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California Water Association

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

October 18, 2016

The Honorable Felicia Marcus, Chair
and Members of the State Water Resources Control Board
c/o Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Delivered by email: Commentletters@waterboards.ca.gov

Subject: Comment Letter – Water Quality Enforcement Policy

Dear Chair Marcus and Members of the Board:

On behalf of the California Water Association ("CWA"), I want to thank you for the opportunity to provide comments on the Proposed Amendments to the State Water Resources Control Board's Water Quality Enforcement Policy, issued on August 4, 2016 (referred to hereinafter as the "Revised Enforcement Policy").

I. INTRODUCTION

CWA is a statewide association that represents the interests of approximately 108 investor-owned water companies that are regulated by, and subject to the jurisdiction of, the California Public Utilities Commission ("CPUC"). CWA's member water companies strive to provide high quality water utility services to nearly 6 million people in communities throughout California. CWA provides a forum for sharing best management practices, promotes sound water policy by representing its members before the Legislature and regulatory agencies, and creates opportunities for educating the public on the efficient use of water resources.

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Jack Hawks, Executive Director
California Water Association
601 Van Ness Avenue, Suite 2047
San Francisco, CA 94102-6316
415.561.9650
415.561.9652 fax
415.305.4393 cell
jhawks@calwaterassn.com
www.calwaterassn.com

Melissa Dixon, Administrative Director
California Water Association
700 R Street, Suite 200
Sacramento, CA 95811
916.231.2147
916.231.2141 fax
mdixon@calwaterassn.com

CWA President
Greg Milleman
California Water Service Group
661.476.0574
gmilleman@calwater.com

CWA Vice Presidents
Lawrence Morales
East Pasadena Water Company

Keith Switzer
Golden State Water Company

Evan Jacobs
California American Company

CWA General Secretary and Treasurer
Chris Alario
Liberty Utilities
P.O. Box 7002
Downey, CA 90241-7002
562.923.0711
chris.alario@libertyutilities.com

CWA Billing Address
California Water Association
700 R Street, Suite 200
Sacramento, CA 95811

CWA Mailing and Shipping Address
California Water Association
601 Van Ness Avenue, Suite 2047
Mail Code: #E3-608
San Francisco, CA 94102-3200

CWA understands that the State Water Resources Control Board ("State Water Board") is proposing amendments to its Water Quality Enforcement Policy (the "Enforcement Policy")[1] to clarify principles that guide enforcement by the State Water Board and the Regional Water Quality Control Boards (each, a "Regional Board" and, together with the State Water Board, the "Water Boards") of the Porter-Cologne Water Quality Control Act and the federal Clean Water Act (to the extent of delegation of Clean Water Act permitting and enforcement duties by the federal government to the Water Boards). We understand that the State Water Board intends that the proposed amendments: 1) provide greater fairness and transparency to the enforcement process and penalty calculation methodology; and 2) change the case prioritization process for enforcement actions to ensure fair, consistent, and efficient application of the Enforcement Policy on a statewide basis.

CWA supports the intent of the proposed amendments to provide greater transparency, clarity, consistency, and fairness in the administration of enforcement actions initiated to address potential violations of waste discharge permits, requirements and water quality certifications, and other applicable water quality laws, regulations, policies, and plans. However, CWA feels strongly that certain changes must be made to the Revised Enforcement Policy as it is currently proposed, in order to promote the State Water Board's express goals in the context of applicable discharge permits and agricultural, industrial and municipal uses, as well as to better reflect the operating conditions and financial constraints associated with investor-owned water systems that supply water to millions of customers, including a significant number of customers within small and disadvantaged communities.

CWA's overarching issue regarding the Revised Enforcement Policy is that it focuses on traditional point source discharge violations primarily by publicly-owned treatment works (POTWs) facilities, and fails to account for the unique activities of the independently-owned "Drinking Water Systems" that make up the membership of CWA.[2] Drinking Water System discharges primarily occur in connection with activities related to the construction, operation, and maintenance of water supply infrastructure and equipment for treatment, storage, and delivery of potable water to consumers. The misplaced focus of the policy and proposed

[1] The State Water Board's Enforcement Policy was last revised on May 20, 2010.

[2] As used herein "Drinking Water System" is a system regulated by the State Water Resources Control Board Division of Drinking Water or a local county department of health (local primacy agency, or LPA), with the primary purpose of conveying, treating, storing and distributing safe drinking water to at least 15 service connections used by yearlong residents or regularly serves at least 25 year-round residents of the area served by the system. This definition is borrowed from Statewide National Pollutant Discharge Elimination System Permit for Drinking Water System Discharges to Waters of the United States, Order 2014-0194-DWQ; General Order No. CAG140001, Attachment A.

revisions creates the following three general concerns, which these comments flesh out in greater specificity in Section II of this letter below:

1. While the Revised Enforcement Policy will govern enforcement actions against Drinking Water Systems for violations of all applicable waste discharge related permits, requirements, and certifications, it appears to have been drafted with a predominant focus on point source discharge violations and POTW-related discharges. As a result, the Revised Enforcement Policy creates a substantial risk of enforcement against Drinking Water Systems for their relatively low-threat discharges, including low-threat discharges that comply with applicable permits or Waste Discharge Requirements (WDRs), including:
    a. Low-threat[3] discharges resulting from a Drinking Water System's essential operations and activities undertaken to comply with the federal Safe Drinking Water Act, the California Health and Safety Code, and the State Water Board's Division of Drinking Water permitting requirements pursuant to individual NPDES permits or the Statewide Drinking Water System NPDES General Permit (order WQ 2014-0194-DWQ; Order No. CAG 140001)(Drinking Water Permit);
    b. Storm water discharges associated with water system infrastructure maintenance or construction activities pursuant to the Construction General NPDES Permit (Order No. 2009-0009-DWQ as amended by Orders 2010-0014-DWQ and 2012-006-DWQ)(Construction General Permit);
    c. Various Statewide General NPDES Permits for application of pesticides, vector and weed control substances, *e.g.,* Orders 2011-0003-DWQ, 2011-0004-DWQ, 2011-0002-DWQ, 2013-0002-DWQ 2014-0174-DWQ, 2014-0194-DWQ (the Pesticide General Permits);
    d. Discharges of fill to Waters of the United States subject to federal Clean Water Act Section 401 Water Quality Certifications; and
    e. Possible discharges of fill to waters of the state subject, independently, to the federal Clean Water Act to Porter Cologne Waste Discharge Requirements (although the State Water Board's jurisdiction to regulate such discharges is currently being debated in the context of the State Water Board's recently proposed Procedures for Discharges of Dredged or Fill Materials to Waters of the State).

2. The Revised Enforcement Policy, including the provisions of the penalty calculator, should be modified to better incentivize Drinking Water Systems to: engage in robust clean-up and collaboration efforts; behave not only reasonably and non-negligently, but proactively; establish an excellent historical record with respect to implementation of and compliance

[3] Drinking Water System General Permit, § III.D, p. 11.

with applicable permits and WDRs, and to invest in and implement state-of-the-art discharge management practices that exceed industry practices for certain types of discharges. Recognizing Drinking Water Systems that provide essential water supply services for the general public in a manner that not only complies with, but exceeds, industry standard practices will foster investment in technologies that may, in the future, mitigate the impact of unplanned, emergency-related discharges.

