

| NUMBER | COMMENTER NAME |
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| 1 | State of California Auto Dismantlers Association |
| 2 | San Diego County Water Authority |
| 3 | San Francisco Public Utilities Commission (SFPUC) |
| 4 | San Joaquin Tributaries Authority (<i>submitted by O'Laughlin & Paris LLP</i>) |
| 5 | Alameda County Flood Control and Water Conservation District, Zone 7 |
| 6 | City of Los Angeles, Bureau of Sanitation (LASAN) |
| 7 | Friends of the North Fork (American River) |
| 8 | Western Placer Waste Management Authority |
| 9 | San Bernardino County, Department of Public Works |
| 10 | Sonoma County Water Agency |
| 11 | Central Valley Clean Water Association |
| 12 | San Diego Regional Water Quality Control Board |
| 13 | California League of Food Processors |
| 14 | California Farm Bureau Federation |
| 15 | SCS Engineers |
| 16 | Agricultural Council of California, California Independent Oil Marketers Association, California Building Industry Association, California League of Food Processors, California Manufacturers & Technology Association, California Metals Coalition, Chemical Industry Council of California, Industrial Environmental Association, West Coast Lumber & Building Material Association, Western Growers, Western Mining Alliance, and Western States Petroleum Association |
| 17 | Community Water Center, Leadership Counsel for Justice and Accountability, Clean Water Action, and Environmental Justice Coalition for Water |
| 18 | Construction Industry Coalition on Water Quality, Building Industry Legal Defense Foundation, and California Building Industry Association |
| 19 | Kings River Water Quality Coalition (<i>submitted by Best Best & Krieger</i>) |
| 20 | California Water Association |
| 21 | Southern California Alliance of Publicly Owned Treatment Works (SCAP) |
| 22 | Los Angeles Department of Water and Power (LADWP) |
| 23 | Sanitation Districts of Los Angeles County |
| 24 | East Bay Municipal Utility District (EBMUD) |
| 25 | Calleguas Creek Watershed Management Plan Stakeholders |
| 26 | California Coastkeeper Alliance |

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| 27 | California Association of Sanitation Agencies, Bay Area Clean Water Agencies, and California Water Environment Association |
| 28 | City of San Diego, Public Utilities Department |
| 29 | Association of California Water Agencies and California Municipal Utilities Association |
| 30 | Agricultural Council of California, Association of California Egg Farmers, Buena Vista Coalition, California Agricultural Irrigation Association, California Association of Wheat Growers, California Cotton Ginners Association, California Cotton Growers Association, California Farm Bureau Federation, California Fresh Fruit Association, California Grain & Feed Association, California Pear Growers Association, California Seed Association, California Warehouse Association, Dairy Cares, East San Joaquin Water Quality Coalition, Kern River Watershed Coalition Authority, Pacific Egg & Poultry Association, San Joaquin and Delta Water Quality Coalition, Western Agricultural Processors Association, Western Growers Association, Western Plant Health Association, Western San Joaquin River Watershed Coalition, Westside Water Quality Coalition |
| 31 | Bay Area Clean Water Agencies (BACWA) |
| 32 | California Stormwater Quality Association (CASQA) |
| 33 | California Council for Environmental and Economic Balance |
| 34 | City of Santa Rosa |
| 35 | Los Angeles, Department of Public Works, and the Los Angeles County Flood Control District |
| 36 | California Water Service |
| 37 | Fred Krieger |
| 38 | Sierra Club--Redwood Chapter, North Group |
| 39 | Keith Hamblin |
| 40 | Orange County Sanitation District |
| 41 | Partnership for Sound Science in Environmental policy |
| 42 | Public Water Agencies Group (<i>submitted by Lagerlof Senecal Gosney & Kruse LLP</i>) |
| 43 | San Jose Water Company |
| 44 | Santa Clara Valley Water District |
| 45 | Stanislaus County, Department of Environmental Resources |
| 46 | Placer County |
| 47 | Coast Action Group--Affiliate of Redwoos Coast Watersheds Alliance |
| 48 | River Watch |
| 49 | Food & Water Watch |
| 50 | Kimberly Burr (Green Valley Creek volunteer) |

| Comment Category | Commenter | Comment | Comment Summary | Response |
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| I. Fair, Firm & Consistent | | | | |
| Introduction | | | | |
| I. Introduction | 3 | 2 | Throughout the proposed Policy, the SFPUC requests that the SWRCB add qualifiers as to the nature of the violation (e.g., gross negligence vs. accidental omission). For example, accidental violations should be better qualified in the definitions of "Potential for Harm" and "Deviation from Requirement" in Step 3 (page 21). Also, the SFPUC requests that this Policy not increase the minimum multiplier for Degree of Culpability Conduct factor to account for unintentional and unavoidable discharges. | Staff disagrees. Several factors in the Enforcement Policy provide a mechanism by which a Discharger's good behavior can be factored in to the penalty calculation favorable. The Culpability, Cleanup and Cooperation, and History of Violations, factors all allow for the penalty to be adjusted downwards when a facility has no history of violations, has acted in accordance with industry standards and within the due standard of care, and has cooperated with the boards. Rather than group the regulated public arbitrarily into categories, the Policy provides that each penalty action analyze the discharger's good faith behavior, egregious behavior and/or conformance to industry wide practices and exercise of due care in the context of specific facts. |
| I. Introduction | 3 | 3 | SFPUC requests that the SWRCB reexamine the proposed changes to address potable drinking water discharges in a manner consistent with treatment of recycled water discharges. | Please see responses to Commenter 2, Comment 6 and Commenter 42, Comment 1. |
| I. Introduction | 9 | 1 | No authority to bring enforcement against people not under the definition of "legally responsible person(s)," such as contractors and/or agents for responsible persons. | The commenter is technically correct. However, contractors, subcontractors and agents may be held legally responsible for unauthorized discharges when they cause and/or permit them and/or act beyond the scope of their contract or agency. In such cases, the Water Boards may pursue an action directly against such legally responsible persons. |
| I. Introduction | 44 | 2 | For agencies that receive runoff from surrounding land uses and tidal waters that may cause water issues, including fish kills, please clarify how responsibility for the discharge would be assigned. | The Water Boards may pursue actions against such legally responsible persons. The penalty methodology requires that culpability be considered in assessing penalties. |
| I. Introduction | 18 | 1 | Holding contractors and subcontractors liable would cause confusion and is illogical. Eliminate the proposal. | Contractors, subcontractors and agents may be held legally responsible for unauthorized discharges when they cause and/or permit them and/or act beyond the scope of their contract or agency. In such cases, the Water Boards may pursue an action directly against such legally responsible persons. |
| I. Introduction | 19 | 1 | The total re-write of 40 pages of comparative regulatory text and 27 pages of pertinent appendices is troubling in general, and specifically so when considering the manifold possible applications to the new and still emerging Irrigated Lands Regulatory Program, and its yet to be fully implemented global expansion to groundwater. | Excepting the addition of provisions addressing disadvantaged communities and the Human Right to Water and reflecting State Board policies adopted that govern the same, amendments to the Policy are largely refinements to reflect current Regional Water Board practices. The Regional Water Boards have already applied the current Policy to dozens of irrigated lands cases, and hundreds of groundwater-related cases. The Policy is intended to provide a consistent approach to violations while recognizing that there are differences in the quality and impact of the violations. These principles apply to irrigated lands as much as any other Water Board program. |
| I. Introduction | 19 | 2 | We understand the merits of a progressive fine system predicated on graduated penalties based on the concept of reclaiming any "advantage" a violator may have gained by virtue of the violation. It, however, also seems that additional factors need to be considered. First, the ILRP is a new extensive and complex regulatory program with various interpretations and approaches being considered by each the agency, coalitions, grower groups, industry experts, and at the farm operation levels. These factors should be appropriately evaluated in the consideration of imposing proper penalties in an emerging program. | The proposed amendments to the Policy provide the Regional Water Boards with the flexibility to appropriately evaluate and address the considerations suggested by the commenter. Relevant mitigating factors the Regional Water Boards may consider when imposing civil liabilities on those regulated under a new program include the violator's conduct and degree of culpability, history of violations, cleanup and cooperation, ability to pay and continue in business, economic benefit and any other factors justice may require. The Penalty Calculation Methodology provides a framework for consistently characterizing and assessing penalty amounts for similarly situated members of the regulated public, while allowing for the consideration of unique circumstances that may arise. Staff believes the revisions to the methodology strike the appropriate balance between the principles of consistency and flexibility and further the Policy objectives of fair, firm, transparent and consistent enforcement. |
| I. Introduction | 19 | 4 | Also unique to the ILRP is that the Central Valley covers some eight million irrigated acres, involving an untold hundreds of thousands of separate fields and perhaps a million surface discharge points, and something like 300 trillion or an infinite number of percolation sites. The Water Board recognized the need to authorize watershed coalitions to bear the enormity of this unparalleled regulatory responsibility. Consequently, the enforcement policy must provide guidance on what would be a proper division of responsibility between the coalitions and the actual discharger who is the direct target of most all of the enforcement actions. Further guidance should also be offered on how such "violations," if any, will be brought against farm dischargers and watershed coalitions, and how they would be evaluated through the new proposed nine step penalty calculation process, if it is applicable to water quality coalitions at all. | The Enforcement Policy has already been applied by the Central Valley and Central Coast Water Boards to dozens of enforcement actions in the Central Valley and Central Coast Regions. Watershed coalitions are not "dischargers," so they are not legally responsible for discharge violations under the Water Code. Some reporting and monitoring obligations that would normally apply under traditional water board permits have been eliminated, relaxed and/or transferred to the coalitions under the Central Valley and Central Coast Water Boards' irrigated lands regulatory programs. The Enforcement Policy does not address what type of conduct constitutes a permit or Water Code violation or who is responsible for the consequences of that violation. Those considerations are determined by the relevant permit and provisions of the Water Code. |

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| I. Introduction | 19 | 12 | The differences between point and non-point discharges are extreme. Enforcement has been a relative new focus as to agricultural non-point source drainage. There is therefore a significant need for meaningful review of applying or developing enforcement penalties and procedures for agricultural irrigation. Drainage from agricultural fields or an interlinked series of fields representing thousands of acres and dozens of acre feet of water, which may contain a fertilizer residue or sediment load is entirely disparate from a point source discharge where per gallon penalties are assessed. This is also true of post rainstorm sheet flow from foothill rangelands, which may pick up pathogen or sediment loads. Per acre assessments and ranking these situations as high level episodes is highly improper. Attempting to force fit these point source enforcement criteria on agricultural irrigation and storm water drainage is wrong-headed and most improper to do in the absence of thoughtful deliberations with the agricultural water community, which has not yet been afforded. | Please see responses to Commenter 19, Comments 1, 2 and 4. The Policy language is intended to provide a consistent approach to violations while recognizing that there are differences in the quality and impact of the violations. The Enforcement Policy, both the current and proposed versions is tailored to apply to a variety of violations, including paper and non-discharge violations. The flexibility of the Policy makes it well suited to address agricultural-related violations. Additionally, both the existing and proposed versions of the Policy provide the Regional Water Boards with express authority to consider reducing civil liabilities for high volume discharges. The Policy provides the Regional Water Boards with considerable flexibility to address the considerations raised by the commenter in the context of violations relating to agricultural activities, and both the Central Valley and Central Coast Water Boards have already done so. Many of these same considerations have been adeptly addressed by the Regional Water Boards in the context of all of our non-point source programs, including construction stormwater, industrial stormwater and the MS4 programs. |
| I. Introduction | 20 | 1 | The Policy focuses on traditional point source discharges and fails to account for low threat discharges, including those that comply with applicable permit limits or WDRs. | Discharges within permit, WDR and Water Code limits are not violations subject to civil liability enforcement actions. The Policy appropriately accounts for "low threat" discharges that exceed permit limits by requiring the Water Boards to make evidence supported findings under step 1 of the methodology relating to the discharge's harm to the specific beneficial uses of the relevant waters. To determine a discharge's potential for harm, the Water Board must make determinations about the toxicity of the waste discharged and the potential harm to applicable beneficial uses. |
| I. Introduction | 22 | 1 | Agrees to language; Requests this section be more specific as to when progressive enforcement applies; Entities need to be held responsible for contributing to violations. | The specific examples set forth by the commenter can be accounted for within the discretion of the Water Boards. More specific guidance could result in undue constraints on the Water Boards' ability to exercise appropriate discretion in the context of specific violations and cases. |
| I. Introduction | 22 | 2 | LADWP agrees with the language that has been added on sharing liability with the contractors and/or agents. Although this is helpful, since in many cases the LRP has contracted out the work to be done or has leased the land and does not operate the facility, LADWP recommends also including language that more specifically holds accountable the individuals responsible for contributing to the violation. | Please see response to Commenter 18, Comment 1. |
| I. Introduction | 33 | 1 | This new language provides that the contractor, in addition to the legally responsible person (LRP), may be enforced upon. In order to ensure fairness in the application of this Policy, it should instead provide that the party(ies) (i.e., LRP and/or contractor) that took the action that caused the alleged violation should be the party against whom the enforcement is taken. | Please see the responses to Commenter 9, Comment 1 and Commenter 18, Comment 1. |
| I. Introduction | 34 | 1 | The Commenter believes that while the Policy should prescribe a process by which discretionary enforcement actions can be implemented in a consistent manner, preserving flexibility to accommodate a wide variety of circumstances is key to ensuring that the Policy is implemented fairly and reasonably. | Comment noted. |
| I. Introduction | 36 | 6 | Policy should recognize that formal enforcement proceedings may be inappropriate when non-compliance is unintentional and there is no economic advantage. For example, a drinking water purveyor realizes no economic advantage when an unplanned, emergency discharge occurs. | Staff disagrees. Unintentional non-compliance can have significant water quality impacts. Economic benefits may result from such discharges in the form of delayed or avoided maintenance, upgrades, and training. |
| I. Introduction | 39 | 1 | Add "and fair" to Page 1, Par.3, line 3, "Without a strong and fair enforcement program..."; Clarify who "agents" are. The text should state that the person who is primarily responsible for a violation is the property owner, operator or developer. The last person to be cited is the contractor if they performed work and that they knowingly violated water quality standards, etc. | Staff support the recommendation to add "and fair." Agents are generally those who act on behalf of others with their authorization, but "agency" is a legal term that is determined by the application of specific facts on a case-by-case basis and defining it in the Policy would not be practicable. |
| I. Introduction | 42 | 1 | The Policy poses the threat of enforcement when water agencies are in compliance with their permits, and does not appropriately account for the de minimus threat ordinarily posed by discharges by public water agencies. | Discharges within permit and WDR limits are not violations subject to civil liability enforcement actions. The Policy appropriately accounts for "low threat" discharges that exceed permit limits by requiring the Water Boards to make evidence supported findings under step 1 of the methodology about the discharge's harm to beneficial uses. To determine a discharge's potential for harm, the Water Board must make determinations about the toxicity of the waste discharged and the potential harm to applicable beneficial uses. |
| I. Introduction | 48 | 2 | The Enforcement Policy should be applied to agricultural operations and other non-point source violations. | Staff agrees. Please see responses to Commenter 19, Comment 12 and Commenter 26, Comment 1. |
| I. Introduction | 48 | 7 | Consideration of the time frame for a remedy or recovery of polluted or impaired waters: Expenses for a recovery plan and recovery of impacted areas can be very expensive as well as taking an inordinate amount of time. This is economic rationale for a more rigorous enforcement policy that not only may stop or diminish the impact but sets a precedent for deterrence. Actions (and policy) that discourage, control, or eliminates potential discharges are essential for an effective water quality control program. | Comment noted. |
| A. Standard and Enforceable Orders | | | | |
| B. Determining Compliance | | | | |
| C. Consistent Enforcement | | | | |

