



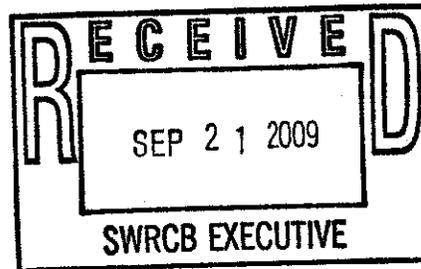
Western States Petroleum Association
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Kevin Buchan
Senior Coordinator, Bay Area and State Water Issues

VIA ELECTRONIC MAIL

September 21, 2009

Chair Hoppin, and Members of the Board
State Water Resources Control Board
Office of Enforcement
1001 I Street
Sacramento, CA 95814



Re: Comments on State Water Resources Control Board Draft Water Quality Enforcement Policy dated July 14, 2009

Chair Hoppin, and Members of the Board,

The Western States Petroleum Association ("WSPA") appreciates the opportunity to submit comments on the State Water Resources Control Board's July 14, 2009 draft update to its Water Quality Enforcement Policy ("Policy"). WSPA is a trade association that represents companies engaged in the exploration, production, transportation, refining and marketing of crude oil, natural gas and refined petroleum products across the western United States. WSPA members own or operate facilities or other properties that are subject to site cleanup requirements, corrective action, or other types of site remediation orders issued by regional water quality control boards ("Water Boards").

On May 28, 2009, WSPA submitted comments on the State Board's May 6, 2009 draft update to the Policy. At the time, the State Board was seeking input from the public with respect to which of two alternative approaches it should adopt for calculating administrative civil liability ("ACL") in discretionary enforcement actions. In its earlier comments, WSPA voiced support for Alternative 2, which contemplated the establishment of a statewide panel comprised of senior level staff from the State Board and the Water Boards that would be charged with calculating the amount of administrative penalties. WSPA favored this alternative over what we believed to be a more formulaic approach that could lead to assessment of unduly large penalties by enforcement staff located in individual regions.

Because there appears to be consensus in favor of Alternative 1 (the calculation methodology described in the draft Policy), WSPA has reviewed this alternative in greater detail and has prepared a mark-up of the Policy containing our suggestions for how this approach might be improved to ensure fairness and to avoid assessment of penalties that are out of proportion to the seriousness of the violation.

This cover letter explains our main revisions to the draft Policy and should be read in tandem with the mark-up. New language is underscored, and deleted language is stuck out. In some cases, we have simply moved blocks of text from one location to another, which appears in strike-out and underlining. Some of the moved text has been edited. There are also a number of other minor revisions (some editorial and some substantive) that are self-explanatory and not specifically addressed below.

Section II Enforcement Priorities

WSPA understands and concurs with the need for administrative prioritization of violations, particularly given the severe constraints on resources that agencies are currently facing. In this manner, Water Board staff will be able to identify and rank violations according to their adverse impact on water quality and other relevant factors, and allocate scarce resources to the maximum advantage.

However, the Policy makes no distinction in this section between those violations that are subject to mandatory enforcement under Water Code section 13385(h) and (i) and those that are more appropriately the subject of discretionary enforcement. One of WSPA's principal concerns is that the penalties assessed for routine violations of NPDES permits — which are typically resolved through the assessment of Mandatory Minimum Penalties ("MMPs") — may increasingly be targeted for discretionary enforcement, where both per day and per gallon penalties may be assessed. Because the volume of NPDES discharges from petroleum refineries and other WSPA member facilities is (or can be) very large, there is a potential for assessment of extremely large penalties under the calculation methodology developed for discretionary enforcement actions. WSPA is therefore suggesting revisions to the introductory discussion of Section II to clarify that the criteria for prioritization of enforcement actions apply only to those actions that are the subject of discretionary enforcement. Where MMPs are applicable, WSPA strongly believes that the Water Boards Expedited Settlement Program should continue to be available to resolve alleged violations on this basis, obviating any need for ranking or prioritization of these violations.

We also believe that the Policy should be revised to clarify that the ranking of violations is a separate function from the actual calculation of a proposed ACL. While this may state the obvious, there is considerable overlap in the factors that are considered for purposes of ranking violations and those that influence the amount of the penalty in any given case. WSPA is concerned that some of these factors may effectively lead to "double counting," and hence increased penalties. For example, violations that are assigned Class I priority automatically carry a "stigma" of seriousness that could unduly influence or predispose staff's calculation of the penalty. While we recognize that more serious violations will most often be assessed greater penalties, the regulated community should be assured that the factors affecting the penalty calculation will be fairly applied in all cases, and that the individual penalty assessment factors are not subsumed within the classification of the violation.

Finally, we believe that the strength of the evidence in the record and the amount and availability of resources likely needed to bring a case to a successful conclusion are important

considerations in deciding whether to bring a discretionary enforcement action in the first instance. These factors are mentioned under the heading "Enforcement Priorities for Individual Entities" but should be introduced here as they pertain generally to staff's ability to successfully prosecute a case.

Section IIA, Ranking Violations

WSPA strongly believes that the basis for all enforcement decisions, including the classifications of violations, should be a matter of public record. Suggested language has been added to ensure this result. Specifically, the ACL documentation should detail not only the facts and circumstances that support the penalty calculation, but the facts and circumstances that support the decision to issue an ACL complaint in the first instance. The classification of the underlying violation(s) is a critical aspect of this decision. This will further increase the transparency of the Water Boards' enforcement decisions and allow the regulated community (and the public at large) to better understand how the Water Boards are implementing the Policy.

WSPA is also proposing minor modifications to the criteria that are used to distinguish among Class I, Class II and Class III violations. Specifically, we believe that in cases involving actual discharges, the Water Boards must have evidence demonstrating the water quality effects of the alleged violations in the receiving waters (outside any mixing zone or zone of initial dilution, if applicable). This information is a critical part of the record of any ACL proceeding and is necessary to validate the relative seriousness of the violation.

Section IIB, Enforcement Priorities for Individual Cases (Entities)

We are proposing a number of modifications to this subsection, including changing the title to "Enforcement Priorities for Individual Cases" (rather than "Entities"). As drafted, this section is confusing, as a number of the criteria have nothing to do with the entity responsible for the violation and relate more to the violation itself.

It should also be reiterated in this section that evaluation of the "individual case" criteria is unnecessary in cases that are to be resolved through the MMP Program.

Section IID, Setting Statewide and Regional Priorities

Consistent with the comment noted previously, the State Board's annual review of its enforcement priorities should be conducted in a public process, and its annual enforcement report should be a public document. This will ensure that the State Board's priorities are effectively communicated to the regulated community, increasing awareness and fostering compliance.

Section IIE, Mandatory Enforcement Actions

As drafted, this subsection suggests that individual violations may be the subject of both mandatory enforcement under the MMP Program and supplemental discretionary enforcement. Based on the experience of its members since the advent of the MMP Program, this represents a significant departure from current practice, if not policy. WSPA believes the MMP Program and the related Expedited Settlement Program work well and should continue to be implemented as they have been in the past. Absent heightened or unusual circumstances that warrant discretionary enforcement in lieu of MMPs, MMPs represent an appropriate enforcement response.

Section VIA. Penalty Calculation Methodology (General)

WSPA acknowledges that liability under the Water Code and the federal Clean Water Act is based on strict liability. The Water Boards are not required to prove any resulting harm to human health or the environment, but may assess liability on the basis of the occurrence of a violation. However, the fact that penalties may be assessed on a strict liability basis does not mean that maximum penalties are the rule rather than the exception. WSPA strongly disputes the notion, as set forth in the draft Policy, that "the defendant must demonstrate that the penalty should be less than the statutory maximum." We are aware of no case law that supports this assertion and believe such an approach would constitute a major (and inappropriate) change in enforcement policy. In our experience, maximum penalties have been assessed only rarely and have historically been reserved for those cases representing the most egregious facts or conduct, as demonstrated by the Water Board.

More importantly, this approach conflicts with the Water Code. Each section of the Water Code that allows for assessment of penalties requires the prosecutorial body – whether it is a Water Board, the State Board or a court of law – to assess penalties in light of specific statutorily mandated factors. This obligatory balancing test places the burden on the government to prove why a certain penalty is appropriate in the circumstances. This burden cannot be shifted to the defendant to prove why the maximum penalty should not be assessed. Accordingly, we have stricken this language and included a more appropriate description of strict liability.

Economic benefit is one of the many factors to be considered in assessing civil penalties. In fact, under section 13385(c), the Water Board is obligated, at a minimum, to recover economic benefit that the violator gains as a result of a violation. WSPA believes this mandate can be carried out through the use of EPA's BEN Model, which calculates avoided and deferred costs. However, we do not believe it is realistic for the Water Boards to try to redress "unfair competitive advantage" as indicated in the Policy. As a legal principle, this transcends avoided or deferred costs, and requires highly sophisticated economic proof. The Water Code does not identify this as a relevant factor in assessment of penalties, and it is doubtful whether the Water Boards have the resources or expertise to make such determinations.

The draft Policy provides a helpful overview of the different steps involved in the penalty calculation. We have suggested a number of changes to this general summary that conform with our more detailed comments on the individual steps, as discussed below.

Step 2. We have revised this section to identify the provisions of the Water Code that allow assessment of per day or per gallon penalties, but not both, and the sole section (§ 13385(c)) which requires assessment of both per day and per gallon penalties. In general, we believe the Policy glosses over these differences, and implicitly (if not explicitly) directs staff to assess penalties on both a per day and per gallon basis. As noted at the outset of these comments, in the case of WSPA member facilities that have permitted NPDES discharges, assessment of penalties on a per gallon basis would lead to extraordinarily high penalties, far out of proportion to the seriousness of the violation.

To address this concern, WSPA proposes that the provisions of the draft Policy pertaining to high volume discharges (e.g., sewage spills and storm water discharges) be expanded to include industrial dischargers that have continuous NPDES discharges in excess of 750,000 gallons per day. As noted above, most NPDES violations are addressed under the MMP Program, which does not assess penalties on a per gallon basis. In circumstances where a Water Board has determined that MMPs do not represent an adequate enforcement response,

WSPA recommends that per gallon penalties be capped at \$0.50 per gallon to avoid unnecessarily punitive and confiscatory penalties.

Steps 6 - 9. We believe that the logic of the penalty calculation as drafted is flawed and is not consistent with the statute. Once the Total Base Liability Amount has been determined (Step 5), this amount should be adjusted up or down based on recovery of economic benefit (Step 6) and other factors as justice may require (Step 7), to produce an Adjusted Total Base Liability Amount (new Step 8). This amount (presumably) reflects the penalty that should be assessed based on consideration of all pertinent factors. Then, as a last step, the Water Boards need to consider the violator's ability to pay or the consequences on the violator's business. The fact that the Legislature directed recovery of economic benefit at a minimum under Water Code section 13385(c) does not trump the violator's inability to pay. If the violator can produce satisfactory documentation proving its inability to pay, as a practical matter, that places a cap on liability. While the Water Boards could, of course, assess a larger — but uncollectable — penalty, the purpose of doing so would be unclear. For these reasons, WSPA suggests switching Step 6 and Step 8 as they appear in the draft, and adding a new Step 8 reflecting the final penalty calculation before consideration of a violator's ability to pay.