3. The Revised Enforcement Policy fails to take into account that CWA's Drinking Water System members provide essential public water supply services to a wide range of consumers, including disadvantaged and small communities that do not have alternative water supplies. The Enforcement Policy should be modified to recognize the critical public services provided to these communities, not only by POTWs, but also by Drinking Water Systems. CWA suggests that modifications should include:
    a. Allowing discounts or credits in assessed penalties for supplemental environmental projects implemented by Drinking Water Systems providing essential water services;
    b. Increasing the percentage of Drinking Water System penalties that may be applied to enhanced compliance actions (ECAs); and
    c. Expanding the environmental justice provisions that protect disadvantaged communities and small communities to Drinking Water Systems and municipal separate storm sewer system operators (MS4s) that provide services to those communities.

CWA would be pleased to meet with the State Board to discuss proposed changes to the Revised Enforcement Policy's language to address these general issues, the comments and suggestions below, and other enforcement issues that are anticipated to arise due to the unique operations, activities, and discharge permits that characterize its members.

II. SPECIFIC COMMENTS AND SUGGESTIONS

A. The List of Class I Priority Violations conflicts with the current Enforcement Policy's definition for such violations and will improperly prioritize low-threat Drinking Water System discharges for enforcement.

The Revised Enforcement Policy includes a substantially broader list of Class I priority violations, i.e., violations that should be considered significant when setting enforcement action priorities.[4] CWA is concerned that the revised list of Class I priority violations, contrary to the definition of priority violation in the original Enforcement Policy,

[4] Revised Enforcement Policy, at pp. 5-6.

need not result in serious impacts on human health or the environment, but would nevertheless trigger prioritized enforcement action, notwithstanding the absence of demonstrable harm.

The currently effective Enforcement Policy specifies that Class I priority violations included only those exceedances that actually ***result in*** harm or adverse impacts to the water body, its beneficial use, aquatic life, or similar characteristics. The proposed amendments to the Enforcement Policy would change this paradigm by defining Class I priority violations as those 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."[5] The result of this change is that an exceedance that poses only a low threat to receiving waters, despite not having *any demonstrable adverse consequences on the water body*, would constitute a Class I priority violation.[6,7]

B. The Revised Enforcement Policy improperly eliminates noncompliance with applicable permits and WDRs, and eliminates causation as elements that define Class I priority violations.

Consistent with basic principles applicable when undertaking an enforcement action that will impose substantial legal penalties,[8] the current Enforcement Policy requires:

- a violation (*i.e.,* culpable conduct or at least noncompliance of discharges with applicable permits and WDRs); and

- a requirement that such violation must actually cause or "result in" an adverse impact on protected beneficial uses, aquatic life, or human health and safety to trigger prioritized enforcement and related penalty assessments.

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[5] Revised Enforcement Policy, at p. 5.
[6] *Compare*: Unauthorized discharges that pose a significant threat to water quality (2010 Enforcement Policy) *to*: Discharges violating acute toxicity effluent limitations (Revised Enforcement Policy).
[7] This is the current (2010) rule for triggering application of Mandatory Minimum Penalties, but does not under current rules trigger Class I Priority Violation status.
[8] U.S. Const. Amend. V.; *Rutherford v. State of California*, 188 Cal.App.3d 1267, 1276-89 (Cal. Ct. App. 1987) (a law "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. This principle applies not only to statutes of a penal nature but also to those prescribing a standard of conduct which is the subject of administrative regulation.") (internal citations and quotations omitted).

Under the Revised Enforcement Policy, two of the new Class I priority violations require only that a discharge must "contribute to" an exceedance of a numeric water quality standard or objective in the receiving water to warrant prioritized enforcement, regardless of whether the discharge complies with all applicable permit limitations or WDRs.[9] Two of the new Class I priority violations require a violation of a permit effluent limitation or WDR, but do not require any resulting harm to the receiving water body.[10] One of the new Class I priority violations identified in the Revised Enforcement Policy requires that any discharge of construction material, regardless of compliance with applicable permits or WDRs and regardless of its effect on receiving waters, constitutes a basis for prioritized enforcement.[11]

As a result, the Revised Enforcement Policy effectively eliminates requirements to consider culpability of conduct/compliance of discharges, as well as causation of harm in determining if enforcement action and related penalties are warranted and should be prioritized. However, and this point cannot be overemphasized, culpability and causation should be the primary factors considered in determining whether an enforcement action should proceed. Table 1 below is an illustrative comparison of two examples of Class I Priority Violations referenced in both the 2010 Enforcement Policy and the proposed Revised Enforcement Policy.[12]

Table 1
Comparison of Current and Proposed Class I Priority Violations

	Current (2010) Enforcement Policy	**(Proposed) Revised Enforcement Policy**
	Violations *that* ***present an imminent danger*** to public health.	***Discharges*** *…****contributing to*** exceedances of primary maximum contaminant levels in receiving waters with a beneficial use of municipal and domestic supply (MUN)
Class I Priority Violation	***Violations that result in*** significant lasting impacts to	***Discharges***:

[9] Revised Enforcement Policy § II.A, bullets 1 and 8, p. 6
[10] Revised Enforcement Policy § II.A, bullets 3 and 5, p. 6.
[11] Revised Enforcement Policy § II.A, bullet 9, p. 6.
[12] Revised Enforcement Policy, at pp. 6-7.

	Current (2010) Enforcement Policy	**(Proposed) Revised Enforcement Policy**
	existing beneficial uses of waters of the State. ***Unauthorized discharges that pose a significant threat*** to water quality.	• ***exceeding water quality based effluent limitations*** for priority pollutants… • ***violating*** acute toxicity effluent limitations • ***of construction material***… • that ***contribute to*** in-stream turbidity in excess of 100 …NTU…
Class I Priority Violation	**Violations *that result in*** significant harm to, or the destruction of, fish or wildlife.	**Discharges** …***contributing to*** demonstrable detrimental impacts to aquatic life and aquatic-dependent wildlife (e.g., fish kill).

As these examples demonstrate, the Revised Enforcement Policy replaces "violations" and "unauthorized discharges" with the term "discharges," meaning that the discharges may be fully compliant with applicable permit conditions and WDRs, but could still constitute priority violations. CWA strongly urges the State Water Board to modify the Revised Enforcement Policy to ensure that only discharges that violate applicable permit conditions or WDRs are subject to enforcement actions.

Further, in many cases, the Revised Enforcement Policy replaces "result in" with "contribute to," thereby effectively eliminating causation as an element required to trigger a Class I priority violation, even when applicable permits or WDRs may (and often do) expressly specify that an exceedance must *result in* actual harm to a receiving water body. Consequently, under the Revised Enforcement Policy, a discharge that, if non-compliant, but would not have an adverse impact on water quality and/or aquatic life, would now justify priority enforcement action, even in the absence of proximate causation, simply because it would contribute to an exceedance of an effluent limitation and or receiving water quality standard.

In order to address these concerns, CWA recommends modifying the Revised Enforcement Policy to incorporate the language of the current Enforcement Policy requiring

that discharges proximately cause harm, as set forth and further discussed in Sections II.A.3 and A.4, and as suggested in the text set forth in Section II.A.6 below.