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| I.C - Consistent Enforcement | 2 | 1 | Supports efforts to improve consistency, transparency, and public input. | Comment noted. |
| I.C - Consistent Enforcement | 3 | 1 | SFPUC requests that the SWRCB reexamine the proposed changes to ensure more consistent application of civil liabilities throughout the state. | Comment noted. |
| I.C - Consistent Enforcement | 6 | 1 | Consistent enforcement should include reviewing penalties assessed for similar discharge violations and events for compatibility. | The Enforcement Policy does not require the Regional Water Boards to compare prior penalties across the state, but, rather, acknowledges that where violations are "standard and routine, a consistent and repeatable outcome can be reasonably expected using this Policy." (See VI.A.) Such consistency is often achieved by comparing previous enforcement actions, although it also recognizes many cases have unique facts and circumstances. The Policy allows for but does not mandate consideration of liability assessments for similar conduct, and provides Regional Water Boards with the flexibility to adjust civil liabilities arrived at under the methodology under "Other Factors as Justice May Require." |
| I.C - Consistent Enforcement | 7 | 2 | Factors are not adequately recognized as being necessary to prevent undermining the strength of enforcement actions, for example, the protection of pristine or near pristine waters; NPDES discharges that end up in surface water bodies like the North Fork American River which point of entry of POTW discharges is not shown on the NPDES permit maps; discharges that enter public recreation areas and parks like the Auburn State Recreation Area. | The Enforcement Policy contemplates higher civil liabilities for discharges to sensitive water bodies through its requirement that the Water Boards must consider a discharge's harm to the beneficial uses of each individual water body. The Enforcement Policy encourages penalty amounts that bear a reasonable relationship to the gravity of the violation and the harm or potential for harm to beneficial uses. (See Step 1.) |
| I.C - Consistent Enforcement | 8 | 1 | Penalties should be consistent regardless of the type of facility or ability of a facility to pay the penalty. | While Water Code sections 13385 and 13350 require the Water Boards to consider a person's or entity's ability to pay and continue in business when determining a penalty amount, and the Enforcement Policy accounts for this statutory mandate, neither the statutes nor the Policy require that the penalty be adjusted as a result of that consideration. |
| I.C - Consistent Enforcement | 9 | 2 | The County is concerned with the feasibility of achieving fairness without comparing an adopted or proposed penalty to other similar actions; where the overall goal is to preclude violators to gain a competitive advantage. As such, the County recommends a comparative tool be created to assist in the fairness assessment. Must use similar action to be consistent in proposed penalties. | See response to Commenter 6, Comment 1. The overall goals of the Policy are to promote firm, fair, transparent and consistent enforcement. One of the implementing principles is to preclude violators from gaining and competitive economic advantage. |
| I.C - Consistent Enforcement | 10 | 1 | While one-to-one comparison of penalties between dischargers may not always be appropriate, we respectfully request that the language that appears to eliminate the usage of these types of comparisons be removed. | See response to Commenter 6, Comment 1; Commenter 9, Comment 2; and Commenter 16, Comment 11. |
| I.C - Consistent Enforcement | 16 | 11 | The caveat that the policy does not require the comparison of a proposed penalty to other actions would relieve the government from explaining penalties on substantively identical parties who are drastically different despite similar impact on the environment. | See response to Commenter 6, Comment 1. Also, the Policy requires the Water Boards to make transparent and evidence-based and/or policy-supported findings, which will provide sound bases for different outcomes. (See VI.A.) |
| I.C - Consistent Enforcement | 18 | 2 | The Draft Policy places less emphasis on "fair" and "consistent" enforcement actions, choosing instead to rely on the penalty calculation formula. Such emphasis will allow the regional boards to make inequitable decisions that could easily lead to abuse of power. Commenter recommends that the Draft Policy be revised to allow the enforcing agency to consider similar enforcement actions when assigning adjustment factors and calculating penalty amounts. The Policy should require that a regional board provide evidence of conflicting applications of the Policy and assess why its application of the Policy does not violate the professed goal that the Policy be applied consistently throughout the state. | See responses to Commenter 6, Comment 1 and Commenter 16, Comment 11. The Policy allows, but does not require, the Water Boards to consider similar actions in making findings to support a specific civil liability. |
| I.C - Consistent Enforcement | 19 | 3 | Many of the regulatory requirements which may be at issue in an enforcement scenario are "program/process" matters (i.e., submittal dates, data omissions, data calculations, etc.), which have no substantive connection in respect to farm management, irrigation release, or having any bearing on a surface water discharge, or the percolation of water to the aquifer. The policy should allow for distinction between paperwork and actual discharge violations. | The Enforcement Policy provides for a distinction between "paperwork" and actual discharge violations. Steps 1 and 2 of the Policy only apply to discharge violations, while Step 3 of the Policy only applies to non-discharge violations. The Policy also provides for substantially reducing the number of days of violation, or "collapsing" days of violation for most strictly "paperwork" violations. |
| I.C - Consistent Enforcement | 20 | 7 | Recommended revisions to I.C., p. 3: "The Water Boards achieve consistency in enforcement by applying the penalty calculator in Section VI. The policy does not require a Water Board to compare a proposed penalty to other actions that it or another Water Board has taken or make specific findings about why the reasons that individual penalty assessments or proposed amounts differ. Water Boards are encouraged to consider penalties assessed for similar violations (e.g., discharges involving similar culpability, volumes, quality and degree of exceedances, and impacts on receiving waters) particularly if such discharges occur under a single, statewide general permit applicable to multiple dischargers in the same industry, when assigning penalty and adjustment factors, particularly in connection with determining whether a particular violation is afforded some economic advantage or competitive benefit on a particular discharger." | See response to Commenter 6, Comment 1; Commenter 9, Comment 2; and Commenter 16, Comment 11. |
| I.C - Consistent Enforcement | 23 | 1 | Require staff to evaluate comparative penalty information and provide written response justifying subsequent adjustments or denial of adjustments. | See response to Commenter 6, Comment 1. |

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| I.C - Consistent Enforcement | 27 | 11 | We understand precise accounting may not be required, and that not all circumstances are comparable, but eliminating the opportunity for valid comparison runs counter to the stated purpose of the policy: fairness and consistency. Like circumstances should be treated equitably under the Policy, and dischargers facing violations must be allowed to demonstrate if they are not being treated equitably using other comparable enforcement actions as examples. | See response to Commenter 6, Comment 1; Commenter 9, Comment 2; and Commenter 16, Comment 11. |
| I.C - Consistent Enforcement | 28 | 2 | The policy should include requirements that the Water Boards make findings as to why proposed and assessed penalties differ, to provide insight into its enforcement approach in practice. | See response to Commenter 6, Comment 1 and Commenter 16, Comment 11. |
| I.C - Consistent Enforcement | 36 | 7 | At section C, Consistent Enforcement, the Policy states, "This policy does not require a Water Board to compare a proposed penalty to other actions that it or another Water Board has taken :." This point is repeated at Section VI.A., at p. 9. However, without such an analysis there can be no confidence that enforcement is consistent. In fact, the failure to conduct this type of analysis undermines another stated goal of the Policy: promoting transparency. We have observed that a water board can be significantly inconsistent with itself and other boards in substantially similar enforcement actions. | See response to Commenter 6, Comment 1; Commenter 9, Comment 2; and Commenter 16, Comment 11. |
| D. Fair Enforcement | | | | |
| I.D Fair Enforcement | 5 | 1 | Supports goal of fair, consistent, and transparent enforcement. | Comment noted. |
| I.D Fair Enforcement | 7 | 3 | Potentially damaging to the policy is what may be the misuse of leveling of the playing field concept. Regulation and enforcement is what levels the playing field so a discharger can't out-compete other dischargers. Proving an economic advantage or disadvantage may allow entry into enforcement what might undermine it. | Formal enforcement should always result when a non-compliant member of the regulated public begins to realize a competitive economic advantage over compliant members of the regulated public. Realizing an economic advantage, however, is not a prerequisite or requirement for an enforcement action to be taken. Formal discretionary enforcement actions are taken pursuant to the prioritization process described in Section II.B. |
| I.D Fair Enforcement | 9 | 3 | The policy does not articulate how determination of competitive economic advantage has been attained and entities/agencies are different due to size and financial wherewithal. | The Policy does articulate how the determination of competitive economic advantage has been attained. Step 7 of the Policy, "Economic Benefit," clearly details how the economic benefit of a violation is determined for each violation. The analysis undertaken for this step accounts for differences in the entity, including specific financial considerations (see Step 7), as does the separate analysis required under Step 6 "Ability to Pay and Continue in Business." |
| I.D Fair Enforcement | 16 | 3 | The enforcement should go against the party who caused the violation. In cases where a contractor acts outside the scope of their authority, it is unfair to take action against others. | Staff generally agrees with this comment and has noted it will take actions directly against contractors, subcontractors and agents where they are legally responsible. See response Commenter 18, Comment 1. However, permittees are often legally responsible for the actions of their contractors, subcontractors and agents and are sometimes the only parties against whom the Water Boards have realistic legal recourse. These considerations are evaluated by the Regional Board on a case-by-case basis. |
| I.D Fair Enforcement | 21 | 2 | Clarify the meaning of "Fair." To SCAP members, "fair" means that two ACL penalty actions for two similar situations receive similar results. | See response to Commenter 6, Comment 1; Commenter 9, Comment 2; and Commenter 16, Comment 11. "Fairness" has the specific meaning described in the Policy, and includes the concept of making sure competitive economic advantages from non-compliance are eliminated. The commenter's proposed definition of "fair" more closely resembles the Policy's treatment of consistency. |
| I.D Fair Enforcement | 26 | 2 | Adopt permits and policies with clear, enforceable standards. | Enforcement Staff agrees that permits and policies should contain enforceable standards and that the Water Boards should be committed to enforcement. Office of Enforcement Staff is now regularly consulted about permit enforceability by permitting staff. |
| I.D Fair Enforcement | 28 | 4 | Water Board should take good faith into consideration early in process of determining enforcement actions, using the Water Boards 'discretion on a case-by-case basis to ensure that the enforcement process is both fair and constructive. | The Policy does account for consideration of an entity's good faith by requiring determinations relating to the cause of the discharge and the discharger's culpability, the discharger's response to a violation under cleanup and cooperation and the discharger's history of violations. These three statutory factors provide an excellent overview of the discharger's "good faith," both with regard to the specific violation and its general attitude towards compliance. |
| I.D Fair Enforcement | 32 | 1 | The Water Boards, at their discretion, should be able to consider penalties for similar types of discharges, similar impacts, and similar types of receiving waters when assigning penalty and adjustment factors. | Please see responses to Commenter 6, Comment 1; Commenter 9, Comment 2; and Commenter 16, Comment 11. |
| I.D Fair Enforcement | 34 | 7 | Commenter believes that two similarly situated dischargers facing similar violations should be treated equitably ad the Water Boards should consider and compare like circumstances. | Please see responses to Commenter 6, Comment 1; Commenter 9, Comment 2; and Commenter 16, Comment 11. |
| E. Progressive Enforcement | | | | |
| I.E Progressive Enforcement | 1 | 1 | Policy reaffirms Board's principle of progressive enforcement on the whole. Such revisions and clarity will seemingly help our members by ensuring regional boards consistently approach enforcement such that those that are striving to be in compliance be given the opportunity to correct at the notification stage rather than the boards seeking immediate civil penalties (except in the more egregious situations or willful noncompliance situations). | Comment noted. |
| I.E Progressive Enforcement | 6 | 2 | Consideration given to previous efforts to address similar issues, e.g. bacterial regrowth. | Staff agrees with the commenter and proposes the addition of the following phrase to subdivision E: "The Water Boards may consider previous efforts to address similar issues." |

