

**AMENDMENTS TO THE STATE WATER RESOURCE CONTROL BOARD'S WATER QUALITY
ENFORCEMENT POLICY**

INITIAL STATEMENT OF REASONS

INTRODUCTION

The Legislature adopted the Porter-Cologne Water Quality Control Act (Wat. Code sections 13000 et seq.), which grants the Regional Water Quality Control Boards (Regional Water Boards) and State Water Resources Control Board (State Water Board) (together Water Boards) the authority to implement and enforce water quality laws, regulations, policies, and plans, to protect waters of the State. Several Water Code sections require the Water Boards to take into consideration specified factors when assessing civil liability for violations. Others provide for mandatory minimum civil liabilities for certain violations. Those Water Code sections, however, do not establish a process for prioritizing discretionary enforcement actions, nor establish a methodology for consistent and transparent analysis of the statutory factors that must be considered in assessing an administrative civil liability.

In 2009, the State Water Board adopted the Water Quality Enforcement Policy (Enforcement Policy) to further its mission to protect and enhance the quality of the waters of the State by defining an enforcement process that addresses water quality problems in the most firm, fair, efficient, effective, and consistent manner. The Office of Administrative Law approved the Enforcement Policy in 2010. The State Water Board also adopted the Enforcement Policy to provide guidance that enables Water Board staff to expend its limited resources in ways that openly address the greatest needs, deter harmful conduct, protect the public, and achieve maximum water quality benefits. The 2009 Enforcement Policy amended and superseded the State Water Board's 2002 Enforcement Policy.

BENEFITS OF PROPOSED AMENDMENTS

The amendments would clarify certain principles that are central to the Enforcement Policy, helping to ensure more transparent and consistent application of the statutory factors the Water Boards must consider when assessing a civil liability. The amendments would change the case prioritization and violation ranking process to make it more workable, efficient, and consistent throughout the state. The amendments are also intended to bring greater global transparency to the Water Boards' enforcement process and penalty methodology application.

Non-substantive technical amendments would increase comprehensibility.

SPECIFIC PURPOSE OF EACH SUBSTANTIVE AMENDMENT – GOVERNMENT CODE 11346.2(b)(1)

The specific purpose of each amendment and rationale that it is reasonably necessary, the public problem each amendment is intended to address, is as follows:

Section I. Fair, Firm, and Consistent Enforcement

The Water Boards have discretion to take enforcement actions pursuant to various provisions of the Porter-Cologne Water Quality Control Act current regulations state that 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. The terms “fair, firm, and consistent” are not completely defined in the regulations. As a result, members of the public lack certainty about what is meant by the term “fair” in the Enforcement Policy context. The proposed amendments would clarify that the principle of “fairness” relates to eliminating the economic advantage gained by those who do not incur the costs to comply with regulatory obligations adopted under the Water Code. The amendments would clarify and articulate that fairness is conceptualized in relation to the voluntarily compliant regulated community.

Existing regulations do not substantially discuss the concept of transparency. Yet, transparency is a governing tenet of the enforcement process. The proposed amendments would add the guiding principle of transparency to “fair, firm, and consistent enforcement” to elucidate that it is the Water Boards’ policy to require specific findings be made to support conclusions, and that those findings must be based on specific and identified evidence and policy considerations.

The existing regulations were adopted prior to State Water Board Resolution No. 2016-0010, which prioritizes the human right to water. The proposed amendments would require the Water Boards to prioritize and pursue enforcement in furtherance of protecting the human right to water. The proposed amendments would also encourage the Water Boards to consider informal enforcement and compliance assistance for Publicly-Owned Treatment Works (POTW) serving disadvantaged Environmental Justice communities in addition to POTWs serving small communities.

The proposed amendments are necessary to achieve transparency in the enforcement process and to infuse it with the principle of environmental justice, the human right to water and associated goals.

Section II. Enforcement Priorities for Discretionary Enforcement Actions

The current regulations require the Water Boards to prioritize cases for formal discretionary enforcement. However, those regulations do not detail how to undertake the prioritization process. As a result, the case prioritization process varies between the Regional Water Boards. The amendments would require Water Board enforcement staff to meet periodically to prioritize cases and would require each Regional Water Board to appoint an Enforcement Coordinator. The proposed amendments are necessary to achieve consistency and greater efficiency in the enforcement prioritization process.