C. The Class I priority violations specified in the Revised Enforcement Policy should be revised to ensure that only discharges that violate applicable permit conditions or WDRs are subject to enforcement actions.

The Revised Enforcement Policy's list of Class I priority violations includes certain Drinking Water System discharges that would be in full compliance with, and specifically permitted under, those NPDES permits and WDRs that typically regulate Drinking Water System activities. As a result, CWA would expect to see a substantial increase in unwarranted enforcement actions against Drinking Water Systems for otherwise permitted discharges.

For example, the Revised Enforcement Policy identifies discharges that may contribute to exceedances of primary maximum contaminant levels (MCLs) in receiving waters with MUN beneficial uses as Class I priority violations, regardless of the compliance of such discharges with applicable permits. Most Drinking Water System discharges pursuant to the Drinking Water System General NPDES Permit will be composed, at least in part, of water that exceeds certain MCLs. This is because the Drinking Water Systems are implementing the discharges in response to state and federal mandates to clean and purge each water utility's potable water system in order to assure water served to consumers meets MCLs and other legal requirements protecting users. Such exceedances in Drinking Water System Discharges would likely be viewed as constituting *prima facie* evidence of the discharge's "contribution" to an exceedance of MCLs in the receiving water. However, as determined by the State Water Resources Control Board in issuing the Drinking Water System General NPDES Permit, the health and safety discharges conducted thereunder result in a very low threat to receiving water quality, aquatic life, and human health and safety. In fact, the discharges are necessary to protect human health and safety. As a result, the Revised Enforcement Policy's designation of all discharges that may contribute to MCL exceedances as a trigger for priority enforcement action creates a significant risk of unwarranted enforcement against Drinking Water Systems with discharges that are compliant with applicable Drinking Water System General NPDES Permit and present negligible risk to receiving waters.

Similarly, as a second example, Drinking Water Systems are also subject to the terms and conditions of the Construction General Permit when conducting water system infrastructure construction and maintenance activities. Pursuant to the Construction General Permit, dischargers must implement Best Management Practices (BMPs) to control discharges from construction sites of construction-related materials and pollutants in storm water runoff. The BMPs implemented must comply with Best Available Technology/Best Conventional Technology (BAT/BCT) pollutant control standards. So long as BMPs are implemented and

properly maintained to assure BAT/BCT control, it is not a violation of the Construction General Permit for stormwater discharges to contain some amount of construction materials, typically in quantities that do not harm receiving water bodies taking into account background conditions during precipitation.

However, under the Revised Enforcement Policy, ***any*** discharge of construction materials, including sediment, which is the most typical construction site pollutant, to receiving waters with beneficial uses of COLD, WARM, and/or WILD would constitute a Class I priority violation. The Revised Enforcement Policy does not define or explain what is meant by "construction materials." Nor is it clear why this type of discharge is included in the list of Class I priority violations without taking into account the statewide Construction General Permit. Nevertheless, the Revised Enforcement Policy's identification of ***any*** discharge of construction materials as a trigger for priority enforcement action creates a significant risk of unwarranted enforcement against Drinking Water Systems even though their discharges are compliant with the Construction General Permit.

As a final example, under the Revised Enforcement Policy, except during storm events, discharges contributing to in-stream turbidity in excess of 100 NTU in receiving waters with beneficial uses of COLD, WARM and/or WILD would constitute Class I priority violations. The Revised Enforcement Policy provides no indication of the basis of the 100 NTU limit, or the reasons that such a limit would be strictly specified, rather than deferring to applicable permit turbidity effluent limitations/WDRs, or receiving water limitations derived from the applicable Basin Plan. That ambiguity aside, the Drinking Water System Permit specifies that only discharges that cause or contribute to an exceedance of a receiving water limitation for turbidity specified in the applicable Basin Plan (which may be much higher than 100 NTU based on background receiving water conditions) constitute a violation of the permit. Moreover, the Drinking Water System Permit specifies an ***action level*** of 100 NTU, meaning that an exceedance of the 100 NTU turbidity limit requires the Drinking Water System to take action to modify and enhance BMPs, but does not constitute a violation of the permit so long as such action is taken. Contrary to these conditions of the Drinking Water System Permit, under the Revised Enforcement Policy such compliant Drinking Water System discharges exceeding the 100 NTU turbidity limit may qualify as Class I priority violations, subjecting Drinking Water Systems to unwarranted enforcement actions.

In order to address these concerns, CWA recommends the State Water Board incorporate the draft language set forth in Section II.A.6 below into the final version of the Enforcement Policy to be adopted by the State Water Board.

D. The Class I priority violations specified in the Revised Enforcement Policy should be revised to ensure that they are consistently expected to result in serious impacts to receiving waters that pose significant risk to human health or the environment.

Class I priority violations should be reserved for those that result in serious impacts to receiving waters or pose a significant risk to human health or the environment. The Revised Enforcement Policy is too far-reaching in that it includes violations of potentially lesser impact and significance in the "Class 1" designation. For example, an exceedance of a primary maximum contaminant level (MCL) when discharging to a waterbody with a municipal and domestic supply (MUN) designation should not be a Class I priority violation. Although not provided for under federal law, under Porter Cologne there are many waterbodies with this designation that are not used as a drinking water source, either because the waterbody is believed to have the future "potential" for such use, or because the designation has not been reconsidered since its adoption in the 1970s pursuant to the triennial review process. Use of an MCL exceedance to trigger priority enforcement in such circumstances would result in discharger liability even though the discharge is benign and presents no risk to public health.

Further, the primary MCLs apply to drinking water as delivered to the customer. Compliance with MCLs is a primary driver for Drinking Water System discharges under the Drinking Water System Permit. Applying MCLs to surface waters may result in exceedances for several common constituents not only in health and safety discharges, but also in storm water runoff discharges.

For example, aluminum has an MCL of 1 mg/L, but the natural background concentration of aluminum in California soils is approximately 7 percent. Consequently, storm water runoff with an average concentration of 142 mg/L consisting of only native soil could contain 10 mg/L of aluminum. Some Basin Plans already apply the MCLs to certain surface waters, however, the identification of MCL exceedances in surface waters as a Class I priority violation is likely to increase focus on compliance with MCLs in a manner that was not intended when they were promulgated, creating a substantially higher, but unwarranted, potential for enforcement. Drinking water treatment plants are effective at controlling particulates — including aluminum — so it is unlikely an exceedance presents a risk to the public health or the environment. It should be noted that the use of primary and secondary MCLs as receiving water standards constitutes an ongoing compliance concern for the regulated community.

In addition, the selection of 100 percent as a benchmark for California Toxics Rule (CTR) priority pollutant violations is not based on risks to the environment. Priority pollutant standards were developed by evaluating toxicity to sensitive organisms and cancer risks to humans, and specifically did not account for effects of stormwater when adopted by the U.S.

Environmental Protection Agency. The impact of exceedances on aquatic organisms and human health is different for each priority pollutant, which in many cases may be a natural constituent present in background water quality conditions and therefore not amenable to control in storm water. Exceeding a CTR standard expressed as a water quality-based effluent limitation by 100 percent does not equate to, or necessarily even support, a conclusion that the adverse impact of a particular priority pollutant on the receiving water is doubled. Therefore, the Revised Enforcement Policy should be modified to direct Water Boards to consider constituent-specific impacts, circumstances surrounding the non-compliant discharge, and other pertinent factors when assessing the priority of violations of CTR based effluent limitations.

