STATE WATER RESOURCES CONTROL BOARD

WATER QUALITY ENFORCEMENT POLICY

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CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

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TABLE OF CONTENTS

INTRODUCTION 1

I. FAIR, FIRM, AND CONSISTENT ENFORCEMENT 2

A. Standard and Enforceable Orders 2

B. Determining Compliance 3

C. Consistent Enforcement 3

D. Fair Enforcement 3

E. Progressive Enforcement 3

F. Transparency 3

G. Environmental Justice and Disadvantaged Communities 3

H. Facilities Serving Small Communities 4

II. ENFORCEMENT PRIORITIES FOR DISCRETIONARY ENFORCEMENT ACTIONS 5

A. Ranking Violations 5

B. Case Prioritization for Individual Entities 6

C. Setting Statewide and Regional Priorities 7

D. Mandatory Enforcement Actions 7

III. ENFORCEMENT ACTIONS 7

IV. STATE WATER BOARD ENFORCEMENT ACTION 8

V. COORDINATION WITH OTHER REGULATORY AGENCIES 8

A. Hazardous Waste Facilities 8

B. Oil Spills 9

C. General 9

VI. MONETARY ASSESSMENTS IN ADMINISTRATIVE CIVIL LIABILITY (ACL) ACTIONS . 9

A. Penalty Calculation Methodology 9

STEP 1 – Actual or Potential for Harm for Discharge Violations 11

STEP 2 – Assessments for Discharge Violations 13

STEP 3 – Per Day Assessments for Non-Discharge Violations 15

STEP 4 – Adjustment Factors 17

STEP 5 – Determination of Total Base Liability Amount 19

STEP 6 – Ability to Pay and Ability to Continue in Business 19

STEP 7 – Economic Benefit 20

ED_002551_00000781-00003

STEP 8 – Other Factors As Justice May Require *22*

STEP 9 – Maximum and Minimum Liability Amounts *23*

STEP 10 – Final Liability Amount *23*

B. Settlement Considerations 24

C. Other Administrative Civil Liability Settlement Components 24

VII. MANDATORY MINIMUM PENALTIES FOR NPDES VIOLATIONS 25

A. Timeframe for Issuance of MMPs 25

B. MMPs for Small Communities 25

C. Single Operational Upset 27

D. Defining a "Discharge Monitoring Report" in Special Circumstances Under California Water Code 13385.1 28

1. Defining a "Discharge Monitoring Report" Where There Is a Discharge to Waters of the United States and the Discharger Fails to Conduct Any Monitoring During the Monitoring Period *28*

2. Defining a "Discharge Monitoring Report" Where There Is No Discharge to Waters of the United States *29*

E. Defining a "Serious Violation" in Situations Where the Effluent Limitation Is Less Than or Equal to the Quantitation Limit 29

VIII. COMPLIANCE PROJECTS (CP) 30

IX. ENHANCED COMPLIANCE ACTIONS (ECA) 31

X. DISCHARGER VIOLATION REPORTING 32

XI. VIOLATION AND ENFORCEMENT DATA 32

XII. ENFORCEMENT REPORTING 32

XIII. POLICY REVIEW AND REVISION 32

APPENDIX A: ENFORCEMENT ACTIONS 1

A. Standard Language 1

B. Progressive Enforcement 1

C. Informal Enforcement Actions 1

1. Oral and Written Contacts 2

2. Notices of Violation (NOV) 2

D. Formal Enforcement Actions 2

1. Notices to Comply 2

2. Notices of Storm Water Noncompliance 3

ED_002551_00000781-00004

3. Technical Reports and Investigations 3
4. Cleanup and Abatement Orders (CAO) 4
5. Section 13300 Time Schedule Orders (TSO) 4
6. Section 13308 Time Schedule Orders (13308 TSO) 4
7. Cease and Desist Orders (CDO) 5
8. Modification or Rescission of WDRs 5
9. Administrative Civil Liabilities (ACL) 5