The current regulations specify three different classes of violations: Class I; Class II, and; Class III. The current regulations establish a goal of automating case prioritization through data algorithms. The existing classification system is unduly burdensome and unworkable due to the difficulty of applying it in a timely and consistent manner. Water Board staff and members of the

regulated public have difficulty discerning under which classification a violation should fall. Class II and Class III violations are often conflated with each other. The amendments would eliminate Class III violations entirely. The amendments would also eliminate the goal of automating case prioritization through data algorithms. These amendments are necessary to reduce burdensome workloads, to add transparency to the enforcement process, and to add clarity and consistency to case prioritization.

Section VI. Monetary Assessments in Administrative Civil Liability (ACL) Actions

Water Code penalty provisions require Water Boards to consider the degree of toxicity of a discharge. When analyzing this statutory factor, existing regulations require the Water Boards to consider the characteristics of the discharge based on the physical, chemical, biological, and/or thermal nature of the discharge, waste, fill, or other material. The current regulations do not include temporal limits, which has led to inconsistency in how the statutory factor is applied. The amendments would clarify that this factor is determined based on the characteristics of the material before it is discharged. This is necessary to increase consistency in the methodology's application.

Water Code penalty provisions require the Water Boards to consider the nature, extent, circumstances and gravity of a violation. The current regulations require the Water Boards to calculate the factor for potential for harm for discharge violations by determining the actual or threatened impact to beneficial uses. This requirement has detrimentally limited the Water Boards from adequately assessing potential or actual harm to human health. The amendments would clarify that calculating this factor entails considering the actual and potential harm of the discharged material in the context of the potential impacts to beneficial uses more generally. The amendments would also clarify that potential harm can be used if actual harm cannot be quantified due to a discharger's untimely reports, inadequate monitoring, or other practical limitations. The existing regulations define categories of harm. Those definitions contain ambiguous language, which has led to inconsistent application and interpretation. The amendments would clarify ambiguities in the six categories of harm and potential for harm. These amendments are necessary to ensure that the Water Boards can meet their goals of protecting human health and safety and are necessary to ensure consistent application of the statutory factor throughout the state.

Water Code penalty provisions require the Water Boards to consider whether a discharge is susceptible to cleanup or abatement. Existing regulations require the Water Boards to apply a "0" for the "Susceptibility to Cleanup" factor if 50 percent or more of a discharge is susceptible to cleanup and abatement. The regulations do not require consideration of whether cleanup or abatement has actually occurred. This has resulted in conflicting interpretations and inconsistent application of the statutory factor. The amendments would base "Susceptibility to Cleanup" on whether 50 percent or more of the discharge was actually cleaned up within a reasonable period of time.

Water Code provisions provide for both per gallon and per day penalties for discharge violations. Existing regulations establish a rubric for determining the per gallon assessment

factor for discharge violations. That rubric contains weighting irregularities, or “spikes” for certain incremental increases in harm. This has resulted in a disproportionate and significant increase in penalties between the “Potential for Harm” scores “7” and “8.” The amendments would eliminate irregularities in the rubric and provide more evenly increased penalties for each incremental increase in the potential for harm score.

Water Code provisions provide maximum per gallon discharge penalties of up to \$10 per gallon. Existing regulations give discretion to the Water Boards to apply a rate of \$2.00 to the per gallon factor for high-volume discharges of sewage and municipal and construction storm water, and \$1.00 to the per gallon factor for recycled water discharges. Existing regulations do not define what constitutes a high-volume discharge. The amendments define high-volume to be between 100,000 gallons and 2,000,000 gallons. These amendments are necessary to clarify what constitutes a high-volume discharge and is subject to a reduced multiplier for per gallon penalties.

The current regulations limit the application of \$2.00 to sewage and municipal and construction storm water, and limit the application of \$1.00 to recycled water discharges, which fails to account for other types of high-volume discharges that should be treated similarly. The amendments would remove the limitation to sewage and storm water, which would broaden the types of discharges to which the reduction may apply. The amendments would also establish that for discharges in excess of 2 million gallons a per-gallon penalty of \$1.00 per gallon may be used. These amendments are necessary to ensure that the Water Boards are able to apply the penalty methodology fairly and consistently.

