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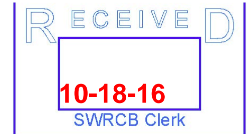
File No. 37370.40.4A

**Public Comment
Water Quality Enforcement Policy
Deadline: 10/18/16 12:00 noon**



State Water Resources Control Board
Attn: Jeanine Townsend, Clerk to the Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Comments on Proposed Changes to Water Quality Enforcement Policy

The Sanitation Districts of Los Angeles County (Sanitation Districts) appreciate the opportunity to provide comments to the State Water Resources Control Board (State Board) on the proposed revisions to the Water Quality Enforcement Policy (Policy). The Sanitation Districts provide wastewater and solid waste management services to approximately 5.6 million people in 78 cities and unincorporated areas of Los Angeles County, and are authorized to manage stormwater and urban runoff in support of local jurisdictions' compliance with Municipal Separate Storm Sewer System (MS4) NPDES permits. The Sanitation Districts are comprised of 24 individual special districts that, altogether, own and operate eleven wastewater treatment facilities with a combined capacity of approximately 625 million gallons per day (MGD), approximately 1,400 miles of regional sewers, 48 pump stations, two operating landfills, several materials recovery facilities/transfer stations, and a biosolids co-composting facility, all of which hold water quality permits. As such, revisions to water quality enforcement regulations have the potential to impact our agency.

The Sanitation Districts support the stated goals of the Policy, which are to protect and enhance the quality of the waters of the State by creating an enforcement system that addresses water quality problems in the most fair, efficient, effective, and consistent manner; to establish a process for ranking enforcement priorities based primarily on the impact to the beneficial uses or culpability of the discharger; and to establish a fair and consistent approach to the administrative civil liability assessment process. However, the proposed revisions raise serious concerns for Publicly Owned Treatment Works (POTWs), municipalities, and ratepayers, as many of the revisions appear as though they are intended to target POTWs for a greater level of enforcement activity and higher penalties (e.g., the per gallon assessment, disallowance of considerations of ability to pay and hardship to service populations, deletion of existing language on the intent for per day assessment of all effluent violations, lack of appropriate consideration of dischargers' past behavior, inappropriate classification of certain effluent violations, and the implementation of consistency and fairness principles in penalty calculations). Detailed comments on these issues and proposed changes are discussed in Attachment A.

As currently written, rather than increase transparency and consistency as described in the Initial Statement of Reasons, the proposed revisions would reduce consistency and fairness and in many cases will lead to unjustified fines that negatively impact ratepayers and result in fewer settlements of

administrative civil liability, more appeals, and increased litigation. Given the nature of the essential public service that POTWs provide to the communities they serve, we also believe that appropriate consideration should be given to POTWs, particularly in the assessment of economic benefit, since they do not derive any of the potential profit from or benefits of non-compliance that a private entity may enjoy. Furthermore, we believe that the policy should not disproportionately penalize recycled water discharges by using the same penalty assessment framework that is used for unpermitted discharges or spills of sewage, partially treated effluent, or other wastes. The Sanitation Districts also concur with the comments submitted to you on October 18, 2016 by the California Association of Sanitation Agencies (CASA). The Sanitation Districts believe that the proposed changes recommended herein will allow the policy to be more closely aligned with the State Board's stated goals.

If you have any additional questions or would like additional information on the issues identified above, please do not hesitate to contact the undersigned at (562) 908-4288, extension 2801 or aheil@lacsd.org.

Very truly yours,

Ann T. Heil
Section Head
Reuse and Compliance Section

ATH:GG:nm

cc: CJ Croyts-Schooley - SWRCB

ATTACHMENT A

(Note: References to page numbers refer to the page numbers of the Redline/Strikeout version of the Enforcement Policy dated July 2016).

Consistent Enforcement and Fairness in Penalty Calculation

On page 3, under "Consistent Enforcement", the Policy states: "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." On page 12, under "Penalty Calculation Methodology", the policy states: "Fairness does not require the Water Boards to compare an adopted or proposed penalty to other actions."

