p> <p>In these situations, the regulations, not the hearing procedure, would control. (<i>See Rea v. Blue Shield of California</i> (Second Dist. 2010) 226 Cal.App.4th 1209 (not bound by administrative agency's position where it contradicts the language of the statute); <i>Cole v. City of Oakland</i> (First Dist. 1992) 3 Cal.App.4th 693, 697 (holding that administrative agency interpretation of a statute is not entitled to great weight when it is erroneous or unauthorized).)</p> <p><b>Recommendation:</b> Modify the language noted to reflect administrative law principles.</p>	<p>Staff disagrees. The regulations referenced specifically allow for the requirements in Article 2 of Title 23 of the California Code of Regulations (sections 648 et seq.) to be waived by the presiding officer so long as the requirements are not mandated by state or federal statute or by the state or federal constitutions. (23 CCR 648(d).) Therefore, it is appropriate for the hearing procedures to control in the event they conflict with the provisions in Article 2.</p>

**2023 Verbal Comments to Draft Enforcement Policy - April 18, 2023 Board Meeting**

<b><u>Comment Category</u></b>	<b><u>Commenter ID</u></b>	<b><u>Comment ID</u></b>	<b><u>Verbal Comments</u></b>	<b><u>Response</u></b>
<b><u>General Comments</u></b>			<b><u>General Comments</u></b>	<b><u>General Comments</u></b>
<b>General Comments</b>	10	1	Overall enforcement has not been effective, believes the intended goals of ensuring those who are accountable for pollution are held responsible. Recognizes the difficulties and the constraint on resources the Office of Enforcement has, but believes that the Policy should be looked at more broadly and how it could be better leveraged.	Comment noted.
<b>General Comments</b>	7	1	Appreciates the presentation on the updates to the WQE Policy, looks in many ways to be common sense and clarifies obligations.	Comment noted.
<b>General Comments</b>	8	1	Their attorneys did an extensive review and there are numerous changes which CASA is supportive. Believes the updated Policy will make clear to the regulated community the standards and approach the Board will be utilizing for the next decade or so.	Comment noted.
<b><u>I.D. - Transparency (Pg. 4)</u></b>			<b><u>I.D. - Transparency</u></b>	<b><u>I.D. - Transparency</u></b>
<b><u>I.E. - Environmental Justice and Disadvantaged Communities</u></b>			<b><u>I.E. - Environmental Justice and Disadvantaged Communities</u></b>	<b><u>I.E. - Environmental Justice and Disadvantaged Communities</u></b>
<b>I.E. - Environmental Justice and Disadvantaged Communities</b>	11	4	The new language regarding prioritization of environmental justice and disadvantaged communities is not specifically limited to threats or impacts to water quality. Believes language should be qualified or limited to the purpose of the Enforcement Policy, which is the quality context and stated scope of the policy. Also notes that the definition of disadvantaged community was taken from the climate change context defining investment. Unclear if that language is deemed appropriate in this context.	See responses to the following written comments: Commenter 3, Comments 1 and 4; Commenter 10, Comment 3.

