



# California Regional Water Quality Control Board San Francisco Bay Region



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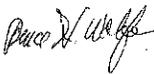
Arnold Schwarzenegger  
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Letter sent via email

September 17, 2009

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FROM: Digitally signed  
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Date: 2009.09.17  
13:01:40 -07'00'

  
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Executive Officer

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California Regional Water Quality Control Board  
San Francisco Bay Region

SUBJECT: Comment Letter – Enforcement Policy

Thank you for the opportunity to review the latest version of the draft Policy. We appreciate the Office of Enforcement's efforts to work with us on revisions to the draft Policy, and we recommend further changes to the Monetary Assessments in Administrative Civil Liability (ACL) Actions (Section VI) portion of the document. The following recommendations are based on collaborative efforts amongst enforcement coordinators of the Regional Water Boards who have evaluated the July 14, 2009, version of the draft Policy.

## 1) STEP 1 – POTENTIAL HARM FACTOR FOR DISCHARGE VIOLATIONS

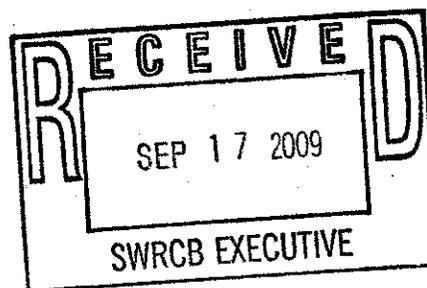
We recommend revising the description of values under Factors 1 and 2 to reduce the uncertainty in interpreting how to assign a value to a given violation and to make the definitions more inline with the Water Boards' mission.

### Recommendation for Factor 1: Harm or Potential Harm to Beneficial Uses

0 = Negligible - no actual or potential harm to beneficial uses

1 = Minor - low threat to beneficial uses (i.e., no observed impacts, but potential impacts to beneficial uses with no appreciable harm)

2 = Below moderate - less than moderate threat to beneficial uses (i.e., impacts are observed or plausible, harm to beneficial uses is minor)



3 = Moderate - moderate threat to beneficial uses (i.e., impacts are observed or plausible and impacts to beneficial uses are moderate and likely to attenuate without appreciable acute or chronic effects).

4 = Above moderate - more than moderate threat to beneficial uses (i.e., impacts are observed or likely substantial, temporary restrictions on beneficial uses (e.g., less than 5 days), and human or ecological health concerns)

5 = Major - high threat to beneficial uses (i.e., significant impacts to aquatic life or human health, long-term restrictions on beneficial uses (e.g., more than 5 days), high potential for chronic effects to human or ecological health)

**Recommendation for Factor 2: The Physical, Chemical, Biological, or Thermal Characteristics of the Discharge**

0 = Discharged material poses a negligible risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material are benign or will not impact potential receptors)

1 = Discharged material poses only minor risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharge are relatively benign or are not likely to harm potential receptors)

2 = Discharged material poses a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharge have some level of toxicity or pose a moderate level of concern to potential receptors)

3 = Discharged material is a direct risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharge exceed known risk factors and/or there is elevated concern regarding receptor protection)

4 = Discharged material poses a significant risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the material are elevated relative to risk factors or receptor harm is considered imminent)

**2) STEP 1 - POTENTIAL HARM FACTOR FOR DISCHARGE VIOLATIONS**

We recommend adding wording to Factor 3 so that evaluations of whether a discharge is susceptible to cleanup or not will be considered in concert with whether cleanup was actually performed.

**Recommendation for Factor 3: Susceptibility to Cleanup or Abatement**

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned for this factor if less than 50% of the discharge is susceptible to cleanup or abatement.

This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the violator, considering the following:

- (a) The penalty should be adjusted upward or downward considering the violator's conduct and response to the discharge under the "Cleanup and Cooperation" adjustment factor (Step 4).
- (b) A credit should only be given if there is clear intent by the violator to conduct cleanup or abatement efforts within a reasonable timeframe, since the exposure to potential receptors generally increases and the likelihood of successful cleanup and abatement efforts generally decreases the longer the discharged material remains in the environment. A score of 0 is

recommended when cleanup and abatement efforts are underway or have been planned. For cases where there is intent to conduct cleanup and abatement but a plan is not evident, this potential credit to the ACL penalty could be suspended within an ACL order agreement. A score of 0 also should not be assigned when more than 50% of the discharge which could have been cleaned up will be rendered unsusceptible before cleanup or abatement actions can be undertaken.