Comments:

Consistency and fairness cannot be attained without ensuring that similar infractions incur comparable penalties. The Sanitation Districts understand that requiring such comparisons may be onerous for State or Regional Board (collectively, "Water Board") staff. However, even if Water Board staff is not required to initiate fairness comparisons for actions and penalties, the policy should make it clear that, at a minimum, Water Board staff should be required to review and consider comparative penalty information, if such information is provided to the Water Board by the discharger or other parties. To ensure consistency across the State, penalties assessed for similar infractions under similar circumstances within the State should be considered by the Water Board staff. If such information is submitted, Water Board staff should evaluate the submitted information and provide a written response with the Water Board's determination and justification as to whether an adjustment is warranted or not.

As noted on page 29, under "STEP 8 – Other Factors As Justice May Require, Step 8.c", the Policy already includes a provision for Water Board consideration of liability assessments for similar conduct made in the recent past using the same enforcement policy, once pertinent information not previously considered is provided to the Water Board by dischargers. Specifically, under Step 8 it is stated: "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." Therefore, the Sanitation Districts strongly recommend that Water Board staff be required to consider and evaluate comparative information that is submitted to them, and provide a written response justifying any subsequent adjustment or denial of adjustment.

Recommended Changes:

Add additional language to the end of Section C on page 3 that reads, "However, the Water Boards should consider penalties for similar violations under similar circumstances, particularly those within the same Region, when proposing penalties and taking enforcement action. Where comparative penalty information is provided to the Water Boards by the discharger, the Water Board shall consider this information when proposing penalties and taking enforcement action." Add additional language on page 12 following the sentence, "Fairness does not require the Water Boards to compare an adopted or proposed penalty to other actions," stating, "However, the Water Boards should consider penalties for similar violations under similar circumstances, particularly those within the same Region, when proposing penalties and taking enforcement action. Where comparative penalty information is provided to the Water Boards by the discharger, the Water Board shall consider this information when proposing penalties and taking enforcement action. A written response justifying any subsequent adjustment or denial of adjustment shall be provided."

<u>Per Day Assessments for Discharge Violations</u>

On page 19, the following statement has been deleted from the proposed Policy: "Generally, it is intended that effluent limit violations be addressed on a per day basis."

<u>Comments:</u>

The phrase "Generally, it is intended that effluent limit violations be addressed on a per day basis" has been deleted on page 19, and a similar but notably different statement has been inserted on page 18: "Generally, NPDES permit effluent limit violations should be addressed on a per day basis only". The combined effect of both changes would have the effect of indicating that violations should be assessed on a per day basis only for NPDES effluent violations, while non-NPDES effluent violations should be assess on a per gallon basis instead.

The proposed deletion of the general intent to address all effluent limit violations on a per day basis on page 19 represents a significant change in the Policy. Per gallon assessment of penalties should not be applied to POTW effluent limit violations, whether they are NPDES discharges or not, or violations related to recycled water. A per gallon assessment makes sense as a starting point for calculating an ACL amount for highly toxic discharges, such as spills of oil or hazardous waste. However, for permitted discharges of fully treated water where dozens of effluent limitations have to be met and only a single parameter is exceeded, a per-gallon assessment is not appropriate. The per-gallon approach would generate absurdly high penalties for exceedances that may have no environmental impact and create a skewed level of liability that is not reflective of the nature of the violation.

<u>Recommended Change:</u>

Reinstate the original language on page 19, "Generally it is intended that effluent limit violations be addressed on a per day basis," and strike the phrase "NPDES permit" in the following sentences on page 18: "Generally, ~~NPDES permit~~ effluent violations should be addressed on a per day basis only. However, where deemed appropriate, some ~~NPDES permit~~ effluent limit violations…."

<u>Ability to Pay and Ability to Continue in Business</u>

On page 25, the proposed revisions to the Policy include the following: "The ability of a discharger to pay an ACL is determined by its income (revenues minus expenses) and net worth (assets minus liabilities)."