<u>Comment Category</u>	<u>Commenter ID</u>	<u>Comment ID</u>	<u>Verbal Comments</u>	<u>Response</u>
<b>I.E. - Environmental Justice and Disadvantaged Communities</b>	10	2	Believes an analysis of environmental justice as it pertains to the Policy is inadequate. Would like to see a proper assessment regarding the widespread challenges and what the Policy could do to properly address gaps in enforcement and addressing the overall environmental justice challenges. Would like to see a more robust section regarding the environmental justice issues and support.	Comment noted. Final proposed revisions include broader discussion of environmental justice as it relates to enforcement.
<b>I.E. - Environmental Justice and Disadvantaged</b>	7	5	Appreciates the integration of the environmental justice and tribal communities into the enforcement priorities.	Comment noted.
<b><u>II. ENFORCEMENT PRIORITIES FOR DISCRETIONARY ENFORCEMENT</u></b>			<b><u>II. ENFORCEMENT PRIORITIES FOR DISCRETIONARY ENFORCEMENT ACTIONS</u></b>	<b><u>II. ENFORCEMENT PRIORITIES FOR DISCRETIONARY ENFORCEMENT ACTIONS</u></b>
<b><u>II.A. - Ranking Violations (Pgs. 8 - 9)</u></b>			<b><u>II.A. - Ranking Violations</u></b>	<b><u>II.A. - Ranking Violations</u></b>
<b>II.A. - Ranking Violations</b>	7	9	Concerned over the treatment of multiple water quality exceedances as a single violations. The Water Board should be enforcing water quality objective exceedances, not just the enforcement of the effectiveness of BMP or BMP failure. Again, feels like the Water Board is coming at this issue from both side. Example, in the industrial stormwater permit, permittees are allowed to combine an average outfall exceedance to come into compliance. During the permitting process, we allow this to happen if the overall averages meet the standard, but then on the enforcement side, the Water Board is also weakening enforcement for multiple violations. Doesn't believe it should work this way.	Comment noted.
<b><u>III. ENFORCEMENT ACTIONS (Pg. 11)</u></b>			<b><u>III. ENFORCEMENT ACTIONS</u></b>	<b><u>III. ENFORCEMENT ACTIONS</u></b>
<b>III. ENFORCEMENT ACTIONS</b>	7	6	Supportive of the State Water Board taking enforcement actions when combined water quality and water right violations occur.	Comment noted

<u>Comment Category</u>	<u>Commenter ID</u>	<u>Comment ID</u>	<u>Verbal Comments</u>	<u>Response</u>
<u>VI.A - Penalty Calculation Methodology (Pgs.</u>			<u>VI.A - Penalty Calculation Methodology</u>	<u>VI.A - Penalty Calculation Methodology</u>
<u>VI.A. - Step 2 - Table 1 Per Gallon Factor for Discharges (Pgs.</u>			<u>VI.A. - Step 2 - Table 1 Per Gallon Factor for Discharges</u>	<u>VI.A. - Step 2 - Table 1 Per Gallon Factor for Discharges</u>
<u>VI.A. - Step 2 - Table 1 Per Gallon Factor for Discharges</u>	7	2	Concerned to see an artificial limitation on high volume discharges in the calculation section, thinks the amount per gallon should be assessed by on the size of the spill. Believes the new language added to the Policy shows there is a possibility for inconsistent penalties assessed, base just a few difference gallons, the difference between 95,000 and 105,000 gallons of spill. This should be standardized, and a way to potentially remove the limitation entirely and just use the basic 10-step process the way it's already outlined to get to a fair result. Very concerned with the starting amount of \$1.00 per gallon for very large spills, the penalty needs to reflect the harm.	See responses to written comments from Commenter 5, Comment 5 and Commenter 7, Comment 2.
<u>VI.A. - Step 2 - Table 1 Per Gallon Factor for Discharges</u>	8	4	Changes noted in the Step-2 methodology, for high volume discharges, believes that the Water Board should attempt to avoid using the per gallon value. Understands the rationale and what the Policy is trying to avoid by penalizing the smaller incident that a larger one having different dollar amounts, but is concerned that this is going away from the intent of the Policy for statewide consistency. Hoping there would be another way to draft this concern to avoid the situation for inconsistency.	See responses to written comments from Commenter 5, Comment 5 and Commenter 7, Comment 2.
<u>VI.A. - Step 4 - Adjustment Factors - Table 4</u>			<u>VI.A. - Step 4 - Adjustment Factors - Table 4</u>	<u>VI.A. - Step 4 - Adjustment Factors - Table 4</u>
<u>VI.A. - Step 4 - Adjustment Factors - Table 4</u>	11	2	Concerns with the amendments to the culpability factors that are used in the penalty calculation methodology, specifically Table 4, with the addition of language "at least one." Believes that coupled with the revised definition of violations, it will likely cause a multiplier of 1.1 or higher will be applied in the calculation of penalty amounts.  The amended Policy disincentivizes self-reporting because even the smallest violations will not impact dischargers history of violations and has a potential to increase their multiplier. The term "violation" should be limited to stipulated or adjudicated violations and self-reported exceedances. Instances that are outside of a facility's control or valid defenses don't seem to be taken into consider in this definition.	See response to written comment from Commenter 3, Comment 9.

