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STATE WATER RESOURCES CONTROL BOARD

WATER QUALITY ENFORCEMENT POLICY

| DRAFT – ~~December 18, 2008~~ May 6, 2009

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

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INTRODUCTION

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

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

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

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

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

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

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

I. FAIR, FIRM, AND CONSISTENT REGULATION AND ENFORCEMENT

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

A. Standard and Enforceable Orders

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

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B. Determining Compliance

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

C. Suitable Enforcement

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

D. Environmental Justice

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

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

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

E. Small Communities

Publicly owned treatment works (POTW) and sewage collection systems that serve small communities (defined in Chapter VII. B) must comply with water quality protection laws. The State Water Board recognizes that complying with environmental laws and regulations will require higher per capita expenditures in small communities than in large communities. When water quality violations occur, traditional enforcement practices used by the Water Boards may result in significant costs to these communities and their residents, thereby limiting the community's ability to achieve compliance without suffering hardships not experienced by other communities.

In recognition of these factors, informal enforcement and/or compliance assistance will be the first steps taken to return a small and/or disadvantaged community to compliance, unless the Regional Water Board finds that extenuating circumstances apply. Informal enforcement is covered in Chapter III. Compliance assistance activities represent a commitment on the part of the entity to achieve compliance and shall be offered in lieu of enforcement when an opportunity exists to correct the violations. Compliance activities that serve to bring a facility into compliance include, but are not limited to:

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

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

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

II. ENFORCEMENT PRIORITIES FOR DISCRETIONARY ENFORCEMENT ACTIONS

Every violation will result in the appropriate enforcement response consistent with the priority of the violation established in accordance with this policy. The Water Boards shall prioritize cases for formal discretionary enforcement action to ensure the most efficient and effective use of available resources.

A. Ranking Violations

The first step in enforcement ranking is determining of the relative significance of each violation. The criteria below will be used by the Water Boards to identify and classify significant violations in order to help establish priorities for enforcement efforts by the respective Water Board.

1. *Class I Priority Violations*

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

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

- a. Significant measured or calculated violations with lasting effects on water quality objectives or promulgated water quality criteria;

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- b. Violations that result in significant lasting impacts to existing beneficial uses of waters of the State;
- c. Violations that result in significant harm to or the destruction of fish or wildlife, such as a fish kill;
- d. Violations that present an imminent danger to public health;
- e. Unauthorized discharges that pose a significant threat to water quality;
- f. Falsification of information submitted to the Water Boards or intentional withholding of information required by applicable laws, regulations, or enforceable orders;
- g. A violation of a prior enforcement action such as a clean-up and abatement order or cease and desist order that results in an unauthorized discharge of waste or pollutants to water of the State; and
- h. Knowing and willful failure to comply with monitoring requirements as required by applicable laws, regulations, or enforceable orders because of knowledge that monitoring results will reveal violations.

2. Class II Violations

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

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

- a. Unauthorized discharges that pose a moderate, ~~indirect~~, or cumulative threat to water quality;
- b. Violations of acute or chronic toxicity ~~testing requirements~~ where the discharge may adversely affect fish or wildlife;
- c. Violations that present a substantial threat to public health;
- d. Negligent or inadvertent failure to ~~completely~~ substantially comply with monitoring requirements as required by applicable laws, regulations, or enforceable orders, such as not taking all the samples required;

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- e. Negligent or inadvertent failure to submit information as required by applicable laws, regulations, or an enforceable order where that information is necessary to confirm past compliance or to prevent or curtail an unauthorized discharge;
- f. Violations of compliance schedule dates (e.g., schedule dates for starting construction, completing construction, or attaining final compliance) by 30 days or more from the compliance date specified in an enforceable order;
- g. Failure to pay fees, penalties, or liabilities within 120 days of the due date, unless the discharger has filed a timely petition pursuant to California Water Code section 13320 for review of the fee, penalty, or liability, or filed a timely request for an alternative payment schedule ~~has been accepted by~~ with the Regional Water Board;
- h. Violations of prior enforcement actions that do not result in an unauthorized discharge of waste or pollutants to waters of the State;
- i. Significant measured or calculated violations of water quality objectives or promulgated water quality criteria; and
- j. Violations that result in significant demonstrated impacts to existing beneficial uses of waters of the State.