WSPA is also very strongly opposed to the notion that a violator's ability to pay, by itself, warrants upward adjustment of a calculated penalty under any circumstances. As discussed above, ability to pay has traditionally functioned as a basis for reducing a penalty that would otherwise be considered appropriate. We are unaware of any situation in which a company's financial wherewithal has served as a basis for increasing the penalty to enhance its deterrent effect. WSPA acknowledges that deterrence is a legitimate goal of a civil penalty scheme, but believes that penalties should be increased for this purpose only rarely, under the rubric of "other factors that justice may require."

Section VII, Mandatory Minimum Penalties

For clarity, WSPA has included a brief summary of the types of violations that are eligible for resolution under the MMP Program. While we understand that the State Board does not intend to include lengthy summaries of code sections in the Policy, we believe it is useful to include this brief summary so that the user has a better understanding of the scope of the program.

Finally, to avoid undue delay in the pursuit of MMPs, we believe the Policy should be revised to impose an outside time limit of 36 months on any administrative action to recover MMPs. This time limit is consistent with the statute of limitations in Code of Civil Procedure section 338(i) and provides the Water Boards with more than enough time to bring these actions. WSPA supports the recommendation in the Policy as drafted that these actions be brought within an 18 month period.

WSPA appreciates the opportunity to submit these comments. Thank you.

Kevin Buchan

Enclosure: WSPA mark-up of draft Policy

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STATE WATER RESOURCES CONTROL BOARD

**WATER QUALITY
ENFORCEMENT POLICY**

DRAFT – July 14, 2009

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

Water Quality Enforcement Policy - July 14, 2009

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INTRODUCTION

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

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

This Policy addresses the enforcement component (i.e. actions that take place in response to a violation) of the Water Boards' regulatory framework, which is an equally critical element of a successful regulatory program. Without a strong enforcement program to back up the cooperative approach, the entire regulatory framework would be in jeopardy. Enforcement is a critical ingredient in creating the deterrence needed to encourage the regulated community to anticipate, identify, and correct violations. Appropriate penalties and other consequences for violations offer some assurance of equity between those who choose to comply with requirements and those who violate them. It also improves public confidence when government is ready, willing, and able to back up its requirements with action.

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

- Establishes a process for ranking enforcement priorities based on the actual or potential impact to the beneficial uses or the regulatory program and for using progressive levels of enforcement, as necessary, to achieve compliance;

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- Establishes an administrative civil liability assessment methodology to create a fair and consistent statewide approach to liability assessment;
- Recognizes the use of alternatives to the assessment of civil liabilities, such as supplemental environmental projects, compliance projects, and enhanced compliance actions, but requires standards for the approval of such alternatives to ensure they provide the expected benefits;
- Identifies circumstances in which the State Water Board will take action, even though the Regional Water Boards have primary jurisdiction;
- Addresses the eligibility requirements for small communities to qualify for carrying out compliance projects, in lieu of paying mandatory minimum penalties pursuant to California Water Code section 13385;
- Emphasizes the recording of enforcement data and the communication of enforcement information to the public and the regulated community; and
- Establishes annual enforcement reporting and planning requirements for the Water Boards.

The State's water quality requirements are not solely the purview of the Water Boards and their staffs. Other agencies, such as, the California Department of Fish and Game have the ability to enforce certain water quality provisions in state law. State law also allows members of the public to bring enforcement matters to the attention of the Water Boards and authorizes aggrieved persons to petition the State Water Board to review most actions or failures to act of the Regional Water Boards. In addition, state and federal statutes provide for public participation in the issuance of orders, policies, and water quality control plans. Finally, the federal Clean Water Act (CWA) authorizes citizens to bring suit against dischargers for certain types of CWA violations.

I.

FAIR, FIRM, AND CONSISTENT ENFORCEMENT

It is the policy of the State Water Board that the Water Boards shall strive to be fair, firm, and consistent in taking enforcement actions throughout the State, while recognizing the unique facts of each case.

A. Standard and Enforceable Orders

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

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B. Determining Compliance

The Water Boards shall implement a consistent and valid approach to determine compliance with enforceable orders.

C. Suitable Enforcement

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

D. Environmental Justice

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

Specifically, the Water Boards shall pursue enforcement that is consistent with the goals identified in Cal-EPA's Intra-Agency Environmental Justice Strategy, August 2004 (<http://www.calepa.ca.gov/EnvJustice/Documents/2004/Strategy/Final.pdf>) as follows:

- Ensure meaningful public participation in enforcement matters;
- Integrate environmental justice considerations into the enforcement of environmental laws, regulations, and policies;
- Improve data collection and availability of violation and enforcement information for communities of color and low-income populations; and,
- Ensure effective cross-media coordination and accountability in addressing environmental justice issues.

E. Small Communities

Publicly owned treatment works (POTW) and sewage collection systems that serve small communities (defined in Chapter VII. B) must comply with water quality protection laws. The State Water Board recognizes that complying with environmental laws and regulations will require higher per capita expenditures in small communities than in large communities. When water quality violations occur, traditional enforcement practices used by the Water Boards may result in significant costs to these communities and their residents, thereby limiting their ability to achieve compliance without suffering disproportionate hardships.

In recognition of these factors, informal enforcement or compliance assistance will be the first steps taken to return a small disadvantaged community to compliance, unless the Water Board finds that extenuating circumstances apply. Informal enforcement is covered in Appendix A. Compliance assistance activities are based on a commitment on the part of the entity to achieve compliance and shall be offered in lieu of

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enforcement when an opportunity exists to correct the violations. Compliance activities that serve to bring a facility into compliance include, but are not limited to:

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

Further, the Water Boards recognize that timely initiation of progressive enforcement is important for a noncompliant small community. When enforcement is taken before a large liability accumulates, there is greater likelihood the small community will be able to address the liability and return to compliance within its financial capabilities.

The State Water Board has a comprehensive strategy for small communities that extends beyond enforcement and will revise that strategy as necessary to address the unique compliance challenges faced by these communities (see State Water Resources Control Board Resolution No. 2008-0048).

II.

ENFORCEMENT PRIORITIES FOR DISCRETIONARY ENFORCEMENT ACTIONS

It is the policy of the State Water Board that every violation results in the appropriate enforcement response consistent with the priority of the violation established in accordance with this Policy. Where civil penalties are considered to be a necessary and appropriate element of an enforcement response, the Water Code offers a range of possible approaches, depending on the type, nature and extent of the violation. For example, certain types of violations are eligible for resolution under the Mandatory Minimum Penalty Program described in Section VII of this Policy. This section of the Policy (Section II) addresses violations that are either ineligible, or are not considered appropriate candidates, for resolution on that basis.

Where mandatory minimum penalties are not applicable, the Water Boards should consider taking discretionary enforcement action, as discussed in this section of the Policy. In such cases, the Water Boards shall rank cases for formal discretionary enforcement action to ensure the most efficient and effective use of available resources. The criteria described in this section shall be used to determine enforcement priorities. While there is some overlap in the factors that are to be considered, ranking of violations for purposes of allocating enforcement resources is a separate step that must be conducted first, independently of any monetary assessment conducted under Section VI of this Policy. Any decision to pursue a discretionary enforcement action against a particular entity should also take into consideration the strength of the evidence in the record to support the enforcement action and the amount and availability of resources that are likely to be needed to bring the case to a successful conclusion.

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A. Ranking Violations

The first step in enforcement ranking is determining the relative significance of each violation. The following criteria will be used by the Water Boards to identify and classify significant violations in order to help establish priorities for enforcement efforts. Information needed to classify violations must be available in the public record and must be presented by Water Board staff where necessary to prove or support an enforcement action.

1. Class I Priority Violations

Class I priority violations are those violations that pose an immediate and substantial threat to water quality and that have the potential to cause significant detrimental impacts to human health or the environment. Violations involving recalcitrant parties who deliberately avoid compliance with water quality regulations and orders are also considered class I priority violations because they pose a serious threat to the integrity of the Water Boards' regulatory programs.

Class I priority violations include, but are not limited to, the following:

- a. Significant measured or calculated violations with lasting effects on that can be demonstrated to cause long-term exceedance of water quality objectives or criteria in the receiving waters, outside any approved mixing zone;
- b. Violations that result in significant, long-term adverse lasting impacts to existing beneficial uses of waters of the State;
- c. Violations that can be demonstrated to result in significant harm to, or the destruction of, fish or wildlife;
- d. Violations that present an imminent danger to public health;
- e. Unauthorized discharges that pose a significant threat to water quality;
- f. Falsification of information submitted to the Water Boards or intentional withholding of information required by applicable laws, regulations, or enforceable orders;
- g. Violation of a prior enforcement action-- such as a cleanup and abatement order or cease and desist order--that results in an unauthorized discharge of waste or pollutants to water of the State; and
- h. Knowing and willful failure to comply with monitoring requirements as required by applicable laws, regulations, or enforceable orders because of knowledge that monitoring results will reveal violations.

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2. Class II Violations

Class II violations are those violations that pose a moderate, indirect, or cumulative threat to water quality and, therefore, have the potential to cause detrimental impacts on human health and the environment. Negligent or inadvertent noncompliance with water quality regulations that has the potential for causing or allowing the continuation of an unauthorized discharge or obscuring past violations is also a class II violation.

Class II violations include, but are not limited to, the following:

- a. Unauthorized discharges that pose a moderate or cumulative threat to water quality;
- b. Violations of acute or chronic toxicity requirements where the discharge can be demonstrated to ~~may~~ adversely affect fish or wildlife;
- c. Violations that present a substantial threat to public health;
- d. Negligent or inadvertent failure to substantially comply with monitoring requirements as required by applicable laws, regulations, or enforceable orders, such as not taking all the samples required;
- e. Negligent or inadvertent failure to submit information as required by applicable laws, regulations, or an enforceable order where that information is necessary to confirm past compliance or to prevent or curtail an unauthorized discharge;
- f. Violations of compliance schedule dates (e.g., schedule dates for starting construction, completing construction, or attaining final compliance) by 30 days or more from the compliance date specified in an enforceable order;
- g. Failure to pay fees, penalties, or liabilities within 120 days of the due date, unless the discharger has pending a timely petition pursuant to California Water Code section 13320 for review of the fee, penalty, or liability, or a timely request for an alternative payment schedule, filed with the Regional Water Board;
- h. Violations of prior enforcement actions that do not result in an unauthorized discharge of waste or pollutants to waters of the State;
- i. Significant measured or calculated violations that can be demonstrated to cause temporary exceedance of water quality objectives or promulgated water quality criteria in the receiving waters, outside any approved mixing zone; and
- j. Violations that result in significant demonstrated adverse impacts on existing beneficial uses of waters of the State.