<u>Comment Category</u>	<u>Commenter ID</u>	<u>Comment ID</u>	<u>Verbal Comments</u>	<u>Response</u>
<b>VI.A. - Step 4 - Adjustment Factors - Table 4</b>	11	3	The discussion of culpability factors now includes reference to other environmental statutes as a potential reason to increase the calculation of penalties. It is unclear why staff would undertake enforcement of other statutes and potentially duplicate liability.	See response to written comment from Commenter 3, Comments 9 and 12.
<b>VI.A. - Step 4 - Adjustment Factors - Table 4</b>	8	2	Agrees with CVCWA's comment regarding Table 4 designation of the type of change that is in the Enforcement Policy, whether substantive or procedural or clarification. CASA will be addressing those issues in their comment letter.	See response to written comments from this Commenter.
<b>VI.A. - Step 4 - Adjustment Factors - Table 4</b>	8	3	Also agrees with CVCWA's comment related to Violator's conduct factor and addition to the history of the violation. CASA has reservation with the changes.	See response to written comment from Commenter 3, Comments 9 and 12.
<b><u>VI.A. - Step 7 - Other Factors As Justice May Require</u></b>			<b><u>VI.A. - Step 7 - Other Factors As Justice May Require</u></b>	<b><u>VI.A. - Step 7 - Other Factors As Justice May Require</u></b>
<b>VI.A. Step 7 - Other Factors As Justice May Require</b>	7	7	Strongly supports the amendmndent to encourage the recovery of staff costs for ACL actions.	Comment noted.
<b><u>VI.A. - Step 9 - Maximum and Minimum Liability</u></b>			<b><u>VI.A. Step 9 - Maximum and Minimum Liability Amounts</u></b>	<b><u>VI.A. Step 9 - Maximum and Minimum Liability Amounts</u></b>
<b>VI.A. Step 9 - Maximum and Minimum Liability Amounts</b>	8	5	Step 9 in the methodology adds minimum as well as maximum and has concern that when you put minimum in there it may not capture them when things are collasped from one incident over multiple days and would like this addressed.	See response to written comment from Commenter 8, Comment 7.
<b><u>VII. MANDATORY MINIMUM PENALTIES FOR NPDES VIOLATIONS</u></b>			<b><u>VII. MANDATORY MINIMUM PENALTIES FOR NPDES VIOLATIONS</u></b>	<b><u>VII. MANDATORY MINIMUM PENALTIES FOR NPDES VIOLATIONS</u></b>