3. Class III Violations

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

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

- a. Unauthorized discharges that pose a low, ~~indirect, or cumulative~~ threat to water quality;
- b. Negligent or inadvertent late submission of information required by applicable laws, regulations, or enforceable orders;
- c. Failure to pay fees, penalties, or liabilities within 30 days of the due date, unless the discharger has filed a timely petition pursuant to California Water Code section 13320 for review of the fee, penalty or liability; or filed a timely request for an alternative payment schedule ~~has been accepted by~~ with the Regional Water Board;

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- d. Any "minor violation" as determined pursuant to California Water Code section 13399 et seq. (see Chapter III. C.1a);
- e. Negligent or inadvertent failure to comply with monitoring requirements when conducting monitoring as required by applicable laws, regulations, or enforceable orders, such as using an incorrect testing method;
- f. Less significant (as compared to class II violations) measured or calculated violations of water quality objectives or promulgated water quality criteria; and
- g. Violations that result in less significant (as compared to class II violations) demonstrated impacts to existing beneficial uses of waters of the State.

B. Enforcement Priorities for Individual Entities

The second step in enforcement ranking involves examining the enforcement records of specific entities based on the significance and severity of their violations, as well as other factors identified below. Regional Water Board senior staff and management, with support from the State Water Board Office of Enforcement, shall meet on a regular basis, no less than bi-monthly, and identify their highest priority enforcement cases. To the greatest extent possible, entities with class I priority violations shall be the target of formal enforcement action.

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

- 1. ~~Priority~~ Class of the entity's violations;
- 2. History of the Entity
 - a. Whether the violations have continued over an unreasonably long period after being brought to the entity's attention and are reoccurring;
 - b. Whether the entity has a history of chronic noncompliance;
 - c. Compliance history of the entity and good-faith efforts to eliminate noncompliance;
- ~~2. Whether the entity has a history of chronic noncompliance;~~
- ~~4.3.~~ 3. Evidence of, or threat of, pollution or nuisance caused by violations;
- ~~5.4.~~ 4. The magnitude or impacts of the violations;
- ~~6.5.~~ 5. Case-by-case factors that may mitigate a violation;
- ~~6. Compliance history of the violator and good faith efforts of the violator to eliminate noncompliance;~~

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~~8.6.~~ Impact or threat to high priority watersheds or water bodies (e.g., due to the vulnerability of an existing beneficial use or an existing state of impairment);

~~9.7.~~ Potential to abate effects of the violations;

~~10.8.~~ Strength of evidence in the record to support the enforcement action; and

~~11.9.~~ Availability of resources for enforcement.

C. Automated Violation Priorities

It is the goal of the State Water Board to develop data algorithms to assign the relative priority of individual violations consistent with this policy by January 1, 2012. This automated system should simplify prioritization of violations and facilitate prioritization of cases for enforcement.

D. Setting Statewide and Regional Priorities

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

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

E. Mandatory Enforcement Actions

In addition to these criteria for discretionary enforcement, the Water Boards will continue to address mandatory enforcement obligations imposed by the law (e.g. Wat. Code § 13385, subs.(h) and (i)). As detailed in Chapter VII, these mandatory actions should be taken, at a minimum, within 18 months of the time that the violations qualify as mandatory minimum penalty violations.

III. ENFORCEMENT ACTIONS

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

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IV. STATE WATER BOARD ENFORCEMENT ACTION

The Regional Water Boards have primary authority for matters directly affecting the quality of waters within their region. The State Water Board has oversight authority in such matters, and may from time to time take enforcement action in lieu of the Regional Water Board. Generally, this will be limited to the following situations:

- In response to petitions alleging inaction or ineffective enforcement action by a Regional Water Board;
- To enforce statewide or multi-regional general permits;
- To address violations by the same discharger in multiple regions;
- Where the Regional Water Board lead prosecutor has requested that the State Water Board take enforcement;
- Where a Regional Water Board is unable to take an enforcement action because of quorum problems, conflicts of interest, or other administrative circumstances;
- Where a Regional Water Board has not investigated or initiated an enforcement action for a class I priority violation in a manner consistent with this Enforcement Policy; and
- Actions where Executive Director has determined that enforcement by the State Water Board is necessary and appropriate to further an important State Water Board interest.

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

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V. COORDINATION WITH OTHER REGULATORY AGENCIES

A. Hazardous Waste Facilities

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

B. Oil Spills

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

C. General

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

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

(Alternative 1)

A. Penalty Calculation Methodology

As a general matter, where, as in the California Water Code, a civil penalty structure has been devised to address environmental violations, civil penalties do not depend on proof of actual damages to the environment. Courts in reviewing similar environmental protection statutes have held that a plaintiff need not prove a loss before recovering a penalty; instead, the defendant must demonstrate that the penalty should be less than the statutory maximum. In certain cases, a strong argument can be made that consideration of the statutory factors can support the statutory maximum as an appropriate penalty for water quality violations, in the absence of any other mitigating evidence. Moreover, as discussed below, the Porter-Cologne Act requires that civil liabilities be set at a level that accounts for any "economic benefit or savings" violators gained through their violations. (Wat. Code, §§ 13351, 13385, subd. (e).) The Water Boards have powerful liability provisions at their disposal which the Legislature and the public expect them to fairly and consistently implement for maximum enforcement impact to address, correct, and deter water quality violations.

