



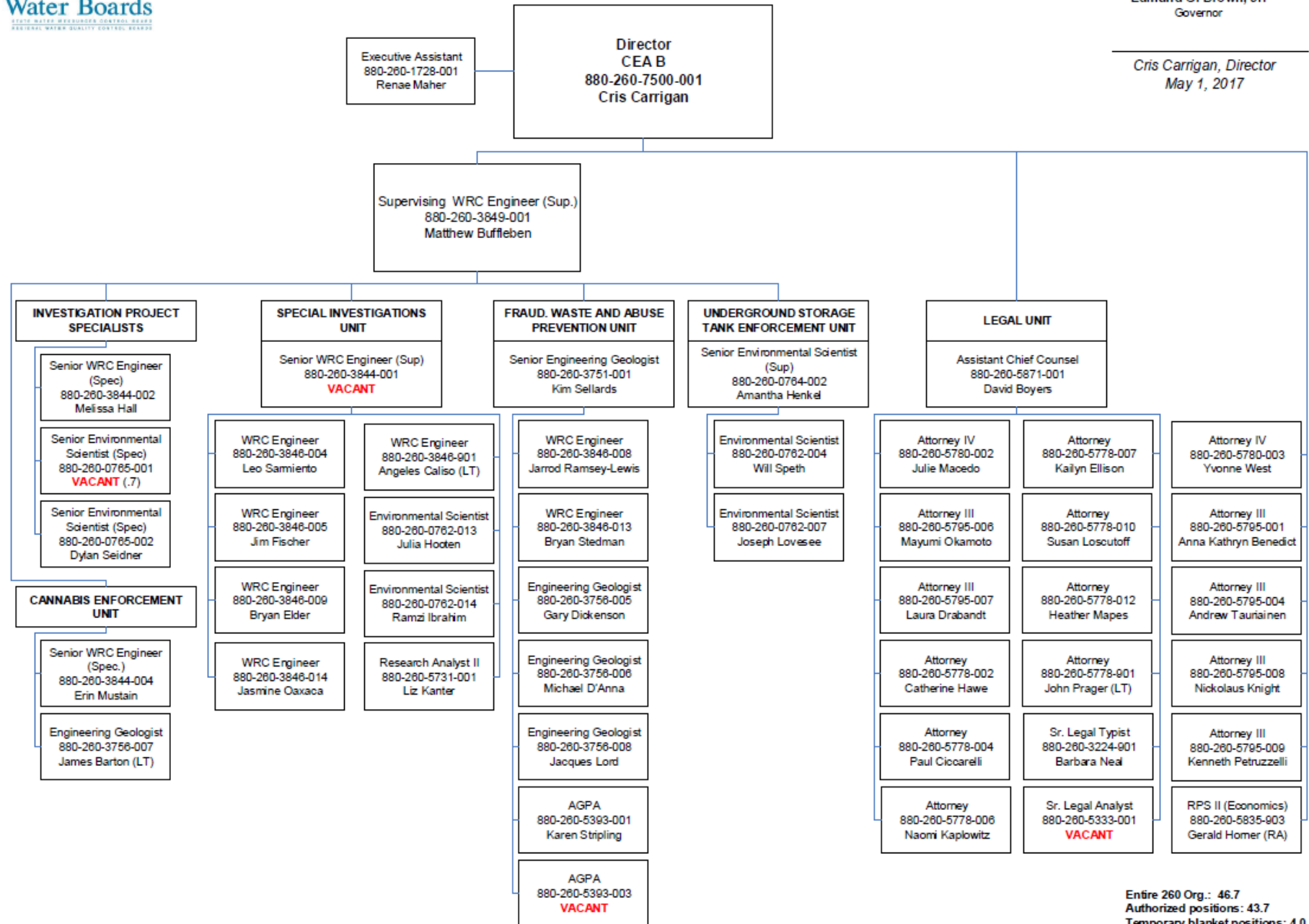
Recent Developments In Enforcement

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State Water Board
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Office Of Enforcement

- Office of Enforcement: Structure & Services
 - Water Quality Enforcement Policy Amendments
- Settlement Considerations in Administrative Civil Liability Actions
 - Supplemental Environmental Project (SEP) Policy



Office of Enforcement's Clients

- Regional Boards
- Division of Water Rights
- Division of Drinking Water
- Division of Financial Assistance
- Cleanup Fund





2017 Water Quality Enforcement Policy

- Human Right to Water/Environmental Justice
 - Prioritization Process
 - Fine-Tuning Penalty Methodology

Further Environmental Justice & Human Right To Water

- Ensure the fair treatment of people of all races, cultures & income levels, including minority & disadvantaged populations in the state.
- Requires Greater Focus on Compliance Assistance & Progressive Enforcement.