3. Class III Violations

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Class III violations are those violations that pose only a minor threat to water quality and have little or no known potential for causing a detrimental impact on human health and the environment. Class III violations include statutorily required liability for late reporting when such late filings do not result in causing an unauthorized discharge or allowing one to continue. Class III violations should only include violations by dischargers who are first time or infrequent violators and are not part of a pattern of chronic violations.

Class III violations are all violations that are not class I priority or class II violations. Those include, but are not limited to, the following:

- a. Unauthorized discharges that pose a low threat to water quality;
- b. Negligent or inadvertent late submission of information required by applicable laws, regulations, or enforceable orders;
- c. Failure to pay fees, penalties, or liabilities within 30 days of the due date, unless the discharger has pending a timely petition pursuant to California Water Code section 13320 for review of the fee, penalty or liability; or a timely request for an alternative payment schedule, filed with the Regional Water Board;
- d. Any "minor violation" as determined pursuant to California Water Code section 13399 et seq. (see Appendix A. C.1a);
- e. Negligent or inadvertent failure to comply with monitoring requirements when conducting monitoring as required by applicable laws, regulations, or enforceable orders, such as using an incorrect testing method;
- f. Less significant (as compared to class II violations) measured or calculated violations that can be demonstrated to cause temporary exceedance of water quality objectives or promulgated water quality criteria in the receiving waters, outside any approved mixing zone; and
- g. Violations that result in less significant (as compared to class II violations) demonstrated adverse impacts to existing beneficial uses of waters of the State.

B. Enforcement Priorities for Individual CasesEntities

The second step in enforcement ranking involves examining the enforcement records of specific entities based on the significance and severity of their violations, as well as other factors identified below. Regional Water Board senior staff and management, with support from the State Water Board Office of Enforcement, shall meet on a regular basis, no less than bi-monthly, and identify their highest priority enforcement cases. To the greatest extent possible, Regional Water Board shall focus on target entities with a history of class I priority violations for formal enforcement action. Routine NPDES permit violations that are resolved through the assessment of mandatory minimum penalties should be excluded from further consideration during this step.

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In determining the importance of addressing the violations of a given entity, the following criteria should be used:

1. Class of the entity's violations;
2. History of the entity
 - a. Whether the violations have continued over an unreasonably long period after being brought to the entity's attention and are reoccurring;
 - b. Whether the entity has a history of chronic noncompliance;
 - c. Compliance history of the entity and good-faith efforts to eliminate noncompliance;
3. Impact or threat to high priority watersheds or water bodies (e.g., due to the vulnerability of an existing beneficial use or an existing state of impairment):
- 3.4. Evidence of, or threat of, pollution or nuisance caused by violations;
- 4.5. The magnitude or impacts of the violations;
- 5.6. Case-by-case factors that may mitigate a violation, including the discharger's efforts to abate the effects of the violations.;
- ~~6. Impact or threat to high priority watersheds or water bodies (e.g., due to the vulnerability of an existing beneficial use or an existing state of impairment);~~
- ~~7. Potential to abate effects of the violations;~~
7. Strength of evidence in the record to support the enforcement action; and
8. Availability of resources for enforcement.
- ~~8. Strength of evidence in the record to support the enforcement action; and~~
- ~~9. Availability of resources for enforcement.~~

C. Automated Violation Priorities

It is the goal of the State Water Board to develop data algorithms to assign the relative priority of individual violations consistent with this Policy by January 1, 2012. A public workshop will be conducted to discuss these algorithms and to obtain input from the public. This automated system should simplify the ranking of violations and facilitate prioritization of cases for enforcement.

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D. Setting Statewide and Regional Priorities

On an annual basis, the State Water Board will propose statewide enforcement priorities. These priorities may be based on types of violations, individual regulatory programs, particular watersheds, or any other combined aspect of the regulatory framework in which an increased enforcement presence is required. These priorities will be documented in an annual enforcement report and reevaluated each year in a public process.

As part of the State Water Board's annual enforcement prioritization process, each Regional Water Board will identify and reevaluate its own regional priorities on an annual basis. This will also be included in a regional annual enforcement report.

E. Mandatory Enforcement Actions

~~In addition to these criteria for discretionary enforcement, the~~ The Water Boards also have certain will continue to address mandatory enforcement obligations imposed by the law (e.g. Wat. Code § 13385, subds.(h) and (i)). As detailed in Chapter VII, these mandatory actions should be taken within 18 months of the time that the violations qualify for the assessment of mandatory minimum penalties. Absent special circumstances, enforcement of eligible violations through assessment of mandatory minimum penalties represents an appropriate and sufficient enforcement response. Expenditure of enforcement resources on discretionary enforcement actions should be reserved for those situations warranting a heightened enforcement response.

III.

ENFORCEMENT ACTIONS

The Water Boards have a variety of enforcement tools to use in response to noncompliance by dischargers. With certain specified exceptions California Water Code section 13360, subdivision (a) prohibits the State Water Board or Regional Water Board from specifying the design, location, type of construction, or particular manner in which compliance may be had with a particular requirement. For every enforcement action taken, where appropriate, the discharger's return to compliance should be tracked in the Water Board's enforcement database. See Appendix A for additional information.

IV.

STATE WATER BOARD ENFORCEMENT ACTION

The Regional Water Boards have primary responsibility for matters directly affecting the quality of waters within their region. The State Water Board has oversight authority in such matters and may, from time to time, take enforcement action in lieu of the Regional Water Board as follows:

- In response to petitions alleging inaction or ineffective enforcement action by a Regional Water Board;

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- To enforce statewide or multi-regional general permits;
- To address violations by the same discharger in more than one region;
- Where the Regional Water Board's lead prosecutor has requested that the State Water Board take over the enforcement action;
- Where a Regional Water Board is unable to take an enforcement action because of quorum problems, conflicts of interest, or other administrative circumstances;
- Where a Regional Water Board has not investigated or initiated an enforcement action for a class I priority violation in a manner consistent with this Policy; and
- Actions where the Executive Director has determined that enforcement by the State Water Board is necessary and appropriate.

Where the State Water Board decides to pursue such enforcement, the Office of Enforcement will coordinate investigation of the violations and preparation of the enforcement action with the staff of the affected Regional Water Board to ensure that the State Water Board will not duplicate efforts of the Regional Water Board. Except under unusual circumstances, the Regional Water Board enforcement staff will have the opportunity to participate and assist in any investigation and the Office of Enforcement will seek input from the Regional Water Board enforcement staff in the development of any resulting enforcement action. Such action may be brought before the State Water Board or the Regional Water Board, as may be deemed appropriate for the particular action. The decision as to where to bring the enforcement action will be discussed with the affected Regional Water Board enforcement staff. Enforcement actions requiring compliance monitoring or long-term regulatory follow-up will generally be brought before the appropriate Regional Water Board.

V.

COORDINATION WITH OTHER REGULATORY AGENCIES

A. Hazardous Waste Facilities

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

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B. Oil Spills

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

C. General

The Water Boards will work cooperatively with other local, state, regional, and federal agencies when violations, for which the agency itself is not responsible, occur on lands owned or managed by the agency.

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

A. Penalty Calculation Methodology

As a general matter, where, as in the California Water Code, a civil penalty structure has been devised to address environmental violations, civil penalties do not depend on proof of actual damages to the environment. Courts in reviewing similar environmental protection statutes have held that a plaintiff need not prove a loss before recovering a penalty; instead, liability under the statute is assessed on a strict liability basis, predicated on the occurrence of the violation rather than on any resulting harm. The amount of the penalty depends on an evaluation of the facts and circumstances relating to the violation in light of the factors set forth in the statute (Wat. Code, § 13351). the defendant must demonstrate that the penalty should be less than the statutory maximum.

In certain cases, ~~a strong argument can be made that~~ consideration of the statutory factors can support the statutory maximum as an appropriate penalty for water quality violations, in the absence of any other mitigating evidence. Moreover, as discussed below, the Porter-Cologne Act requires that civil liabilities be set at a level that accounts for any "economic benefit or savings" violators gained through their violations. (Wat. Code, §§ 13351, 13385, subd. (e).) The Water Boards have powerful liability provisions at their disposal which the Legislature and the public expect them to fairly and consistently implement for maximum enforcement impact to address, correct, and deter water quality violations.

While it is a goal of this Policy to establish broad consistency in the Water Boards' approach to enforcement, the Policy recognizes that, with respect to liability determinations, each Regional Water Board, and each specific case, is somewhat unique. The goal of this section is to provide a consistent approach and analysis of factors to determine administrative civil liability. Where violations are standard and routine, a consistent outcome can be reasonably expected using this Policy. In more complex matters, however, the need to assess all of the applicable factors in liability determinations may yield different outcomes in cases that may have many similar facts.

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

- Be assessed in a fair and consistent manner;
- Fully eliminate any economic benefit or savings advantage obtained from noncompliance;¹
- ~~Fully eliminate any unfair competitive advantage obtained from noncompliance;~~
- Bear a reasonable relationship to the gravity of the violation and the harm to beneficial uses or regulatory program resulting from the violation;
- Deter the specific person(s) identified in the ACL from committing further violations; and
- Deter similarly situated person(s) in the regulated community from committing the same or similar violations.

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

The following provisions apply to all discretionary administrative civil liabilities (ACLs). Mandatory Minimum Penalties (MMPs) required pursuant to California Water Code section 13385, subdivisions (h) and (i), are discussed in Chapter VII.

General Approach

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

- Step 1. *Potential Harm Factor for Discharge Violations* – Calculate Potential Harm Factor considering: (1) the potential for harm to beneficial uses; (2)

¹ When liability is imposed under California Water Code § 13385(c), Water Boards are statutorily obligated to recover, at a minimum, all economic benefit to the violator as a result of the violation.

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the degree of toxicity of the discharge; and (3) the discharge's susceptibility to cleanup or abatement.

- Step 2. *Per Gallon and/or Per Day Assessments for Discharge Violations* – For ~~discharges resulting in violations that involve unlawful discharges,~~ determine whether the violation is subject to per day or per gallon penalties, or both, based on applicable provisions of the Water Code.² Once this has been determined, use Table 1 and/or Table 2 to determine specific Per Gallon and/or Per Day Assessments. Depending on the particular language of the ACL statute being used, either or both tables may be used. Multiply these factors by per gallon and/or per day amounts as described below. Where allowed by code, both amounts should be determined and added together. This becomes the initial amount of the ACL for the discharge violations.
- Step 3. *Per Day Assessments for non-Discharge Violations* – For non-discharge violations, use Table 3 to determine per day assessments. Multiply these factors by the per day amount as described below. ~~Where allowed by the California Water Code, amounts for these violations should be added to amounts (if any) for discharge violations from Step 2, above.~~ This becomes the initial amount of the ACL for the non-discharge violations.
- Step 4. *Adjustment Factors* – Adjust the initial amounts for each violation, as determined in Step 2 and Step 3, by factors addressing the violator's conduct, multiple instances of the same violation, and multiple day violations.
- Step 5. *Total Base Liability Amount* – Add the adjusted amounts for each violation from Step 4.