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

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

- Be assessed in a fair and consistent manner;
- Fully eliminate any economic advantage obtained from noncompliance;¹
- Fully eliminate any competitive advantage obtained from noncompliance;
- ~~Ensure that the amount of liability assessed for of noncompliance meaningfully exceeds the cost of compliance;~~
- ~~Be appropriate and s~~Should have a reasonable relationship to the gravity of the violation and the harm to beneficial uses and/or regulatory program resulting from the violation;
- Deter the specific person(s) identified in the ACL from committing further violations; and
- Deter similarly situated person(s) in the regulated public from committing the same type of violation(s.)

The liability calculation process set forth in this chapter provides the decision-maker with a methodology for arriving at a liability amount consistent with these objectives. This process is applicable to determining administratively-adjudicated assessments as well as those obtained through settlement.

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

GENERAL APPROACH

Step 1. *Potential Harm Factor for Discharge Violations* – Calculate Potential Harm to Beneficial Uses.

Step 2. *Per Gallon and Per Day Assessments for Discharge Violations* – For discharges resulting in violations, use Table 1 and Table 2 to determine Per Gallon and Per Day Assessments. Depending on the particular language of the ACL statute being used, either or both tables may be used. Multiply these factors by the maximum per gallon and/or per day amounts allowed under statute for the violations involved. For sewage spills and releases of stormwater from construction sites, a maximum

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

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amount of \$2.00 per gallon should be used with the factor from Table 2 to determine the per gallon amount for sewage spills and stormwater. Where allowed by code, both amounts should be determined and added together. This becomes the initial amount of the ACL for the discharge violations.

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

Step 4. *Adjustment Factors* – Adjust the initial amounts for each violation by factors addressing the violator's conduct, multiple instances of the same violation and multiple day violations.

Step 5. *Total Base Liability Amount (TBLA)* – Add the adjusted amounts for each violation from Step 4.

Thereafter, the total liability amount may be adjusted based on consideration of the following:

Step 6. *Ability to Pay and Ability to Continue in Business* – If the ACL exceeds these amounts, it may be adjusted downward provided express findings are made to justify this. Similarly, ability to pay may justify an increase in the amount to provide a sufficient deterrent effect.

Step 7. *Other Factors as Justice May Require* – Determine if there are additional factors that should be considered that would justify an increase or a reduction in the Total Base Liability amount. These factors must be documented in the ACL eComplaint. One of these factors is the staff costs of investigating the violations and issuing the ACL. The staff costs should be added to the amount of the ACL.

Step 8. *Economic Benefit* – The economic benefit of the violations must be determined based on the best available information, and the amount of the ACL should exceed this amount. (Note that the Economic Benefit is a statutory minimum for ACLs issued pursuant to California Water Code section 13385.)

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

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

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STEP 1 - POTENTIAL HARM FACTOR FOR DISCHARGE VIOLATIONS

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

FACTOR 1: HARM OR POTENTIAL HARM TO BENEFICIAL USES

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

0 = negligible - no actual or potential harm to beneficial uses.

1 = minor - low threat to beneficial uses– (e.g., suspected or potential impacts to aquatic life due to effluent or toxicity limit violations).

2 = below moderate - below moderate threat to beneficial uses– (e.g., observed, but minor, impacts to aquatic life due to effluent or toxicity limit violations).

3 = moderate - moderate threat to beneficial uses – (e.g., observed impacts to aquatic life, short term restrictions on the use of a water body such as beach closures, material contribution to MCL exceedences for drinking water supplies).

4 = above moderate - above moderate threat to beneficial uses – (e.g. observed and substantial impacts to aquatic life, beach closures of more than one day where determined necessary by local officials, causes short term MCL exceedences for drinking water supplies).

5 = major - high threat – (e.g., significant impacts to aquatic life, long term restrictions of the use of water body (more than five days) , consumption warnings for fish or shellfish, causes long term (more than 5 days) MCL exceedences for drinking water supplies).

FACTOR 2: THE PHYSICAL, CHEMICAL, BIOLOGICAL OR THERMAL CHARACTERISTICS OF THE DISCHARGE

The characteristics of the discharge factor is scored based on the physical, chemical, biological, and/or thermal nature of the discharge, waste, fill or material involved in the violation or violations. A score between 0 and 4 is assigned based on a determination of whether the discharge or discharges are relatively benign wastes with negligible risk of harm (0), wastes that pose a minor or potential risk of harm (1), wastes that pose a

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moderate risk of harm (2), wastes that pose a major risk of harm (3), or hazardous wastes (4).

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

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

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

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

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

FACTOR 3: SUSCEPTIBILITY TO CLEANUP OR ABATEMENT

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned for this factor if less than 50% of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the violator.