E. Petitions of Enforcement Actions 6

APPENDIX B: ENFORCEMENT REPORTING 1

A. Legislatively Mandated Enforcement Reporting 1

B. Elective Enforcement Reporting 2

APPENDIX C: REFERENCES 1

ED_002551_00000781-00005

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 water quality laws, regulations, policies, and plans to protect the groundwater and surface waters of the State. Timely and consistent enforcement of these laws is critical to the success of the water quality program and to ensure that the people of the State have clean water. The goal of this Water Quality Enforcement Policy (Policy) is to protect and enhance the quality of the waters of the State by defining an enforcement process that addresses water quality problems in the most fair, efficient, effective, and consistent manner. In adopting this Policy, the State Water Board intends to provide guidance that will enable Water Board staff to expend its limited resources in ways that openly address the greatest needs, deter harmful conduct, protect the public, and achieve maximum water quality benefits. Toward that end, it is the intent of the State Water Board that the Regional Water Boards' decisions be consistent with this Policy.

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

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

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

- Establishes a process for ranking enforcement priorities, while at the same time recognizing that the variety and scope of specific beneficial uses in each Region may require unique considerations when setting priorities;

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- Re-affirms the principle of progressive enforcement, which contemplates an escalating series of actions beginning with notification of violations and compliance assistance, followed by increasingly severe consequences, culminating in a complaint for civil liabilities or other formal enforcement. While progressive enforcement is the most typical approach to enforcement, it may not be an appropriate enforcement response when violations result from intentional or grossly negligent misconduct, or where the impacts to beneficial uses are above moderate or major;
- Establishes an administrative civil liability assessment methodology to create a transparent, fair, and consistent statewide approach to liability assessment;
- Recognizes the value in using 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 (MMP) 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 staff. Other agencies, including local government and the California Department of Fish and Wildlife (DFW) have the ability to enforce certain water quality provisions in state law. State law also allows members of the public to bring enforcement matters to the attention of the Water Boards and authorizes aggrieved persons to petition the State Water Board to review most actions or failures to act of the Regional Water Boards. In addition, State and federal statutes provide for public participation in the issuance of orders, policies, and water quality control plans. Finally, the federal Clean Water Act (CWA) authorizes citizens to bring suit against dischargers for certain types of CWA violations.

I. FAIR, FIRM, CONSISTENT, AND TRANSPARENT ENFORCEMENT

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

A. Standard and Enforceable Orders

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

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B. Determining Compliance

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

C. Consistent Enforcement

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

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

D. Fair Enforcement

Fair enforcement requires, at a minimum, adequate civil liabilities to ensure that no competitive economic advantage is attained through non-compliance, while recognizing that, in many cases, merely recapturing the economic benefit gained by non-compliance is insufficient to establish an appropriate level of specific and/or general deterrence and a higher penalty should be imposed.

E. Progressive Enforcement

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

F. Transparency

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

G. Environmental Justice and Disadvantaged Communities

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

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Specifically, the Water Boards shall pursue enforcement that is consistent with the goals identified in CalEPA's Intra-Agency Environmental Justice Strategy, August 2004 (https://calepa.ca.gov/files/2017/01/EnvJustice-Documents-2004yr-EnglishStrategy.pdf) as follows:

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

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

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

The Water Boards shall also prioritize and pursue enforcement in furtherance of State Water Board Resolution No. 2016-0010, adopting the Human Right to Water as a core value, and will make information about violations of the Human Right to Water available through the Water Boards' public databases. In furtherance of the Human Right to Water, the Water Boards shall prioritize the enforcement of violations that involve a discharge or threatened discharge, which results in or threatens to result in, the contamination of drinking water resources.

H. Facilities Serving Small Communities

The State Water Board has a comprehensive strategy for facilities serving small and/or disadvantaged communities that extends beyond enforcement and will revise that strategy as necessary to address the unique compliance challenges faced by these communities (see State Water Resources Control Board Resolution No. 2008-0048). Consistent with this strategy, reference in this Section H to small communities is intended to denote both small and disadvantaged small communities.

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

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

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

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

II. ENFORCEMENT PRIORITIES FOR DISCRETIONARY ENFORCEMENT ACTIONS

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

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

A. Ranking Violations

The first step in enforcement prioritization is to determine the relative significance of each violation or series of violations at a particular facility. Significance should be determined by analyzing the severity of impacts to beneficial uses, the level of disregard for regulatory program

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requirements, and deviation from applicable water quality control plan standards or permit or order conditions.