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

- Step 6. *Economic Benefit* – The economic benefit of the violations must be determined based on the best available information, and the Total Base Liability Amount should be adjusted to so that it equals or exceeds this amount. (Note that the Economic Benefit is a statutory minimum for ACLs issued pursuant to California Water Code section 13385(c).) ~~Ability to Pay and Ability to Continue in Business~~ – ~~If the ACL exceeds these amounts, it may be adjusted downward provided express findings are made to justify this. Similarly, ability to pay may justify an increase in the amount to provide a sufficient deterrent effect.~~

² Administrative civil liability imposed under Water Code § 13350(e) may include per day or per gallon penalties, but not both. Penalties imposed under Water Code § 13385(c) must include both per day and per gallon penalties. The later section applies only to discharges subject to regulation under the federal Clean Water Act.

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Step 7. *Other Factors as Justice May Require* – Determine if there are additional factors that should be considered that would justify an increase or a reduction in the Total Base Liability amount. These factors must be documented in the ACL Complaint. One of these factors is the staff costs of investigating the violations and issuing the ACL. The staff costs should be added to the amount of the ACL. In cases involving egregious, willful or grossly negligent conduct, the ACL may be adjusted upward to provide a sufficient deterrent effect. The factors justifying this adjustment must also be documented in the ACL Complaint.

Step 8. *Adjusted Total Base Liability Amount* – Add or subtract the amounts from Steps 6 and 7 to determine this amount.

~~Step 8.~~ Step 9. *Ability to Pay and Ability to Continue in Business* – If the ACL exceeds the discharger's ability to pay or would compromise the discharger's ability to continue in business, the ACL may be adjusted downward provided express findings are made to justify this. Economic Benefit – The economic benefit of the violations must be determined based on the best available information, and the amount of the ACL should exceed this amount. (Note that the Economic Benefit is a statutory minimum for ACLs issued pursuant to California Water Code section 13385.)

~~Step 9.~~ Step 10. *Maximum and Minimum Liability Amounts* - Determine the statutory maximum and minimum amounts of the ACL, if any. Adjust the ACL to ensure it is within these limits.

~~Step 10.~~ Step 11. *Final Liability Amount* – The final liability amount will be assessed after consideration of the above factors. The final liability amount and significant considerations regarding the liability amount must be discussed in the ACL Complaint and in any order imposing liability.

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STEP 1 - Potential Harm Factor for Discharge Violations

Calculating this factor is the initial step for discharge violations. Begin by determining the actual or threatened impact to beneficial uses caused by the violation using a three-factor scoring system to quantify: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) the discharge's susceptibility to cleanup or abatement for each violation or group of violations.

Factor 1: Harm or Potential Harm to Beneficial Uses

The evaluation of the potential harm to beneficial uses factor considers the harm that may result from exposure to the pollutants or contaminants in the illegal discharge, in light of the statutory factors of the nature, circumstances, extent and gravity of the violation or violations. The score evaluates direct or indirect harm or potential for harm from the violation. A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm is negligible (0), minor (1), below moderate (2), moderate (3), above moderate (4), or major (5).

- 0 = negligible - no actual or potential harm to beneficial uses.
- 1 = minor - low threat to beneficial uses— (e.g., suspected or potential impacts to aquatic life due to effluent or toxicity limit violations).
- 2 = below moderate – less than moderate threat to beneficial uses— (e.g., observed, but minor, impacts to aquatic life due to effluent or toxicity limit violations).
- 3 = moderate - moderate threat to beneficial uses – (e.g., observed impacts to aquatic life, short term restrictions on the use of a water body such as beach closures, material contribution to MCL exceedences for drinking water supplies).
- 4 = above moderate – – more than moderate threat to beneficial uses – (e.g. observed and substantial impacts to aquatic life, beach closures of more than one day where determined necessary by local officials, causes short term MCL exceedences for drinking water supplies).
- 5 = major - high threat – (e.g., significant impacts to aquatic life, long term restrictions of the use of water body (more than five days), consumption warnings for fish or shellfish, causes long term (more than 5 days) MCL exceedences for drinking water supplies).

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

The characteristics of the this discharge factor are are scored based on the physical, chemical, biological, and/or thermal nature of the discharge, waste, fill, or material involved in the violation or violations. A score between 0 and 4 is assigned based on a determination of whether the discharge or discharges are relatively benign materials or wastes with negligible risk of harm (0), materials or wastes that pose a

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minor or potential risk of harm (1), materials or wastes that pose a moderate risk of harm (2), materials or wastes that pose a major risk of harm (3), or hazardous wastes regulated by DTSC (4).

0 = discharged material is relatively benign – (e.g., the chemical characteristics of the discharged material are relatively benign and pose a negligible risk of harm).

1 = discharged material is non-hazardous waste and poses only a minor or potential risk of harm – (e.g., the chemical characteristics of the discharged material are relatively benign, but pose a minor or potential risk of harm, such as dilute or partially treated effluent).

2 = discharged material is non-hazardous waste and poses a moderate risk of harm – (e.g., the chemical characteristics of the discharge are relatively benign, but pose a moderate risk of harm, such as partially treated effluent discharged to sensitive habitats).

3 = discharged material is non-hazardous waste and poses major risk of harm – (e.g., the chemical or physical characteristics of the discharge, while not hazardous, pose a significant risk of harm, such as raw sewage, or fill material placed in a wetland).

4 = discharged material is hazardous waste regulated by DTSC or a petroleum product – (e.g., the chemical characteristics of the discharge qualify it as either a listed or characteristic hazardous waste, or pose a major risk of harm).

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 relates to the inherent characteristics of the discharge and is evaluated independently regardless of any actions taken by the violator whether the discharge to was actually cleaned up or abated the effects of the discharge by the violator.

Final Score – “Potential For Harm”

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

STEP 2 - Assessments for Discharge Violations

Per Gallon Assessments for Discharge Violations

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The procedures in this section shall be used where the Water Board has determined that assessment of per gallon penalties is allowed by law and appropriate. In such cases, ~~Where there is a discharge,~~ the Water Boards shall determine an initial liability amount on a per gallon basis using on the Potential Harm score and the extent of Deviation from Standard of the violation. These factors will be used in Table 1 below to determine a Per Gallon Factor for the discharge. Except for certain high-volume discharges discussed below, the per gallon assessment would then be the Per Gallon Factor multiplied by the number of gallons subject to penalty multiplied by the maximum per gallon penalty amount allowed under the California Water Code.

TABLE 1 - Per Gallon Factor for Discharges										
Deviation from Standard	Potential Harm Factor									
	1	2	3	4	5	6	7	8	9	10
Minor	0.005	0.007	0.009	0.011	0.060	0.080	0.100	0.250	0.300	0.350
Moderate	0.007	0.010	0.013	0.016	0.100	0.150	0.200	0.400	0.500	0.600
Major	0.010	0.015	0.020	0.025	0.150	0.220	0.310	0.600	0.800	1.000

The categories for **Deviation from Standard** in Table 1 are defined as follows:

Minor – The violation deviates somewhat from the requirement but the effectiveness of the requirement has not been compromised as a result.

Moderate – As a result of the violation, the effectiveness of the requirement is only partially achieved.

Major – As a result of the violation, the requirement is rendered ineffective in its essential functions.

~~With the exception of exceedances of NPDES permit effluent limitations, for~~ requirements with more than one part, the Water Boards shall consider the extent of the violation in terms of its adverse impact on the effectiveness of the most significant requirement.

High volume discharges

The Water Boards shall apply the above per gallon factor to the maximum per gallon amounts allowed under statute for the violations involved unless the violation involves one of the following high volume discharges. Since the volume of sewage spills and releases of stormwater from construction sites and municipalities can be very large for sewage spills and releases of municipal stormwater or stormwater from construction sites, a maximum amount of \$2.00 per gallon should be used with the above factor to determine the per gallon amount for sewage spills and stormwater. Similarly, for releases of recycled water that has been treated for reuse, a maximum amount of \$1.00 per gallon should be used with the above factor. Where reducing these maximum amounts results in a disproportionately small penalty, such as dry weather discharges or small volume discharges that impact beneficial uses, a higher amount, up to the

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maximum per gallon amount, may be used. However, for all industrial dischargers that have continuous NPDES discharges in excess of 750,000 gallons per day (and where the Water Board has determined that the violations are not appropriate for resolution under the Mandatory Minimum Penalty Program), a maximum amount of \$0.50 per gallon should be used with the above factor to determine the per gallon amount for such discharges.

For violations of NPDES permit effluent limitations, including those that are the subject of discretionary enforcement, the base liability must be at least equal to the amount of should be established by calculating the mandatory penalty required under Water Code section 13385(h) and (i). The mandatory penalty should be adjusted upward in accordance with this Policy to account for where the specific facts and circumstances that warrant discretionary enforcement action in the first instance of the violation warrant a higher liability.

Per Day Assessments for Discharge Violations

Where appropriate, there is a discharge, the Water Boards shall determine an initial liability factor per day based on the Potential Harm score and the extent of Deviation from Standard of the violation. These factors will be used in Table 2, below, to determine a Per Day Factor for the violation. The per day assessment would then be the Per Day Factor multiplied by the maximum per day amount allowed under the California Water Code. Where assessment of both per day and per gallon penalties is allowed by statute (i.e., Water Code § 13385(c)), it is intended that Table 2 be used in conjunction with Table 1, so that both per gallon and per day amounts be considered where there is a discharge violation. Where there is a violation of the permit not related to a discharge incident, Step 3/Table 3 below should be used instead.

TABLE 2 - Per Day Factor for Discharges

Deviation from Standard	Potential Harm Factor									
	1	2	3	4	5	6	7	8	9	10
Minor	0.005	0.007	0.009	0.011	0.060	0.080	0.100	0.250	0.300	0.350
Moderate	0.007	0.010	0.013	0.016	0.100	0.150	0.200	0.400	0.500	0.600
Major	0.010	0.015	0.020	0.025	0.150	0.220	0.310	0.600	0.800	1.000

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

Minor – The violation deviates somewhat from the requirement but the effectiveness of the requirement has not been compromised as a result.

Moderate – As a result of the violation, the effectiveness of the requirement is only partially achieved.

Major – As a result of the violation, the requirement is rendered ineffective in its essential functions.

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

The Water Boards shall apply the above per day factor to the maximum per day amounts allowed under statute for the violations involved. Where allowed by code, both the per gallon and the per day amounts should be determined and added together. This becomes the initial amount of the ACL for the discharge violations.