FINAL SCORE

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

STEP 2 - ASSESSMENTS FOR DISCHARGE VIOLATIONS

Per Gallon Assessments for Discharge Violations

Where there is a discharge, the Water Boards shall determine an initial liability amount on a per gallon basis using on the Potential Harm score and the extent of deviation from standard of the violation. These factors will be used in Table 1 below to determine a Per Gallon Factor for the discharge.

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

The categories for the **Deviation from Standards** are defined as follows:

The categories for **Deviation from Standards** in Table 1 are:

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

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

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

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

Apply the above per gallon factor to the maximum per gallon amounts allowed under statute for the violations involved. Since the volume of sewage spills and releases of stormwater from construction sites and municipalities can be so large, for sewage spills and releases of municipal stormwater or stormwater from construction sites, a maximum amount of \$2.00 per gallon should be used with the above factor to determine the per gallon amount for sewage spills and stormwater. Similarly, for releases of recycled water that has been treated for irrigation and groundwater recharge, a maximum amount of \$1.00 per gallon should be used with the above factor. Where reducing these maximum amounts results in a disproportionately small penalty, such as dry weather discharges or small volume discharges that impact beneficial uses, the maximum per gallon amount may be used.

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

For violations of NPDES permit effluent limitations, the base liability should be established by calculating the mandatory penalty required under Water Code section 13385(h) and (i). The mandatory penalty should be adjusted upward where the facts and circumstances of the violation warrant a higher liability.

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Per Day Assessments for Discharge Violations

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

TABLE 2 - Per Day Factor for Discharges

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

The categories for the deviation from standard are defined as follows:

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

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

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

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

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

STEP 3 - PER DAY ASSESSMENTS FOR NON-DISCHARGE VIOLATIONS

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering potential harm and the extent of deviation from applicable requirements. These are violations include, but are not limited to, the failure to conduct routine monitoring and reporting, the failure to provide required information, and the

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failure to prepare required plans. While these violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program. The Water Boards shall use the matrix set forth below to determine the initial liability factor for each violation. The per day assessment would then be the Per Day Factor multiplied by the maximum per day amount allowed under the California Water Code. For multiple day violations, please refer to the adjustment section below.

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

| TABLE 3 - Per Day Factor | | | |
|---------------------------------|---------------|---------------|---------------|
| Deviation from Standard | Harm | | |
| | Minor | Moderate | Major |
| Minor | 0.1 (0.15) | 0.2 (0.25) | 0.3 (0.35) |
| | 0.2 | 0.3 | 0.4 |
| Moderate | 0.2 (0.25) | 0.3 (0.35) | 0.4 (0.55) |
| | 0.3 | 0.4 | 0.7 |
| Major | 0.3 (0.35) | 0.4 (0.55) | 0.7 (0.85) |
| | 0.4 | 0.7 | 1 |

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

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

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

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

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

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

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

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

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

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

STEP 4 – ADJUSTMENT FACTORS

Violator’s Conduct Factors

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

TABLE 4 – Violator’s Conduct Factors

| Factor | Adjustment for |
|-------------------------|--|
| Culpability | Discharger’s degree of culpability regarding the violation. Higher liabilities should result from intentional or negligent violations than for accidental, non-negligent violations. A first step is to identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation. The test 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 to 1.5 , with the lower multiplier for accidental incidents, and higher multiplier for intentional or negligent behavior. |
| Cleanup and Cooperation | Extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage, including any voluntary cleanup efforts undertaken. Adjustment should result in a multiplier between 0.75 to 1.5 with the lower multiplier where there is a high degree of cleanup and cooperation, and higher multiplier where this is absent. |
| History of violations | Prior history of violations. Where there is a history of repeat violations, the amount of the initial liability should be increased by a minimum of 10% to reflect this. |

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

Multiple Instances of the Same Violation

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

- The facility has violated the same requirement at one or more locations within the facility;
- A single operational upset where violations occur on multiple days:
- The violation occurs on separate days but the violation is a violation that continues ~~uninterrupted~~ for more than one day;
- When violations are not independent or are not substantially distinguishable. For such violations, the Water Boards may consider the extent of the violation in terms of the most egregious violation;
- A single act may violate multiple permit or water quality control (WQC) standards, and constitute multiple violations. For example, a construction dewatering discharge to a dewatering basin located on a gravel bar next to stream may violate a WQC requiring the use of best management practices (BMPs) for sediment and turbidity control, a WQC prohibiting the discharge of soil silt or other organic matter to waters of the State, and a WQC requiring temporary sedimentation basins be located at least 100 feet from a stream channel. Such an act would constitute three distinct violations.