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| I.E Progressive Enforcement | 8 | 2 | An NOV should be issued only after a facility had failed to comply with an informal notification to correct a potential violation. An NOV should be considered a formal notification that begins the enforcement action process. | Both the current and proposed Enforcement Policies define formal enforcement, in Appendix A, as those enforcement actions based on statute. The commenter's proposed limitation on use of NOV's is too restrictive. Frequently staff does provide additional informal notification and an opportunity to correct a potential violation before issuing an NOV. Also, timely compliance responses and corrective actions taken to address violations identified within an NOV frequently removes the discharger from the enforcement cycle, eliminating the need for formal enforcement. Staff recommends retaining the discretion to take either approach depending on circumstances. |
| I.E Progressive Enforcement | 16 | 1 | We appreciate the intent of the Policy to reaffirm the Board's principle of progressive enforcement on the whole such that an escalating series of actions would be enlisted beginning with notification of violations, ramping up to a complaint for civil liabilities where compliance cannot/is not achieved in a reasonable time or compliance is refused. Such revisions and clarity could help ensure regional boards consistently approach enforcement such that those that are striving to be in compliance be given the opportunity to correct at the notification stage rather than the boards seeking immediate civil penalties (except in the more egregious situations or willful noncompliance situations). | Comment noted. |
| I.E Progressive Enforcement | 39 | 2 | Define Fair Enforcement. The definition needs to state how the process is fair to all parties. | The concept of fairness in the context of application of the Enforcement Policy is well defined. |
| I.E Progressive Enforcement | 40 | 7 | Should promote fairness, consistency and equity by continuing to allow dischargers to compare similarly situated enforcement actions. Suggests following revised language: "The Regional Water Boards are not required to make specific findings comparing a proposed penalty to other actions that it or another Water Board has taken or why the proposed amounts differ. However, the Water Boards may consider penalties for similar violations under similar circumstances, particularly those within the same Region, when proposing penalties and taking enforcement action." | See responses to Commenter 6, Comment 1; Commenter 9, Comment 2; and Commenter 16, Comment 11. The Policy allows, but does not require, the Water Boards to consider similar actions in making findings to support a specific civil liability. Dischargers may present evidence regarding the similarity of enforcement actions. |
| I.E Progressive Enforcement | 48 | 1 | Progressive Enforcement is acceptable if the desired outcomes of protection and /or recovery of beneficial uses is insured. | Comment noted. |
| F. Transparency | | | | |
| I. F Transparency | 6 | 3 | In support of policy of transparency. | Comment noted. |
| I. F Transparency | 7 | 4 | The policy and its many procedures might ultimately fail including the public because there is no requirement of disclosure about how the enforcement decisions are made that are made pursuant to the policy and how and where they are documented for the public. | Staff disagrees. The Policy requires that specific findings on a number of factors be evidence supported and that those findings support the ultimate result. The Policy provides a structured framework whereby the public is able to follow the Water Boards' decision making process from evidence to finding to result. |
| I. F Transparency | 15 | 1 | The proposed addition of a Regional Enforcement Coordinator could be a positive step, but the role and duties of the position should be defined more clearly. Have meetings with a closed-session door legal issues and an open session for the public and/or dischargers to provide transparency. | The Policy provides the appropriate flexibility for each Regional Water Board to define the role of the Enforcement Coordinator that best fits the needs of the Region. All the Regional Water Boards currently have an Enforcement Coordinator. Their contact information is available on the Office of Enforcement website. Public meetings for the internal prioritization function are not recommended. The Enforcement Coordinator is regularly available to meet with the public to discuss prioritization, most of the Regional Water Boards have annual public meetings to discuss enforcement priorities and the public always has the opportunity to comment on regional enforcement policies at every Board meeting. |
| I. F Transparency | 16 | 2 | The revisions result in the reliance on great deal of subjectivity on the part of the staff person preparing the enforcement action. This is contrary to the revisions supporting progressive enforcement that could help ensure consistent regional board application of enforcement and associated penalties. | Staff disagrees. The Policy requires that specific, evidence-supported findings be made by the Water Boards and is substantially similar to the 2010 Policy with respect to the number of steps that must be taken. The Regional Water Boards have successfully applied the Penalty Calculation Methodology in the Policy in hundreds of enforcement cases. The Policy's steps are based on the factors enumerated in Water Code sections 13385 and 13350, all of which the Water Boards are required to consider in civil liability actions. The standards in Step 1 have been clarified to consistently address gradients of toxicity on the basis of the waste material(s)' harm or threat of harm to potential receptors. |
| I. F Transparency | 17 | 5 | Violations relating to Human Right to Water should be tracked, recorded, and made publicly available in a reasonably accessible manner so that impacted people will be informed quickly. We ask that the Board direct staff to look into how such violations could be integrated into existing databases. | Enforcement Staff agrees with this proposal and will begin working with OIMA to determine how best to quickly and accurately provide this information. |
| I. F Transparency | 26 | 4 | The Enforcement Coordinator's job should be solely focused on enforcement. The Policy should direct the State Water Board to hold quarterly enforcement meetings between Enforcement Coordinators. | The Policy provides the appropriate flexibility for each Regional Water Board to define the role of the Enforcement Coordinator that best fits the needs of the Region. All the Regional Water Boards currently have an Enforcement Coordinator. While not required by the Policy, the Enforcement Coordinators do meet with each other on a regular basis throughout the year. |
| I. F Transparency | 39 | 3 | Transparency needs to state that the public as well as the accused have access to all records and other information the regulators have used or prepared as part of the enforcement issue. A list of this information and where it can be obtained must be made available to all parties. Remove the comma between consistent and evidence. | The public, affected persons and dischargers already have access to all records and other information used by regulators and Enforcement Staff under the California Public Records Act. Additionally, notice is provided to the public and the named dischargers identifying the records and information supporting an enforcement action shortly after each individual enforcement action commences under the Regional Water Boards' hearing procedures. |

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| I. F Transparency | 46 | 1 | Enforcement Coordinators should be available to the public. Their duties need to be defined more clearly, they should be able to meet with dischargers and discuss enforcement actions, reasons for actions and facts leading to the actions. | Enforcement Coordinators are available to meet with dischargers and the public and frequently do. Every Regional Water Board has an Enforcement Coordinator and their contact information can be found on the State Water Board's Enforcement webpage. Each Regional Water Board's Coordinator has slightly different responsibilities tailored to meet each Board's unique needs. |
| I. F Transparency | 48 | 8 | Public review: The costs and findings of any settlement and/or penalty should be supported by an accounting of this and should be available for public review. | Staff agrees. All Water Board settlements are available for public review on the Regional Water Board websites or by visiting the Regional Water Board offices. |
| G. Environmental Justice and Disadvantaged Communities | | | | |
| I.G EJ and Disadvantaged Communities | 4 | 1 | Would like further explanation on how the Human Right to Water should be incorporated into the two-step prioritization process. | The Policy provides that the Water Boards "shall consider" the Human Right to Water in prioritizing enforcement actions. The first step of the prioritization process considers the severity of the violation(s), the second step is where prioritization of the use of scarce resources occurs. The Policy requires that the Regional Water Boards consider the Human Right to Water when determining how to allocate its scarce enforcement resources, but allows for each Regional Board to determine how to do that in the context of unique regional considerations. |
| I.G EJ and Disadvantaged Communities | 7 | 5 | Page 4 Disadvantaged Communities. As written this could cause intentionally fraudulent activities by some organizations. | The Policy references the California Environmental Protection Agency Intra-Agency Environmental Justice Strategy and the Water Boards determine whether a community is economically disadvantaged or severely disadvantaged according to a calculation of median household income, which is subject to verification. While fraudulent activities are always possible, the Water Boards take steps to help ensure communities actually qualify for special considerations as disadvantaged or severely disadvantaged. |
| I.G EJ and Disadvantaged Communities | 12 | 1 | Reflect changes to coincide with SB839's mandates relating to environmental justice. | The Policy is consistent with SB 839, which required coordination of environmental justice enforcement through the California Environmental Protection Agency. The Office of Enforcement coordinates multi-agency and multi-media enforcement efforts in identified disadvantaged communities that are disproportionately affected by pollutant exposure. The State Water Boards provided CalEPA with a list of approved Supplemental Environmental Projects that benefit disadvantaged communities, which was also required by SB 839. Office of Enforcement is coordinating directly with the Regional Water Board Enforcement Coordinators to develop and vet the SEP list, and with respect to the CalEPA multi-agency and multi-media enforcement projects. |
| I.G EJ and Disadvantaged Communities | 17 | 1 | The Human Right to Water must be a central tenant of the Policy and not only a narrowly-focused subsection. Suggest defining Human Right to Water as one where the violation results or threatens to result in the denial of one's human right to water. | Enforcement staff agrees that violations of the Human Right to Water should be treated seriously, and proposes adding violations of the Human Right to Water to the list of Class 1 violations. With this addition, Enforcement staff believes the Policy places the appropriate emphasis on the consideration of the Human Right to Water in the Regional Water Boards' discretionary enforcement prioritization process. We agree with the definition of a violation of the Human Right to Water proposed by the commenter and have suggested amendments. |
| I.G EJ and Disadvantaged Communities | 17 | 2 | A violation relating to the Human Right to Water should be defined to provide clarity for enforcement actions. We propose the following definition: A violation relating to the Human Right to Water for the purposes of this Policy is one where the violation results, or threatens to result, in the denial of one's human right to water. This includes, but is not limited to, violations for contamination of drinking water sources, the deliverance of contaminated drinking water supplies to customers, or failure of a system to inform customers of a contaminated water supply. | Please see response to Commenter 17, Comment 1. |
| I.G EJ and Disadvantaged Communities | 19 | 11 | The proposed program would advance specific considerations for assigning penalties for discharges that affect Disadvantaged Communities (DAC) (pg. 39). As discussed above, specific consideration needs to be engaged when dealing with nitrate percolation to aquifers. The question then becomes how should any penalty be assessed for an incident which may have impact on a DAC. We do, however, support that the penalty assessed for impacting DACs may be directed to a compliance fund dedicated to providing remedy/relief to the DAC without being limited to 50%. | Enforcement Staff disagrees with the comment that the Policy is vague and lacks specificity. The Policy strives to balance an appropriate level of Regional Water Board discretion and flexibility with guidance on how to assess the significance of mandatory statutory factors. Revisions of the Policy are accurately characterized as minor and cleanup to clarify application of the Policy adopted in 2010. The methodology for determining penalties is detailed and closely adheres to the statutory requirements set forth in Water Code section 13385 and 13350. See also responses to Commenter 19, Comments 1, 2, and 4 (lines 9, 10, and 11) concerning the frequency with which the Policy has already been applied to nitrate discharges to groundwater and non-point source discharge violations. |
| I.G EJ and Disadvantaged Communities | 20 | 17 | Environmental justice and disadvantaged communities exceptions should apply to all essential public services, including drinking water systems, as the financial challenges are the same regardless of the infrastructure that experienced the non-compliance. | Staff agrees that the Policy's considerations for agencies that serve environmental justice and disadvantaged communities should apply to potable water purveyors in those communities. |
| I.G EJ and Disadvantaged Communities | 24 | 2 | Environmental justice and disadvantaged communities exceptions should apply to all essential public services, including drinking water systems, as the financial challenges are the same regardless of the infrastructure that experienced the non-compliance. | Please see response to Commenter 20, Comment 17. |
| I.G EJ and Disadvantaged Communities | 27 | 12 | We request that the State Water Board define the term "disadvantaged community" to mean a publicly owned treatment works with financial restrictions where enforcement results in undue burden on its service population based on (a) median income of the residents, (b) rates of unemployment, or (c) low population density in the service area. It should also be made clear that not all three factors (median income, unemployment, low population density) are necessary to qualify as a disadvantaged community, these are simply factors to be considered. | Staff recommends the Board retain the existing framework for establishing whether a community is "disadvantaged." For enforcement purposes and to further SB 839 and existing Water Board policies, staff is recommending provisions currently established for "small" disadvantaged communities be extended to all disadvantaged communities, but does not agree that the definition of disadvantaged should be broadened as the commenter suggests. |