<u>Comments:</u>

This revision states that the ability of a discharger to pay an ACL will be determined by its income (revenues minus expenses) and net worth (assets minus liabilities), without allowing for any differentiation between private business and public agencies. The indices income and net worth are not the appropriate indicators of ability to pay for public agencies. Public agencies inherently do not have income because rates are set such that revenue is equal to expenses, including maintenance of appropriate reserves. Similarly, net worth is not an appropriate consideration, because assets consist of publicly owned facilities along with appropriate reserves that are typically set aside for specific purposes (cash flow, emergencies, capital improvements, etc.) For a public agency, the ability to pay should be based on factors such as current service rates and mean household income.

<u>Recommended Change:</u>

Add the phrase "private sector" to the last sentence of first paragraph of Step 6 on page 25 so that it reads, "The ability of a <u>private sector</u> discharger to pay an ACL is determined by its income (revenues minus expenses) and net worth (assets minus liabilities)."

On page 26, the proposed revisions to the Policy include the following changes: "A civil liability may only be imposed below this level for violations of other provisions of the Water Code based on specific, evidence~~ that an ACL~~-based findings that imposing a civil liability that recovers less than the economic benefit realized by the violator would ~~result in widespread hardship to the service population or undue hardship to the discharger, the amount of the assessment may be reduced on the grounds of~~ be unjust or against public policy."

Comments:
This revision has eliminated the case of hardship to the service population, and limits the consideration for any potential reduction of civil liabilities only to cases where the assessments are deemed to be "unjust" or "against public policy".

The proposed revisions allow consideration of hardship to the service population only for disadvantaged and small communities but the same opportunity to invoke similar considerations for rate payers is not extended to POTWs in communities that may not meet the existing definitions of "small" or "disadvantaged". Elimination of consideration of hardship to the service population appears to be a change that is specifically adverse to POTWs as it fails to recognize that, unlike private for-profit industry, wastewater infrastructure represents a major public investment and POTWs provide an essential public service to the communities they serve. Therefore, financial penalties imposed on POTWs can have accompanying economic effects upon citizens and municipalities. Potential adverse economic effects on communities from enforcement actions should be evaluated as a factor in the assessment of penalties on an equal basis as the ability of private entities to continue in business, and the existing enforcement regulation language regarding these considerations should not be stricken out. High penalties imposed on POTWs without consideration of hardship to the service population are likely to result in serious affordability issues impacting communities for decades to come.

Recommended Change:
Reinstate the deleted language in the second paragraph of Step 6 on page 26 so that it reads, "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 specific economic benefit realized by the violator would result in widespread hardship to the service population or undue hardship to the discharger, or would be unjust or against public policy."

Class I and II violations

The proposed revisions have merged the previous Class II and III into Class II violations, and include a new description of exceedances that constitute Class I violations (page 6). The Policy states, "Class I priority violations are those violations that pose an immediate and substantial threat to water quality and/or that have the potential to individually or cumulatively cause significant detrimental impacts to human health or the environment."

The proposed revisions to the Class I violations include several types of exceedances that are problematic, will result in overly punitive penalties, and could divert enforcement resources away from more important violations that require vigilance and enforcement action. The following exceedances should be removed from the Class I designation or significantly modified:

Class I violations are proposed to include "discharges causing or contributing to exceedances of primary maximum contaminant levels in receiving waters with a beneficial use of municipal and domestic supply (MUN)."

Comments:
Under the proposed revisions to the Policy, any discharge that "contributes" to or "causes" a Maximum Contaminant Level (MCL) exceedance is proposed as a Class I violation, regardless of actual impact. This revision is problematic. Regional Boards have incorporated State Board Resolution 88-63 into their Basin Plans, applying the MUN beneficial use to virtually all waters in California, with enumerated exceptions. The State Board has opined that those exceptions can only be applied via the Use Attainability Analysis de-designation process. Therefore, many water bodies that are considered "drinking water supplies" for purposes of water quality regulation in California are not, in fact, used for drinking water. Consequently, exceedance of a permit limit for a constituent that has an MCL may have no actual impact to drinking water supplies, even though a brief or geographically limited receiving water exceedance occurs.