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

- Discharges causing exceedances of primary maximum contaminant levels for chemical constituents in receiving waters with a beneficial use of municipal and domestic supply (MUN);
- Unauthorized discharges of sewage, regardless of level of treatment, within 1,000 feet of a municipal water intake;
- Discharges exceeding water quality based effluent limitations for priority pollutants as defined in the California Toxics Rule by 100 percent or more;
- Discharges causing demonstrable detrimental impacts to aquatic life and aquatic-dependent wildlife (e.g., fish kill);
- Discharges violating numeric acute toxicity effluent limitations;
- Unauthorized discharges from Class II surface impoundments;
- For discharges subject to Title 27 requirements, failure to implement corrective actions in accordance with WDRs;
- Unpermitted fill of wetlands exceeding 0.5 acre in areal extent;
- Unauthorized discharges of construction materials to receiving waters with beneficial uses of COLD, WARM, and/or WILD; and,
- Discharges causing in-stream turbidity in excess of 100 nephelometric turbidity units (NTU) in inland surface waters with beneficial uses of COLD, WARM, and/or WILD, except during storm events.

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

All other violations are Class B violations.

B. Case Prioritization for Individual Entities

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

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

1. In furtherance of the Human Right to Water, violations that involve a discharge or threatened discharge, that results in or threatens to result in, the contamination of drinking water resources.
2. Significance of the entity's violation(s) as assessed in Step 1;

3. Whether the entity has avoided the cost of compliance and therefore gained a competitive economic advantage and/or economic benefit;
4. Compliance 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 noncompliance; and,
   c. Good-faith efforts to eliminate noncompliance;
5. Evidence of, or threat of, pollution or nuisance caused by violations;
6. The magnitude of impacts of the violation(s);
7. Case-by-case factors that may mitigate a violation;
8. 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);
9. Potential to abate effects of the violations;
10. Strength of evidence in the record to support the enforcement action;
11. Availability of resources for enforcement; and,
12. Whether the action is likely to encourage similarly situated members of the regulated public to voluntarily identify, and avoid or correct similar violations.

C. Setting Statewide and Regional Priorities

On a biennial basis, the State Water Board Office of Enforcement will propose statewide enforcement priorities and vet them with the Regional Water Board enforcement teams. Based on this process, some proposed statewide enforcement priorities will become statewide enforcement initiatives. These initiatives may be based on types of violations, individual regulatory programs, particular watersheds, or any other combined aspect of the regulatory framework in which an increased enforcement presence may be required on a statewide or multi-regional basis. These initiatives will be documented in an annual enforcement report and reevaluated each year.

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

D. Mandatory Enforcement Actions

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

III. ENFORCEMENT ACTIONS

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

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IV. STATE WATER BOARD ENFORCEMENT ACTION

The Regional Water Boards have primary responsibility for matters directly affecting the quality of waters within their region, including enforcement matters. The State Water Board generally acts as an administrative appellate body for enforcement proceedings, but also has oversight authority in water quality enforcement matters and may, from time to time, take enforcement action in lieu of the Regional Water Board as follows:

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

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

V. COORDINATION WITH OTHER REGULATORY AGENCIES

A. Hazardous Waste Facilities

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

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B. Oil Spills

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

C. General

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

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

A. Penalty Calculation Methodology

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

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

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

- Be assessed in a fair and consistent manner;

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- Fully eliminate any economic advantage obtained from noncompliance;[1]
- Fully eliminate any unfair competitive advantage obtained from noncompliance;
- Contain evidence-based and/or policy-based findings that provide transparency in understanding the bases for a decision;
- Bear a reasonable relationship to the gravity of the violation and the harm or potential for harm to beneficial uses or regulatory program resulting from the violation;
- Deter the specific person(s) identified in the ACL from committing further violations; and,
- Deter similarly situated person(s) in the regulated community from committing the same or similar violations.

The liability calculation process set forth in this chapter 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 use of this methodology by a Regional Water Board, the State Water Board will generally 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 ACL actions. MMPs required pursuant to California Water Code section 13385, subdivisions (h) and (i), are discussed in Chapter VII.