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| I.G EJ and Disadvantaged Communities | 27 | 13 | We also request that the State Water Board clarify that a "disadvantaged community," as used in the Policy, is not the same as a "publicly owned treatment works serving a small community" as defined in Water Code section 13385(k)(2), so as to avoid the overly narrow definition that limits applicability of that designation to those POTWs whose population is 10,000 or less persons. | Staff agrees with this interpretation, but clarification is unnecessary. |
| I.G EJ and Disadvantaged Communities | 28 | 5 | The Policy should be amended to allow the use of informal enforcement and leniency for all agencies acting in good faith, not just those serving disadvantaged communities. | The Policy accounts for leniency for agencies and others that act in good faith. Civil liabilities are lower for persons who take steps to prevent violations, for persons whose culpability is low and for those who respond quickly to mitigate the effects of violations. These factors can aggregate to significantly reduce the case priority of a an enforcement action, as well as a proposed civil liability. Staff's recommendation that special considerations apply to disadvantaged communities is a response to Legislative mandates and State Board policies. Rather than arbitrarily categorize the regulated public as "good faith" in advance, the Policy allows for the good faith of all members of the regulated public to be considered on a case-by-case basis. |
| I.G EJ and Disadvantaged Communities | 29 | 1 | Allowances for Environmental Justice and Disadvantaged Communities and Small Communities should be extended to potable water system and municipal separate stormwater system discharges. | Staff agrees with this comment and has proposed an appropriate amendment to the proposed Policy. |
| I.G EJ and Disadvantaged Communities | 40 | 8 | Requests definition of the term "disadvantaged community" to mean a publicly owned treatment works with financial restrictions where enforcement results in undue burden on its service population based on median income of the residents, rates of unemployment in the area, low population density in service area. Also requests clarification that a "disadvantaged community" as used in the Policy is not the same as a "publicly owned treatment works serving a small community" as defined in Water Code section 13385(k)(2). Requests that staff can consider a disadvantaged community and/or small community's "ability to pay" and to cross reference page 4 of the Policy in the "Ability to Pay" section. | Please see response to Commenter 27, Comment 12. |
| I.G EJ and Disadvantaged Communities | 42 | 2 | Allowances for environmental justice, disadvantaged communities, and small communities should be extended to potable water systems and municipal separate stormwater system discharges. | See response to Commenter 29, Comment 1. |
| I.G EJ and Disadvantaged Communities | 43 | 3 | Water Board should incentivize Public Water Systems to invest in and implement state-of-the-art discharge management practices that exceed industry standards, which includes: Increasing or eliminating the 50 percent cap on the use of assessed penalties for capital and operation improvements if the discharger is allocating money to improve water system infrastructure with the intent to avoid/minimize discharge violations. The goal should be to end violation across the state regardless of the economic status of the communities serviced. | Staff's recommendation that special considerations apply to disadvantaged and environmental justice communities is a response to SB 839 and prior Legislative mandates, as well as State Board policies. Civil liabilities collected as a consequence of violations serve as a strong incentive for the regulated public to be proactive with respect to compliance measures. The commenter's suggestion would disincentivize voluntary and proactive compliance by eliminating the consequences of non-compliance. At a minimum, public agencies with the financial means to do so should be taking the steps described by the commenter to avoid violations before violations are committed. |
| I.G EJ and Disadvantaged Communities | 49 | 1 | A violation relating to the Human Right to Water should be defined to provide clarity for enforcement actions (the Community Water Center letter suggests a definition). | Please see response to Commenter 17, Comment 1. |
| I.G EJ and Disadvantaged Communities | 49 | 2 | Violations that affect persons or a community's access to clean and safe water (e.g. HRtW) should be a priority. To the maximum extent possible, communities/households should not need to bear the cost of violations. | Staff agrees. The effect on the Human Right to Water is considered in the violation prioritization process. |
| I.G EJ and Disadvantaged Communities | 49 | 3 | When a water system/provider is the violator, alternative enforcement tools that do not result in rate increases should be considered. | Rate increases may be necessary and reasonable when community rates are below average and systems are in poor repair. Staff may analyze potential rate increases in light of affordability in disadvantaged communities. |
| I.G EJ and Disadvantaged Communities | 49 | 4 | Violations relating to the HRtW should be tracked, recorded, and made publicly available - these situations pose public health risk and need to be noticed. | Staff agrees and is committed to working with OIMA to determine the best way to track these in CIWQS. |
| H. Facilities Servicing Small Communities | | | | |
| I.H Small Communities | 20 | 18 | I. H should include Drinking Water Systems whose discharges are subject to NPDES permits and WDRs and service small communities, but that do not operate a POTW. | Staff agrees and has proposed amendments to include all relevant public service providers in disadvantaged communities. |
| II. Enforcement Priorities for Discretionary Enforcement Actions | | | | |
| II. Priorities Intro - Enforcement Coordinators | 8 | 3 | Commenter requests that "newly identified" Enforcement Coordinators be available as an initial point of contact prior to formal enforcement to provide more transparent, fair, and potentially less subjective process, while noting that their involvement may not improve transparency as it appears that much of the prioritization and evaluation process may be protected by attorney-client privilege. | See responses to Commenter 15, Comment 1 and Commenter 46, Comment 1. The commenter is correct that some of the prioritization process is attorney client privileged. Enforcement Coordinators are available to the regulated public and interested persons. |

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| II. Priorities Intro - Enforcement Coordinators | 15 | 2 | The commenter observes that the role of the "new" Enforcement Coordinators appears to be largely an internal function to the Regional Board process and requests that means be provided for the public and regulated parties to access results of their decisions regarding enforcement prioritization, while recognizing that some details will need to be protected for legal reasons. Commenter suggests that role include the ability to meet with dischargers to discuss bases for possible enforcement actions and hear discharger positions in advance of enforcement action, especially when enforcement actions are proposed to move from informal to formal. | See responses to Commenter 15, Comment 1; Commenter 46, Comment 1; and Commenter 8, Comment 3. |
| II. Priorities Intro - Enforcement Coordinators | 15 | 5 | Commenter suggests that Enforcement Coordinator role include the ability to meet with dischargers to discuss bases for possible enforcement actions and hear discharger positions in advance of enforcement action, especially when enforcement actions are proposed to move from informal to formal. | See responses to Commenter 15, Comment 1; Commenter 46, Comment 1; and Commenter 8, Comment 3. |
| II. Priorities Intro | 38 | 3 | Basin Plan provisions with respect to agricultural pollution is the only way to restore beneficial uses within California impaired streams. Prioritize adequate resources for regional boards to enforce Basin Plan TMDL Implementation Plans. | The prioritization process for the deployment of discretionary enforcement resources seeks to balance the need to protect water quality across all programs. |
| II. Priorities Intro - Enforcement Coordinators | 45 | 1 | The roles and duties of the Regional Enforcement Coordinators should be better defined. | See responses to Commenter 15, Comment 1; Commenter 46, Comment 1; and Commenter 8, Comment 3. |
| II. Priorities Intro - Enforcement Coordinators | 45 | 2 | Suggests that role of enforcement coordinators should be expanded to include the ability to meet with dischargers to discuss bases for possible enforcement actions and hear discharger positions in advance of enforcement action, especially when enforcement actions are proposed to move from informal to formal. | See responses to Commenter 15, Comment 1; Commenter 46, Comment 1; and Commenter 8, Comment 3. |
| A. Ranking Violations | | | | |
| II.A Ranking Violations | 2 | 2 | Recommends that the proposed list of violations that "ordinarily" would fall under Class I be clarified as an example of Class I violations, depending on individual permit conditions. | Staff agrees and has proposed an amendment accordingly. |
| II.A Ranking Violations | 2 | 3 | Amend II.A., first bullet, to read: "Discharges causing or contributing to exceedances of primary maximum contaminant levels for chemical constituents in receiving waters with a beneficial use of municipal and domestic supply (MUN)". | Staff agrees and has proposed an amendment accordingly. |
| II.A Ranking Violations | 2 | 4 | Amend II.A, third bullet, to read: "Discharges exceeding water quality based effluent limitations for priority pollutants as defined in the California Toxics Rule by 100 percent or more, unless exempted by the discharge permit" | Staff disagrees with the specific exception, but has added language allowing for consideration of unusual, unique, or exceptional circumstances. |
| II.A Ranking Violations | 2 | 5 | Expresses concern that the proposed changes to violation ranking will result in too much weight for minor violations. Commenter is particularly concerned that potable water discharges would now be ranked as Class I violations [instead of Class III]. | The ranking system is flexible enough to allow for each Regional Board to deploy its resources to address the most significant violators. Potable water discharges in compliance with applicable permit limitations are not violations and therefore not subject to this Policy. |
| II.A Ranking Violations | 3 | 4 | A rationale for eliminating Class III violations, rather than more clearly delineating these classifications, was not provided. SFPUC recommends providing a clear definition of Class II violations, an analysis of how this new classification structure would affect penalties, and the rationale for using two categories instead of three. | The three violations classification system was inefficient with respect to valuable staff time and was not consistently applied from region to region. The former approach was too staff time intensive and did not provide as meaningful a basis for deployment of scarce enforcement resources. |
| II.A Ranking Violations | 3 | 5 | Remove discharges violating acute toxicity effluent limitations from Class I violation list. Commenter states that acute toxicity violations are inappropriate for inclusion as Class I violations because (a) false positives are common; (b) toxicity results are usually ephemeral, sporadic, and caused by difficult-to-identify factors; and (c) do not pose an immediate or substantial threat to water quality. | If a discharger can demonstrate a false positive, then the violation would be deficient monitoring rather than failure to comply with an effluent limitation. Additional threat to water quality considerations are provided for in the case prioritization process and the potential for harm portion of the penalty calculation methodology. |
| II.A Ranking Violations | 3 | 6 | Commenter requests that discharges exceeding primary MCLs be considered Class II violations, rather than Class I, and only when the pollutant addressed presents a risk after treatment at a drinking water treatment plant. | The threshold for this Class I violation type is a discharge causing in-stream exceedance of a primary MCL, rather than a discharge that itself exceeds an MCL. The class of the violation is only one factor considered in whether to deploy discretionary enforcement tools. |
| II.A Ranking Violations | 3 | 7 | Commenter requests that if fish kills are to be considered Class I violations, the specific factors related to the fish kill, such as species and number of fish, be taken into account. | Staff agrees, but these considerations are part of the penalty calculation methodology and are relevant for consideration of the amount of an appropriate penalty - not the classification of the violation. |
| II.A Ranking Violations | 3 | 8 | Commenter requests that in-stream turbidity threshold of 100 NTU be removed from the Class I violation list, or revised in favor of effluent limits and action levels contained in the statewide general treated drinking water permit. | The proposed threshold for Class I violation relative to turbidity does not conflict with the statewide general treated drinking water permit. The general permit includes an effluent turbidity action level and requires compliance with Basin Plan objectives. The proposed Class I turbidity threshold is in-stream, rather than effluent. |
| II.A Ranking Violations | 4 | 3 | The Policy states that prioritization is based, in part, on the extent to which a violator has deviated from applicable water quality control plans. There is no clarification in the Policy as to how water quality control plans will be enforced. Some are implemented through water rights proceedings. The proposed policy fails to state whether actions will overlap. The Policy should clarify the extent to which prioritization does not apply to enforcement of water quality control plans that are implemented through water rights actions. | These considerations can be made on a case-by-case basis depending on the applicable plan and the violation being considered. The level of detail requested by the commenter is too granular for a policy. |

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| II.A Ranking Violations | 6 | 4 | Remove acute toxicity effluent limit violations, discharges causing or contributing to exceedances of MCLs within streams with the beneficial use of municipal and domestic supply because not all of these streams are currently used for water supply, and replace 100% benchmark for CTR priority pollutant exceedances with constituent-specific considerations. Proposed revisions to Class I list: "Discharges violating acute toxicity effluent limitations, unless the Discharger has conducted a Toxicity Identification and Reduction Evaluation (TIE/TRE) consistent with their NPDES permit" "Discharges causing or contributing to exceedances of primary maximum contaminant levels in receiving waters that are known to be utilized as a with a beneficial use of municipal or domestic supply(MUN)" "Discharges exceeding water quality based effluent limitations for priority pollutants as defined in the California Toxics Rule, depending on the magnitude of the exceedance, which must be by 100 percent or more, and possible impacts to uses of the receiving waters" | Staff has proposed adding language allowing for consideration of unusual, unique, or exceptional circumstances in prioritizing violations. Importantly, the violation classification process is just the first of two steps in determining whether to pursue formal enforcement. In cases where impacts are low and/or relate only to potential future beneficial uses, consideration can be given in the second part of the process. Finally, these considerations can also be addressed in the penalty calculation methodology. |
| II.A Ranking Violations | 7 | 6 | The commenter expresses concern that the Class I violation examples may become de facto standards and notes that the 1,000 ft. threshold for proximity of unauthorized sewage discharges to municipal water intakes overlooks riverfront drinking water users. | Concern noted. The plain language of the list clearly establishes it is intended to be illustrative rather than exhaustive. |
| II.A Ranking Violations | 9 | 4 | Eliminate Class I and Class II ranking, since only identified examples are for Class I and all others are Class II violations. | The ranking system is helpful for determining potential for harm to beneficial uses and it furthers a consistent approach to enforcement. |
| II.A Ranking Violations | 10 | 6 | The additions to the list of criteria used to determine Class I priority violations may not all be appropriate, as addressed in CASA comments. | The illustrative list serves as a starting point for evaluating the relative priority of an enforcement case in light of other priorities and cases. |
| II.A Ranking Violations | 11 | 2 | Commenter finds the proposed blanket characterization of all acute toxicity violations as a Class I violation to be problematic, as the presence of acute toxicity in wastewater typically has no relation to the culpability or actions of the discharger. | Culpability and actions/inactions in response to a discharge are specifically considered in case prioritization (II.B.2: whether entity has avoided cost of compliance and II.B.3.c "good-faith efforts to eliminate noncompliance") and in degree of culpability. |
| II.A Ranking Violations | 12 | 2 | Inconsistency between the Class I narrative and the bulleted examples. Suggests several alternative narrative examples. Notes databases will require modifications to accommodate revised prioritization scheme. Notes may result in increase in Class I violations and compromise ability to meet Performance Measure of addressing all Class I violations with formal enforcement actions. | The commenter has identified the principal reason for moving to this violation classification scheme. In the event the Board approves the Policy, it may be appropriate to re-visit Performance Measures for enforcement. |
| II.A Ranking Violations | 14 | 1 | Class I violation examples appear to expand the types of violations that fall under Class I, such as a discharges or fill into wetlands. References to the dredge and fill of wetlands is potentially problematic given the current proposed changes to the Dredge and Fill Procedures for wetlands and the resulting uncertainty regarding expanding the definition and scope of dredge and fill activities. The removal of the Class III category is potentially concerning with regard to the treatment of non-discharge violations. | Violations are determined by the permits or plans under which they fall. See also response to Commenter 3, Comment 4. |
| II.A Ranking Violations | 16 | 4 | In Section II, the Policy seeks to simplify the prioritization of violations by consolidating several types of violations. In doing so, the Policy deems discharges "causing or contributing to exceedances of primary maximum contaminant levels" as Class I violations, justifying immediate enforcement action. The addition of the maximum contaminant level (MCL) language unnecessarily muddles the analysis, particularly given the fact that many scientific studies have noted that MCL exceedances have a variety of sources. This fact is particularly true in the urban areas where many industries are located. By allowing MCL exceedances alone to justify the commencement of immediate enforcement action – despite the presence of intervening dischargers – the Policy grants the regulators the ability to target any discharger in dense areas. This result is contrary to the Policy's emphasis on transparency and fairness. | The commenter misunderstands the way the two steps of prioritization work together. Not all Class 1 violations require immediate enforcement action. Violations are evaluated in a second step to determine whether a case should be prioritized. The commenter calls out some of the factors that are evaluated in case prioritization. In addition, staff have proposed adding language allowing for consideration of unusual, unique, or exceptional circumstances, and removing references to "or contributing to" within the Class I violation list. |
| II.A Ranking Violations | 18 | 3 | Oppose and suggest eliminating any changes made to Class I. As currently worded, even discharges that pose a low threat to the environment or would have no actual adverse consequences in receiving waters would be considered Class I violations. | Please see response to Commenter 20, Comment 2. |
| II.A Ranking Violations | 18 | 4 | Classifying "unpermitted fill of wetlands over .5 acres" as a Class I violation is problematic. The term "wetlands" is not defined and the state does not have authority to regulate wetlands in this manner. | Staff agrees with the commenter that the Water Boards cannot take enforcement where there has been no violation, including where there is no jurisdiction. |
| II.A Ranking Violations | 18 | 5 | Classifying any discharge of construction materials: into receiving waters with beneficial use of COLD, WARM, or WILD is too far reaching. Discharges from construction sites having BMPs that meet BAT/BCT are allowed; the Policy would classify these as Class I violations even if the discharge complies with the Construction General Permit. | Discharges that comply with applicable permit terms are not violations and not subject to enforcement. |
| II.A Ranking Violations | 18 | 6 | Classifying discharges with the potential to cause or contribute to turbidity in receiving waters over 100 NTU is problematic. Background conditions may be in excess of 100 NTU and discharges that are compliant with its permit should be immune from enforcement. | Please see response to Commenter 18, Comment 5. In addition, staff have proposed removing references to "or contributing to" within the Class I violation list. |