Recommended Change:
Delete this criterion or change it to read, "Discharges causing or contributing to exceedances of primary maximum contaminant levels within 1,000 feet of a municipal water intake."

Class I violations are proposed to include "discharges exceeding water quality based effluent limitations for priority pollutants as defined in the California Toxics Rule by 100 percent or more."

Comments:
Priority pollutants as defined in the California Toxics Rule (CTR) include chronic criteria for many pollutants and single or intermittent pollutant exceedances may not pose an immediate and substantial threat. The impacts of carcinogenic pollutants to human health are based on a 10^{-6} (or 0.00001) cancer risk threshold, translating into a 2 x 10^{-6} (or 0.00002) risk level for a one hundred percent exceedance. This low level of increase does not justify classification of these exceedances in the same category as exceedances that pose an immediate threat or have otherwise serious and demonstrable detrimental impacts.

Furthermore, CTR limits for many pollutants are very low and in many cases close to the limits of analytical detection, and low-level resolution analytical results may not be reliable indicators of actual threats to water quality. Therefore, although some short term, sporadic exceedances of CTR limits by 100% may potentially occur, such exceedances may be attributable to sampling and laboratory issues and should not be considered to be Class I violations

Recommended Change:
Delete this criterion from the examples of Class I violations, or at minimum change it to only include CTR limits that are violated by a factor of 10 or that exhibit an ongoing pattern of exceedances.

Class I violations are proposed to include "discharges violating acute toxicity effluent limitations."

Comments:
Effluent toxicity is a characteristic, not a constituent of effluent discharge, and therefore toxicity exceedances are very dissimilar in their nature, causes, and mitigation measures than the other types of exceedances that are currently proposed as Class I violations. Exceedances of a single test acute effluent toxicity limitation not also demonstrating an associated receiving water impact should not be considered a Class I violation. Acute toxicity is regulated using a variety of statistical endpoints and some of the statistical endpoints are more prone to inaccuracies and false positive test results than others. For example, the LC50 point estimate statistical endpoint is generally considered to demonstrate fairly low levels of inaccuracy and false positive error while the false positive error rate of the hypothesis testing analyses such as the No-Observed-Effect-Concentration (NOEC) and Test of Significant Toxicity (TST) has been estimated by EPA to be at least 5%. Therefore, a single exceedance of an effluent toxicity limitation, causing no known harm, should not be considered a violation requiring formal enforcement action with a

civil penalty. Additionally, discharges resulting in biological impacts to receiving waters are already addressed by the fourth bullet point ("discharges causing or contributing to demonstrable detrimental impacts to aquatic life and aquatic-dependent wildlife"). The appropriate response to toxicity test exceedances not associated with any observed receiving water biological impact is not to declare a violation, but to investigate the cause, starting with follow-up testing to confirm the initial result.

Recommend Change:
Delete this criterion.

Potential Harm as an Alternative to Actual Harm
Revisions allow the use of potential harm in place of actual harm.

Comments:
The revisions note that actual harm is not always quantifiable and stipulates that potential harm can be used instead (Step 1, page 14; Factor 2, page 16). While we agree that actual harm is not always quantifiable, we are concerned that the vague, undefined notion of "potential harm" as used in the Policy is going to prove problematic in many cases, as that term is theoretical and subjective, and will lead to inconsistent, and potentially unreasonable, interpretations.

The term "potential harm" as used in the Policy should, at a minimum, be grounded in potential harm that could actually occur under the relevant factual setting, and must be supported by peer-reviewed literature, or other supportable scientific basis. Further, if evidence of actual harm (or lack thereof) is available and presented to the Water Boards, the Policy should state that such evidence should be utilized in favor of more speculative "potential" harm.