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

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

Multiple Day Violations

For violations ~~which that~~ are assessed a civil liability on a per day basis, ~~the liability shall be calculated for each day where the violation is causing daily detrimental impacts to the environment or the regulatory program, there is an economic benefit obtained on a daily basis from the illegal conduct, or where a violator knows or should have known of the violation and failed to take action to mitigate or eliminate the violation.~~ For these types of multiple day violations, the initial liability amount should be assessed for each day up to thirty (30) days. For violations that last ~~for~~ more than thirty (30) days, the daily

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assessment can be less than the calculated daily assessment, ~~provided that it is no less than the per day economic benefit or cost of compliance, if any, obtained from the violation.~~

For ~~other~~ multiple day violations, where the Water Board makes express findings that the violation:

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

an alternate approach may be used. In these cases, the liability shall not be less than an amount that is calculated based on an assessment of the initial base liability amount for the first day of the violation, plus an assessment for each five day period of violation until the 30th day, plus an assessment for each thirty (30) days of violation, ~~and an assessment of 3 percent of the Initial Base Liability Amount for each day where there is less than a full thirty (30) day period.~~ For example, a violation lasting sixty-two (62) days would accrue a total of 8.06 day's' worth of violations, based on a per day assessment for day 1, 5, 10, 15, 20, 25, 30, and 60 ~~and .03 x 2 for days 61 and 62.~~ Similarly, a violation lasting ninety-nine (99) days would accrue a total of 9.27 day's worth of violations, based on a per day assessment for day 1, 5, 10, 15, 20, 25, 30, 60, and 90 ~~and .03 x 9 for days 91 through 99.~~

STEP 5 – DETERMINATION OF A TOTAL BASE LIABILITY AMOUNT

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

STEP 6 – ABILITY TO PAY AND ABILITY TO CONTINUE IN BUSINESS

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

The ability of a discharger to pay an ACL is determined by its revenues and assets. In most cases, it is in the public interest for the discharger to continue in business and bring its operations into compliance. If there is strong evidence that an ACL would result in widespread hardship to the service population or undue hardship to the discharger, the amount of the assessment may be reduced on the grounds of ability to pay. The Water Boards may also consider increasing an ACL to assure that the enforcement action would have a similar deterrent effect for a business or public agency that has a greater

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ability to pay and to help ensure that the discharger does not view the liability amount as simply a “cost of doing business.” Normally, an ACL assessment should not seriously jeopardize the discharger’s ability to continue in business or operation. The Water Board must have information in the record about a discharger’s ability to pay the proposed liability.

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

An adjustment can be used to reduce the ACL to an amount that the discharger can reasonably pay and still bring operations into compliance. For a violation addressed pursuant to California Water Code section 13385, the adjustment for ability to pay can not reduce the liability to less than the economic benefit amount.

The Water Boards may also consider increasing the ACL because of ability to pay. For example, if the Water Board determines that the proposed amount is unlikely to have an appropriate deterrent effect on an uncooperative discharger with a greater ability to pay, the amount should be increased to the level that the Water Board determines is necessary to assure future compliance.

STEP 7 –OTHER FACTORS THAT JUSTICE MAY REQUIRE

If the Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the “other factors as justice may require,” and express finding must be made to justify this. Examples of circumstances warranting an adjustment under this step are:

- 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.
- A consideration of issues of environmental justice indicates that the amount would have a disproportionate impact on a particular socioeconomic group.
- The calculated amount is entirely disproportionate to assessments for similar conduct made in the recent past using the same Enforcement Policy.

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Costs of Investigation and Enforcement Adjustment

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

STEP 8 – ECONOMIC BENEFIT

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

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

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calculation should be done using the U.S. EPA's BEN ²computer program (the most recent version is accessible at <http://www.waterboards.ca.gov/plnspols/docs/wgplans/benmanual.pdf>) unless the Water Board determines, or the discharger demonstrates to the satisfaction of the Water Board, that, based on case-specific factors, an alternate method is more appropriate for a particular situation ~~such as the use of the USEPA Munipay model~~. However, in more complex cases, such as where the economic benefit may include revenues from continuing production when equipment used to treat discharges should have been shut down for repair or replacement, the total economic benefit should be determined by experts available from the Office of Research Planning and Performance or outside experts retained by the enforcement staff.

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

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

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

² USEPA developed the BEN model to calculate the economic benefit a violator derives from delaying and/or avoiding compliance with environmental statutes. Funds not spent on environmental compliance are available for other profit-making activities or, alternatively, a defendant avoids the costs associated with obtaining additional funds for environmental compliance. BEN calculates the economic benefits gained from delaying and avoiding required environmental expenditures such as capital investments, one-time non-depreciable expenditures, and annual operation and maintenance costs.