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| II.A Ranking Violations | 19 | 5 | There seems to be some confusion as to the elimination of three pages (6-8) of regulations dealing with Class 2 and 3 violations, yet retaining the reference to Class 1 violations (page 6). This leads to confusion and begs clarity in respect to Class 2 violations. The summary document still refers to Class 2, however, in the document itself does not refer to Class 2 violations. | The proposed policy states that violations not classified as I are Class II. "All other violations are Class II." |
| II.A Ranking Violations | 20 | 2 | Revise language regarding class 1 violations to be the same as current Policy. That will ensure the only unauthorized discharges that result in imminent danger to public health, significant and lasting impacts to beneficial uses and/or significant harm to or destruction of fish or wildlife or their habitats are considered Class 1 violations and result in formal discretionary enforcement actions. Specific proposed revisions: "Class I priority violations are those <u>violations</u> that pose an immediate and substantial threat to <u>water quality beneficial uses</u> and/or that have the potential to individually or cumulatively cause significant detrimental impacts to human health or the environment. Class I violations ordinarily include, but are not limited to, the following: • Discharges causing or contributing to <u>resulting in</u> exceedances of primary maximum contaminant levels in receiving waters <u>that are utilized as a with a beneficial use of</u> municipal or domestic supply (MUN);" • "Discharges exceeding water quality-based effluent limitations for priority pollutants as defined in the California Toxics Rule, <u>and dependent on the magnitude of the exceedance and resulting impacts of the discharge on beneficial uses of receiving waters; by 100 percent or more</u> • Discharges causing or contributing to <u>resulting in significant</u> demonstrable detrimental impacts to aquatic life and aquatic-dependent wildlife (e.g., fish kill);" • "Unpermitted fill of wetlands exceeding 0.5 acre in areal extent; • Discharge of construction materials to receiving waters with beneficial uses of COLD, WARM, and/or WILD; • Discharges causing or contributing to <u>resulting in</u> in-stream turbidity in excess of <u>100 NTU the applicable Basin Plan water quality objectives</u> in receiving waters with beneficial uses of COLD, WARM, and/or WILD, except during storm events." | Proposed revisions to the Enforcement Policy include deletion of the language suggesting that Regional Boards must prioritize discretionary enforcement based on how violations are classified, formerly with emphasis on Class 1 violations. Instead, the Policy now focuses on a case prioritization, rather than a violation specific, model that looks at the totality of circumstances and suggests the assessment of a variety of factors, only one of which is the severity of any single violation. The case prioritization model, as opposed to the violation prioritization model, is favored by every Regional Water Board because it places emphasis on using scarce enforcement resources to pursue the most serious violators, as opposed to viewing violations in isolation. Also, as a practical matter, Enforcement Staff has found the three-class system difficult to implement consistently on a state wide basis. The two-step prioritization process is more heavily weighted on the second step, where Regional Water Boards analyze a variety of different considerations. While the revised process may result in more violations being classified as Class 1, it does not mean that more cases involving only or single Class 1 violations will result. Enforcement staff believe the recommended change from 100 NTU to the applicable Basin Plan water quality objectives to be excessively restrictive for the purpose of prioritizing violations, as five Basin Plans incorporate the secondary MCL of 5 NTU as water quality objectives for water bodies having the MUN beneficial use designation. In addition, staff have proposed adding language allowing for consideration of unusual, unique, or exceptional circumstances, and removing references to "or contributing to" within the Class I violation list. See also responses to Commenter 18, Comments 4 and 5. |
| II.A Ranking Violations | 20 | 3 | Commenter encourages the State Water Board to add text describing and characterizing Class II violations so that both the regulated community and the Water Boards may better understand the intended distinction between Class I and Class I violations and believes an exemplar list of Class II violations, similar to the Class I list, would further clarify the Enforcement Policy's intent with regard to ranking of violations and would result in the ranking being applied with greater consistency. | See response to Commenter 3, Comment 4. |
| II.A Ranking Violations | 20 | 4 | It is unclear why the revised Enforcement Policy would eliminate the Class III violation category for violations that pose only a minor threat to water quality and have little or no known potential for causing a detrimental impact. The Class III category seems particularly useful for identifying violations for that do not warrant significant enforcement effort from the standpoint of culpability or harm to human health or the environment. Eliminating the Class III category of violations, combined with an unclear definition of Class II violations may result in Water Boards characterizing all violations as Class I. The consequence of this trend would be to lose the practical benefits of a robust and useful ranking system. | The commenter misunderstands the nature of a Class III violation under the current scheme. Chronic Class III violations and/or those caused by intentional misconduct are subject to discretionary enforcement and prioritization under the current policy. Staff has limited resources and cannot increase the number of enforcement cases it undertakes without additional staff and budget authorization. There will be no increase in enforcement, just more targeted enforcement. |
| II.A Ranking Violations | 21 | 3 | SCAP is concerned about the removal of the Classes of violations. SIR, pp. 2-3. The only problem with these Classes was that they were not used, not that the Classes themselves were problematic. SCAP would encourage maintenance of Class III violations, which would only be subject to informal enforcement. Perhaps the Classes should be organized in a different way to make them more usable (e.g., eliminating use of data algorithms), instead of eliminating whole classes. | See response to Commenter 20, Comment 4. Class III is not a "defense" to enforcement under the current Policy. |
| II.A Ranking Violations | 22 | 3 | LADWP believes the Class I priority violations definition needs clarification so that it is not open-ended with the phrase "not limited to." There should be a specific list of clearly defined Class I violations as an appendix. | Commenters are divided on this question, with many observing that a mandatory list is too rigid. Staff believes that the list should allow for real world conditions, inclusion of possible violations not on the list, and exclusion of listed violations when circumstances warrant. In any event, classification is the first step in a two-step process. |

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| II.A Ranking Violations | 23 | 5 | The following exceedances should be removed from the Class I designation or significantly modified: <u>Discharges causing or contributing to exceedances of primary MCLs in receiving waters with a beneficial use of MUN.</u> This is because Regional Boards have incorporated State Board Resolution 88-63 into their Basin Plans, applying the MUN beneficial uses to virtually all waters of California. Therefore many water bodies that are considered drinking water supplies for purposes of regulation are not actually used for drinking water. Suggest revision to define this category as "Discharges causing or contributing to exceedances of primary MCLs within 1,000 feet of a municipal water intake." | Deployment of discretionary enforcement resources is a two-step process and violation classification is only the first step. Discharge circumstances and potential for harm are considered in the case prioritization process and in the penalty methodology. In addition, staff have proposed adding language allowing for consideration of unusual, unique, or exceptional circumstances, and removing references to "or contributing to" within the Class I violation list. |
| II.A Ranking Violations | 23 | 6 | (A) Degrees of culpability, should keep an option of less than 1.0 multiplier for instances when a 3rd party hits a fire hydrant or a pipe during construction. (B) There is no time limit on the history of violations factor; a more prescriptive policy with | Please see response to Commenter 23, Comment 5. In addition, as summarized at VII.E of this policy, compliance determination for priority pollutants is subject to Section 2.4.5 of the State Water Board's <i>Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California</i> . Section 2.4.5 of the Implementation Policy specifically provides for compliance determination for analytical results near the limits of detection. Patterns of exceedances may be considered in the case prioritization step. |
| II.A Ranking Violations | 23 | 7 | The following exceedances should be removed from the Class I designation or significantly modified: <u>Discharges violating acute toxicity limitations.</u> This is because effluent toxicity is a characteristic, not a constituent of effluent discharge, and therefore toxicity exceedances are very dissimilar in their nature, causes, and mitigation measures than the other types of exceedances that are currently proposed as Class I violations. The appropriate response to toxicity test exceedances not associated with any observed receiving water biological impact is not to declare a violation, but to investigate the cause, starting with follow-up testing to confirm the initial results. Suggest deleting this criterion. | Please see response to Commenter 23, Comment 5. |
| II.A Ranking Violations | 24 | 1 | Elimination of Class III reduces opportunities for enforcement to prioritize incidents. Class II violations need to be defined. Commenter recommends not including acute toxicity exceedances as default Class I violations due to the test's propensity for false-positive results. The Class I violation reference to construction materials needs to be clarified as it is unclear what is meant or how it would be used for penalty calculation. The Class I violation reference to 100 NTU in-stream turbidity is inconsistent with the general NPDES permit for drinking water discharges. Commenter suggests simply referencing regional basin plans and including language to meet those requirements. | Please see responses to Commenter 3, Comment 5; Commenter 20, Comment 2; and Commenter 18, Comments 4 and 5. |
| II.A Ranking Violations | 25 | 1 | Revise Class I language to remove discharges causing exceedances of primary maximum contaminant levels and discharges violating acute toxicity effluent limitations. Revise the third Class I violation bullet to read: "Discharges exceeding water quality based effluent limitations for priority pollutants as defined in the California Toxics Rule, <u>depending on the magnitude of the exceedance and possible impacts to uses of the receiving waters.</u> " | Please see response to Commenter 23, Comment 5. |
| II.A Ranking Violations | 27 | 18 | Making all violations in areas designated MUN Class I penalizes a discharger not for its behavior, nor for any other aspect of the violation aside from the sheer happenstance of the location of the discharge. This section should be removed from the Class I priority violations, or, at a minimum, modified to reflect the fact that the discharge must demonstrate an actual impact on an actual drinking water supply (not simply a receiving water designated with a blanket MUN beneficial use via Resolution No. 88-63) in order to be considered Class I. | Please see response to Commenter 23, Comment 5. |
| II.A Ranking Violations | 27 | 19 | Second, the bullet prioritizing "unauthorized discharge of sewage, regardless of level of treatment, within 1,000 feet of a municipal water intake" seems to characterize water that may have been treated (at least partially or almost fully) exactly the same as water that has undergone no treatment whatsoever. Thus, we suggest that this bullet point be modified to add the word "untreated" before the word "sewage," and eliminate the phrase "regardless of level of treatment." | Staff disagrees. Please see response to Commenter 23, Comment 5. The factor mentioned is appropriately considered in the second step or the penalty calculation methodology. |
| II.A Ranking Violations | 27 | 20 | We also request the State Water Board to clarify what constitutes a "municipal water intake" for purposes of this section (consistent with our understanding, that it is intended to apply only to those municipal water intakes regulated by the Water Boards, generally those serving more than 15 customers). | While "municipal water intake" is generally intended to refer to an intake serving a public water system as defined at Health and Safety Code section 116275, Regional Boards will retain the flexibility to deem a violation causing exceedance of a primary MCL at a water intake serving a smaller population a Class I violation. Deployment of discretionary enforcement resources is a two-step process and violation classification is only the first step. Other factors may be considered at the case prioritization level and as part of the penalty methodology. |