Recommended Change:
The Policy should be revised to clarify that potential harm can be used only when actual harm is not quantifiable, and that any determination of potential harm be limited to that which could actually occur under the relevant factual setting and be supported by peer-reviewed literature.

Indirect Harm
The proposed revisions refer to "indirect actual harm" and "the potential to...indirectly impact beneficial uses", but do not define "indirect" harm or impacts (on page 16, under "Factor 2: Actual Harm or Potential Harm to Beneficial Uses"; also, on page 20, under "Step 3 – Per Day Assessments for Non-Discharge Violations").

Comments:
The phrases "indirect actual harm" and "indirectly impact beneficial uses" are overly broad and vague, may be misused to increase the penalty factor for an unauthorized discharge that has little to no direct threat to water quality or beneficial uses, and do not provide the intended improvements in clarity of penalty assessments. The use of poorly defined terms can result in inconsistency in enforcement outcomes, contrary to the intent of the Policy.

Recommended Change:
Delete the terms "indirect actual harm" and "indirectly impact beneficial uses."

Assessments for Discharge Violations – Discharger's Intent
On pages 18, 20, and 21, where categories for Deviation from Requirement are listed, the sentence "there is general intent by the discharger to follow the requirement" has been deleted.

Comments:
Consideration of intent, evaluated through actions and prior history of the discharger, provides incentive for dischargers to avoid deviations from requirements and to comply.

Recommended Change:
The deleted phrases concerning the discharger's intent should be reinstated.

Assessments for Discharge Violations - High Volume Discharges
The Policy states that the Water Boards have the discretion to select a value between $2.00 per gallon and $10.00 per gallon 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.

Comments:
The existing Policy states that a $2.00 per gallon rate should be applied to all sanitary sewer overflows and other types of listed spills (sewer spills, municipal stormwater, construction stormwater), regardless of volume; these types of spills tend to be higher volume but less environmentally harmful than other types of unpermitted discharges. The proposed revisions have softened the language of the policy, replacing "...should be used...", as stated in the current version of the policy, with "...the Water Boards have the discretion to select a value..." and "...may elect to use...". The proposed revisions will also disproportionally increase the penalties for stormwater and other similar discharges that can be high volume, but not necessarily above 100,000 gallons. The Sanitation Districts recommend that a maximum $2.00 per gallon rate be applied to sewer spills and stormwater. The Sanitation Districts also support a $1.00 per gallon maximum as the default value for very high volume discharges.

Regarding unauthorized discharges of recycled water, given California's water situation it is critical that the Policy not discourage water recycling. Subjecting spills of recycled water to large liabilities could create a chilling effect on reuse. Therefore, the maximum per gallon amount assessed for recycled water incidents should be significantly less than for other discharges. Furthermore, recycled water is typically of suitable quality for surface water discharge. Recognizing that appropriate maximum amounts may vary based on the level of treatment, the Sanitation Districts recommend that a per-day assessment or a maximum amount of $0.50/gallon be used, whichever is less. This approach would be consistent with the State Board's efforts to encourage widespread use of recycled water in lieu of scarce potable water sources for uses such as landscape or crop irrigation.

Recommended Change:
The maximum per gallon assessment for all sewage spills and stormwater should be $2.00 per gallon up to 2,000,000 gallons and $1.00 per gallon thereafter. The maximum per gallon assessment for recycled water spills should be $0.50 per gallon, or a per-day assessment, whichever is less.

Assessments for Discharge Violations – Violator's Conduct Factors
The Degree of Culpability factor currently ranges between 0.5 and 1.5; in the revision they range between 1 and 1.5 (page 23, Table 4 - Violator's Conduct Factors). The History of Violations factor is currently given as a minimum of 1.1 when there is a history of repeat violations; in the revision, the value is 1.0 for no violations, 1.1 for any history of prior violations, and higher than 1.1 without any upper limit restriction for a history of multiple violations.