Finally, care should be taken in relying on exceedances of acute toxicity effluent limitations as the primary factor to prioritize enforcement absent any evidence of harm to receiving water bodies. Acute toxicity test results are quite susceptible to "false positives" indicating toxicity even when no actual or potential harm to aquatic life is threatened. As a result, acute toxicity monitoring results should be considered not only in comparison to water quality-based effluent limitations, but also in the context of actual information regarding effects of the exceedance on receiving waters and aquatic species before prioritizing the violation for enforcement action.

E. The Class I priority violations specified in the Revised Enforcement Policy should be revised to eliminate references to unpermitted fill of wetlands.

The proposed amendments to the Enforcement Policy would, for the first time, make the discharge of fill to more than 0.5 acres of wetlands a Class I priority violation, subject to enforcement and maximum penalties. However, neither the policy nor the recently proposed (and as of yet not adopted) permitting regulations for Discharge of Dredged and Fill Material to Waters of the State contain any jurisdictional definition of "wetlands." As a result, it is impossible for dischargers of dredged or fill material, particularly when discharges of such material are associated with constructed, but open and soft-bottomed conveyance and storage channels and reservoirs, to know with certainty when a discharge may constitute a violation.

The absence of a jurisdictional definition of "wetlands" combined with the classification of the discharge of fill to more than 0.5 acre of wetlands as a Class I priority violation, with attendant monetary penalties, sets up an unconstitutionally vague standard that fails to warn the regulated community of the conduct that would result in a violation, thus creating substantive due process issues for dischargers, including those who must perform operational and maintenance activities on conveyance and storage facilities that may result in incidental discharges of fill material. See, e.g., *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982) ("[B]ecause we assume that man is free to steer between

lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." [internal citations omitted]); *People v. Appel*, 51 Cal.App.4th 495 (1996) (citing 7 Witkin, Summary of Cal. Law, Constitutional Law, § 104, p. 157) ("A statute violates the due process clause if it is so indefinite that it does not give fair warning of the conduct that gives rise to criminal penalties.")

Moreover, without a clear legal standard governing unpermitted fills that constitute a violation of law and those that do not, individual Water Boards will be left without guidance to determine inconsistently and differently from Water Board to Water Board, whether a feature is a wetland, and thus whether a discharge is properly classified as a Class I priority violation subject to the Revised Enforcement Policy. Such inconsistency in the application of enforcement actions is contrary to the intent of the proposed amendments to provide for consistent, fair, and transparent prosecution of enforcement actions. Indeed, as acknowledged by the State Water Board in public workshops and hearings on the *Draft Procedures for Discharges of Dredged or Fill Material to Waters of the State* (June 17,2016)(Permitting Procedures), the very reason that the proposed Permitting Procedures do not have a jurisdictional definition of wetlands is because Regional Boards could not agree upon a consistent definition of wetlands, and wanted to retain autonomy to apply different standards and tests to determine when a water of the state might be a jurisdictional wetland on a "case by case basis." See also *Procedures for Discharges of Dredged of Fill Materials to Waters of the State Staff Report* § 6.2, pp 47-48.The Water Boards' position further increases the potential for inequities in enforcement, inconsistent penalties, and all of the consequences that substantive due process protections are designed to preclude. See, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, supra, at p. 497 ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.")

Finally, it remains a great concern to CWA that regulation of discharge of dredged and fill material to waters of the state, including application of the Revised Enforcement Policy to discharge of fill to wetlands, is beyond the Water Board's statutory authority. Sections 13370 through 13389 of the Water Code authorize the Water Boards to issue permits for, among other things, discharges of dredged or fill material — but only to the extent the state has an EPA-approved state permit program under the federal Clean Water Act for those discharges. See Cal. Water Code §§ 13370, 13372(b), 13376; 33 U.S.C. § 1344(g)-(j) (authorizing state administration of dredged and fill material discharges). Water Code subsection 13372(b) states:

> The provisions of Section 13376 requiring the filing of a report [under Section 13260][13] for the discharge of dredged or fill material and the provisions of this chapter relating to the issuance of dredged or fill material permits by the state board or a regional board shall be applicable only to discharges for which the state has an approved permit program, in accordance with the provisions of the Federal Water Pollution Control Act, as amended, for the discharge of dredged or fill material.

California has not applied for nor obtained authority to operate an approved permit program for dredged or fill material discharges under the federal Clean Water Act. Absent an approved permit program whereby such discharges may be lawfully regulated by the Water Boards, dischargers should not be subject to the provisions of the Revised Enforcement Policy that would classify discharge of fill material to more than 0.5 acre of wetlands as Class I priority violations. Nor should a utility be subject to the attendant monetary penalties and "black marks" on a utility's compliance history for such "violations."

Because these cited provisions of the Water Code do not currently authorize regulation of dredged or fill material discharges by the Water Boards, there is no stated legal authority for either the proposed Permitting Procedures or the application of the Revised Enforcement Policy to discharge of fill to 0.5 acre of more of wetlands. The Legislature's explicit grant of authority to regulate dredged or fill discharges in section 13376, combined with its decision to condition that authority on approval of a dredged and fill permit program under the Clean Water Act in subsection 13372(b), strongly contradicts any inference that the state already has authority independent of a federal Clean Water Act permitting program delegation to regulate dredged or fill discharges under other provisions of state law. The Legislature's intent is clear: if the state is to regulate discharges of dredged or fill material, it must do so by adopting an approved permit program under the Clean Water Act.

In light of these significant issues regarding the authority to regulate discharges of dredge and fill, and the substantial substantive due process concerns and uncertainty created for dischargers by reference to unpermitted fill of "wetlands," which are neither currently defined nor proposed to be defined as part of the Permitting Procedures, CWA recommends deleting unpermitted discharges to wetlands from the list of Class I priority violations as suggested in subsection F of this letter below.

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[13] Text added to incorporate statutory cross reference set forth in Cal. Wat. Code § 13376.

F. Recommended revisions to the list of Class I Priority Violations.

To address the issues and for the reasons discussed in the preceding Sections II.A 1-5 above, CWA recommends the following revisions to the list of Class I Priority Violations;

"Class I priority violations are those violations that pose an immediate and substantial threat to ~~water quality~~ beneficial uses and/or that have the potential to individually or cumulatively cause significant detrimental impacts to human health or the environment. Class I violations ordinarily include, but are not limited to, the following:

- *Discharges ~~causing or contributing to~~ resulting in exceedances of primary maximum contaminant levels in receiving waters that are utilized as a ~~with a beneficial use of~~ municipal or 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, and dependent on the magnitude of the exceedance and resulting impacts of the discharge on beneficial uses of receiving waters; ~~by 100 percent or more~~*
- *Discharges ~~causing or contributing to~~ resulting in significant demonstrable detrimental impacts to aquatic life and aquatic-dependent wildlife ~~(e.g., fish kill)~~;*
- *Unauthorized discharges from Class II surface impoundments;*
- *For discharges subject to Title 27 requirements, failure to implement corrective actions in accordance with WDRs; and*
- ~~*Unpermitted fill of wetlands exceeding 0.5 acre in areal extent;*~~
- ~~*Discharge of construction materials to receiving waters with beneficial uses of COLD, WARM, and/or WILD;*~~
- *Discharges ~~causing or contributing to~~ resulting in in-stream turbidity in excess of ~~100 NTU~~ the applicable Basin Plan water quality objectives in receiving waters with beneficial uses of COLD, WARM, and/or WILD, except during storm events."*

G. Additional revisions to the Ranking of Violations.

The proposed amendments would substantially modify the Enforcement Policy with respect to its Enforcement Priorities for Discretionary Enforcement Actions by omitting the example list of Class II violations and eliminating Class III violations altogether.