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

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STEP 9 – MAXIMUM AND MINIMUM LIABILITY AMOUNTS

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

STEP 10 – FINAL LIABILITY AMOUNT

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

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

SETTLEMENT CONSIDERATIONS

The liabilities resulting from the above methodology are for adoption by the Water Boards after formal administrative proceedings. The calculated liabilities, however, may be adjusted as a result of settlement negotiations with a violator. It is not the goal of the Enforcement Policy to address the full range of considerations that should be entertained as part of a settlement. It is appropriate, however, to readjust the administrative civil liabilities calculated pursuant to the methodology under the following circumstances:

- 1) In consideration of hearing and/or litigation risks including equitable factors, mitigating circumstances, evidentiary issues or other weaknesses in the enforcement action which the prosecution reasonably believes may adversely impact the team's ability to obtain the calculated liability from the administrative hearing body. Ordinarily, these factors will not be fully known until after the issuance of an administrative civil liability complaint or through pre-filing settlement negotiations with an alleged violator. These factors shall be generally identified in any settlement of an administrative civil liability complaint which seeks approval by a Water Board or its designated representative.
- 2) Factors which should not affect the amount of the calculated civil liability sought from a violator in settlement include, but are not limited to, the following:

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

OTHER ADMINISTRATIVE CIVIL LIABILITY SETTLEMENT COMPONENTS

In addition to a reduction of administrative civil liabilities, a settlement can result in the permanent suspension of a portion of the liability in exchange for the performance of a Supplemental Environmental Project or an Enhanced Compliance Project.

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

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Note: The following approach of establishing a Monetary Liability Recommendation Panel is presented as an alternative to the above Penalty Calculation Methodology. We are seeking input as to whether there is more support for Alternative 1 or Alternative 2. If the concept of Alternative 2 is preferred as a replacement to the above methodology, many elements described above, such as “Economic Benefit” and “Ability to Pay”, will be rewritten to provide policy and guidance to this second alternative.

(Alternative 2)

B. Monetary Liability Recommendation Panel

In order to assist the Water Boards in achieving more consistent administrative liability assessments for water quality violations resulting from the issuance of ACL Complaints, there shall be a Monetary Liability Recommendation Panel (Panel) comprised of the following individuals:

1. The Director of the Office of Enforcement;
2. The Deputy Director responsible for Water Quality Programs
3. The Assistant Executive Officers from three of the Regional Water Boards, rotated annually in accordance with the following schedule:

Year 1 – Regions 1, 5, and 8
Year 2 – Regions 2, 4, and 6
Year 3 – Regions 3, 7 and 9
(Repeat in subsequent years)

Prior to issuance, the Panel shall review each proposed ACL Complaint which proposes to assess a discretionary ACL amount. The Panel shall recommend a monetary civil liability assessment, while giving consideration to the specific facts of each case and any information provided by enforcement staff preparing the ACL Complaint. Following its review, the Panel shall prepare a written letter of recommendation to the Water Board enforcement staff. If the person issuing the administrative liability complaint does not select an amount of liability within 10 percent of the Panel’s recommendation, the issuer must identify the Panel’s recommendation in the ACL complaint and provide a written explanation as to why the issuer did not adopt the Panel’s recommendation. The Panel’s recommendation shall be a factor which is evaluated by the Water Board members in assessing the amount of administrative civil liability after hearing. The consideration of the Panel’s recommendation shall be expressly evaluated in any order issued by a Water Board after a hearing on the ACL complaint.

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VII. MANDATORY MINIMUM PENALTIES FOR NPDES VIOLATIONS

Mandatory penalty provisions are required by California Water Code section 13385, subdivisions (h) and (i) for specified violations of NPDES permits. For violations that are subject to mandatory minimum penalties, the Water Boards must either assess an ACL for the mandatory minimum penalty or for a greater amount.

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

The intent of these provisions of the California Water Code is to assist in bringing the State's permitted facilities into compliance with WDRs. The Water Boards should issue MMPs within eighteen months of the time that the violations qualify as mandatory minimum penalty violations. The Water Boards shall expedite MMP issuance if (a) the discharger qualifies as a small community with financial hardship, or (b) the total mandatory penalty amount is \$30,000 or more. Where the NPDES Permit is being revoked or rescinded because the discharger will no longer be discharging under that permit, the Water Boards shall ensure that all outstanding MMPs for that discharger are issued at least within 30 days prior to termination of their permit to discharge.

B. MMPs for Small Communities

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

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

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

1. Has a population of 10,000 or fewer people or
2. Lies completely within one or more rural counties.³

A POTW serving incorporated areas completely within one or more rural counties is considered a POTW serving a small community. No department or agency of state

³ The determination of the size of population served by the POTW and "rural county" status shall be made as of the time the penalty is assessed, not as of the time the underlying violations occurred.