Existing regulations require the Water Boards to calculate an initial liability factor for each non-discharge violation, which is defined as those violations that harm or undermine the regulatory program but may not directly impact beneficial uses. Existing regulations establish categories for assessing the “Potential for Harm” score for non-discharge violations. Those categories are based on varying levels of harm or potential harm to beneficial uses. This has resulted in problems identifying under which category a non-discharge violations should fall, because the category descriptions are not based on harm to the regulatory program. The amendments would base the category definitions on whether there was harm to the Water Boards’ ability to perform their statutory or regulatory functions. This amendment is necessary to ensure that the categories for “Potential for Harm” are consistent with the definition of “Potential for Harm” for non-discharge violations.

Water Code penalty provisions require the Water Boards to consider whether a discharger has “any prior history of violations.” Existing regulations require the Water Boards to apply a minimum multiplier of “1.1” when there is a history of repeat violations. Existing regulations do not establish whether the multiplier can be less than “1.0” if there is no history of violations. This has resulted in conflicting interpretations and inconsistent application of this statutory factor. The amendments would clarify that there is no reduction for a discharger with no history of violations and that the minimum for this multiplier in any case is “1.0.” This is necessary to provide transparency and consistent application of this statutory factor.

Water Code penalty provisions provide for a specified maximum penalty amount for “each day in which the violation occurs.” Existing regulations grant the Water Boards discretion to “collapse,” or reduce the days of violation for multiple-day violations that last more than 30 days if at least one of three findings is made. The three findings contain ambiguous language, which has led to inconsistent interpretations by both Water Board staff and the public. Existing regulations grant the Water Boards discretion to collapse the number of days of violation if a violation is not causing daily detrimental impacts to the environment or the regulatory program. The amendments would clarify that this finding can only be made if the violation is not causing daily detrimental impacts to the environment and is not causing detrimental impacts to the regulatory program. Existing regulations grant a Water Board discretion to collapse the number of days of violation if it finds that a violation results in no economic benefit from the illegal conduct that can be measured on a daily basis. The amendments would clarify that where the sole economic benefit measured on a daily basis is time value of money, the Water Board has the discretion to make this finding. The amendments would also clarify that the number of days of violation should not be collapsed for violations that delay remedial action.

The existing method for assessing this alternative multiple-day calculation includes an irregularity whereby some violations lasting longer than 30 days are calculated as having lasted for a shorter duration than those violations lasting fewer than 30 days. The amendments would change the method of collapsing days and fix the irregularity so that violation days 30 through 60 are collapsed by a unit of five days to one, rather than 30 to one. These amendments are necessary to ensure fair application of this factor.

Water Code penalty provisions require the Water Boards to consider whether a violator has the ability to pay a proposed liability and the effect the proposed penalty will have on its ability to continue its business before assessing a penalty. Existing regulations grant the Water Boards discretion to lower a penalty based on a finding that a discharger does not have the ability to pay the penalty and continue in business. The existing regulations, however, do not specify what types of information or evidence may serve as the basis for that finding, or by what means that information should be gathered. Existing regulations also do not establish adequate procedures for cases in which there is disagreement between the Water Boards and a discharger regarding its ability to pay and continue in business. Existing regulations do not include an explanation of how low a penalty can be adjusted when the operable Water Code section also mandates a statutory minimum penalty. As a result, the ability to pay and continue in business analysis has not been undertaken in a consistent manner throughout the state. The amendments would clarify that ability to pay and continue in business is determined by considering income and net worth. The amendments would clarify that the Water Boards can issue subpoenas to obtain ability to pay and continue in business information.¹ The amendments would provide that a discharger failing to comply with such a subpoena should be treated by the Water Boards as having waived its right to challenge a finding of ability to pay. The amendments would also clarify that a penalty could not be adjusted lower than the

¹ The Water Boards have discretion to issue administrative and investigatory subpoenas pursuant to Government Code sections 11180 et seq. and 11450.05 et seq., Water Code section 183, and title 23, Code of California Regulations, section 649.6.

economic benefit gained from non-compliance for Water Code section 13385 violations. The amendments would clarify that a penalty could only be adjusted lower than the economic benefit for other Water Code violations based on evidence-supported findings that imposing a penalty that recaptures economic benefit would be unjust or against public policy.