Class II violations are defined in the Revised Enforcement Policy in the negative; all violations that are not Class I violations are ipso facto Class II violations. CWA is concerned that without a description or list of examples, it is not clear when the Water Boards should consider classifying a discharge a Class II violation. Given the conflict between the definition of Class I violations and the overly broad range of discharges that would be captured under the Revised Enforcement Policy's current list of examples, it is an open question whether any violation could be classified as anything ***other*** than a Class I priority violation.

To address this issue, CWA encourages the State Water Board to add text describing and characterizing Class II violations so that both the regulated community and the Water Boards may better understand the intended distinction between Class I and Class II violations. CWA also believes that an exemplar list of Class II violations, similar to the Class I list, would further clarify the Enforcement Policy's intent with regard to ranking of violations and would result in the ranking being applied with greater consistently.

Finally, the currently effective Enforcement Policy defines Class III violations as violations that pose only a minor threat to water quality and have little or no known potential for causing a detrimental impact on human health and the environment. It is unclear why the Revised Enforcement Policy would eliminate this class of violations entirely, given the very real likelihood of violations that do not pose a threat to water quality, human health or the environment, as discussed above. The Class III category seems particularly useful for identifying violations that do not warrant significant enforcement effort from the standpoint of culpability or harm to human health or the environment.

Eliminating the Class III category of violations, combined with an unclear definition of Class II violations and the expansive description of Class I violations, means that the Water Boards may, for simple lack of appropriate guidance, characterize all violations as Class I priority violations even when enforcement is not warranted. The consequence of this trend would be to lose the practical benefits of a robust and useful ranking system.

H. Penalty Calculation Methodology – Total Base Liability.

As a preliminary matter, CWA finds it difficult to assess or predict the likely penalties that would be imposed under the penalty calculator in Section VI of the Revised Enforcement

Policy. It is equally difficult to discern how such penalties would compare with penalties assessed under the current Enforcement Policy. Therefore, CWA recommends that, in order to fulfill the State Water Board's goal of improved transparency, a new appendix with case studies comparing enforcement outcomes and penalties under both the current and revised versions of the Enforcement Policy so that the regulated community and other stakeholders can better understand the practical implications of the latest revisions on the enforcement actions and calculation of penalties. Furthermore, given the numerous factors and associated multipliers that any monetary penalty will involve, CWA recommends adding sample calculations to guide Water Board staff in the application of the evaluation process under the Revised Enforcement Policy.

CWA also recommends that the statement made in Section I.C of the Revised Enforcement Policy, that Water Boards are not required (or even encouraged) to compare proposed penalties assessed on dischargers pursuant to the penalty calculator set forth in Section VI, be reconsidered. Attaining "consistent and fair" exercise of prosecutorial discretion and implementation of enforcement actions typically requires some consideration of precedent and penalties assessed for similar violations (e.g., discharges involving similar culpability, volumes, quality and degree of exceedances, and impacts on receiving waters) particularly if such discharges occur under a single, statewide general permit applicable to multiple dischargers in the same industry.

While we understand that Water Boards need discretion to properly apply the penalty calculator, that discretion, and indeed the finding of whether a particular violation has afforded some economic advantage or competitive benefit on a particular discharger, requires consideration of penalties levied against similarly situated dischargers for similar violations, particularly when the dischargers are subject to the same discharge conditions and requirements. Having the ability to consider comparable scenarios promotes the State Water Board's goals of improving fairness and consistency in enforcement, without curtailing the discretion and flexibility afforded Water Boards to apply the Section VI methodology. Accordingly, CWA recommends revising the language of Revised Enforcement Policy § I.C., p. 3 as follows:

> "The Water Boards achieve consistency in enforcement by applying the penalty calculator in Section VI. The 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 specific findings about ~~why~~ the reasons that individual penalty assessments or proposed amounts differ~~,~~. Water Boards are encouraged to consider penalties assessed for similar violations (e.g., discharges involving similar culpability, volumes, quality and degree of exceedances, and impacts on receiving waters) particularly if such discharges occur under a single, statewide general permit applicable to

multiple dischargers in the same industry, when assigning penalty and adjustment factors, particularly in connection with determining whether a particular violation has afforded some economic advantage or competitive benefit on a particular discharger. "

1. Actual or potential for harm for discharge violations.

As CWA understands it, Step 1 of the Revised Enforcement Policy methodology for calculating penalties requires the Water Boards to consider the "Actual Harm or Potential for Harm" for each discharge violation. The "Actual or Potential for Harm" score is a composite score comprising scores for the following three factors: (1) degree of toxicity of the discharge; (2) actual or potential harm to beneficial uses; and (3) susceptibility to cleanup or abatement.[14] Scores may range from 0, in which the discharged material poses a negligible risk or threat to potential receptors, there is no actual harm or potential harm to beneficial uses, and the discharger cleans up 50 percent or more of the discharge within a reasonable amount of time, to 10, which denotes a significant risk, high-harm discharge where less than 50 percent of the discharge is cleaned up or abated within a reasonable time.[15]

Step 2 of the methodology for calculating penalties involves a per gallon and per day assessment for all discharges resulting in violations. The Water Boards use two tables provided in the Revised Enforcement Policy to determine the per gallon factor for discharges and the per day factor for discharges. However, these tables (Tables 1 and 2 [Per Gallon and Per Day factors for discharges]) do not include factors of 0 for discharges that did not cause "Potential for Harm," i.e., negligible threat, no harm discharges with 50 percent or more cleaned up or abated, in Step 1.[16] It is reasonable to assume, but the Revised Enforcement Policy should make explicit, that for discharges with a composite score of 0 for Potential for Harm in Step 1, a factor of 0 would apply in Step 2 for a total base liability of 0.

Such a circumstance is entirely plausible, particularly for discharges under the Drinking Water System Permit or the pesticide application General Permits, which regulate very low-threat discharges at the outset. For instance, under the Drinking Water System Permit, it is possible to have an initially non-compliant discharge of potable water for which monitoring results indicate an exceedance of chlorine at the point of discharge, which exceedance is fully neutralized through natural attenuation prior to reaching receiving water.

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[14] Revised Enforcement Policy, §VI.A., at 11-17.
[15] Revised Enforcement Policy, §VI.A at p. 12.
[16] Revised Enforcement Policy, §VI.A, at pp. 13-14.