General Approach

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

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

Step 2. *Per Gallon and Per Day Assessments for Discharge Violations* – For discharges resulting in violations, use Table 1 and/or Table 2 to determine Per Gallon and/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 ACL amount for the discharge violations.

Step 3. *Per Day Assessments for non-Discharge Violations* – For non-discharge violations, use Table 3 to determine per day assessments. Multiply these factors by the per day amount as described below. This becomes the initial ACL amount for the non-discharge violations. Where allowed by the California Water Code, amounts for these violations should be added to amounts (if any) for discharge violations from Step 2, above.

[1] When liability is imposed under California Water Code § 13385, Water Boards are statutorily obligated to recover, at a minimum, all economic benefit to the violator as a result of the violation. Consistent with the principles of fairness expressed herein, this Policy extends the requirement to recover a minimum of all economic benefit to all discretionary ACL actions, except when decision makers make specific, evidence-based findings under Step 8, Other Factors as Justice May Require.

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Step 4. *Adjustment Factors* – Adjust the initial amounts for each violation 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. *Ability to Pay and Ability to Continue in Business* – If the Total Base Liability calculated under the methodology exceeds the discharger's ability to pay, or would impact the discharger's ability to continue in business, the decision maker may adjust the liability downward provided express findings are made to justify so doing. Decision makers need only consider ability to pay and continue in business under the California Water Code and this Policy, and are well within their discretion to decline to reduce a liability based on this factor.

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

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

Step 9. *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. *Final Liability Amount* – The final liability amount will be assessed after consideration of the above factors. The final liability amount and significant considerations regarding the liability amount must be discussed in the ACL Complaint and in any order imposing liability.

STEP 1 – Actual or Potential for Harm for Discharge Violations

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

Factor 1: The Degree of Toxicity of the Discharge

The evaluation of the degree of toxicity considers the physical, chemical, biological, and/or thermal characteristics of the discharge, waste, fill, or material involved in the violation or violations and the risk of damage the discharge could cause to the receptors or beneficial uses. A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material, as outlined below. Evaluation of the discharged material's toxicity should

account for all the characteristics of the material prior to discharge, including, but not limited to, whether it is partially treated, diluted, concentrated, and/or a mixture of different constituents. Toxicity analysis should include assessment of both lethal and sublethal effects such as effects on growth and reproduction. Factor 2 (below) is focused on impacts or the threat of impacts to beneficial uses in specific receiving waters; whereas Factor 1 is focused on the nature and characteristics, or toxicity of the material discharged in the context of potential impacts to beneficial uses more generally.

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

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

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

3 = Discharged material poses an above-moderate risk or a direct threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material exceed known risk factors or there is substantial threat to potential receptors).

4 = Discharged material poses a significant risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material far exceed risk factors and pose a significant threat to potential receptor uses).

Factor 2: Actual Harm or Potential Harm to Beneficial Uses

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

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

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

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

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

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

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

Factor 3: Susceptibility to Cleanup or Abatement

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

Final Score – "Potential for Harm"

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

STEP 2 – Assessments for Discharge Violations

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

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

Per Gallon Assessments for Discharge Violations

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

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TABLE 1 – Per Gallon Factor for Discharges

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

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

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

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

High Volume Discharges

In most cases, the Water Boards shall apply the above per gallon factor to the maximum per gallon amounts allowed under the California Water Code for the violations involved. However, recognizing that the volume of certain discharges can be very high, the Water Boards may elect to use a value between $2.00 per gallon and $10.00 per gallon with the above factor to determine the per gallon amount for discharges that are between 100,000 gallons and 2,000,000 gallons for each discharge event, whether it occurs on one or more days. For discharges in excess of 2,000,000 gallons, or for discharges of recycled water that has been treated for reuse, the Water Boards may elect to use a maximum of $1.00 per gallon with the above factor to determine the per gallon amount. These provisions are advisory and intended to provide a basis for achieving consistency and substantial justice in setting appropriate civil liabilities. Where electing to use a maximum of $1.00 per gallon or $2.00 per gallon would result in an inappropriately small civil liability based on the severity of impacts to beneficial uses, the discharger's degree of culpability, and/or other considerations, a higher amount, up to the statutory maximum, should be used. Examples of discharges that could be subject to a reduction include, but are not limited to, wet weather sewage spills, partially-treated sewage spills, discharges from irrigated agricultural operations, potable water discharges, and construction or municipal stormwater discharges.