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| II.A Ranking Violations | 27 | 21 | Third, identifying discharges violating acute toxicity effluent limitations as Class I in all circumstances is inappropriate. In the context of a discharge from a publicly owned treatment works, in nearly all cases, acute toxicity is determined to be from a source that is temporal in nature and may be outside the control of the discharger. As such, this provision needs to be removed, or in the alternative appropriately scoped to more closely tie circumstances where this would be a Class I violations to the actual action of the discharger (i.e., consistently repeated discharges that violate acute toxicity effluent limitations without appropriate responses by the discharger). Replacing this bullet with language stating "Discharges repeatedly violating acute toxicity effluent limitations without an appropriate response action by the discharger" could address this concern. | Deployment of discretionary enforcement resources is a two-step process and violation classification is only the first step. Whether a violation occurs repeatedly and how the discharger responded are considered in the case prioritization step and as part of the penalty methodology. See also response to Commenter 23, Comment 5. |
| II.A Ranking Violations | 27 | 22 | Finally, we request modification of the bullet dealing with CTR exceedances. Although some short term, sporadic exceedances of CTR limits by 100% may potentially occur, such exceedances can frequently be attributed to sampling and laboratory issues and should not be considered to be Class I violations. Isolated exceedances of this type may not pose an immediate and substantial threat and should not be considered per se priorities for enforcement. Thus, we request the word "repeatedly" be inserted into the bullet point referencing the exceedance of CTR water quality-based effluent limitations by 100 percent or more as follows: "Discharges repeatedly exceeding water quality based effluent limitation ..." | Sampling and analysis errors are recorded as deficient monitoring rather than effluent limit violations. See responses to Commenter 23, Comments 5 and 6, and Commenter 27, Comment 21. |
| II.A Ranking Violations | 28 | 6 | Commenter requests that the Water Boards' process for determining and ranking enforcement priorities be clarified and limited to those discharges that are not permitted or have significant exceedances of limits contained within respective NPDES permits. Commenter specifically requests the following modifications to the Class I priorities list: "(1) Add 'unless permitted' prior to the bullet list, (2) Clarify the scope of the first priority bullet to remove drinking water reservoirs and other low-threat discharges, (3) Clarify the application of "regardless of level of treatment" criterion in the second bullet, (4) Clarify the third bullet, which could be inappropriately interpreted as applying all California toxics Rule receiving water objectives as a Water Quality-Based Effluent Limit, (5) Clarify the fifth bullet to incorporate dilution and mixing for low-threat discharges, and (6) Clarify that the tenth bullet regarding turbidity only applies to inland surface waters and excludes discharges from wells that are part of the drinking water system. " | Discharges within permit parameters are not violations. Staff is proposing a change to the tenth bullet clarifying that the 100 NTU threshold applies to inland surface waters. The remainder of the comments can be accounted for on a case-by-case basis and are too granular for a policy. Please see response to Commenter 23, Comment 5. |
| II.A Ranking Violations | 29 | 2 | Proposed changes to the Enforcement Priorities for Discretionary Enforcement Actions do not provide adequate differentiation between classes of violations, and contain provisions that contradict existing NPDES permits and WDRs. Additionally, the draft Enforcement Policy update does not provide any examples of Class II violations and completely eliminates the Class III priority. It is unclear why these changes were made and where a Class II would apply. Suggest revising language to list examples of Class II priority violations and to continue to include the Class III priority for discharges that pose minimal threat to water quality. | Please see responses to Commenter 23, Comment 5, and Commenter 20, Comment 2. |
| II.A Ranking Violations | 30 | 3 | Generic classification of violations based solely on beneficial use designations, without case-specific information regarding the body of water which the discharge occurred in would result in inequitable enforcement. | Staff agrees and that is why the Policy provides that the list is illustrative and for a second, case-prioritization step in the prioritization process. |
| II.A Ranking Violations | 32 | 2 | Some of the proposed Class I violations should be revised or removed since they don't always result in serious impacts to receiving waters. Exceedance of a primary MCL when discharging to a MUN designated waterbody should not be a Class I violation because there are many waterbodies with this designation that are not used as a drinking water source. Also, using 100% as a benchmark for CTR priority pollutant violations is not based on risks to the environment. The Water Boards should consider constituent-specific impacts when assessing violations of CTR priority pollutant limitations. | Please see response to Commenter 23, Comment 5. |
| II.A Ranking Violations | 33 | 2 | Commenter recommends revising the Class I and Class II violation language to provide that Class I violations are limited to a specific list of significant violations. Requests clarification that the last two bulleted items in the Class I violation list do not apply to permitted discharges conducted in compliance with the conditions of the permit. | Discharges that do not violate permits are not violations. Flexibility in the illustrative list allows the Regional Boards to apply specific factual circumstances to general events. |
| II.A Ranking Violations | 34 | 11 | City concurs with the concerns expressed by CASA and CASQA regarding the newly proposed circumstances that would result in a "Class I" characterization, and supports the changes requested. | Please see response to Commenter 23, Comment 5. |
| II.A Ranking Violations | 35 | 2 | The Policy should make clear that this provision applies to receiving waters with an "existing" MUN beneficial use designation, not to waters with a "potential" MUN Beneficial use designation. | Please see response to Commenter 23, Comment 5. |

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| II.A Ranking Violations | 36 | 8 | By eliminating the distinction between intentional / willful & negligent /inadvertent, SWRCB has inappropriately limited flexibility of categorizing violations based on specifics. It is inappropriate for an enforcement policy to direct the Water Boards to disregard the scale of the impact of a discharge. Should not apply to drinking water. | The discharger's culpability is considered in step two of the prioritization process and in the penalty calculation methodology. |
| II.A Ranking Violations | 37 | 1 | Regulation of surface waters to protect the MUN beneficial use should be limited to those constituents potentially passing through the treatment processes. This does not include aluminum. Define "causing or contributing." Changes to the turbidity conflict with existing permits. | Please see response to Commenter 23, Comment 5. Discharges consistent with permit limits are not violations. |
| II.A Ranking Violations | 37 | 2 | The phrase "causing or contributing" is used in reference to exceedances of MCLs, the presence of detrimental impacts, and elevated turbidity. The phrase should be defined. | Staff disagrees. The terms are plain. In addition, staff have proposed removing references to "or contributing to" throughout the Class I violation list. |
| II.A Ranking Violations | 37 | 3 | The Statewide Drinking Water Permit contains turbidity action levels or limits applicable to specified discharges which differ from the 100 NTU limitation imposed by the proposed Policy. It is inappropriate to change permit provisions via the Enforcement Policy. | Permit provisions govern whether a violation has been committed. No permit provisions are changed by the proposed Policy. The list of proposed Class I violations is illustrative and provides for the flexibility to appropriately assess discharges. See also responses to Commenter 3, Comment 8, and Commenter 18, Comment 5. In addition, staff have proposed removing references to "or contributing to" within the Class I violation list. |
| II.A Ranking Violations | 37 | 4 | NPDES permits contain WQBELs in conformance with EPA and other state requirements. The proposed Policy appears to create a separate approach for establishing permit limitations by creating new water quality standards which are sometimes different than those in Water Quality Plans. These new standards are being established without following the procedures for water quality objectives in Water Code section 13241, which includes an assessment of economic considerations. | See response to Commenter 37, Comment 4. |
| II.A Ranking Violations | 39 | 4 | The process for enforcement prioritization meetings described in the last paragraph on page 5 is overly detailed. Times change and the agency is bound by this procedure until it is revised. The Regional Boards should be able to adopt alternative procedures for flexibility. | Comment noted. The Policy provides for the flexibility Regional Boards need with minimum standards. |
| II.A Ranking Violations | 39 | 5 | The Class I violations list should be changed because many of the violations listed do not meet the criteria of <u>Immediate and substantial threat to water quality...</u> Suggest removing violations 1-4, 6, 8, 9, and 10. | Discharge circumstances and potential for harm are considered in the case prioritization process and in the penalty methodology. In addition, staff have proposed adding language allowing for consideration of unusual, unique, or exceptional circumstances, and removing references to "or contributing to" within the Class I violation list. Moreover, enforcement prioritization is a two-step process. |
| II.A Ranking Violations | 40 | 11 | Several new proposed circumstances that would qualify as Class I may not be appropriate. Remove in-stream primary MCL exceedance from Class I violation list, or modified to require demonstration of actual impact on actual drinking water supply. For second bullet, recommends insertion of "untreated" before "sewage" and elimination of "regardless of level of treatment" and requests clarification of what constitutes a "municipal water intake". Commenter asserts that, in nearly all cases, acute toxicity is determined to be from a source that is temporal in nature, may be outside the control of the discharger, and typically has no relationship to the culpability or actions of the discharger. Requests removal of acute toxicity violations from Class I list, or scoping to more closely tie circumstance to discharger actions, such as consistently repeated discharges that violate acute toxicity effluent limitations. For the third bullet, commenter recommends the following: "Discharges repeatedly exceeding water quality based effluent limitation..." | See response to Commenter 20, Comment 2. |
| II.A Ranking Violations | 42 | 3 | Proposed Class I violation revision needs to reflect the statewide general NPDES permit for discharges from drinking water systems condition allowing effluent turbidity greater than 100 NTU for up to 10 minutes for drinking water discharges. Clarification needed as to why Class III was removed and what constitutes a Class II violation. | Permit provisions govern whether a violation has been committed. The list of proposed Class I violations is illustrative and provides for the flexibility to appropriately assess discharges. |
| II.A Ranking Violations | 43 | 7 | Commenter suggests that, as written, the proposed 100 NTU in-stream turbidity threshold for Class I violations would appear to make drinking water system discharges compliant with the statewide general NPDES drinking water system permit 100 NTU action level Class I violations, subjecting public water systems to unwarranted enforcement actions. | Permit provisions govern whether a violation has been committed. The list of proposed Class I violations is illustrative and provides for the flexibility to appropriately assess discharges. |
| II.A Ranking Violations | 44 | 1 | Recommend removing Class I violation guideline regarding turbidity in excess of 100 NTU level because fish spawning and walking through streams may cause this level of turbidity. | Regional Boards have the flexibility to determine whether "walking through a stream" would constitute a Class I violation under the policy language. |
| B. Case Prioritization for Individual Entities | | | | |
| II.B Case Prioritization | 8 | 4 | Increasing the priority of an enforcement action on one facility to set an example or influence other facilities to comply does not seem to reflect the Policy's goals of "fairness and consistency". Violations should be evaluated based on their potential to impact water quality, not to influence compliance of other facilities. | Enforcement actions should be based on case prioritization, not individual violation rank. All violations can be identified. Not all cases can or should be pursued with formal enforcement. Cases are to be prioritized to maximize impact and efficiency. |
| II.B Case Prioritization | 9 | 5 | Commenter asks how the Water Boards will determine whether an entity has gained a competitive economic advantage without comparing similarly situated entities, in particular, for public agencies. | The Water Boards determine what it would have cost a compliant discharger to avoid the violation and determine that to be the competitive economic advantage. Comparison to other agencies can be helpful, but can also be misleading, particularly where that agency has avoided a violation through luck. |

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| II.B Case Prioritization | 12 | 3 | Notes redundancy between II.A. and II.B for some factors. Requirements in Section II.A, II.B, and II.C create mixed messages as to what and how the Boards should select enforcement cases. At a minimum, the non-exclusive factors listed in this section should also include consideration of Class I violations, environmental justice, and other regional and statewide enforcement priorities. Proposed alternative language: "1. Class 1 Violations; 2. Environmental Justice considerations; 3. Regional/ Statewide enforcement priorities; 4. Whether the entity has avoided the cost of compliance and therefore gained a competitive economic advantage and/or economic benefit; 5. The magnitude of impacts of the violation(s); 6. Discharger's history of compliance and/or voluntary corrective actions; 7. Strength of evidence in the record to support the enforcement action; 8. Availability of resources for enforcement; and, 9. Whether the action is likely to encourage similarly situated members of the regulated public to voluntarily identify, and avoid or correct similar violations." | Comment noted. Staff believes the considerations in each section are relevant. The Regional Boards have the flexibility to consider these and other factors they deem appropriate in prioritizing deployment of their discretionary enforcement resources. |
| II.B Case Prioritization | 15 | 3 | Commenter suggests removing "likely encourage similarly situated members of the regulated public to voluntarily identify, and avoid or correct similar violations" from this section. The commenter states that enforcement should be consistent based on the facts of each individual case, rather than the perceived ability to effect compliance changes on other parties through enhanced enforcement actions on one party alone. | Staff disagrees. General deterrence is a key aspect of the Water Boards' enforcement policy and, indeed, nearly every meaningful enforcement program. The Water Boards have limited resources and cannot pursue every violation. |
| II.B Case Prioritization | 17 | 3 | Whether a water quality violation impedes or threatens to impede one's human right to water should play a large role in prioritizing violations. Violations to the HRtW pose serious public health risks to the residents of this State. While some communities may have the ability to weather the impacts of a contaminated water supply, through increased testing, outreach, or by using an alternative supply, many other communities do not have that capacity. Additionally, it should not be residents who are bearing the cost of contaminated water supplies. However, we recognize that at times the violators are the water systems themselves for not treating or noticing their customers of a violation. In these instances we agree with the proposed alternatives provided by the Policy, including requiring a compliance project and also helping the system find additional funding sources in order to come into compliance. | Staff agrees that violations of the Human Right to Water should play a large role in prioritizing cases for discretionary enforcement and proposed to add this as a factor the Regional Boards must consider. |
| II.B Case Prioritization | 17 | 7 | Under "Case Prioritization for Individual Entities" the Policy states "Whether the violations have continued over an unreasonably long period after being brought to the entity's attention and are reoccurring." "Unreasonably long period" is ambiguous, and what constitutes a long period of time for one violation may be within reason for another. Furthermore, there are certain violations, in particular violations which endanger human health or the environment, where compliance needs to be achieved as soon as practical. We suggest adding further clarification to the language, such as, "Whether the entity's violation is of a less serious nature and thus not causing immediate or near-term harm to any beneficial uses or users, and has not continued over an unreasonably long period.... This does not apply to violations which relate to the human right to water, as remediation for such violations must begin immediately after being brought to the entity's attention." | The commenter's proposal would unduly restrict the Regional Boards' ability to prioritize discretionary enforcement. |
| II.B Case Prioritization | 17 | 9 | The link included in the Policy to the CalEPA Environmental Justice Strategy document is broken (page 3). | Staff will repair the link. |
| II.B Case Prioritization | 19 | 6 | The reference to evaluating if one farm's violation may have "encouraged others" to violate is total speculation, and in the absence of some affirmative finding of a conspiracy, it would be improper. Also, if such evidence of conspiracy was produced, it would seem the violation would be treated as an intentional violation. | The comment mistakenly references and quotes language not found in the policy. However, the comment appears to state that the enforcement goal of general deterrence is akin to accusing a discharger of conspiracy. We disagree. General deterrence is a critical component of the Water Boards' enforcement policies. See response to Commenter 15, Comment 3. |
| II.B Case Prioritization | 26 | 5 | Invest resources into automated systems to better use data algorithms to set enforcement case priorities. | Staff is unaware of any such algorithms being used by any modern enforcement agency. |
| II.B Case Prioritization | 33 | 3 | Retain term "chronic" rather than changing it to "history of non-compliance." Evaluation of history of non compliance should be based on a per outfall review of discharge data. | The term history of non-compliance better provides the Regional Boards with the flexibility they need to appropriately prioritize deployment of their discretionary enforcement resources. |
| II.B Case Prioritization | 46 | 2 | The commenter feels it is not appropriate to increase enforcement on one party to better effect compliance on the part of others. | See response to Commenter 15, Comment 3. |
| II.B Case Prioritization | 46 | 3 | While each case is unique, a comparison to other enforcement actions for similar situations is warranted. | There is no prohibition on comparing enforcement actions. The policy language allows for it, but does not require it. Cases can be similar, but unique. |
| C. Setting Statewide and Regional Priorities | | | | |