In fact, natural attenuation of chlorine is recognized as an accepted BMP pursuant to the Drinking Water System Permit. Guidance Manual for the Disposal of Chlorinated Water, American Water Works Association Research Foundation (2001), p. 8 . Therefore, while monitoring results may indicate an initial exceedance of an effluent limitations set forth in the Sections IV.A., IV.B. and VIII. of the Drinking Water System Permit (pp. 13-16) and Section VIII (pp 17-18) such discharges should *not* be considered a permit violation or the basis for assessment of a penalty under the Revised Enforcement Policy, but instead should be exempt from penalties so long as the dischargers can demonstrate that BMPs, including natural attenuation BMPs, were properly deployed and avoided significant adverse impacts to beneficial uses of the receiving water, the environment, and potential receptors.

Similarly, many of the Pesticide General Permits mandate and rely on BMPs and a degree of attenuation between the discharge point and receiving water to avoid adverse effects on receiving waters. Accordingly, the Revised Enforcement Policy should be modified to assure exemption of discharges under those permits from enforcement and penalties so long as the dischargers can demonstrate that appropriate BMPs, including natural attenuation BMPs recognized by the permits, were properly deployed, thereby avoiding significant adverse impacts to beneficial uses of the receiving water, the environment, and potential receptors

To attain that result using the calculator, a factor of 0 must available in Step 2 for application to such discharges particularly because once potable water discharges and/or highly diffused discharges under the Pesticide General Permits (unlike oil or similar pollutants) are released to receiving waters, the discharge is not sufficiently detectable or distinguishable from the receiving water to allow for clean-up pursuant to the third factor of Step 1. Accordingly, to effectuate the intent of Drinking Water System Permit and the Pesticide General Permits, Step 2 of the Revised Enforcement Policy should be revised to expressly allow a score of 0 to apply to non-compliant discharges that dischargers can show do not cause harm to the receiving water by, for example, producing testing results that indicate the absence of chlorine or pesticide residuals in the receiving water, as well as visual monitoring records indicating no observed adverse impacts to the beneficial uses or aquatic resources of the receiving water.

CWA also recommends a modification the Revised Enforcement Policy to include a footnote or similar caveat to Factor 3 of Step 1 to clarify that, while attenuation of pollutants may not be sufficient to establish clean-up under Step 1 due to the text Revised Enforcement Policy § VI.A, Factor 3 (p. 17) [stating “natural attenuation of discharged pollutants in the environment is not considered cleanup or abatement for purposes of evaluating this factor”], deployment of, reliance on, and the effectiveness of attenuation BMPs, as authorized by applicable permits, may be considered pursuant to Step 2 when evaluating potential for harm and assessing base liability.

Consistent with the comments above, CWA suggests the following addition to the beginning of the Step 2 text of the Revised Enforcement Policy, in connection with the assessments of monetary penalties in ACL actions:

> ***Recommendation:*** *Under Step 2 of the penalty calculator, if violations are assessed: (i) under Step 1 Factor 1 as presenting negligible or minor for risk of toxicity (scores of 0 or 1); and (ii) under Step 1 Factor 2 as presenting negligible or minor (scores of 0 or 1) risk of potential to harm to beneficial uses, then such discharges shall be assigned a total base liability of 0.*
>
> *Any discharge with a total base liability of 0, regardless of classification as a violation, shall be reclassified as compliant (not in violation) for purposes of administration of the Enforcement Policy, including any record of a history of violations.*

2. The Enforcement Policy's lower penalty provisions should be expanded to include discharges with minimal impacts on water quality, including potable water.

Discharges with negligible or minor impacts on water quality (e.g., discharges that exceed turbidity action levels only), and very high-volume discharges of potable or diluted storm water should be considered for penalty assessments in lower amounts. CWA agrees with the Revised Enforcement Policy's recognition of the negligible threat posed by, and corresponding reduction in per gallon penalties for, discharges of recycled water treated for reuse, for which penalties may be limited to a maximum $1/gallon amount.[17] However, there is no similar express provision recognizing the low threat to receiving water presented by Drinking Water System discharges composed primarily of ***potable*** water in the Revised Enforcement Policy. The same potential exists for chlorine residual, the predominant pollutant of concern, to persist in both Drinking Water System and recycled water discharges. Accordingly, the Revised Enforcement Policy's cap on per gallon penalties with respect to discharges of recycled water should be extended to cap penalties for discharges of potable water, regardless of the discharge volume. CWA recommends the text revision proposed in subsection 3 below be adopted in order to address this issue.

[17] Revised Enforcement Policy, at p. 18.

3. The high-volume thresholds and corresponding per gallon penalties are not well supported and should be revised.

The Revised Enforcement Policy gives the Water Boards discretion to apply a penalty of $2 to $10/gallon for discharges that are between 100,000 and 2,000,000 gallons. Historically, the "ceiling" under the current Enforcement Policy for discharge penalties has been $2 per gallon; the Revised Enforcement Policy makes $2 the "floor" with the option to go up to $10 per gallon – the statutory maximum. Neither the proposed amendments to the Enforcement Policy nor the initial statement of reasons explains why the State Water Board is now proposing to increase the minimum per gallon penalty that may be considered, as well as an increase in the penalty range and the maximum penalty amount that may be applied such discharges. There is no information supporting the reasons that establishment of a $2 per gallon minimum and the proposed $8 per gallon increase in the maximum applicable penalty is important to attaining the State Water Board's goals of improving fairness and transparency via the proposed revisions to the Enforcement Policy. CWA respectfully requests that, at a minimum, adequate supporting information regarding the need for these significant increases in potential per gallon penalties be provided as justification for the proposed modifications.

Further, the Revised Enforcement Policy's initial statement of reasons does not include an adequate rationale for the high-volume thresholds as they are proposed to be revised in this section. There is no explanation of what, if any, data was used to determine that only volumes exceeding 2,000,000 gallons should constitute a high volume. CWA respectfully suggests that the definition of a small or large discharge volume should correspond to the size of the operation or the program being implemented.

For example, defining a set and inflexible range for identification of "large" Drinking Water System discharge volumes is too prescriptive because the actual discharge volume for any system is related primarily the size of the water treatment and distribution system necessary to provide water service for the benefit of consumers, who may be residents of a small or disadvantaged community. Therefore, requiring system discharges exceeding 2,000,000 gallons to be eligible for reduced penalties inequitably impacts water users served by small systems. In order to enable Water Boards to appropriately take the low threat posed by discharges to receiving waters and/or the overall program and system size into consideration in reducing penalties for high volume, low threat discharges, CWA recommends the following revision to the High Volume Discharges provisions of the Revised Enforcement Policy set forth on page 19:

> ***Recommended policy revision:*** *"However, recognizing that the volume of certain discharges can be very high <u>and/or may not result in significant adverse impacts to receiving water beneficial uses, human health or the environment</u>, the Water*

Boards have the discretion to select a value between $2.00 per gallon and $10.00 per gallon with the above factor to determine the per gallon amount for any discharge event, whether it occurs on one or more days, that constitutes 80 percent or less of the maximum discharge volume or flow anticipated by the applicable discharge permit, waste discharge requirements, or the maximum capacity of the particular system or program permitted for discharge. ~~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~~ 80 percent of the maximum discharge volume or flow anticipated by the applicable discharge permit, waste discharge requirements, or the maximum capacity of the particular system or program permitted for discharge; for low threat discharges that do not significantly adversely affect beneficial uses, the environment or human health, ~~or~~ for discharges of recycled water that have been treated for reuse, and for discharges of potable water, 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. When reducing the $10.00 per gallon statutory maximum 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 discharge~~r~~s that could be subject to a reduction include, but are not limited to, wet weather sewage spills, partially-treated sewer spills, potable water discharges, and construction or municipal stormwater discharges."