Comments:

Degree of Culpability: The proposed revisions do not allow any reduction in the degree of culpability, even for cases of unavoidable, non-negligent, non-intentional violations, as allowed under the current policy. This is problematic for POTWs, especially when combined with the proposed deletions for consideration of the discharger's intent. A discharger's historical performance and prior history of violations should be considered as factors that may be used to infer the discharger's intent and potentially reduce the degree of culpability. The degree of culpability factor should remain in the range from 0.5 to 1.5 instead of the proposed range of 1.0 to 1.5.

History of Violations: As currently written, the proposed revision to the policy refers to "any prior history of violations" in regards to this factor, with no regard as to the type and severity of any past violation that may have occurred, or the time elapsed since the time when the past violation(s) occurred. POTWs with a long history of operation in the State are likely to have some history of past violations and, under the proposed terms, these POTWs would continue to be assessed using a higher-than-neutral factor in perpetuity. As such, a five-year limitation should be applied to considerations of past violation history.

Additionally, dischargers with no prior history of violations are not allowed any reduction of this factor to values lower than 1.0, which eliminates any possibility for reduction of liability based on good compliance history. The Sanitation Districts recommend that dischargers with no history of violations for five years be recognized for good past performance and be allowed to reduce their liability by using a factor of 0.75. Where a discharger has a history of similar or numerous dissimilar violations, a factor higher than 1.1 is proposed without any upper limit restriction; in the interest of clarity, an upper limit not to exceed a value of 1.25 for this factor should be set.

Recommended Changes:

The degree of culpability factor should remain in the range from 0.5 to 1.5 instead of the proposed range of 1.0 to 1.5. The range for the history of violations factor should be set at 0.75 to 1.25, and only a five year history of violations should be considered.

Assessments for Discharge Violations – Multiple Violations Resulting from the Same Incident

On page 24, Item c is proposed for deletion: "For situations not addressed by statute, a single base liability amount can also be assessed for multiple violations at the discretion of the Water Boards, under the following circumstances:

> **a. The facility has violated the same requirement at one or more locations within the facility;**
>
> **b. A single operational upset where violations occur on multiple days;**
>
> ~~**c. The violation continues for more than one day;**~~

Comments:

A single incident that is not an operational upset may have an impact for more than one day, as constituents that enter a POTW with the influent may require time to flow through and exit the plant and therefore may result in effluent exceedances over multiple days. Assessing such an incident as multiple violations would be overly punitive.

Recommended Change:

Reinstate "The violation continues for more than one day" as a criterion to assess multiple violations with a single base liability.

Assessments for Discharge Violations – Multiple Day Violations

On pages 25-26, the Policy lists the express findings the Water Board must make about a multiple day violation in order to reduce assessments, and provides a revised method for collapsing days of violation, i.e., for not assessing a penalty every day for violations lasting more than 30 days.

Comments:

The proposed revisions to the method for collapsing days of violation for violations lasting more than thirty days will result in a significant increase of penalties in comparison to the current policy. Examples included in the proposed revisions indicate that a hypothetical violation lasting sixty days, which would have accrued a total of eight days of violation assessment under the current policy, will be increased to thirty six days under the terms of the proposed revisions. The State Board has not provided any rationale (such as a recent increase of violations based on the State Board's CIWQS database, or other possible justification) for this increase in assessment of penalties. This increase is problematic for POTWs where correcting multiple day violations of permit requirements may often require large-scale, expensive treatment facility upgrades that can cost tens of millions of dollars, and sometimes hundreds of millions of dollars. Such violations may be due to new pollutants being present in plant influent, which POTWs have not had time to address, or may be due to treatment processes that accomplish the reduction of certain pollutants, but unexpectedly affect the concentration of other pollutants. Violations of extended duration may also be the result of regulatory re-interpretation of existing requirements. Completion of facilities can also take longer than anticipated notwithstanding good faith efforts to expedite completion, and violations can accrue after the compliance schedule period as a result (i.e., no competitive bids received, Prop 218 challenge to rate increases, SRF Fund approval delays, CEQA challenges, etc.). Ratepayers should not be required to pay the costs to comply and then be required to pay those same costs again in the form of an unnecessarily stringent and overly punitive penalty for violations that require time to mitigate.