Per Day Assessments for Discharge Violations

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

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TABLE 2 – Per Day Factor for Discharges

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

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

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

For requirements with more than one part, the Water Boards shall consider the extent of the violation in terms of the adverse impact on the effectiveness of the most significant requirement. The Water Boards shall apply the above per day factor to the maximum per day amounts allowed under statute for the violations involved. Where 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.

STEP 3 – Per Day Assessments for Non-Discharge Violations

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

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

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

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TABLE 3 – Per Day Factor for Non-Discharge Violations

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

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

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

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

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

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

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Multiply the days of violation by the Potential for Harm factor by the Deviation from Requirement to determine the initial ACL amount for non-discharge violations.

STEP 4 – Adjustment Factors

Violator's Conduct Factors

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

TABLE 4 – Violator's Conduct Factors

Factor	Adjustment
Degree of Culpability	Discharger's degree of culpability prior to the violation: Higher liabilities should result from intentional or negligent violations than for accidental, non-negligent violations. A first step is to identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation. The test for whether a discharger is negligent is what a reasonable and prudent person would have done or not done under similar circumstances. Adjustment should result in a multiplier between **0.75 and 1.5**, with a higher multiplier for intentional misconduct and gross negligence, and a lower multiplier for more simple negligence. A neutral assessment of 1.0 should be used when a discharger is determined to have acted as a reasonable and prudent person would have. A multiplier of less than 1.0 should only be used when a discharger demonstrates that it has exceeded the standard of care expected of a reasonably prudent person to prevent the violation.
History of Violations	Any prior history of violations: Where the discharger has no prior history of violations, this factor should be neutral, or 1.0. Where the discharger has prior violations within the last five years, the Water Boards should use a multiplier of **1.1**. Where the discharger has a history of similar or numerous dissimilar violations, the Water Boards should consider adopting a multiplier above 1.1.
Cleanup and Cooperation	Voluntary efforts to cleanup and/or to cooperate with regulatory authorities in returning to compliance after the violation: Adjustment should result in a multiplier between **0.75 to 1.5**, using the lower multiplier where there is exceptional cleanup and cooperation compared to what can reasonably be expected, and higher multiplier where there is not. A reasonable and prudent response to a discharge violation or timely response to a Water Board order should receive a neutral adjustment as it is assumed a reasonable amount of cooperation is the warranted baseline. Adjustments below or above 1.0 should be applied where the discharger's response to a violation or order is above and beyond, or falls below, the normally-expected response, respectively.

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

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Multiple Violations Resulting from the Same Incident

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

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

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

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

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

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

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

Multiple Day Violations

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

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

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

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

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

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

STEP 5 – Determination of Total Base Liability Amount

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

Violation A =
(Initial ACL Amount) x (Culpability) x (Violation History) x (Cleanup and Cooperation) X (# of Days)

+
Violation B

+

Violation C

=
Total Base Liability Amount

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

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

In most cases, it is in the public interest for the discharger to continue in business and bring its operations into compliance. However, the Water Boards are not required to ensure that civil liabilities are set at levels that allow violators to continue in business. Rather, the Water Code requires the Water Boards to consider this issue when imposing civil liabilities. Civil liabilities should be imposed at levels that do not allow violators to obtain a competitive economic advantage over dischargers that voluntarily incur the costs of regulatory compliance, whether or not the violator is able to continue in business after incurring the liability. A civil liability may never be imposed below the economic benefit realized by the violator for violations of Water Code section 13385. A civil liability may only be imposed below this level for violations of other provisions of the Water Code based on specific, evidence-based findings that imposing a civil liability that recovers less than the economic benefit realized by the violator would be unjust or against public policy.

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

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

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

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

STEP 7 – 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 obtaining regulatory coverage, capital improvements to the discharger's treatment system, implementation of adequate BMPs, staff training, the development of a plan, or the introduction of procedures to improve management of the facility.