### 3) STEP 2 – ASSESSMENTS FOR DISCHARGE VIOLATIONS

We recommend changing the presentation of Table 1 (“Per Gallon Factor for Discharges”) and Table 2 (“Per Day Factor for Discharges”) to clearly identify steps in table values, by grouping and labeling potential harm factors within each “step”, and to improve flexibility of use, by consolidating individual harm factor values into ranges of values to a range of values within each “step” (example shown below). While values in the table have been consolidated into ranges for each upward step in the harm level, values in the table itself have not been changed.

#### Recommendation for Tables 1 and 2

Deviation from Standard	Potential Harm Factor									
	Low		Low - Moderate		Moderate - High			High		
	1	2	3	4	5	6	7	8	9	10
Minor	0.005 to 0.007		0.009 to 0.0011		0.060 to 0.100			0.250 to 0.350		
Moderate	0.007 to 0.010		0.013 to 0.0016		0.100 to 0.200			0.400 to 0.600		
High	0.010 to 0.015		0.020 to 0.025		0.150 to 0.310			0.600 to 1.000		

### 4) STEPS 2 AND 3 – DEVIATION FROM STANDARD

The Regional Water Boards’ enforcement coordinators’ understanding of how “Deviation from Standard” would be applied remains unclear even after numerous discussions about the topic and testing of case scenarios. We recommend that “Deviation from Standard” be better defined.

#### Recommendation for defining Standard of Deviation (beneath Tables 1, 2, and 3)

This factor compares the root cause of the violation against the legal standard or the regulatory requirement, and it considers repercussions from the violation. The categories for Deviation from Standard in Table “x” are defined as follows:

Minor – The intended effectiveness of the requirement remains generally intact (e.g., while the requirement was not met, there is general intent by the discharger to follow the requirement, and the consequences resulting from the violation are not significant).

Moderate – The intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and there are some consequences associated with the violation).

Major – The requirement has been rendered ineffective (e.g., blatant disregard for the requirement, and/or there are significant consequences associated with the violation).

### **5) STEP 3 – PER DAY ASSESSMENTS FOR NON-DISCHARGE VIOLATIONS**

The potential harm values proposed in Table 3 result in high-end penalties because the base penalty generated by Table 3 for non-discharge violations will be ratcheted upward due to discharger conduct factors associated with these types of violations. Non-discharge violations which are elevated to ACL enforcement involve some combination of:

- prior knowledge of the requirement, where the base penalty will be increased up to 1.5 times due to “Culpability”;
- poor cooperation or recalcitrance by the discharger, which can increase the base penalty up to 1.5 times via the “Cleanup and Cooperation” factor; and
- prior violations, where the penalty increases up to 1.1 times if there is a “History of Violations.”

The Regional Water Boards’ enforcement coordinators have undertaken efforts to recommend revisions to Table 3 considering the typical scenarios associated with ACL enforcement of non-discharge violations, but there has not been time for sufficient peer review of any adjustments for Table 3. While there is a preference for improving Table 3, the “multiple day calculator” proposed in the draft Policy provides a means of lowering penalty assessments for these types of violations. We therefore do not recommend revising Table 3 at this time, but do recommend that Table 3 be amended before the Policy is next revised (on an approximate 5-year timeframe).

#### **Recommendation for Table 3**

We recommend allowing for the penalty calculation methodology to be revised and amended as necessary before the next revision of the Policy by including specific language in the Policy to revisit the methodology within an approximately 2-year timeframe. We request that the Office of Enforcement take responsibility in the interim for tracking statewide penalty assessments for non-discharge violations and for working with the Regional Water Boards’ enforcement coordinators on developing more reasonable base values for Table 3 and/or an alternative approach for non-discharge violation penalty assessments.