Recommended Change:

Delete the proposed changes to the method for collapsing days of violations.

Economic Benefit

On page 28, the proposed revisions include a requirement to calculate economic benefit using EPA's BEN computer model.

Comments:

The BEN model should not be used to set a minimum penalty level (through calculation of economic benefits) for public agencies for the following reasons: 1) the calculation of any economic benefit value is subject to substantial variability, 2) in many cases, the permittee actually incurs a negative economic impact when the construction of facilities needed for compliance are delayed or commenced at a later date, 3) the premise of economic benefit rests on the assumption that a permittee did not exercise "due care" and failed to take appropriate measures at the appropriate time to prevent violations, and 4) usage of the BEN model does not consider the difference between dischargers who are public agencies and dischargers who are private entities.

The policy should include an alternative to BEN for determining economic benefit for POTWs. One potential methodology to evaluate economic benefit could be used in those cases where the Water Boards prepared an economic or cost analysis during the regulatory adoption process and that analysis examined projected compliance costs with the standard(s) being promulgated. This type of analysis could be used as a basis for comparison with what the discharger in question actually did or did not do to achieve compliance. Another approach that could be used is to compare the approach to compliance used by the public agency to industry standards to determine what, if any, economic benefit might have been gained by the municipality. Recognizing that this area requires further work and is likely to be controversial in the context of individual enforcement actions, we would welcome the opportunity to work with the State

Board and other interested stakeholders to identify additional valid means for applying and determining economic benefit.

Recommended Change:
Amend the Policy to allow alternatives to use of the BEN model for determining economic benefit for POTWs.

Assessments for Discharge Violations – STEP 8 – Other Factors As Justice May Require

On page 29, the proposed revisions to the Policy include the following: "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. 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."**

Comments:
In Section 8, Item b, the language "...or would be insufficient to provide substantial justice to a disadvantaged group" introduces a new concept to this Policy, that liability assessments may be considered as financial means for providing justice to a disadvantaged group. It is unclear what the definition of a "disadvantaged group" might be or how compensation to provide "substantial justice" might be calculated and no further clarification has been provided. Environmental justice issues are already covered by the Enforcement Policy in Section I.G, and it is not clear why this new concept is needed or how it may be interpreted in the context of this Policy. This language should be removed from the proposed revisions to the Enforcement Policy.

In Section 8, Item c, circumstances warranting an adjustment would require that a calculated amount be "entirely disproportionate to assessments for similar conduct made in the recent past using the same Enforcement Policy". If assessments for similar conduct made in the recent past using the same Enforcement Policy are found to be disproportionate, considerations of any adjustments that may be warranted should not be contingent on vague qualifying conditions such as *entirely* disproportionate. As discussed above, the principles of fairness and consistency require that disproportionate penalties for similar infractions be evaluated and adjusted as necessary. The word "entirely" should be deleted from this item.

Recommended Changes:
Delete "or would be insufficient to provide substantial justice to a disadvantaged group" from Step 8, Item b on page 29. Delete the word "entirely" from Section 8, Item c.

Notices of Violation (NOV)

In Appendix A, page 3, proposed revisions include the deletion of the requirement to provide Notices of Violation to the dischargers by certified mail.

Comments:
Notices of Violation are an item of great significance to dischargers; timely and secure receipt of these documents is critical. The proposed deletion may lead to Notices of Violation being sent by email and, since emails are addressed to specific persons and staffing is subject to change, emailed notices might not

reach the intended recipient. Certified mail to the official address of a discharger is a more secure method of delivery and allows for documentation of delivery and receipt.

Recommended Change:
Certified mail should be maintained as the required method of delivery for Notices of Violation; there is no objection to additional/supplemental notification by email.