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

c. Evaluate the types of actions that should have been taken to avoid the violation, and estimate the costs of these actions. There are two types of costs that should be considered; delayed costs and avoided costs. Delayed costs include expenditures that should have been made sooner (e.g., for capital improvements such as plant upgrades and collection system improvements, training, development of procedures and practices), but that the discharger implemented too late to avoid the violation and/or is still obligated to perform. Avoided costs include expenditures for equipment or services that the discharger should have incurred to avoid 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 United States Environmental Protection Agency's (U.S. EPA) computer program, BEN,[2] unless the Water Board determines, or the discharger demonstrates to the satisfaction of the Water Board, that based on case-specific factors, an alternate method is more appropriate for a particular situation.

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

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

The Economic Benefit Amount should be compared to the adjusted Total Base Liability Amount. The adjusted Total Base Liability Amount should be at least 10 percent higher than the Economic Benefit Amount so that liabilities are not construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violations. Absent express findings of exceptional circumstances and as qualified under Other Factors as Justice May Require, below, if the adjusted Total Base Liability Amount is lower than the Economic Benefit Amount plus 10 percent, the Economic Benefit Amount plus 10 percent shall be the civil liability. It would be unfair to dischargers that voluntarily incur the costs of regulatory compliance to impose a lower amount absent exceptional circumstances.

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[2] U.S. EPA developed the BEN model to calculate the economic benefit a violator derives from delaying and/or avoiding compliance with environmental statutes. Funds not spent on environmental compliance are available for other profit-making activities or, alternatively, a defendant avoids the costs associated with obtaining additional funds (e.g. cost of debt) for environmental compliance. BEN calculates the economic benefits gained from delaying and 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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STEP 8 – Other Factors As Justice May Require

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

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

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

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

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

Costs of Investigation and Enforcement Adjustment

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

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

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

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

STEP 9 – Maximum and Minimum Liability Amounts

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

STEP 10 – 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 indicate 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 evidentiary and policy considerations underlying the adjustments, as the staff report or complaint may not reflect those final considerations. A Water Board's final determination should transparently mirror the analytical route it traveled, from the consideration of evidence to specific findings about the statutory factors it is required to consider, to the final outcome.

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B. Settlement Considerations

The liabilities resulting from the above methodology are for the Water Board's use during formal administrative proceedings. Staff preliminarily uses the same methodology when issuing an ACL complaint, but calculated liabilities may be adjusted as a result of settlement negotiations with a violator. It is not the goal of the Enforcement Policy to address the full range of considerations that should be entertained as part of a settlement. It is appropriate to adjust the ACLs calculated pursuant to the methodology in consideration of hearing and/or litigation risks, including: equitable factors, mitigating circumstances, evidentiary issues, or other weaknesses in the enforcement action that the prosecution reasonably believes may adversely affect the ability to obtain the calculated liability from the administrative hearing body.[3] Ordinarily, these factors will not be fully known until after the issuance of an ACL complaint or through pre-complaint settlement negotiations with an alleged violator. These factors shall be generally identified in any settlement of an ACL that seeks approval by a Water Board or its designated representative.

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

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

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

C. Other Administrative Civil Liability Settlement Components

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

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

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

VII. MANDATORY MINIMUM PENALTIES FOR NPDES VIOLATIONS

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

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

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

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

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

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

A. Timeframe for Issuance of MMPs

The intent of these provisions of the California Water Code is to assist in bringing the State's permitted facilities into compliance with WDRs. The Water Boards should issue MMPs within eighteen months of the time that the violations qualify as MMP violations. 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.

B. MMPs for Small Communities

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.

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A POTW serving a small community is a POTW serving a community that has a financial hardship and:

1. Has a population of 10,000 or fewer people; or,
2. Lies completely within one or more rural counties.[4]

A POTW serving incorporated areas completely within one or more rural counties is 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 income[5] for the community is less than 80 percent of the California median household income;
- The community has an unemployment rate[6] of 10 percent or greater; or,
- Twenty percent of the population is below the poverty level.[7]

The median household income, unemployment rate, and poverty level of the population served by the POTW are based on the most recent United States Census (U.S. Census) block group[8] data or a local survey approved by the Regional Water Board in consultation with the State Water Board.