Where allowed by code, both the per gallon amount and the per day amount should be determined and added together. This becomes the initial amount of the ACL for the discharge violations.

STEP 3 - Per Day Assessments for Non-Discharge Violations

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential Harm and the extent of deviation from applicable requirements. These are violations include, but are not limited to, the failure to conduct routine monitoring and reporting, the failure to provide required information, and the failure to prepare required plans. While these violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. The Water Boards shall use the matrix set forth below to determine the initial liability factor for each violation. The per day assessment would then be the Per Day Factor multiplied by the maximum per day amount allowed under the California Water Code. For multiple day violations, please refer to the Adjustment Factors in Step 4, below.

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

TABLE 3 - Per Day Factor

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

The categories for **Potential for Harm** in Table 3 are:

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Minor – The characteristics of the violation present a minor threat to beneficial uses, and/or the circumstances of the violation indicate a minor potential for harm.

Moderate – The characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. Most incidents would be considered to present a moderate potential for harm.

Major – The characteristics of the violation present a particularly egregious threat to beneficial uses, and/or the circumstances of the violation indicate a very high potential for harm. Additionally, non-discharge violations involving particularly sensitive habitats should be considered major.

The categories for **Deviation from Standard** in Table 3 are:

Minor – The violation deviates somewhat from the requirement but the effectiveness of the requirement has not been compromised as a result.

Moderate – As a result of the violation, the effectiveness of the requirement is only partially achieved.

Major – As a result of the violation, the requirement is rendered ineffective in its essential functions.

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

For any given requirement, the Deviation from Standards may vary. For example, if a facility does not have a required response plan or has not submitted a required monitoring report, the deviation would be major. If a facility has a prepared a required plan or submitted the required monitoring report, but significant elements are omitted or missing, the deviation would be moderate. If a facility has a required plan or submitted the required monitoring report with only minor elements missing, the deviation would be minor.

STEP 4 – Adjustment Factors

Violator's Conduct Factors

There are three additional factors that should be considered for modification of the amount of the initial liability: the violator's culpability, the violator's efforts to cleanup or cooperate with regulatory authorities after the violation, and the violator's compliance history. Not all factors will apply in every liability assessment.

TABLE 4 – Violator's Conduct Factors

Factor	Adjustment
Culpability	Discharger's degree of culpability regarding the violation.

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Factor	Adjustment
	<p>Higher liabilities should result from intentional or negligent violations than for accidental, non-negligent violations. A first step is to identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation. The test is what a reasonable and prudent person would have done or not done under similar circumstances.</p> <p>Adjustment should result in a multiplier between 0.5 to 1.5, with the lower multiplier for accidental incidents, and higher multiplier for intentional or negligent behavior.</p>
Cleanup and Cooperation	<p>Extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage, including any voluntary cleanup efforts undertaken. Adjustment should result in a multiplier between 0.75 to 1.5, with the lower multiplier where there is a high degree of cleanup and cooperation, and higher multiplier where this is absent.</p>
History of Violations	<p>Prior history of violations. Where there is a history of repeat violations, <u>a minimum multiplier of 1.1 should be used</u> the amount of the initial liability should be increased by a minimum of 10% to reflect this.</p>

After each of the above factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

Multiple Instances of the Same Violation

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

- a. The facility has violated the same requirement at one or more locations within the facility;
- b. A single operational upset where violations occur on multiple days;
- c. The violation occurs on separate days, but the violation is one that continues for more than one day;
- d. When violations are not independent of one another or are not substantially distinguishable. For such violations, the Water Boards may consider the extent of the violation in terms of the most egregious violation;

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- e. A single act may violate multiple permit or water quality control (WQC) standards, and constitute multiple violations. For example, a construction dewatering discharge to a dewatering basin located on a gravel bar next to stream may violate a WQC standard requiring the use of best management practices (BMPs) for sediment and turbidity control, a WQC standard prohibiting the discharge of soil silt or other organic matter to waters of the State, and a WQC standard requiring temporary sedimentation basins be located at least 100 feet from a stream channel. Such an act would constitute three distinct violations.

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

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

Multiple Day Violations

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

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

If one of the above findings is made, an alternate approach to penalty calculation for multiple day violations may be used. In these cases, the liability shall not be less than an amount that is calculated based on an assessment of the initial Total Base Liability Amount for the first day of the violation, plus an assessment for each five day period of violation until the 30th day, plus an assessment for each thirty (30) days of violation. For example, a violation lasting sixty-two (62) days would accrue a total of 8 day's worth of violations, based on a per day assessment for day 1, 5, 10, 15, 20, 25, 30, and 60. Similarly, a violation lasting ninety-nine (99) days would accrue a total of 9 day's worth of violations, based on a per day assessment for day 1, 5, 10, 15, 20, 25, 30, 60, and 90.

STEP 5 – Determination of Total Base Liability Amount

The Total Base Liability Amount will be determined by adding the amounts above for each violation, though this may be adjusted for multiple day violations as noted above.

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Depending on the statute controlling the liability assessment for a violation, the liability can be assessed as either a per day penalty, a per gallon penalty, or both.

STEP 6 – Economic Benefit

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

- a. Determine those actions required to comply with a permit or order of the Water Boards, an enforcement order, or an approved facility plan, or that were necessary in the exercise of reasonable care, to prevent a violation of the Water Code. Needed actions may have been such things as capital improvements to the discharger's treatment system, implementation of adequate BMPs, or the introduction of procedures to improve management of the treatment system.
- b. Determine when and/or how often these actions should have been taken as specified in the order or approved facility plan, or as necessary to exercise reasonable care, in order to prevent the violation.
- c. Estimate the type and cost of these actions. There are two types of costs that should be considered; delayed costs and avoided costs. Delayed costs include expenditures that should have been made sooner (e.g., for capital improvements such as plant upgrades and collection system improvements, training, development of procedures and practices) but that the discharger is still obligated to perform. Avoided costs include expenditures for equipment or services that the discharger should have incurred to avoid the incident of noncompliance, but that are no longer required. Avoided costs also include ongoing costs such as needed additional staffing from the time determined under step "b" to the present, treatment or disposal costs for waste that cannot be cleaned up, and the cost of effective erosion control measures that were not implemented as required.
- d. Calculate the present value of the economic benefit. The economic benefit is equal to the present value of the avoided costs plus the "interest" on delayed costs. This calculation reflects the fact that the discharger has had the use of the money that should have been used to avoid the instance of noncompliance. This calculation should be done using the USEPA's BEN³

³ USEPA developed the BEN model to calculate the economic benefit a violator derives from delaying and/or avoiding compliance with environmental statutes. Funds not spent on environmental compliance are available for other profit-making activities or, alternatively, a defendant avoids the costs associated with obtaining additional funds for environmental compliance. BEN calculates the economic benefits gained from delaying and avoiding required
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computer program (the most recent version is accessible at <http://www.waterboards.ca.gov/plnspols/docs/wqplans/benmanual.pdf>) unless the Water Board determines, or the discharger demonstrates to the satisfaction of the Water Board, that, based on case-specific factors, an alternate method is more appropriate for a particular situation. However, in more complex cases, such as where the economic benefit may include revenues from continuing production when equipment used to treat discharges should have been shut down for repair or replacement, the total economic benefit should be determined by experts available from the Office of Research Planning and Performance or outside experts retained by the enforcement staff.

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

The Water Boards should not adjust the economic benefit for expenditures by the discharger to abate the effects of the unauthorized conduct or discharge, or the costs to come into or return to compliance. Rather, economic benefit relates to the direct or indirect financial benefits (as opposed to costs) that accrue to the discharger as a result of the violation. The discharger's conduct relating to abatement is appropriately considered under "cleanup and cooperation" liability factor.

The Economic Benefit Amount should be compared to the adjusted Total Base Liability Amount. The adjusted Total Base Liability Amount shall be at least 10 percent higher than the Economic Benefit Amount so that liabilities are not construed as the cost of doing business and the assessed liability provides a meaningful deterrent to future violations.

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

~~If the violator has provided the Water Boards with the financial information necessary to assess its ability to pay the Total Base Liability Amount or to assess the effect of the Total Base Liability Amount on the violator's ability to continue in business, the Total Base Liability Amount may be adjusted to address the ability to pay or to continue in~~

~~environmental expenditures such as capital investments, one-time non-depreciable expenditures, and annual operation and maintenance costs.~~

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

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~~business. The extent or degree of adjustment for ability to pay or ability to stay in business shall consider whether the penalty has been adjusted upward because of a failure to cooperate or because of a prior history of noncompliance.~~

~~The ability of a discharger to pay an ACL is determined by its revenues and assets. In most cases, it is in the public interest for the discharger to continue in business and bring its operations into compliance. If there is strong evidence that an ACL would result in widespread hardship to the service population or undue hardship to the discharger, the amount of the assessment may be reduced on the grounds of ability to pay. For a violation addressed pursuant to California Water Code section 13385, the adjustment for ability to pay can not reduce the liability to less than the economic benefit amount.~~

~~The Water Boards may also consider increasing an ACL to assure that the enforcement action would have a similar deterrent effect for a business or public agency that has a greater ability to pay and to help ensure that the discharger does not view the liability amount as simply a "cost of doing business." Normally, an ACL assessment should not seriously jeopardize the discharger's ability to continue in business or operation. The Water Board must have information in the record about a discharger's ability to pay the proposed liability.~~

~~If staff anticipates that the discharger's ability to pay or ability to continue in business will be a contested issue in the proceeding, staff should conduct a simple preliminary asset search prior to issuing the ACL complaint. Staff should submit a summary of the results (typically as a finding in the Complaint or as part of staff's initial transmittal of evidence to the discharger), in order to put some evidence about these factors into the record for the proceeding and to give the discharger an opportunity to submit additional financial evidence if it chooses. If staff does not put any financial evidence into the record initially and the discharger later contests the issue, staff may then either choose to rebut any financial evidence submitted by the discharger, or submit some financial evidence and provide an opportunity for the discharger to submit its own rebuttal evidence. In some cases, this may necessitate a continuance of the proceeding to provide the discharger with a reasonable opportunity to rebut the staff's evidence. As a general practice, in order to maintain the transparency and legitimacy of the Water Boards' enforcement programs, any financial evidence that the discharger chooses to submit in an enforcement proceeding will generally be treated as a public record.~~

STEP 7 – Other Factors As Justice May Require

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

- a. The discharger has provided, or Water Board staff has identified, other pertinent information not previously considered that indicates a higher or lower amount is justified.
- b. A consideration of issues of environmental justice indicates that the amount would have a disproportionate impact on a particular disadvantaged group.

