

APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY

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

Amendments in the 2024 Policy that are ~~identified below as mere clarifications may be used immediately upon adoption by the State Water Board (and prior to approval by the Office of Administrative Law) to assist the Water Boards in interpreting previous versions of the Policy. Procedural clarifications¹ or procedural²~~ changes may be applied to new or pending enforcement matters once the Policy is approved by the Office of Administrative Law. Substantive changes can only be applied prospectively to violations which occur on or after the Policy's effective date unless a discharger consents to their retroactive application.

ANALYSIS

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

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

There are some exceptions to the general rule that the version in place at the time of the violation is the version that controls in prosecuting an action. However, applying the Policy to violations that predate its effective date raises concerns regarding the presumption against retroactivity. A law is considered retroactive when it “relates back to a previous transaction and gives it a different legal effect from that which it had under

¹ The term “clarifications” as used herein refers to regulatory amendments that eliminate potential ambiguities in the 2017 Enforcement Policy. (See *Syngenta Crop Protection v. Helliker* (2006) 138 Cal.App.4th 1135, 1178.)

² Procedural changes are those that affect the conduct of adjudicative proceedings including principles of discovery. (*Tapia v. Superior Court* (1991) 53 Cal.3d. 282, 288, 301.)

the law when it occurred.” (*Bear Valley Mut. Wat. Co v. County of San Bernardino* (1966) 242 Cal.App.2d 68, 72.) The presumption against retroactivity holds that in most instances a new law is not relevant to the adjudication of conduct that occurred before the law was officially adopted. (*Georgia-Pacific Corp. v. California Coastal Com.* (1982)132 Cal.App.3d 678, 694.)

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

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

The chart below categorizes the amendments to the 2023 2024 Policy as either clarifications, procedural changes, or substantive changes. Questions regarding which Policy applies should be made on a case-by-case basis in consultation with legal counsel.

Categorization of Amendments			
Page	Section	Topic	Type
X	Section I.F <u>[Note: will be I.F. when I.A is restored]</u>	Additional language added to determine whether a community is a disadvantaged or environmental justice community. <u>Communities identified as disadvantaged within CalEnviroScreen are considered disadvantaged for the purposes of this Policy.</u>	Clarification
X	Section I.G <u>[Note: will be I.G. when I.A is restored]</u>	Language added to describe outreach to California Native American Tribes.	Procedural
X	Sections II.A and II B.	Language changes in Section II.A “Ranking Violations” and Section II.B	Procedural

		“Case Prioritization for Individual Entities.”	
X	Section II.E.	Moving “Multiple Violations Resulting from the Same Incident” from the penalty calculation methodology to Section II.	Procedural
X	Section IV.	Modifying State Water Board’s ability to take the lead in an enforcement action by eliminating the requirement that “water rights are predominant.”	Procedural
X	Section VI.A.	Under Step 1 (Actual or Potential Harm): For degree of toxicity, clarifying that examples of “potential receptors” include human health, aquatic life, habitat, etc.	Clarification
X	Section VI.A.	Under Step 2 (Assessments for Discharge Violations): Additional language in High Volume Discharges.	Clarification
X	Section VI.A.	Under Step 3 (Per Day Assessments for Non-Discharge Violations): Language allowing for consideration of “whether to collapse days for multiple day violations” is moved to determining the initial liability amount.	Procedural
X	Section VI.A.	Under Step 3 (Per Day Assessments for Non-Discharge Violations); Prohibition on collapsing days of violation for discharge violations.	Substantive
X	Section VI.A.	Changes to order in which Other Factors as Justice May Require and Ability to Pay and Ability to Continue in business are considered (methodology steps 7 and 8).	Procedural
X	Section VI.A.	Under Step 4 (Adjustment Factors): Additional language in Degree of Culpability.	Clarification
X	Section VI.A.	Under Step 4 (Adjustment Factors): History of Violations shall never be below 1.0.	Clarification
X	Section VI.A.	Under Step 4 (Adjustment Factors): Definition of “violation” in History of Violations.	Substantive
X	Section VI.A.	Under Step 4 (Adjustment Factors): Additional language in Cleanup and Cooperation.	Clarification
X	Section VI.A.	Under Step 7 (Other Factors As Justice May Require): Additional language in Costs of Investigation and Enforcement	Clarification

		Adjustment.	
X	Section VII	Changing the name of “non-serious” violation to “chronic” violation.	Clarification
X	Section VII.A.	Timeframe for issuance of MMPs for dischargers regulated by generally applicable stormwater permits.	Procedural
X	Section VII.B.	Modified language in MMPs for Small Communities with Financial Hardship.	Clarification
X	Section VIII.	Modified language in Compliance Projects.	Clarification
X	Section IX.	Modified language in Enhanced Compliance Actions.	Clarification
X	Appendix A Section A	Deleted reference to model enforcement orders.	Procedural
X	Appendix A Section B.2.	Separating Orders requiring technical or monitoring reports from NOV.	Clarification
X	Appendix A Section C.1.	Modified language in Appendix A.1: Notices to Comply.	Clarification
X	Appendix A Section C.4.	Cleanup and Abatement Orders, expanding the definition of discharger to include “responsible party” from UST regulations.	Clarification
X	Appendix B.A.	Appendix B.A: Legislatively Mandated Enforcement Reporting.	Clarification
X	Appendix E	Appendix E: Template Hearing Procedure.	Procedural