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government, including the University of California, the State University, and the Community Colleges, shall be considered a POTW serving a small community.

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

- Median household income⁴ for the community is less than 80 percent of the California median household income;
- The community has an unemployment rate⁵ of 10 percent or greater; or
- Twenty percent of the population is below the poverty level.⁶

“Median household income,” “unemployment rate,” and “poverty level” of the population served by the POTW are based on the most recent U.S. Census block group⁷ data or a local survey approved by the Regional Water Board in consultation with the State Water Board.

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

⁴ **Median household income**

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

⁵ **Unemployed**

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

⁶ **Poverty**

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

⁷ **Block group**

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

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

Based on 2003 USDA Rural-Urban Continuum Codes for California

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

C. Single Operational Upset

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

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

D. Defining a “Discharge Monitoring Report” in Special Circumstances under 13385.1

Section 13385.1(a)(1) states “for the purposes of subdivision (h) of section 13385, a ‘serious violation’ also means a failure to file a discharge monitoring report required

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pursuant to section 13383 for each complete period of 30 days following the deadline for submitting the report, if the report is designed to ensure compliance with limitations contained in waste discharge requirements that contain effluent limitations.”

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

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

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

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

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

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

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

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

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

2. Defining a “Discharge Monitoring Report” Where There is No Discharge to Surface Waters

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

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

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

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

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

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

VIII. COMPLIANCE PROJECTS (CPs)

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

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

1. The amount of the penalty that is suspended shall not exceed the cost necessary to complete the CP;
2. The discharger must spend an amount of money on the CP that is equal to or greater than the amount of the penalty that is suspended. Grant funds may be used only for the portion of the cost of the CP that exceeds the amount of the penalty to be suspended;
3. Where implementation of the CP began prior to the assessment of a mandatory minimum penalty, the penalty may be suspended under these conditions:
 - (a) the cost of the CP yet to be expended is greater than the penalty;
 - (b) the problem causing the underlying violations will be corrected by the project;
 - (c) the underlying violations occurred during, or prior to the initiation of, project implementation;

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

IX. ENHANCED COMPLIANCE ACTIONS (ECAs)

Enhanced Compliance Actions (ECAs) are projects that enable a discharger to make capital or operational improvements beyond those required by law, and are separate

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from projects designed to merely bring a discharger into compliance. The Water Boards may approve a settlement with a discharger that includes suspension of a portion of the monetary liability for completion of an ECA. Except as specifically provided below, any such settlement is subject to the rules that apply to Supplemental Environmental Projects.

For these ECAs the Water Boards shall require the following:

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

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

X. DISCHARGER VIOLATION REPORTING

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

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

XI. VIOLATION AND ENFORCEMENT DATA

The Water Boards will ensure that all violations and enforcement actions are documented in the appropriate Water Board data management system. Sufficient information will be collected and maintained regarding regulated facilities and sites to allow preparation of internal and external reporting of violation and enforcement

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information, and development and reporting of performance measures regarding the Water Boards' enforcement activities. To ensure timely collection of this information, all violations will be entered within 10 days of discovery of the violation, and all enforcement actions will be entered within 20 days of the date of the enforcement action.

XII. ENFORCEMENT REPORTING

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

XIII. POLICY REVIEW AND REVISION

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

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APPENDIX A: ENFORCEMENT ACTIONS

A. Standard Language

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

B. Informal Enforcement Actions

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

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

1. *Oral and Written Contacts*

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

A letter is often appropriate as a follow-up to, or in lieu of, an oral contact. Letters signed by staff or by the appropriate senior staff should inform the discharger of the specific violations and, if known to staff, discuss how and why the violations have occurred or may occur. This letter should ask how and when the discharger will correct the violation and achieve compliance. The letter should require a prompt response and a certification from the discharger that the violation(s) has been corrected. Correction of the violation by the discharger shall be recorded in the enforcement database.

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

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2. Notices of Violation (NOV)

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

C. Formal Enforcement Actions

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

1. Notices to Comply

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

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

- (a) Under most circumstances the violations listed below are considered to be “minor” violations:
 - (i) Inadvertent omissions or deficiencies in recordkeeping that do not prevent a Water Board from determining whether compliance is taking place.
 - (ii) Records (including WDRs) not being physically available at the time of the inspection, provided the records do exist and can be produced in a reasonable time.
 - (iii) Inadvertent violations of insignificant administrative provisions that do not involve a discharge of waste or a threat thereof.
 - (iv) Violations that result in an insignificant discharge of waste or a threat thereof; provided, however, that there is no significant threat to human health, safety, welfare, or the environment.