<u>Comment Category</u>	<u>Commenter ID</u>	<u>Comment ID</u>	<u>Verbal Comments</u>	<u>Response</u>
<b>VII. MANDATORY MINIMUM PENALTIES FOR NPDES VIOLATIONS</b>	7	8	Has concerns over the deprioritization of certain aspects of enforcing the sanitary sewer overflows. Previously advocated for the SSO waste discharge to be a NPDES permit requirement due to the spills reaching the waters of the U.S. and the state. LA Coastkeeper Alliance was told the purpose of the permit was to prohibit discharges altogether by preventing spills. Believes that the Policy is "loosing it's teeth" in two directions on this permit. The permitting processed that removed the enforceability of an NPDES permit and now by deprioritizing enforcement for spills that the SSO order intended to prevent. Specifically within 1000 feet of a municipal water intake. Believes this should be a high priority area, it should be maintained and spills should be a priority and avoided at all costs.	See response to written comment from Commenter 3, Comment 6.
<b><u>VII.A. - Timeframe for Issuance of MMPs (Pg. 36)</u></b>			<b><u>VII.A. - Timeframe for Issuance of MMPs</u></b>	<b><u>VII.A. - Timeframe for Issuance of MMPs</u></b>
<b>VII.A. - Timeframe for Issuance of MMPs</b>	7	10	The construction general stormwater permit, the State Water Board ultimately decided that for total suspended solids as a proxy represented numerous pollutants, if there was an exceedance of the total suspended solids proxy, then that counted as a violation for every pollutant represented by that proxy. Believes this section of the Policy goes against that provision of the permit, the violation should be enforced, but at a minimum the Policy should prevent the enforcement of a single violation from the multiple incident violations when the permit or the policy explicitly states that each exceedance should be consider a single violations.	Commet noted.
<b>VII.A. - Timeframe for Issuance of MMPs</b>	7	12	Appreciates the removal of the 18-month limitation when it comes to the mandatory minimum penalties. Understands that this is a time-consuming process and happy to see that there is more flexibility.	Commet noted.
<b><u>IX. ENHANCED COMPLIANCE ACTIONS</u></b>			<b><u>IX. ENHANCED COMPLIANCE ACTIONS</u></b>	<b><u>IX. ENHANCED COMPLIANCE ACTIONS</u></b>
<b>IX. ENHANCED COMPLIANCE ACTIONS</b>	7	3	Believes the Enhanced Compliance Section shows there is some discretion for the director to increase the amount of any penalty that could be dedicated to enhanced compliance actions similar to the same discretion for the SEPs above the 50% limit. Would be helpful to have more clarification and general guidance on what circumstances may increase the amount that can go into compliance actions.	See response to written comment from Commenter 7, Comment 5.

<u>Comment Category</u>	<u>Commenter ID</u>	<u>Comment ID</u>	<u>Verbal Comments</u>	<u>Response</u>
<b>X. CORRECTIVE ACTION PROJECTS (Pg. 46)</b>			<b>X. CORRECTIVE ACTION PROJECTS</b>	<b>X. CORRECTIVE ACTION PROJECTS</b>
<b>X. CORRECTIVE ACTION PROJECTS</b>	7	4	Concern with the lack of guidance and/or guardrails about what it means for a discharger to be unable to pay the full amount, particularly public agencies or others that could claim they don't have ability to pay to clean up. Would like to be provided more guidance or provide carve outs for different types if dischargers abd explain what evidence would be necessary to meet those justifications.	The section on Corrective Action Projects is proposed to be deleted.
<b>APPENDIX B: B. Elective Enforcement Reporting (Pg. 2)</b>			<b>Appendix B. B. Elective Enforcement Reporting</b>	<b>Appendix B. B. Elective Enforcement Reporting</b>
<b>APPENDIX B: B. Elective Enforcement Reporting</b>	7	11	Supportive of setting enforcement goals, but does not understand the need to remove this requirement every two years. Seems too onerious of a requirement.	See response to written comment from Commenter 7, Comment 15.
<b>APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT</b>			<b>APPENDIX D. DETERMINING APPLICABILITY OF ENFORCEMENT POLICY</b>	<b>APPENDIX D. DETERMINING APPLICABILITY OF ENFORCEMENT POLICY</b>
<b>APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY</b>	11	1	Has concerns with the assignment of categories in Appendix D - determination of applicability. Believes that many of the amendments in the Policy are substantive, but are listed as "Clarification" or "Procedural" changes. It is important for how the policy is applied to the violations that occur before the effective date of when the Policy will be adopted. Will provide more specifics in the comment letter, but areas that are substantive need to be listed as such.	See response to written comments related to Appendix D.