Finally, language in the second paragraph under Step 2 of the Revised Enforcement Policy on page 18 appears to eliminate language in the current (2010) version of the Enforcement Policy, which supports penalty assessments for effluent limit violations on a per day basis only.[18] This approach should be retained to clarify and establish a general intent to apply ***only*** the per day assessment for effluent limit violations associated with specific types discharges. Based on the typically short-term occurrence of both potable water system discharges, and construction related storm water and minimal impacts to receiving waters, stormwater discharges that exceed permit limitations should only be addressed on a per day basis. CWA recommends the following modification to the text at p. 18:

[18] Revised Enforcement Policy, at p. 13.

Recommendation: *"This step addresses per gallon and per day assessments for discharge violations. Generally, it is intended that ~~NPDES permit~~ effluent limit violations ~~should~~ be addressed on a per day basis only. However, where deemed appropriate, such as for willful or reckless effluent limit violations, spills or releases with significant demonstrable adverse impacts on beneficial uses and aquatic resources, 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."*

I. The Enforcement Policy should encourage and reward "good behavior" by including multipliers less than 1.0 (neutral) in all categories.

CWA is concerned that the Revised Enforcement Policy eliminates the incentive for good actors to invest in aggressive programs that go above and beyond industry standards to reduce the potential for unplanned or accidental spills, emergency releases, and other discharges that may result in violations, or that exceed reasonably anticipated clean-up and cooperation expectations and requirements to further reduce their potential penalties in response to such discharge incidents.

1. The multiplier approach used for the "Cleanup and Cooperation" factor should be extended to account for the factors related to "Culpability" and "History of Violations."

Step 4 of the methodology for calculating penalties requires the Water Boards to consider three adjustment factors for potential modification of the penalty amount. The violator's degree of culpability, prior history of violations, and voluntary efforts to clean up or cooperate with regulatory authorities are all weighed and an adjustment factor is applied depending on the violator's specific conduct in the case.

The Revised Enforcement Policy retains the 0.75 to 1.5 multiplier range for the factor of "cleanup and cooperation."[19] New text in the Revised Enforcement Policy instructs the Water Boards to use a factor of less than 1.0 (to provide a penalty credit) where the discharger demonstrates "exceptional cleanup and cooperation," greater than 1.0 when the discharger's response falls below what can reasonably be expected and 1.0 (neutral) for a reasonable and prudent response to a discharge violation.[20]

[19] Revised Enforcement Policy, Table 4, at p. 23.
[20] Revised Enforcement Policy, Table 4, at p. 23.

The multiplier range of 0.75 to 1.5 and the general direction for use of the multiplier provides the necessary framework for a fair and consistent application of the multiplier – and therefore penalty calculations – across different violation scenarios and across Water Boards. Moreover, this multiplier framework encourages good actors. As discussed immediately below, this multiplier approach, including a multiplier with a value less than 1.0, is similarly appropriate for use across the two other violator conduct factors: culpability and history of violations.

2. The revised Culpability multiplier unfairly penalizes violations outside dischargers' control and fails to incentivize proactive water quality programs.

As noted above, the Water Boards are required to consider a discharger's conduct when calculating the penalty amount. Regarding culpability, the Water Boards must assign, as applicable, high liability for "intentional or negligent violations" and low liability for "accidental, non-negligent violations."[21] However, the Revised Enforcement Policy eliminates the existing lower multiplier range for culpability of 0.5 (beneficial) to 1.5 (punitive) set forth in the current Enforcement Policy. The proposed amendments replace the existing range with a narrower range of 1.0 (neutral) on the low end to 1.5 (punitive) on the high end. This revised range negatively constrains the Water Boards' current level of discretion to recognize via a penalty reduction the absence of discharger culpability.

CWA recommends that the discretion to apply a multiplier value of less than 1.0 should be retained for non-negligent violations or violations that result from emergency circumstances such as floods, earthquakes and terrorism. A discharge occurring under such extreme circumstances should not be accorded the same "culpability" where the cause of these violations is entirely external to, and outside of the control of a Drinking Water System.

Further, by assigning a neutral assessment of 1.0 to a discharger determined to have acted as a "reasonable and prudent person," the Revised Enforcement Policy removes the potential for assigning any credit to dischargers that have demonstrated strong clean-up and cooperative efforts, or have implemented proactive programs that exceed industry standards to control the quality of discharges and/or prevent unplanned discharges. A neutral assessment of 1.0 eliminates an important incentive for dischargers to make extraordinary investments to implement state-of-the art programs that are not commercially available, but that reduce the potential for discharge violations by, for example, reducing human error, improving storage, treatment, or delivery infrastructure, or demonstrating potential to prevent catastrophic failure from emergencies, accidents, and disasters.

[21] Revised Enforcement Policy, Table 4, at p. 23.

By way of example, state of the art discharge management measures that are just beginning to become commercially accessible for some Drinking Water Systems include automated dechlorination devices for tank overflows, turbidity reduction systems for well blow-offs, and new dewatering watering practices for pipes and trenches that are automatically activated by main breaks or similar infrastructure failures. These types of measures constitute expensive, but proactive discharge management measures that Drinking Water Systems should be encouraged to implement in order to decrease the impact and the frequency of unplanned releases of potable water, including chlorinated water, to receiving waters. To ensure that the Revised Enforcement Policy appropriately encourages and expands the available opportunities for Drinking Water Systems to implement such state –of-the-art discharge management practices that exceed industry standards, the multiplier should be modified to allow penalties to be reduced commensurate with reduced "culpability."

To address these issues, CWA recommends the following revisions be made to Table 4 of the Revised Discharge Policy, p. 23.

> ***Recommended policy revision****: "Discharger's degree of culpability prior to the violation: Higher liabilities should result from intentional or negligent violations than for accidental, non-negligent violations* *or emergency-induced discharges**. 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* *0.5* ~~*1.0*~~ *to 1.5 with a higher multiplier for intentional misconduct and gross negligence,* ~~*and*~~ *a lower multiplier for more simple negligence,* *and the lowest factor for* *non-negligent violations or violations resulting from factors that are not within the discharger's control* *. 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.* *Water Boards have discretion to determine the degree of culpability and determine the appropriate multiplier."*

3. The "History of Violations" multiplier eliminates incentives to establish an excellent compliance history and is too open-ended to be applied fairly and consistently.

The Revised Enforcement Policy requires the Water Boards to apply a multiplier of 1.0 or "neutral" where there is no history of violations or 1.1 *or greater* where a discharger has

"any history of prior violations."[22] The Revised Enforcement Policy provides no credit for violators with good compliance histories and gives the Water Boards complete discretion[23] to use any multiplier for dischargers with a history of similar or numerous dissimilar violations.[24]

As a practical matter, almost all dischargers have had some violations at some point in the past. Ideally, the Water Boards should give consideration to the length of time that has passed since the violation(s), the nature of the past violation(s), the response to the violation(s), and subsequent compliance and cooperation and collaboration with the Water Boards. However, for violations that occurred well in the past, such information may not be available, leaving Water Boards to assign multipliers based on gross data such as number of past violations, which is likely to over-penalize some dischargers while under-penalizing others. This potential inequity could be resolved by prescribing a reasonable timeframe limiting the historical period that the Water Boards can consider when assessing past violations.