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

In particularly egregious cases, the Water Boards may also consider increasing an ACL to assure that the enforcement action is rigorous enough to have a reasonable deterrent effect on the discharger or the regulated community at large. The degree of upward adjustment is limited by two primary factors: (1) the maximum penalty that is allowed under the code, and (2) the policy that an ACL assessment should not jeopardize the discharger's ability to continue in business or operation. The Water Board must have information in the record documenting the need and rationale for adjustment of an ACL on this basis.

Costs of Investigation and Enforcement Adjustment

The costs of investigation and enforcement are "other factors as justice may require", and should be added to the liability amount. These costs may include the cost of investigating the violation, preparing the enforcement action, participating in settlement negotiations, and putting on a hearing, including any expert witness expenses. Such costs are the total costs incurred by the Water Boards enforcement or prosecution staff, including legal costs, that are reasonably attributable to the enforcement action. Costs include the total financial impact on the staff of the Water Board, not just wages, and should include benefits and other indirect overhead costs. The ability to include such costs as a component of the ACL is limited by the maximum penalty that is allowed under the code.

STEP 8 - Determine Adjusted Total Base Liability Amount

The Adjusted Total Base Liability is the amount of the ACL after making any upward or downward adjustments to the Total Base Liability relating to economic benefit or other factors as justice may require.

STEP 9 - Ability to Pay and Ability to Continue in Business

If the violator has provided the Water Boards with the financial information necessary to assess its ability to pay the Adjusted Total Base Liability Amount or to assess the effect of the Adjusted Total Base Liability Amount on the violator's ability to continue in business, the Adjusted Total Base Liability Amount may be further adjusted to address the ability to pay or to continue in business. The extent or degree of adjustment for ability to pay or ability to stay in business shall consider whether the penalty has already been adjusted upward because of a failure to cooperate or because of a prior history of noncompliance.

The ability of a discharger to pay an ACL is determined by its revenues and assets. In most cases, it is in the public interest for the discharger to continue in business and bring its operations into compliance. If there is strong evidence that an ACL would result in widespread hardship to the service population or undue hardship to the discharger, the amount of the assessment may be reduced on the grounds of ability to pay. For a violation addressed pursuant to California Water Code section 13385, the adjustment for ability to pay can not reduce the liability to less than the economic benefit amount.

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If staff anticipates that the discharger's ability to pay or ability to continue in business will be a contested issue in the proceeding, staff should conduct a simple preliminary asset search prior to issuing the ACL complaint. Staff should submit a summary of the results (typically as a finding in the Complaint or as part of staff's initial transmittal of evidence to the discharger), in order to put some evidence about these factors into the record for the proceeding and to give the discharger an opportunity to submit additional financial evidence if it chooses. If staff does not put any financial evidence into the record initially and the discharger later contests the issue, staff may then either choose to rebut any financial evidence submitted by the discharger, or submit some financial evidence and provide an opportunity for the discharger to submit its own rebuttal evidence. In some cases, this may necessitate a continuance of the proceeding to provide the discharger with a reasonable opportunity to rebut the staff's evidence. As a general practice, in order to maintain the transparency and legitimacy of the Water Boards' enforcement programs, any financial evidence that the discharger chooses to submit in an enforcement proceeding will generally be treated as a public record, subject to the provisions of the California Public Records Act relating to non-disclosure of confidential business information.

STEP 8—Economic Benefit

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

- ~~a. Determine those actions required to comply with a permit or order of the Water Boards, an enforcement order, or an approved facility plan, or that were necessary in the exercise of reasonable care, to prevent a violation of the Water Code. Needed actions may have been such things as capital improvements to the discharger's treatment system, implementation of adequate BMPs, or the introduction of procedures to improve management of the treatment system.~~
- ~~b. Determine when and/or how often these actions should have been taken as specified in the order or approved facility plan, or as necessary to exercise reasonable care, in order to prevent the violation.~~
- ~~c. Estimate the type and cost of these actions. There are two types of costs that should be considered; delayed costs and avoided costs. Delayed costs include expenditures that should have been made sooner (e.g., for capital improvements such as plant upgrades and collection system improvements, training, development of procedures and practices) but that the discharger is still obligated to perform. Avoided costs include expenditures for equipment or services that the discharger should have incurred to avoid the incident of noncompliance, but that are no longer required. Avoided costs also include ongoing costs such as needed additional staffing from the time determined under step "b" to the present, treatment or disposal costs for waste that~~

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cannot be cleaned up, and the cost of effective erosion control measures that were not implemented as required.

d. Calculate the present value of the economic benefit. The economic benefit is equal to the present value of the avoided costs plus the "interest" on delayed costs. This calculation reflects the fact that the discharger has had the use of the money that should have been used to avoid the instance of noncompliance. This calculation should be done using the USEPA's BEN⁴ computer program (the most recent version is accessible at <http://www.waterboards.ca.gov/plnspols/docs/wgplans/benmanual.pdf>) unless the Water Board determines, or the discharger demonstrates to the satisfaction of the Water Board, that, based on case-specific factors, an alternate method is more appropriate for a particular situation. However, in more complex cases, such as where the economic benefit may include revenues from continuing production when equipment used to treat discharges should have been shut down for repair or replacement, the total economic benefit should be determined by experts available from the Office of Research Planning and Performance or outside experts retained by the enforcement staff.

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

The Water Boards should not adjust the economic benefit for expenditures by the discharger to abate the effects of the unauthorized conduct or discharge, or the costs to come into or return to compliance. In fact, the costs of abatement may be a factor that demonstrates the economic extent of the harm from the violation and, therefore, may be a factor in upwardly adjusting any monetary liability as a benefit from noncompliance. The discharger's conduct relating to abatement is appropriately considered under "cleanup and cooperation" liability factor.

⁴ USEPA developed the BEN model to calculate the economic benefit a violator derives from delaying and/or avoiding compliance with environmental statutes. Funds not spent on environmental compliance are available for other profit-making activities or, alternatively, a defendant avoids the costs associated with obtaining additional funds for environmental compliance. BEN calculates the economic benefits gained from delaying and avoiding required environmental expenditures such as capital investments, one-time non-depreciable expenditures, and annual operation and maintenance costs.

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

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~~The Economic Benefit Amount should be compared to the adjusted Total Base Liability Amount. The adjusted Total Base Liability Amount shall 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.~~

STEP 910 – Maximum and Minimum Liability Amounts

For all violations, the statute sets a maximum liability amount that may be assessed for each violation. For some violations, the statute also requires the assessment of a liability at no less than a specified amount. The maximum and minimum amounts for each violation must be determined for comparison to the amounts being proposed, and shall be described in any ACL complaint and in any order imposing liability. Where the amount proposed for a particular violation exceeds to statutory maximum, the amount must be reduced to that maximum. Similarly, the minimum statutory amount may require raising the amount being proposed unless there is a specific provision that allows assessment below the minimum. In such cases, the reasons for assigning a liability amount below this minimum must be documented in the resolution adopting the ACL.

STEP 1140 – Final Liability Amount

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

The administrative record must reflect how the Water Board arrived at the final liability amount. In particular, where adjustments are made to the initial amount proposed in the ACL complaint, the record should clearly reflect the Water Board's considerations, as the staff report or complaint may not reflect those considerations, or for any adjustments that are made at hearing that are different from those recommended in the ACL complaint or that further support the final liability amount in the administrative civil liability order.

B. Settlement Considerations

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

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Factors that should not affect the amount of the calculated civil liability sought from a violator in settlement include, but are not limited to, the following:

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

C. Other Administrative Civil Liability Settlement Components

In addition to a reduction of administrative civil liabilities, a settlement can result in the permanent suspension of a portion of the liability in exchange for the performance of a Supplemental Environmental Project (see the State Water Board Policy on Supplemental Environmental Projects) or an Enhanced Compliance Action (see Section IX).

As far as the scope of the settlement is involved, the settlement resolves only the claims that are made or could have been made based on the specific facts alleged in the ACL complaint. A settlement shall never include the release of any unknown claims or a waiver of rights under Civil Code section 1542.

VII. MANDATORY MINIMUM PENALTIES FOR NPDES VIOLATIONS

Mandatory penalty provisions are required by California Water Code section 13385, subdivisions (h) and (i) for specified violations of NPDES permits. For violations that are subject to mandatory minimum penalties, the Water Boards must assess an ACL for the mandatory minimum penalty or for a greater amount, calculated in accordance with the statutory formulas specified in Water Code section 13385. In cases where a larger penalty is considered appropriate based on the circumstances relating to a particular discharge, the Water Boards should proceed in accordance with the procedures provided in Section II of this Policy applicable to discretionary enforcement actions.

D R A F T

A. Types of Violations Eligible for Mandatory Minimum Penalties (MMPs)

It is anticipated that most NPDES permit violations will be enforced through the MMP Program, obviating the need to determine penalties through the step-by-step calculation methodology described in Section VI of this Policy. Where this presumption is overcome (i.e., where circumstances relating to a particular discharge are deemed to warrant a higher level of enforcement), the Water Board must develop written findings that explain the basis for such action. MMP-eligible violations fall into two broad categories generally described as "serious" and "chronic." Serious violations are those which result in exceedance of effluent limitations for Group II pollutants by 20% or more, or Group I pollutants by 40% or more. Chronic violations include: (A) other effluent limitations violations; (B) failure to file reports under Water Code section 13260; (C) filing incomplete reports under Water Code section 13260; and (D) violations of whole effluent toxicity limitations.

In the case of serious violations, MMPs of \$3,000 must be assessed for each violation. For chronic violations, MMPs of \$3,000 must be assessed if four or more violations occur in any consecutive six-month period, except that MMPs are not applicable to the first three violations.

As an alternative to assessing MMPs under subdivisions (h) and (i) of Water Code sections 13385, subdivision (l) allows the Water Boards, with the concurrence of the discharger, to direct that a portion of the penalty amount be expended on a supplemental environmental project, in accordance with Section VIII of this Policy.

MMPs may not be assessed where the discharger is able to demonstrate that the violation was caused by (A) an act of war; (B) an unanticipated, grave natural disaster or other natural phenomenon the effects of which could not have been prevented or avoided by the exercise of due care; (C) an intentional act of a third party the effects of which could not have been prevented or avoided by the exercise of due care; or (D) certain excursions occurring during startup of new or reconstructed wastewater treatment facilities.

AB. Timeframe for Issuance of Mandatory Minimum Penalties (MMPs)

The intent of these provisions of the California Water Code is to assist in bringing the State's permitted facilities into compliance with WDRs. The Water Boards should issue MMPs within eighteen months of the time that the violations qualify as mandatory minimum penalty violations—and may not issue MMPs for any violation that occurred more than 36 months ago. The Water Boards shall expedite MMP issuance if (a) the discharger qualifies as a small community with financial hardship, or (b) the total proposed mandatory penalty amount is \$30,000 or more. Where the NPDES Permit is being revoked or rescinded because the discharger will no longer be discharging under that permit, the Water Boards should ensure that all outstanding MMPs for that discharger are issued prior to termination of its permit to discharge.