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

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[4] 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.

[5] **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.

[6] **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.

[7] **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."

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

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

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

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 State or 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 State or 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.

C. Single Operational Upset

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

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

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

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

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

California Water Code 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 30 days following the deadline for submitting a report, penalties may potentially accrue for an indefinite time period. Dischargers who fail to conduct their required monitoring cannot go back, recreate, and submit the data for a prior monitoring period. In such a case, an MMP for a missing report will continue to be assessed and reassessed for each 30-day period following the deadline for submission until an ACL Complaint for MMPs is issued. This Policy is designed to assist dischargers by stopping the accrual of penalties for late or missing reports under the special circumstances described below. Nevertheless, under these circumstances, the discharger has the burden of submitting the required documentation pursuant to this Policy.
The following subsections provide additional guidance on the definition of a "discharge monitoring report," for the purposes of subdivision (a) of section 13385.1 only, in situations where: (1) there was a discharge to waters of the United States, but the discharger failed to conduct any monitoring during that monitoring period, or (2) there was no discharge to waters of the United States during the relevant monitoring period.

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

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

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

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

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

Upon the request of the Regional Water Board, the discharger may be required to support the written statement with additional explanation or evidence. Requiring a discharger to state 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 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.

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

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

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

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

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

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

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

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

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

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

1. For discharges of pollutants subject to the State Water Board's "Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California," or the "California Ocean Plan," where the effluent limitation for a pollutant is lower than the applicable Minimum Level, any discharge that: (1) equals or exceeds the Minimum Level; and (2) exceeds the effluent limitation by 40 percent or more for a Group 1 pollutant, or by 20 percent or more for a Group 2 pollutant, is a serious violation for the purposes of California Water Code section 13385(h)(2).

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

VIII. COMPLIANCE PROJECTS (CP)

A Compliance Project (CP) is a project designed to address problems related to the violation and bring the discharger back into compliance in a timely manner. CPs shall only be considered where they are expressly authorized by statute. At the time of the development of this Policy, CPs are expressly authorized by statute only in connection with MMPs for small communities with a financial hardship. (Wat. Code, § 13385, subd. (k).) Unless expressly 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, all or a portion of the penalty may be suspended under these conditions:
   a. The cost of the CP yet to be expended is equal to or greater than the penalty that is suspended;
   b. The problem causing the underlying violations will be corrected by the project;
   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 assessment of the MMP;
4. CPs may include, but are not limited to:
   a. Constructing new facilities;
   b. Upgrading or repairing existing facilities;
   c. Conducting water quality investigations or monitoring;
   d. Operating a cleanup system;
   e. Adding staff;
   f. Providing training;
   g. Conducting studies; and,

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h. Developing operation, maintenance, or monitoring procedures.

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

IX. ENHANCED COMPLIANCE ACTIONS (ECA)

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 of a discretionary ACL for completion of an ECA. Except as specifically provided below, any such settlement is subject to the rules that apply to SEPs, including the 50 percent limit. Settlement agreements may contain both SEPs and ECAs, so long as the aggregate sum of the costs for these alternatives does not exceed 50 percent of the total liability.

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

1. The 50 percent limit on ECAs shall not apply to economically disadvantaged communities with a financial hardship, the criteria for which is defined in Water Code section 13385(k);
2. ECAs must have clearly identified project goals, costs, milestones, and completion dates and these must be specified in the ACL order;
3. ECAs that will last longer than one year must have at least quarterly reporting requirements;
4. Upon completion of an ECA, the discharger must submit a final report declaring such completion and detailing fund expenditures and goals achieved;
5. If the discharger completes the ECA to the satisfaction of the Water Board by the specified date, the suspended amount is dismissed and no longer payable;
6. If the ECA is not completed to the satisfaction of the Water Board on the specified date, the amount suspended becomes due and payable to the CAA, or other fund or account as authorized by statute. For economically disadvantaged communities with financial hardship, the Executive Officer may extend specified deadline dates in writing upon a showing of good cause; and,

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