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- (b) A violation is not considered “minor” if it is a class I priority violation as described in Section III of this Policy or includes any of the following:
- (i) Any knowing, willful, or intentional violation of Division 7 (commencing with Section 13000) of the California Water Code.
 - (ii) Any violation that enables the violator to benefit economically from noncompliance, either by realizing reduced costs or by gaining a competitive advantage.
 - (iii) Chronic violations or violations committed by a recalcitrant violator.
 - (iv) Violations that cannot be corrected within 30 days.

2. Notices of Stormwater Noncompliance

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

3. Technical Reports and Investigations

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

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

4. Cleanup and Abatement Orders (CAOs)

Cleanup and Abatement Orders (CAOs) are adopted pursuant to California Water Code section 13304. CAOs may be issued to any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a Regional Water Board or the State Water Board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the State and creates, or threatens to create, a condition of pollution or

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nuisance (discharger). The CAO requires the discharger to clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.

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

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

5. Section 13300 Time Schedule Orders (TSOs)

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

6. Section 13308 Time Schedule Orders (13308 TSOs)

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

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

7. Cease and Desist Orders (CDOs)

Cease and Desist Orders (CDOs) are adopted pursuant to California Water Code sections 13301 and 13303. CDOs may be issued to dischargers violating or threatening

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to violate WDRs or prohibitions prescribed by the Regional Water Board or the State Water Board.

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

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

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

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

9. *Administrative Civil Liabilities (ACLs)*

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

In addition to those specific factors that must be considered in any ACL action, there is another factor that ought to be considered. When the underlying problem that caused the violation(s) has not been corrected, the Water Board should evaluate whether the liability proposed in the ACL complaint is sufficient to encourage necessary work by the discharger to address problems related to the violation. If not, the Water Board should consider other options. An ACL action may be combined with another enforcement mechanism such as a CAO, a CDO, or other order with a time schedule for obtaining compliance. The appropriate orders to bring a discharger into compliance via an enforcement action will vary with the circumstances faced by the Water Boards.

The Water Boards should not limit enforcement action to the assessment of monetary liability in situations where there is an outstanding or continuing violation of a requirement which significantly affects or threatens to affect water quality. Except where expressly provided for by law, an ACL action should not suspend penalties based on a

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discharger's alleged costs of coming into compliance with existing legal requirements (see Chapter VIII for a discussion of statutorily-authorized compliance projects).

D. Petitions of Enforcement Actions

Persons affected by most formal enforcement actions or failures to act by a Regional Water Board may file petitions with the State Water Board for review of such actions or failures to act. The petition must be received by the State Water Board within 30 days of the Regional Water Board action. A petition on the Regional Water Board's failure to act must be filed within 30 days of the date the Regional Water Board refuses to act or within 60 days after a request has been made to the Regional Water Board to act. Actions taken by the Executive Officer of the Regional Water Board pursuant to authority delegated by the Regional Water Board (e.g., CAOs, ACL orders) are considered actions by the Regional Water Board and are also subject to the 30-day time limit. In addition, significant enforcement actions by a Regional Water Board Executive Officer may be reviewed by the Regional Water Board at the request of the discharger. When a discharger has unsuccessfully petitioned the Regional Water Board and subsequently petitions the State Water Board for review, the petition to the State Water Board must be filed within 30 days of the Executive Officer's action. The State Water Board may, at any time and on its own motion, review most actions or failures to act by a Regional Water Board. When a petition is filed with the State Water Board, the time for payment of fees, liabilities or penalties that are the subject of the petition is extended during the State Water Board review of the petition.

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APPENDIX B: ENFORCEMENT REPORTING

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

A. Legislatively Mandated Enforcement Reporting

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

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

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

B. Elective Enforcement Reporting

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

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

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| Recommended Performance Measures For Water Boards' Enforcement Programs | |
|--|--|
| Measure Name | Measure Description |
| Self-Monitoring Report Evaluation | The number of self-monitoring reports due, received, and reviewed and the percentage of reports reviewed |
| Inspection Monitoring | The number of inspections and the percentage of facilities inspected |
| Compliance Rates | The percentage of facilities in compliance, based upon the number of facilities evaluated |
| Enforcement Response | The percentage of facilities in violation that received an enforcement action requiring compliance |
| Enforcement Activities | The number of enforcement actions by type |
| Penalties Assessed and Collected | The amount of penalties assessed and collected, the number of SEPs approved, and the number of injunctions obtained |
| MMP Violations Addressed | The number of facilities with MMP violations receiving a penalty at or assess more than the minimum penalty |
| Recidivism | The number and percentage of facilities returning to non-compliance for a violation(s) that was previously addressed through an enforcement action |
| Environmental Benefits <i>(as a result of an enforcement action)</i> | The estimated quantity of pollutants reduced/removed through cleanup (soil or water), or the area of wetlands, stream habitat, beach, creek, or rivers protected or restored |

(From FY 2006-2007 Baseline Enforcement Report)

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