CB. MMPs for Small Communities

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Except as provided below, the Water Boards do not have discretion in assessing MMPs and must initiate enforcement against all entities that accrue a violation. However, California Water Code section 13385, subdivision (k), provides an alternative to assessing MMPs against a POTW that serves a small community. Under this alternative, the Regional Water Boards may allow the POTW to spend an amount equivalent to the MMP toward a compliance project that is designed to correct the violation.

For purposes of California Water Code section 13385, subdivision (k)(2), the Regional Water Boards are hereby delegated the authority to determine whether a POTW is serving a small community, in accordance with the requirements set forth in this Policy.

A POTW serving a small community is a POTW serving a community that has a financial hardship, that depends primarily on residential fees (e.g., connection fees, monthly service fees) to fund its wastewater treatment facility (operations, maintenance, and capital improvements), and that:

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

A POTW serving incorporated areas completely within one or more rural counties is considered a POTW serving a small community. No department or agency of state government, including the University of California, the State University, and the Community Colleges, shall be considered a POTW serving a small community.

"Financial hardship" means that the community served by the POTW meets one of the following criteria:

- Median household income⁶ for the community is less than 80 percent of the California median household income;
- The community has an unemployment rate⁷ of 10 percent or greater; or

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

⁶ **Median household income**

The median income divides the income distribution into two equal groups, one having incomes above the median and the other having incomes below the median.

⁷ **Unemployed**

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

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- Twenty percent of the population is below the poverty level.⁸

"Median household income," "unemployment rate," and "poverty level" of the population served by the POTW are based on the most recent U.S. Census block group⁹ data or a local survey approved by the Regional Water Board in consultation with the State Water Board.

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

Qualified Rural Counties		
Alpine	Inyo	Nevada
Amador	Lake	Plumas
Calaveras	Lassen	Sierra
Colusa	Mariposa	Siskiyou
Del Norte	Mendocino	Tehama
Glenn	Modoc	Trinity
Humboldt	Mono	Tuolumne

Based on 2003 USDA Rural-Urban Continuum Codes for California

If a POTW believes that the U.S. Census data do not accurately represent the population served by the POTW or that additional factors such as low population density in its service area should be considered, the POTW may present an alternative justification to the Regional Water Board for designation as a "POTW serving a small community." The justification must include a map of service area boundaries, a list of properties, the number of households, the number of people actually served by the POTW, and any additional information requested by the Regional Water Board. The Regional Water Board shall consult with the State Water Board when making a determination based upon these additional, site-specific considerations.

⁸ **Poverty**

Following the Office of Management and Budget's Directive 14, the Census Bureau uses a set of income thresholds that vary by family size and composition to detect who is poor. If the total income for a family or unrelated individual falls below the relevant poverty threshold, then the family or unrelated individual is classified as being "below the poverty level."

⁹ **Block group**

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

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CD. Single Operational Upset

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

US EPA defines "single operational upset" as "an exceptional incident which causes simultaneous, unintentional, unknowing (not the result of a knowing act or omission), temporary noncompliance with more than one CWA effluent discharge pollutant parameter. Single operational upset does not include... noncompliance to the extent caused by improperly designed or inadequate treatment facilities". The US EPA Guidance further defines an "exceptional" incident as a "non-routine malfunctioning of an otherwise generally compliant facility." Single operational upsets include such things as an upset caused by a sudden violent storm, some other exceptional event, or a bursting tank. A single upset may result in violations of multiple pollutant parameters. The discharger has the burden of demonstrating that the violations were caused by a single operational upset occurred. A finding that a single operational upset has occurred is not a defense to liability, but may affect the number of violations.

ED. Defining a "Discharge Monitoring Report" in Special Circumstances Under California Water Code 13385.1

Section 13385.1(a)(1) states "for the purposes of subdivision (h) of section 13385, a 'serious violation' also means a failure to file a discharge monitoring report required pursuant to section 13383 for each complete period of 30 days following the deadline for submitting the report, if the report is designed to ensure compliance with limitations contained in waste discharge requirements that contain effluent limitations."

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

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

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

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

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

- a. That no monitoring was conducted during the relevant monitoring period;
- b. The reason(s) the required monitoring was not conducted; and
- c. If the written statement is submitted after the deadline for submitting the discharge monitoring report, the reason(s) the required discharge monitoring report was not submitted to the Regional Water Board by the requisite deadline.

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

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

2. Defining a "Discharge Monitoring Report" Where There Is No Discharge to Surface Waters

Some waste discharge requirements or associated monitoring and reporting programs for episodic or periodic discharges require the submission of either a discharge

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monitoring report, if there were discharges during the relevant monitoring period, or a report documenting that no discharge occurred, if there were no discharges.

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

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

- a. That there were no discharges to surface waters during the relevant monitoring period; and
- b. The reason(s) the required report was not submitted to the Regional Water Board by the deadline.

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

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

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**VIII.
COMPLIANCE PROJECTS (CPs)**

A Compliance Project (CP) is a project designed to address problems related to the violation and bring the discharger back into compliance in a timely manner. CPs shall only be considered where they are authorized by statute, and may involve a suspension of a portion of the monetary liability, assessed either through a contested enforcement action or through settlement. At the time of the development of this Policy, CPs are authorized by statute only in connection with MMPs (Wat. Code, § 13385, subd. (k).) Unless authorized by future legislation, CPs may not be considered in connection with other ACLs. Absent such statutory authorization, if the underlying problem that caused the violations addressed in the ACL has not been corrected, the appropriate manner for compelling compliance is through an enforcement order with injunctive terms such as a Cleanup and Abatement Order (CAO), Cease and Desist Order (CDO), or Time Schedule Order (TSO).

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

1. The amount of the penalty that is suspended shall not exceed the cost necessary to complete the CP;
2. The discharger must spend an amount of money on the CP that is equal to or greater than the amount of the penalty that is suspended. Grant funds may be used only for the portion of the cost of the CP that exceeds the amount of the penalty to be suspended;
3. Where implementation of the CP began prior to the assessment of an MMP, the penalty may be suspended under these conditions:
 - a. The cost of the CP yet to be expended is greater than the penalty;
 - b. The problem causing the underlying violations will be corrected by the project;
 - c. The underlying violations occurred during, or prior to the initiation of, project implementation;
 - d. The completion date of the project is specified by an enforcement order (a CDO, CAO, TSO, or ACL Order) adopted at or before the time the penalty is assessed; and
 - e. The deadline for completion of the project is within 5 years of the date of the first of the violations underlying the penalty to be suspended.
4. CPs may include, but are not limited to:
 - a. Constructing new facilities;

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- b. Upgrading or repairing existing facilities;
 - c. Conducting water quality investigations or monitoring;
 - d. Operating a cleanup system;
 - e. Adding staff;
 - f. Providing training;
 - g. Conducting studies; and
 - h. Developing operation, maintenance, or monitoring procedures.
5. CPs shall be designed to bring the discharger back into compliance in a five-year period and to prevent future noncompliance.
 6. A CP is a project that the discharger is not otherwise obligated to perform, independent of the ACL.
 7. CPs must have clearly identified project goals, costs, milestones, and completion dates and these must be specified in an enforceable order (ACL Order, CDO, CAO, or TSO).
 8. CPs that will last longer than one year must have quarterly reporting requirements.
 9. Upon completion of a CP, the discharger must submit a final report declaring such completion and detailing fund expenditures and goals achieved.
 10. If the discharger completes the CP to the satisfaction of the Water Board by the specified date, the suspended penalty amount is permanently suspended.
 11. If the CP is not completed to the satisfaction of the Water Board on the specified date the amount suspended becomes due and payable to the State Water Pollution Cleanup and Abatement Account (CAA) or other fund or account as authorized by statute.
 12. The ACL complaint or order must clearly state that payment of the previously suspended amount does not relieve the discharger of its independent obligation to take necessary actions to achieve compliance.

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IX.

ENHANCED COMPLIANCE ACTIONS (ECAs)

Enhanced Compliance Actions (ECAs) are projects that enable a discharger to make capital or operational improvements beyond those required by law, and are separate from projects designed to merely bring a discharger into compliance. The Water Boards may approve a settlement with a discharger that includes suspension of a portion of the monetary liability for completion of an ECA. Except as specifically provided below, any such settlement is subject to the rules that apply to Supplemental Environmental Projects.

For these ECAs the Water Boards shall require the following:

1. ECAs must have clearly identified project goals, costs, milestones, and completion dates and these must be specified in the ACL order.
2. ECAs that will last longer than one year must have at least quarterly reporting requirements.
3. Upon completion of an ECA, the discharger must submit a final report declaring such completion and detailing fund expenditures and goals achieved.
3. If the discharger completes the ECA to the satisfaction of the Water Board by the specified date, the suspended amount is dismissed.
4. If the ECA is not completed to the satisfaction of the Water Board on the specified date the amount suspended becomes due and payable to the CAA or other fund or account as authorized by statute.
5. The ACL complaint or order must clearly state that payment of the previously suspended amount does not relieve the discharger of its independent obligation to take necessary actions to achieve compliance.

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

X.

DISCHARGER VIOLATION REPORTING

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

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

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**XI.
VIOLATION AND ENFORCEMENT DATA**

The Water Boards will ensure that all violations and enforcement actions are documented in the appropriate Water Board data management system. Sufficient information will be collected and maintained regarding regulated facilities and sites to allow preparation of internal and external reporting of violation and enforcement information, and development and reporting of performance measures regarding the Water Boards' enforcement activities. To ensure timely collection of this information, all violations will be entered within 10 days of discovery of the violation, and all enforcement actions will be entered within 20 days of the date of the enforcement action.

**XII.
ENFORCEMENT REPORTING**

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

**XIII.
POLICY REVIEW AND REVISION**

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

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APPENDIX A: ENFORCEMENT ACTIONS

A. Standard Language

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

B. Informal Enforcement Actions

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

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

1. Oral and Written Contacts

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

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

Oral enforcement actions and enforcement letters or emails shall not include language excusing the violation or modifying a compliance date in waste discharge requirements (WDRs) or other orders issued by the Water Boards.

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2. Notices of Violation (NOV)

The NOV letter is the most significant level of informal enforcement action and should be used only where a violation has actually occurred. An NOV must be signed by the appropriate staff and mailed to the discharger(s) by certified mail. In cases where the discharger has requested that its consultant be notified of Regional Water Board actions, the consultant should also receive a copy of the NOV. The NOV letter shall include a description of specific violation, a summary of potential enforcement options available to address noncompliance (including potential ACL assessments), and a request for a certified, written response by a specified date that either confirms the correction of the violation or identifies a date by which the violation will be corrected. The NOV can be combined with a request for technical information pursuant to California Water Code section 13267. The summary of potential enforcement options must include appropriate citations to the California Water Code and must specify that the Regional Water Board reserves the right to take any enforcement action authorized by law.