Further Environmental Justice & Human Right To Water



“In furtherance of the Human Right to Water, the Water Boards shall prioritize the enforcement of violations that involve a discharge, or threatened discharge, that results in, or threatens to result in, the contamination of drinking water resources.”

Violations of the Human Right to Water will be specifically tracked and publicly available.

Discretionary Enforcement Goals



- Identify the greatest needs
 - Deter harmful conduct
- Encourage the regulated community to anticipate, identify & correct violations
- Achieve maximum water quality benefits
 - Protect the public.

Prioritizing Enforcement: Categorizing Cases

- Change the violation classification method so that all violations are either Class A or Class B. No Class I, II, and III. No Mandatory Enforcement on Class I.
- Remove the goal of automating the case prioritization process through data algorithms.

Prioritizing Enforcement: Categorizing Cases

- ✓ Identifying the highest priority cases
- ✓ Impacts to Human Right to Water?
- ✓ Magnitude of violations & threat to beneficial uses
- ✓ Did violations harm a sensitive water body?
- ✓ Did violations continue after being brought to the attention of the entity?
- ✓ Is there a good-faith effort to correct the violation?
- ✓ Are there facts mitigating the violations?
- ✓ What is the strength of evidence?
- ✓ Are enforcement resources available?

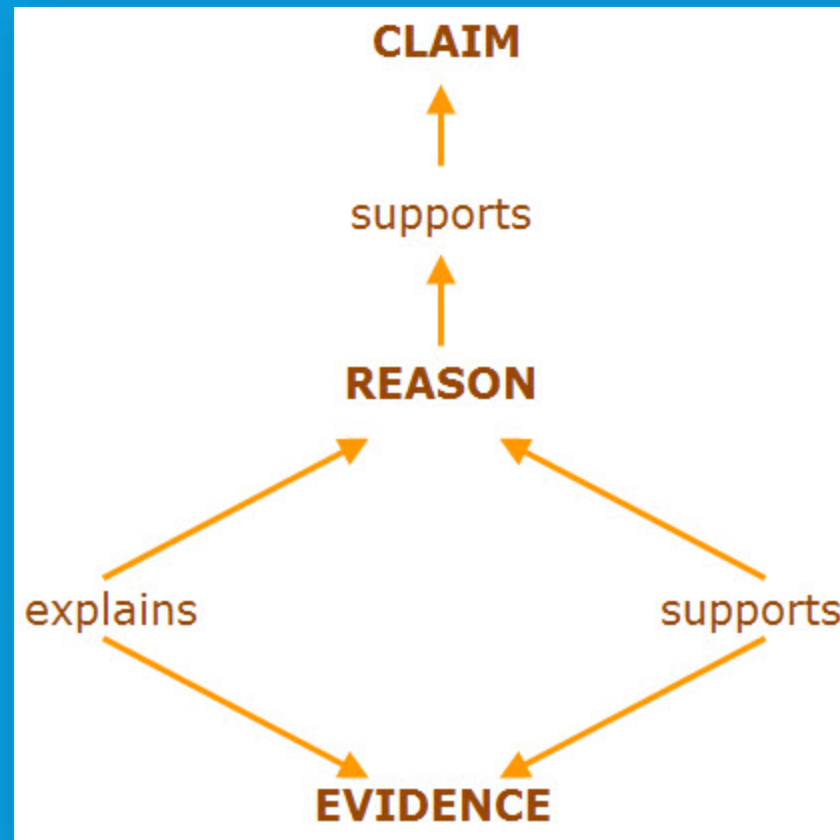
Calculating Penalties: Fine-Tuning the Penalty Methodology

Penalty Methodology – Establishes a method for the Water Boards to consider statutory factors when determining an appropriate civil liability to create a fair, transparent & consistent statewide approach to liability assessment.

Water Code Factors (§§ 13327 & 13385)

- Nature, circumstance, extent and gravity of the violation.
- Whether the discharge is susceptible to cleanup or abatement.
- Degree of toxicity of the discharge, & with respect to the violator.
 - The ability to pay
 - The effect on ability to continue in business
 - Voluntary cleanup efforts taken
 - History of violations
 - Degree of culpability
 - Economic benefit or savings, if any, resulting from the violation, & other matters as justice may require.

Make Evidence-Supported Findings Support the Liability



Fairness, Transparency & Consistency

Fairness relates to eliminating economic advantage for violators & leveling the playing field.