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| II.C State and Regional Priorities | 16 | 12 | We have concerns regarding the public participation provisions associated with enforcement matters, environmental justice and human right to water considerations. This approach is concerning in that advocacy organizations can use such public forums to target a specific site or company for issues unrelated to issues under regional board authority. Further, such a forum may be used to pressure enforcement staff to make commitments on prioritizing enforcement actions against a company that they normally would not consider of significant concern based on a subjective evaluation associated with the revised Policy. | The Human Right to Water and the protection of disadvantaged communities are important Water Board policies and it is appropriate to consider them in enforcement actions. Their consideration does not mandate a particular result. |
| II.C State and Regional Priorities | 26 | 3 | Direct the State Water Board to set a statewide goal and direct all Regional Water Boards to set regional goals - and report annually - enforcement actions taken in response to a water quality violation. | The Water Boards have performance measures relating to enforcement that recognize the unique aspects of each region and the independent statutory authority of the Regional Boards. |
| II.C State and Regional Priorities | 33 | 4 | Commenter recommends modifying II.C to clarify that only issues specific to general enforcement priorities will be discussed at the meetings and that enforcement proceedings related to a specific entity will not be discussed; specify that public meetings be formally structured and explained to the public in advance that only issues under Board authority would be considered; establish ground rules for these meetings so that all attendees are aware that they are informational only and that Board members would not be making commitments at the meetings; and set a clear limitation on time for comments so that everyone would have an opportunity to present. | These considerations are already accounted for in the Regional Boards' public participation processes. |
| D. Mandatory Enforcement Actions | | | | |
| II.D Mandatory Enforcement | 28 | 7 | Define "good cause" as used in the amendments and set the 18-month period once the violations are issued to discharger. | Good cause is considered on a case- by-case basis. The 18th month period is a performance measure. |
| III. Enforcement Actions | | | | |
| III. Enforcement Actions | 12 | 4 | Please consider that not all formal enforcement actions specify a return to compliance. We suggest the following alternative language..."All enforcement actions and their applicable compliance milestones shall be tracked in the Water Board's enforcement databases." | Staff concurs and will propose this revision. |
| IV. State Water Board Enforcement Actions | | | | |
| IV. State Board Actions | 7 | 8 | Page 11 identified funds. All funds administered by the boards should be subject to this provision. | Comment noted. |
| V. Coordination with Other Regulatory Agencies | | | | |
| V. Coordination with Other Agencies | 7 | 9 | Page 11 coordination, page 11 general. This is also a subject of well earned enforcement ridicule. DFW has expressed on the record that when Colfax stops discharging into the ravine this affects life in it. The shutting down of the wastewater treatment is not considered to be a permit violation because POTW water is diverted into a 75 foot sewer pond #3. Miller-Coors caused the plant to close down off and on for about 90 of the first six months of 2015. No violation there. | Comment noted. |
| A. Hazardous Waste Facilities | | | | |
| B. Oil Spills | | | | |
| C. General | | | | |
| V.C General | 29 | 8 | Technical workshops should be held throughout the state to provide opportunities for public comment and interaction and clarification of impact on stakeholders. | Comment noted. |
| VI. Monetary Assessments in Administrative Civil Liability (ACL) Actions | | | | |
| VI. ACLs Intro | 8 | 5 | Subsection A dictates that "Fairness does not require the Water Boards to compare an adopted or proposed penalty to other actions." It seems that "fairness" would require that an ACL imposed by the Water Board be compared to other similar actions to avoid subjective and inconsistent ACL assessments. Again, penalties should be consistent and related to the nature of the violation. | While the Enforcement Policy does not require the comparison of prior penalties across the state, it acknowledges that where violations are "standard and routine, a consistent and repeatable outcome can be reasonably expected using this Policy." (See VI.A.) Such consistency can be achieved by comparing previous enforcement actions, but the policy also accounts for different circumstances and the uniqueness of violations. Furthermore, the Policy already includes a provision for the consideration of liability assessments for similar conduct made in the recent past using the same enforcement policy under "Other Factors as Justice May Require." |
| VI. ACLs Intro | 9 | 6 | In some cases, the Regional Boards can reduce a penalty by 50%, based on the discharger's degree of culpability. Under the proposed amendments, however, this is adjustment factor is eliminated. The only adjustment factor for reducing a penalty is a 25% reduction for cooperation during cleanup. As a result, the adjustment factors have been revised to result in less overall potential reductions, and greater increases in penalties associated with discharge violations. | Many factors in the enforcement policy serve to mitigate against the maximum civil liability of \$10,000 per day and \$10 per gallon, including the deviation from requirement, harm to beneficial uses, ability to pay and continue in business and cleanup and cooperation factors. |
| VI. ACLs Intro | 16 | 9 | To help minimize subjectivity and provide clarity to the regulated community and the public, the Board may wish to consider providing supplemental examples of implementation of the steps. | Comment noted. Providing examples fails to account for unique circumstances that may apply. Dischargers can access hundreds of examples of settled cases and dozens of examples of adjudicated cases on the Regional Boards' websites and in their files if they want to compare their violations to those previously adjudicated. |

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| VI. ACLs Intro | 16 | 10 | The Board may wish to institute a pilot test of the steps by providing several cases to each of the regional boards so as to evaluate their results against the intended consistency within the proposed Policy. | The Regional Boards have already handled hundreds of cases under the methodology and the changes are best characterized as minor adjustments to the factors consistent with Regional Board experiences. |
| VI. ACLs Intro | 20 | 6 | The finding of whether a particular violation has afforded some economic advantage or competitive benefit on a particular discharger, requires consideration of penalties levied against similarly situated dischargers for similar violations, particularly when the dischargers are subject to the same discharge conditions and requirements. Having the ability to consider comparable scenarios promotes the State Water Board's goals of improving fairness and consistency in enforcement, without curtailing the discretion and flexibility afforded Water Boards to apply the Section VI methodology. Revise language of section I.C., p. 3 to reflect this. | Staff disagrees. Economic benefit is determined by reference to the avoided costs associated with a violation. Comparison to other dischargers may not be appropriate because they may have avoided violations by luck. While the Enforcement Policy does not require the comparison of prior penalties across the state, it acknowledges that where violations are "standard and routine, a consistent and repeatable outcome can be reasonably expected using this Policy." (See VI.A.) Such consistency may be achieved by comparing previous enforcement actions. Furthermore, the Policy already includes a provision for the consideration of liability assessments for similar conduct made in the recent past using the same enforcement policy under "Other Factors as Justice May Require." |
| VI. ACLs Intro | 35 | 1 | The Enforcement Policy should recognize the unique challenge of stormwater and not include municipal stormwater permittees in the category of potential violators against whom per gallon penalties can be assessed. Accordingly, revise page 13 to explicitly state per gallon penalties should not be assessed on municipal stormwater discharges. | The amendments are intended to reflect that Water Code section 13385 allows for both per day liability and per gallon liability to be imposed for discharge violations. The ability to impose both per day liability and per gallon liability allows for an appropriate enforcement response in cases where a high volume discharge occurs over a short period of time and where the maximum per day liability would be an insufficient penalty. The Water Boards have discretion to impose a reduced per gallon penalty for discharges of municipal stormwater that are high volume. |
| VI. ACLs Intro | 48 | 4 | Penalties must be commensurate with the level of harm, or potential harm, and not just a cost of doing business. The policy consideration of the discharger's history and conduct is appropriate and should be informed and subject to serious compliance standards and extensive penalties. Insufficient penalties should not be allowed to be a cost of doing business or a cost that is passed on to the public. | Staff agrees. |
| VI. ACLs Intro | 48 | 5 | Commensurate and equitable penalties must meet standards: Penalties should have assurance of resource recovery, deterrence / resource protection, and be equitable in terms of lost resources (beneficial uses) and the cost of prosecution of an enforcement action. If "equity" is a consideration, as stated in the policy, all costs and effects must be part of the consideration. | Staff agrees and seeks to recover civil liabilities as discussed within Constitutional and statutory limits. |
| A. Penalty Calculation Methodology | | | | |
| VI.A Penalty Calculation I | 6 | 5 | When considering the local compliance issues and penalty calculation, the overall size and obligations and resources of the dischargers' watershed(s) should be taken into consideration. | These issues are already taken into consideration under the Potential for Harm for Discharge Violations factor, the Ability to Pay and Continue in Business factor, and the Other Factors as Justice May Require factor. |
| VI.A Penalty Calculation I | 7 | 7 | Page 10 petitions to State Board. Friends considers these as a waste of time on violation orders. Plus there is the absence conflict of Board interest/ ethical problems. Commenter believes it was an enforcement order commenter petitioned and the State Board counsel who called to say it was dismissed had name last name as the regional board's enforcement officer. | The Policy can not trump requirements imposed by statute. |
| VI.A Penalty Calculation I | 15 | 4 | The commenter suggests that ACL enforcement actions against one discharger do need to be compared to other actions taken to provide fairness and consistency and notes that such an evaluation would seem to be a logical part of the duties of the Enforcement Coordinators. | While the Enforcement Policy does not require the comparison of prior penalties across the state, it acknowledges that where violations are "standard and routine, a consistent and repeatable outcome can be reasonably expected using this Policy." (See VI.A.) Such consistency can be achieved by comparing previous enforcement actions. The Policy allows for, but does not require, the comparison of previous penalty amounts. |
| VI.A Penalty Calculation I | 16 | 6 | With regard to the individual penalty decisions derived from the changes to this Policy, it is clear that some of the changes and additions will result in higher proposed monetary penalties. We are concerned this can be in-part attributed to the fact that the steps in the Policy use a conservative method that seemingly compounds the factors that would lead to higher penalties. | Many factors in the enforcement policy serve to mitigate against the maximum civil liability of \$10,000 per day and \$10 per gallon, including the deviation from requirement, harm to beneficial uses, ability to pay and continue in business and cleanup and cooperation factors. The high volume discharge provisions also serve to mitigate against higher penalties. On balance, the factors allow the Water Boards to set appropriate penalties. |
| VI.A Penalty Calculation I | 16 | 8 | In Step 2, it states that the penalty should be adjusted upward based on the case prioritization process outlined in Section II. Additionally, it indicates that in some cases the penalties based on both "per day" and "per gallon" can be combined; and that penalties are to be based on the extent of the violation in terms of its adverse impact on the effectiveness of the "most significant requirement", when a requirement has more than one part. Step 4 includes "adjustment factors" and Step 8 requires other factors to be considered as "Justice May Require". While it could be argued the last bullet may allow for a reduction or increase in the penalty, application of the other factors would result in making the penalties higher. The subjectivity that has been incorporated as part of some of these changes will undoubtedly compromise the goal of increased consistency in application of the Policy and the penalties assessed for similar enforcement actions brought forth by the SWRCB. | Penalties are not adjusted based on case prioritization. They are determined based on the penalty calculation methodology and require at least ten specific, evidence-based findings. Application of the methodology and the requirement of making evidence-supported findings are how the policy seeks to advance consistency. |