Moreover, the Enforcement Policy's 1.1 minimum multiplier provides no guidance as to how such a multiplier should be used fairly or consistently across similar cases under consideration by a Water Board or across Water Boards. Nor does the Revised Enforcement Policy instruct the Water Boards how to adjust a multiplier to account for differences in the magnitude or severity of violation histories. The absence of a multiplier range, created by imposition of a ceiling on the multiplier applicable to the worst offenders, is therefore likely to lead to unequal and unfair results, even if a statute of limitations on the history of violations considered is adopted.

As discussed in the context of the culpability multiplier above, a low-end multiplier of 1.0 (neutral) for dischargers with no history of violations eliminates credit for those entities that have a demonstrated track-record of compliance. A 1.0 multiplier floor removes from Water Boards' discretion the ability to use discounted penalties – even in limited circumstances – where doing so provides an incentive to the regulated community.[25]

The Water Boards should be allowed discretion when assessing whether a discharger has a good compliance history within a reasonable timeframe (e.g. 10 years) and if

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[22] Revised Enforcement Policy, Table 4, at p. 23.
[23] For all violations a maximum liability amount is set by statute; where the amount calculated for a particular violation exceeds the statutorily-defined maximum the total penalty assessed must be reduced to that maximum. (See, e.g., p. 23.)
[24] It is not clear from the Revised Enforcement Policy what is meant by "dissimilar violations."
[25] Allowing Water Boards to use a multiplier less than 1.0 in the culpability and history of violations factors does not override the Boards' obligation to calculate the Economic Benefit Amount or the Policy goal to reach an adjusted Total Base Liability Amount of at least 10 percent higher than the Economic Benefit Amount. See Revised Enforcement Policy, at pp. 20-21.

those dischargers should be rewarded with a lower penalty based on use of multiplier of less than 1.0. To address these issues, CWA recommends the following revision to Table 4 of the Revised Discharge Policy, p. 23.

> ***Recommended policy revision:*** *"~~Any prior h~~History of violations within the past 5 years: Where the discharger has a good compliance ~~no prior~~ history within the past 5 years~~of any violations~~, this factor should be ~~neutral, or 1.0~~ 0.5 to 1.0. Where the discharger has ~~any~~ a history of prior violations within the past 10 years, a ~~minimum~~ multiplier of 1.0 to 1.5~~1~~ should be used. ~~Where the discharger has a history of similar or numerous dissimilar violations, the Water Boards should consider adopting a multiplier above 1.1.~~ Water Boards have discretion to evaluate the 5-year history of compliance and determine the appropriate multiplier."*

J. Environmental Justice and Disadvantaged Communities exceptions/allowances should include potable water infrastructure and MS4s.

The currently effective Enforcement Policy appears to have been drafted with a predominant focus on POTW-related discharges. This approach does not adequately capture some of the issues specific to other types of dischargers like Drinking Water Systems that serve similar communities, and their discharges, such as potable water discharges. Nevertheless, the Revised Enforcement Policy must be used to guide enforcement action against those dischargers under applicable permits. Specifically:

- Section I, Paragraph G. Environmental Justice and Disadvantaged Communities. The policy does not recognize that most Drinking Water Systems do not operate POTWs, but do serve disadvantaged communities under the same investment and fiscal constraints faced by POTWs. The policy should recognize the need for the consideration of special hardship created by compliance costs arising under applicable NPDES permits and WDRs (including the Drinking Water System Permit, the Construction General Permit) for Drinking Water Systems that serve disadvantaged communities using aging infrastructure, but that do not operate a POTW. The language should be revised to apply special considerations for all Drinking Water Systems that serve disadvantaged communities.

- Section I, Paragraph H. Facilities Serving Small Communities. This section also should include Drinking Water Systems whose discharges are subject to NPDES permits and WDRs (including the Drinking Water System Permit, the Construction General Permit) serve small communities, but that do not operate a POTW.

- Section VII. Mandatory Minimum Penalties for NPDES Violations. Consideration for an alternative to assessing MMPs should be extended to Drinking Water Systems that are subject to NPDES permits and WDRs (including the Drinking Water System Permit, the Construction General Permit) and that serve small or disadvantaged communities.

K. Penalties should be used to achieve compliance in certain instances.

CWA agrees with the Revised Enforcement Policy's conclusion that violators should have the ability to suspend up to 50 percent of the monetary penalties assessed pursuant to the Revised Enforcement Policy for the purpose of making capital or operational improvements. However, CWA recommends that the Revised Enforcement Policy go further in this regard by allowing POTWs, MS4s, and Drinking Water Systems to invest up to 100 percent of their penalties--and particularly those that are not associated with discharges resulting serious adverse impacts to beneficial uses, or arising from significant culpability, willful misconduct or gross negligence—in capital and operational improvements to reduce the likelihood of future violations.

The ability to invest all of the liability into improvements that would provide enhanced protection to receiving waters would benefit Drinking Water Systems serving disadvantaged and small communities in particular. The Revised Enforcement Policy should be modified to support POTWs, MS4s, and Drinking Water Systems – all providers of essential public services for the benefit of the community – in achieving greater compliance through education and investment rather than relying on a punitive approach to enforcement.

Consistent with CWA's recommendation that the State Water Board's Enforcement Policy promote constructive, future-forward investment, CWA provides the following suggested amendments:

- Increase or eliminate altogether the 50 percent cap on the use of assessed penalties for capital and operation improvements if the discharger is allocating money to improve water system infrastructure with the intent to avoid/minimize discharge violations to the maximum extent practicable. CWA recommends not limiting this provision to systems serving small or economically disadvantaged communities; the goal should be to end violations across the state regardless of this designation.

- Increase or eliminate altogether the 50 percent cap on use of assessed penalties for capital and operational improvements for water system infrastructure improvements near environmentally sensitive areas, and allow ECA funds to be allotted for such improvements.

- Water agencies should be given the option to enter into an ECA and to put money back into infrastructure, BMP enhancements, trainings, creation/adaptation of manuals, and other such tools. Authorizing these investments would serve the water agency and their rate payers, promote the State Board's goal of minimizing discharges and meeting discharge requirements, and would benefit the environment.

III. CONCLUSION

CWA appreciates this opportunity to provide comments on the Revised Enforcement Policy and urges the State Water Board to revise its Enforcement Policy consistent with the recommendations presented above. If you have any questions, please feel free to contact me at jhawks@calwaterassn.com or (415) 561-9650.

Sincerely,

Jack Hawks

Executive Director, California Water Association

cc: California Water Association, Board of Directors
Hon. Catherine J.K. Sandoval, Commissioner, California Public Utilities Commission
Tom Howard, Executive Director, State Water Resources Control Board
Cris Carrigan, Director, SWRCB Office of Enforcement
Rami S. Kahlon, CPUC Director, Water Division
California Water Association, Executive and Water Quality Committees