C. Formal Enforcement Actions

Formal enforcement actions are statutorily based actions to address a violation or threatened violation of water quality laws, regulations, policies, plans, or orders. The actions listed below present options available for enforcement.

1. Notices to Comply

Water Code section 13399 *et seq.* deals with statutorily defined "minor" violations. When dealing with such a "minor" violation, a Notice to Comply is the only means by which the State Water Board or Regional Water Board can commence an enforcement action. Because these "minor" violations are statutorily defined, they do not directly correlate with the classification system defined in Section II of this Policy. Typically, however, "minor" violations may be considered equivalent to Class III violations.

A violation is determined to be "minor" by the State Water Board or the Regional Water Board after considering factors defined in California Water Code section 13399, subdivisions (e) and (f), and the danger the violation poses to, or the potential that the violation presents for endangering human health, safety, welfare, or the environment.

- a. Under most circumstances the violations listed below are considered to be "minor" violations:
 - (1) Inadvertent omissions or deficiencies in recordkeeping that do not prevent a Water Board from determining whether compliance is taking place.
 - (2) Records (including WDRs) not being physically available at the time of the inspection, provided the records do exist and can be produced in a reasonable time.
 - (3) Inadvertent violations of insignificant administrative provisions that do not involve a discharge of waste or a threat thereof.

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- (4) Violations that result in an insignificant discharge of waste or a threat thereof; provided, however, that there is no significant threat to human health, safety, welfare, or the environment.
- b. A violation is not considered "minor" if it is a class I priority violation as described in Section III of this Policy or includes any of the following:
- (1) Any knowing, willful, or intentional violation of Division 7 (commencing with Section 13000) of the California Water Code.
 - (2) Any violation that enables the violator to benefit economically from noncompliance, either by realizing reduced costs or by gaining an unfair competitive advantage.
 - (3) Chronic violations or violations committed by a recalcitrant violator.
 - (4) Violations that cannot be corrected within 30 days.

2. Notices of Stormwater Noncompliance

The Stormwater Enforcement Act of 1998 (Wat. Code, § 13399.25 et seq.) requires that each Regional Water Board provide a notice of noncompliance to any stormwater dischargers who have failed to file a notice of intent to obtain coverage, a notice of non-applicability, a construction certification, or annual reports. If, after two notices, the discharger fails to file the applicable document, the Regional Water Board shall issue a complaint for administrative civil liability against the discharger.

3. Technical Reports and Investigations

California Water Code sections 13267, subdivision (b), and 13383 allow the Water Boards to conduct investigations and to require technical or monitoring reports from any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste in accordance with the conditions in the section. When requiring reports pursuant to Water Code section 13267, subdivision (b), the Water Board must ensure that the burden, including costs of the reports bears a reasonable relationship to the need for the reports and the benefits to be obtained from them. Further, the Water Board shall provide a written explanation with regard to the need for the reports and identify the evidence that supports requiring them.

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

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4. Cleanup and Abatement Orders (CAOs)

Cleanup and Abatement Orders (CAOs) are adopted pursuant to California Water Code section 13304. CAOs may be issued to any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a Regional Water Board or the State Water Board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the State and creates, or threatens to create, a condition of pollution or nuisance (discharger). The CAO requires the discharger to clean up the waste or abate the effects of the waste, or both, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.

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

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

5. Section 13300 Time Schedule Orders (TSOs)

Pursuant to California Water Code section 13300, a Regional Water Board can require the discharger to submit a time schedule that sets forth the actions the discharger will take to address actual or threatened discharges of waste in violation of requirements. TSOs that require submission of technical and monitoring reports should state that the reports are required pursuant to California Water Code section 13267.

6. Section 13308 Time Schedule Orders (13308 TSOs)

California Water Code section 13308 authorizes the Regional Water Board to issue a Section 13308 Time Schedule Order (13308 TSO) that prescribes, in advance, a civil penalty if compliance is not achieved in accordance with the time schedule. The Regional Water Board may issue a 13308 TSO if there is a threatened or continuing violation of a cleanup and abatement order, cease and desist order, or any requirement issued under California Water Code sections 13267 or 13383. The penalty must be set based on an amount reasonably necessary to achieve compliance and may not contain any amount intended to punish or redress previous violations. The 13308 TSO provides the Regional Water Boards with their primary mechanism for motivating compliance, and if necessary, assessing monetary penalties against federal facilities. Orders under this section are an important tool for regulating federal facilities.

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If the discharger fails to comply with the 13308 TSO, the discharger is subject to a complaint for Administrative Civil Liability. The State Water Board may issue a 13308 TSO if the violation or threatened violation involves requirements prescribed by a State Water Board Order.

7. Cease and Desist Orders (CDOs)

Cease and Desist Orders (CDOs) are adopted pursuant to California Water Code sections 13301 and 13303. CDOs may be issued to dischargers violating or threatening to violate WDRs or prohibitions prescribed by the Regional Water Board or the State Water Board.

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

CDOs shall contain language describing likely enforcement options available in the event of noncompliance and shall specify that the Regional Water Board reserves its right to take any further enforcement action authorized by law. Such language shall include appropriate California Water Code citations. Violations of CDOs should trigger further enforcement in the form of an ACL, 13308 TSO, or referral to the Attorney General for injunctive relief or monetary remedies.

8. Modification or Rescission of Waste Discharge Requirements (WDRs)

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

9. Administrative Civil Liabilities (ACLs)

Administrative Civil Liabilities (ACLs) are liabilities imposed by a Regional Water Board or the State Water Board. The California Water Code authorizes the imposition of an ACL for certain violations of law. The factors used to assess the appropriate penalties are addressed in Chapter VI.

In addition to those specific factors that must be considered in any ACL action, there is another factor that ought to be considered. When the underlying problem that caused the violation(s) has not been corrected, the Water Board should evaluate whether the liability proposed in the ACL complaint is sufficient to encourage necessary work by the

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discharger to address problems related to the violation. If not, the Water Board should consider other options. An ACL action may be combined with another enforcement mechanism such as a CAO, a CDO, or other order with a time schedule for obtaining compliance. The appropriate orders to bring a discharger into compliance via an enforcement action will vary with the circumstances faced by the Water Boards.

The Water Boards should not limit enforcement action to the assessment of monetary liability in situations where there is an outstanding or continuing violation of a requirement that significantly affects or threatens to affect water quality. Except as expressly provided for by law, an ACL action should not suspend penalties based on a discharger's alleged costs of coming into compliance with existing legal requirements (see Chapter VIII for a discussion of statutorily-authorized compliance projects).

D. Petitions of Enforcement Actions

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

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APPENDIX B: ENFORCEMENT REPORTING

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

A. Legislatively Mandated Enforcement Reporting

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

- Section 13225, subdivision (e) - requires each Regional Water Board to report rates of compliance for regulated facilities. In accordance with the "Implementation Plan Regarding Information Reporting Requirements for Regional Board Enforcement Outputs" (January, 2008) compliance rates will be reported in the Annual Enforcement Report.
- Section 13225, subdivision (k) - requires each Regional Water Board, in consultation with the State Water Board, to identify and post on the Internet a summary list of all enforcement actions undertaken in that regional and the disposition of each action, including any civil penalty assessed. *This list must be updated at least quarterly.*
- Section 13225, subdivision (k) and Section 13225, subdivision (e) – In accordance with the "Implementation Plan Regarding Information Reporting Requirements for Regional Board Enforcement Outputs" (January, 2008) each Regional Water Board must post the information required by these sections on its website as a single table and update it quarterly.
- Section 13323, subdivision (e) requires information related to hearing waivers and the imposition of administrative civil liability, as proposed and as finally imposed, to be posted on the Internet.
- Section 13385, subdivision (o) – requires the State Water Board to continuously report and update information on its website, but at a minimum, annually on or before January 1, regarding its enforcement activities. The required information includes all of the following:
 - A compilation of the number of violations of waste discharge requirements in the previous calendar year, including stormwater enforcement violations;
 - A record of the formal and informal compliance and enforcement actions taken for each violation, including stormwater enforcement actions; and
 - An analysis of the effectiveness of current enforcement policies, including mandatory minimum penalties.

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- Government Code Section 65962.5, subdivision (c) – requires that the State Water Board annually compile and submit to Cal/EPA a list of:
 - All underground storage tanks for which an unauthorized release report is filed pursuant to Health and Safety Code Section 25295.
 - All solid waste disposal facilities from which there is a migration of hazardous waste and for which a Regional Water Board has notified the Department of Toxic Substances Control pursuant to subdivision (e) of California Water Code section 13273.
 - All CDOs issued after January 1, 1986, pursuant to California Water Code Section 13301, and all CAOs issued after January 1, 1986, pursuant to California Water Code section, which concern the discharge of wastes that are hazardous materials.

B. Elective Enforcement Reporting

To present a more comprehensive view of the Water Boards' enforcement activities and to identify enforcement goals and priorities, the Water Boards will prepare an annual integrated water quality enforcement report that will, at a minimum, address the following subjects:

- Budgetary and staff resources available for water quality enforcement at the Water Boards, as compared with the total resources for the regulatory programs and activities that they support, and the types of enforcement actions taken with those enforcement resources during the reporting period.
- All enforcement information required by statute to be reported to the public every year.
- The effectiveness of the Water Boards' compliance and enforcement functions using metrics such as those identified in the Annual Enforcement Report (to the extent that the information is available in the Water Boards' data base system), below.

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Measure Name	Measure Description
Self-Monitoring Report Evaluation	Number of self-monitoring reports due, received, and reviewed and percentage of reports reviewed
Inspection Monitoring	Number of inspections and the percentage of facilities inspected
Compliance Rates	Percentage of facilities in compliance, based upon the number of facilities evaluated
Enforcement Response	Percentage of facilities in violation that received an enforcement action requiring compliance
Enforcement Activities	Number and type of enforcement actions
Penalties Assessed and Collected	The amount of penalties assessed and collected, SEPs approved, and injunctive relief
MMP Violations Addressed	Number of facilities with MMP violations receiving a penalty at or above the minimum penalty assessed
Recidivism	Number and percentage of facilities returning to non-compliance for the same violation(s) addressed through an enforcement action
Environmental Benefits (as a result of an enforcement action)	Estimated pounds of pollutants reduced/removed through cleanup (soil or water), and wetlands/stream/beach/creek/river miles protected/restored (acres, miles, etc.)

From FY 2007-2008 Annual Enforcement Report

http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/annual_enf_rpt_032609.pdf

- Proposed enforcement priorities for the State Water Boards for the next reporting period and staff's basis for these proposals.
- The extent of progress on enforcement priorities identified in prior Annual Enforcement Reports.
- Recommendations for improvements to the Water Boards' enforcement capabilities, including additional performance metrics, and an evaluation of efforts to address prior staff recommendations for enforcement improvements.