“The principle of fairness in enforcement requires that those who are unwilling to incur the expense of regulatory compliance not be rewarded for making that choice. It is the intent of the State Water Board that formal enforcement should be used as a tool to maintain a level playing field for those who do comply with their regulatory obligations by setting appropriate civil liabilities for those who do not.” (2017 Enforcement Policy, P.1)

Fairness, Transparency & Consistency

Consistency is achieved by applying the penalty methodology, not by comparing outcomes.

“The Water Boards achieve consistency in enforcement by applying the penalty calculator in Section VI and not by comparing enforcement matters. While comparing similar enforcement cases is not prohibited and may be relevant, this Policy does not require a Water Board to compare a proposed penalty to other actions that it or another Water Board has taken, or make findings about why the assessed or proposed amounts differ.” (2017 Enforcement Policy, P.3)

Changes To Methodology

- Change Order of Factors 1 (Toxicity) & 2 (Harm to Beneficial Uses)
- Clarify Toxicity is Determined by Characteristics **before** Discharge
- Clarify Potential for Harm can be Analyzed where Actual Harm is unknown
- Susceptibility to Cleanup Requires Actual Cleanup in Reasonable Time
- Smooth out Curve in Tables 1 & 2.

Changes To Methodology

- Adjustments to Collapsing Days of Violation for Multiple Day Violations Lasting more than 30 Days – Reporting Violations Only.
- High Volume Discharges – Regional Board Select a Per Gallon Liability Multiplier Between \$2 Per Gallon & \$10 Per Gallon.
 - No Limitation to Sewage or Stormwater
 - Between 100,000 & 2,000,000 Gallons Can be High Volume
 - Over 2 Million Gallons (or Recycled Water) Regional Boards May Use \$1 Per Gallon

Changes To Methodology

- **Cleanup and Cooperation (.75 to 1.5)**
 - Exceptional Compared to what is Reasonably Expected (Below 1.0)
 - Neutral for what a Reasonable & Prudent Person would do (1.0)
 - Falls Below Normally-Expected Response (Above 1.0)
- **Culpability (.75 to 1.5) Below 1 Only for Exceeding Standard of Care to Prevent the Violation**
- **History of Violations** – Clarify that there is no reduction for having a clear history with no violations (minimum should always be 1). History of ordinary violations in last 5 years should be 1.1, & history of similar or numerous dissimilar violations should be considered as potentially higher than 1.1.

Changes To Methodology

- **Ability to Pay (ATP)**

- Clarify that ATP is determined by considering income and net worth.

- Clarify that Water Boards can issue subpoenas to obtain ATP information & that failure to comply or provide full and accurate information should be treated as discharger waiving its right to challenge a finding of ability to pay.

- Clarify that ATP is just a consideration; no obligation to ensure that a discharger can pay or stay in business.

- **Economic Benefit**

- Economic Benefit is absolute minimum for section 13385 violations; for other Water Code violations, only go below if imposing economic benefit would be unjust or against public policy.

- **Staff Costs May be Recovered.**

Assessing Administrative Civil Liabilities: **Settlement**

- ✓ Use Same Approach as Regional Board
- ✓ Engage with the Discharger
- ✓ Re-evaluate the Methodology
- ✓ Determine a **range** of possibilities



Stipulated Orders

- Negotiated by enforcement staff/consistent with penalty methodology.
- Memorializes obligation of discharger to pay/ memorializes agreement of discharger to do compliance projects or supplemental environmental projects (SEPs).
- Can provide for actions by discharger to attain compliance in addition to payment of penalties.
 - Public Comment, Board Input, Delegation, Public Hearing.

Alternatives to Assessing Monetary Liabilities

Supplemental Environmental Projects (SEPs): An environmentally beneficial project that the person is not otherwise obligated to perform or would not be undertaken in the absence of an enforcement action.

Compliance Projects: Applies to resolve all or a portion of a mandatory minimum penalty against a publicly owned treatment works serving a small community with financial hardship (10,000 residents or fewer) in a rural county.

Enhanced Compliance Actions (ECAs): A project that allows a discharger to make capital or operational improvements beyond those required by law & is separate from projects designed to bring a discharger into compliance.

Supplemental Environmental Projects (SEPs)

- **Voluntary** – Part of Stipulated Order
- No Benefit to the Discharger
- No Benefit to Water Boards/Fund Water Board Programs
- Must be a Nexus to the Violation
- No Parking Funds

Supplemental Environmental Projects

- Environmental Justice SEP List Required by Statute
 - Board-Approved SEP List is Best Practice





QUESTIONS?

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