Water Code penalty provisions require the Water Boards to consider “other matters that justice may require.” Existing regulations grant the Water Boards authority to adjust a proposed liability based on express, evidence-supported findings that application of the other statutory factors results in an unjust penalty. Existing regulations grant the Water Boards discretion to add the costs of investigation and enforcement to the total liability under this factor. The regulations, however, fail to specify the methodology by which the costs of investigation and enforcement are calculated. This has led to use of inconsistent methods throughout the state. The amendments would direct the Water Boards to base these costs on each staff person’s hourly rate including benefits and overhead. The amendments would direct the Water Boards to include in that estimate those hours incurred between the times the violation is discovered or when the first informal enforcement action is issued and the time the administrative civil liability complaint is issued. The amendments would also clarify that attorney costs and costs associated with preparing for and attending a hearing may not be included. These amendments are necessary to ensure that the costs of investigation and enforcement are more accurately and consistently calculated.

IX. Enhanced Compliance Actions (ECA)

Existing Regulations grant the Water Boards discretion to approve settlement agreements that suspend a portion of monetary liability for completion of an Enhanced Compliance Action (ECA), as defined. Existing regulations establish that ECAs are subject to the same rules governing Supplemental Environmental Projects (SEP). Current regulations apply a 50 percent limit on the amount of liability that can be applied to SEPs, and thus to ECAs. The amendments would waive the 50 percent limit for ECAs in economically disadvantaged communities with a financial hardship. This amendment is necessary to further the Water Boards’ policies related to environmental justice.

OTHER REQUIRED SHOWINGS – GOVERNMENT CODE 11346.2(b)(2)-(6)

Economic Impact Assessment – Gov. Code 11346.2(b)(2): The amendments pertain to procedures before the Water Boards and do not impose any new financial obligations on the business community or otherwise affect the cost of doing business. The costs of regulatory compliance are unchanged. The State Water Board has determined that the proposed regulations would not significantly affect the following:

- The creation or elimination of jobs within the State of California. The amendments summarized above would not have any affect because there would not be any significant change in the cost of compliance or regulatory personnel needed for compliance with the amended policy, or change to the civil administrative penalties ultimately reached utilizing the amended policy.

- The creation of new businesses or the elimination of existing businesses within the State of California. The amendments would not result in the creation or elimination of businesses. The impact of the proposed amendments on businesses would be insignificant because they do not change compliance requirements or costs associated therewith.
- The expansion of businesses currently doing business within the State of California. Since the amendments do not change the core provisions of the previous Enforcement Policy, the proposed regulations would not have any effect on the expansion of businesses.
- The benefits of the amendments to the health and welfare of California residents, worker safety, and the state's environment. The State Water Board has determined that the proposed amendments would improve the protection of the public's health and welfare and enhance the state's environment by improving existing case prioritization processes and clarifying enforcement policy methodology application.

Studies, Reports, or Documents Relied Upon – Gov. Code 11346.2(b)(3): Except for an Economic Impact Assessment, the State Water Board did not rely on technical, theoretical, or empirical studies, reports, or similar documents in proposing the amended regulations. The proposed amendments do not mandate the use of specific technologies or equipment.

Reasonable Alternatives Considered – Gov. Code 11346.2(b)(4)(A): None. No reasonable alternatives have been identified or brought to the attention of the agency.

Reasonable Alternatives That Would Lessen the Impact on Small Businesses – Gov. Code 11346.2(b)(4)(B): The State Water Board did not identify any alternatives that would lessen any adverse impact on small business. The State Water Board has determined that the impact on small businesses is insignificant.

Evidence Relied Upon to Support the Initial Determination That the Regulation Will Not Have a Significant Adverse Economic Impact on Business –Gov. Code 11346.2(b)(5): None. The proposed amendments will not have a significant adverse impact upon business because they do not impose any new financial obligations on the business community or otherwise affect the cost of doing business.

Duplication or Conflicts with Federal Regulations –Gov. Code 11346.2(b)(5): The proposed amendments do not unnecessarily duplicate or conflict with federal regulations. A review of the Code of Federal Regulations did not indicate the existence of duplicative or conflicting law.

Water Code Section 106.3 Consideration

In establishing and adopting the proposed regulations, the State Water Board considered the statewide policy set forth in section 106.3 of the Water Code and determined the proposed regulations will further the stated policy.