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| VI.A Penalty Calculation I | 20 | 5 | CWA recommends that, in order to fulfill the State Water Board's goal of improved transparency, a new appendix with case studies comparing enforcement outcomes and penalties under both the current and revised versions of the Enforcement Policy so that the regulated community and other stakeholders can better understand the practical implications of the latest revisions on the enforcement actions and calculation of penalties. | This is unnecessary as all the information in the appendix is already made readily available to the public. Hundreds of settlements and adjudications are available on the Regional Board websites. Furthermore, this is a Policy document and therefore is not meant to address issues with this level of specificity. |
| VI.A Penalty Calculation I | 28 | 1 | City is concerned that the Policy as proposed will encourage overly-punitive penalties that impose economic burdens on ratepayers that are out of proportion with the actual public health and environmental impacts to discharges. | The Penalty Calculation Methodology provides a framework for consistently characterizing and assessing penalty amounts. Based on our experience with hundreds of enforcement cases, we believe the revisions to the methodology will help ensure enforcement will be fair, firm, transparent and consistent. |
| VI.A Penalty Calculation I | 28 | 8 | In order to ensure fairness and transparency in enforcement, the Policy should be amended to require that monetary penalty assessments be based on evidence that is consistent with policy, not policy alone. | All ACLs must be based on over 10 specific findings, all of which must be based on evidence submitted into the record. |
| VI.A Penalty Calculation I | 36 | 9 | Consideration needs to be taken of whether similarly situated dischargers are being treated the same. Thus, the Water Boards should compare similar enforcement matters. | While the Enforcement Policy does not require the comparison of prior penalties across the state, it acknowledges that where violations are "standard and routine, a consistent and repeatable outcome can be reasonably expected using this Policy." (See VI.A.) Such consistency is can be achieved by comparing previous enforcement actions. Furthermore, the Policy already includes a provision for the consideration of liability assessments for similar conduct made in the recent past using the same enforcement policy under "Other Factors as Justice May Require." |
| VI.A Penalty Calculation I | 40 | 1 | (1) The Policy should maintain the current presumption that high-volume releases will be assessed with a \$2 per gallon liability rather than the proposed sliding scale of \$2-\$10 per gallon; (2) The Policy should keep the language referencing the application of the high volume reduction to sewage and storm water releases but should be amended to indicate that the high volume reduction could apply to other types of discharges as well; and (3) the Policy should lower the high volume threshold to 50,000 gallons if high volume discharges continue to be defined volumetrically. | The amendments to the high volume discharge section are intended to clarify existing practices and remove any perceived limitation on the Water Boards' authority to impose an appropriate per gallon penalty between \$2 per gallon and \$10 per gallon for high volume discharges after taking into consideration the nature and circumstances of the violation, rather than always applying a default maximum penalty of \$2 per gallon. The amendments define the term "high-volume" as between 100,000 gallons and 2,000,000 gallons and allow the high volume reduction to apply to any type of high volume discharge. The commenter's suggestion to lower the high volume threshold to 50,000 gallons is generally not consistent with the Water Board historical application of this provision. |
| Step 1 - Actual or Potential for Harm for Discharge Violations | | | | |
| VI.A Step 1 - Harm | 2 | 6 | Recommend under Factor 3, Susceptibility to Cleanup, assigning a score of 0 for potable water discharges that are addressed within a reasonable amount of time, accounting for the nature of these discharges that are not susceptible to cleanup or abatement, and attenuate in the environment with little potential impact. | Potable water discharges cause disparate impacts to beneficial uses depending on the facts surrounding the discharge. The policy appropriately accounts for impacts, as well as culpability, economic benefit, cooperation, ability to pay and deviation from requirement. |
| VI.A Step 1 - Harm | 3 | 10 | Compliance with the Statewide Treated Drinking Water Permit Order 2014-0194-DWQ relies on natural attenuation of chlorine residual; it is included as a suggested BMP. However, the proposed Policy states natural attenuation is not considered cleanup or abatement. Recommendation: The SFPUC requests that this inconsistency be removed from the Policy. Penalties should be less for discharge violations of contaminants that naturally attenuate (or have been abated) versus contaminants that cannot be removed from the environment once discharged. | The policy allows for mitigation of penalties in circumstances suggested by the commenter. Harm to beneficial uses could be considered lower in appropriate fact patters, as could economic benefit, ability to pay and other factors justice may require. The policy allows Regional Boards the flexibility to address these circumstances with fact specific, evidence supported findings that can mitigate a potential civil liability. |
| VI.A Step 1 - Harm | 3 | 9 | The current language regarding susceptibility to cleanup or abatement punishes those agencies having discharges that are unable to be cleaned up due to location or due to dissipation. The SFPUC requests decreasing the score from 1.0 to 0.5 for the condition when less than 50% of a discharge is not susceptible to cleanup or abatement. | The consideration of whether a discharge is susceptible to cleanup or abatement is a factor the Water Boards must consider pursuant to statute. The Policy attempts to place a value on this factor in a manner that considers the impact of a discharge that is able to be cleaned up verses one that is not, and recognizes that generally a discharge that is not subject to cleanup will have a greater impact on the environment. Therefore, as part of the consideration of the initial liability amount, a discharge that is not subject to cleanup should generally be treated as warranting a higher penalty than a discharge that is subject to cleanup. Moreover, the policy allows for mitigation of penalties in circumstances suggested by the commenter. Harm to beneficial uses could be considered lower in appropriate fact patters, as could economic benefit, ability to pay and other factors justice may require. The policy allows Regional Boards the flexibility to address these circumstances with fact specific, evidence supported findings that can mitigate a potential civil liability. |
| VI.A Step 1 - Harm | 4 | 2 | The five-point scale for assessing harm requires further clarification. The policy effectively allows for a finding of "minor" harm based upon unreasonable expectations of potential impacts, and immeasurable potential impacts. This standard is too speculative. Potential harm is difficult to define and quantify and should not be a standard upon which monetary penalties can be imposed. | A discharger can usually monitor a discharge and determine actual harm, but doesn't often do so, compelling the Water Boards to look at harm more generically as potential harm. Permits are intended to set limits to protect beneficial uses, and it is fair to assume that exceeding those limits causes at least some harm. |

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| VI.A Step 1 - Harm | 5 | 3 | The amendments seek to improve consistency by specifying that the degree of toxicity of the discharge is to be determined based on the characteristics of the material prior to discharge. This proposed change would unfairly penalize potable water discharges, where the greatest risk to receptors is from the chlorine concentration of the discharge. The chlorine concentration of the water prior to discharge must meet the minimum specified by the Safe Drinking Water Act, California Code of Regulations Title 22. The concentration of chlorine in the water prior to discharge would pose a significant risk to sensitive receptors and thus a value of 4 would be selected, the highest value. This simplistic calculation does not acknowledge the quick dissipation of chlorine in the environment from volatilization and reaction with dirt and organic matter, especially for smaller spills. | The change is a clarifying change so that the potential for harm score and the degree of toxicity score are no longer conflated. The proposed change would not unfairly penalize potable water discharges since the potential for harm score (calculated after the degree of toxicity score) would acknowledge any quick dissipation of chlorine in the environment. |
| VI.A Step 1 - Harm | 5 | 4 | For "susceptibility to cleanup or abatement," because chlorine naturally attenuates in the environment, drinking water system dischargers are assigned a score of 1 and thus are unfairly penalized. Far more toxic and persistent discharges, such as an oil spill, may receive a factor of 0 because they are able to be partially cleaned up. | See response to Commenter 3, Comments 9 and 10. |
| VI.A Step 1 - Harm | 9 | 7 | For "susceptibility to cleanup or abatement" the term "reasonable amount of time" should be defined. Also, in most cases, an enforcement action will ensue and penalties will be calculated long before a "reasonable time" for completing a cleanup has elapsed. Finally, the Enforcement Policy states that natural attenuation is not considered cleanup or abatement for purposes of Step 1. The County believes that natural attenuation should be taken into account in evaluating Step 1 because environmental impacts are decreased when natural attenuation occurs. | It is not necessary to define the term "reasonable amount of time." The intent is to allow the Water Boards discretion to determine what a reasonable amount of time may be after considering the circumstances. The intent is to provide an incentive for dischargers to voluntarily conduct cleanup in a timely manner. Allowing a discharge to attenuate naturally requires no affirmative act by the dischargers that should warrant a decrease in liability. |
| VI.A Step 1 - Harm | 10 | 8 | Inclusion and use of "Potential harm" is vague and subject to disparate interpretations. | The Policy language is intended to provide a consistent approach to violations while recognizing that there are differences in the quality and impact of the violations. Potential for harm is only analyzed when actual harm is not measured appropriately by the discharger, and is analyzed according to generally available scientific and technical information. |
| VI.A Step 1 - Harm | 14 | 2 | The proposed Policy revises the matrix for calculating penalties in which the scale of harm is multiplied by the classification of the violation (major, moderate, minor) and then by the amount of the discharge. Under the proposed amendments, the numerical factors have been increased for low to moderate harms, in some cases by more than 50%. If implemented, this could result in significantly higher penalties for discharge violations that are not necessarily major violations. | Tables 1 and 2 of the existing Enforcement Policy has two sharp transitions between Potential for Harm scores, particularly between four and five, which are problematic when trying to fairly apply the Enforcement Policy. Adjustments were made to smooth the sharp transitions and provide more evenly increased penalties as harm increases. |
| VI.A Step 1 - Harm | 16 | 5 | Harm categories lack clarity as they do not use consistent language within a continuum for the benchmarks. The language highlighted in yellow varies from "impact" to "harm" to three separate levels of "threat." This verbiage and the nuances between them will undoubtedly result in confusion in assigning a violation to one category or another. In essence, without clarification and consistency in the use of these terms and the continuum built around them decisions made by staff will be inherently subjective. And this subjectivity will lead to inconsistency in application of this Policy, mitigating the goal the Board through the revisions is seeking to solidify. | Staff disagrees. The terms are workable and scalable. |
| VI.A Step 1 - Harm | 16 | 7 | A factor is obtained from Table 1 which is based on an assessment of Actual or Potential for Harm for Discharge Violations in Step 1 and the Deviation from Requirement analysis in Step 2. The calculation in Step 1 includes factors for both the "Degree of Toxicity of the Discharge" and the "Actual Harm or Potential Harm to Beneficial Uses." These two factors would most likely always be correlated (i.e., they measure the same effect) and, since these results are added together, they will result in higher Step 1 scores and, in turn, higher penalty assessments. | The statute requires the Boards to consider both of these factors. As indicated by many of the potable water dischargers, they should be considered separately. Toxicity and harm to beneficial uses have already been considered additively in hundreds of cases under the existing policy. |
| VI.A Step 1 - Harm | 19 | 7 | The provisions on pages 13, 14 and 15, suggesting increasing penalties based on toxicity, clean-up costs, and any impact on drinking water, are problematic for evaluating agricultural farm and irrigation practices, as discussed below. The policy asserts that special increased penalties will be assessed in situations involving "toxicity" (pgs 14-16). This is an overly broad concept, and a particular problem when dealing with agriculture. In industrial, municipal, and most other discharge situations involving toxic releases to water are accidental, controllable and undesirable. In agriculture, however, toxic materials are necessarily and intentionally applied pursuant to federal and state law with the express purpose of being toxic to pests so as to produce food as part of the state's premier industry – agriculture. Consequently, using toxicity as a penalty measure for agriculture must be exercised with some perspective and reservation. Toxicity is an intentional lawful application in agriculture, which is much different than chemicals in most water quality situations. | The Toxicity factor ranges from a "0" to a "4." Therefore, the Water Boards have broad discretion to exercise this factor with care and apply it equitably to a broad range of scenarios, including agriculture. The Regional Boards have successfully applied these factors in hundreds of enforcement cases involving agriculture. The comment does not address changes to the policy. |

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| VI.A Step 1 - Harm | 19 | 8 | Another problematic factor is the cost or effort for clean-up. Most of the recently promulgated General Orders involving the ILRP are not yet finalized or fully implemented (i.e., still being developed and involved in appeals), and the new regulatory obligations now involve groundwater. It is well established that 1) the aquifers underlying the Central Valley are huge and 2) the percolation travel time for groundwater from surface irrigation to first encountering the aquifer will be several decades. Each of these factors presents major questions regarding linking any present calculation of a fine to what may influence a huge aquifer some 25 years hence. This would be speculative and is therefore unsupportable (pg. 19). Further, there is not even any present speculation by agency or other experts as to what it may take to commence any clean-up of such major aquifers. Therefore, this "clean-up" factor cannot be utilized in agricultural percolation to aquifers. | Noted. |
| VI.A Step 1 - Harm | 19 | 9 | Nitrate influences on groundwater, and thus impacting potential drinking water, presents a major problem with which the Kings Water Quality Coalition has been very engaged in cooperation with the local and state agencies and Environmental Justice groups. Therefore, we appreciate the issues surrounding these drinking water problems. We are very involved with the Alta Irrigation District and other efforts underway to provide temporary and semi-temporary replacement water while at the same time working through the CV-SALTS Program to work towards improving the aquifers. The use of nitrogen is necessary for plant growth (this is similar to discussions regarding toxicity in 6.A above), and the scope of the aquifer problem raises some of the same issues discussed in 6.B above. Therefore, the programs to deal with drinking water are still emerging, and will need to be considered when assigning penalties for drinking water impacts. Consequently, each of these three factors needs to be reasonably evaluated in respect to their utilization in agricultural water situations. | Noted. |
| VI.A Step 1 - Harm | 20 | 9 | Recommends a modification to include footnote or caveat to Factor 3 of Step 1 to clarify that, while attenuation of pollutants may not be sufficient to establish clean-up under Step 1 due to the text Revised Enforcement Policy § VI.A, Factor 3 (p. 17) [stating "natural attenuation of discharged pollutants in the environment is not considered cleanup or abatement for purposes of evaluating this factor"], deployment of, reliance on, and the effectiveness of attenuation BMPs, as authorized by applicable permits, may be considered pursuant to Step 2 when evaluating potential for harm and assessing base liability. | The intent is to provide an incentive for dischargers to voluntarily conduct cleanup in a timely manner. Allowing a discharge to attenuate naturally requires no affirmative act by the dischargers that should warrant a decrease in liability. |
| VI.A Step 1 - Harm | 21 | 4 | SCAP agrees that the amendments should include a temporal limit, and that the harm factors should be determined based on the characteristics of the material discharged before discharge. SIR, p. 3. However, the concept of dilution must be considered in conjunction with any determination of harm. | Dilution is considered in the harm to beneficial uses factor. |
| VI.A Step 1 - Harm | 21 | 5 | SCAP is concerned about allowing harm factors to utilize the concept of "potential for harm" when there is no evidence of actual harm. SIR, p. 3. This concept has the ability for abuse in actions where no harm is demonstrated or anticipated. If maintained, specific additional guidance on how and when this concept will be utilized is needed. | When sufficient and timely evidence of actual harm exists, the Policy guides the Water Boards to account for that evidence. Dischargers, however, often fail to collect, analyze, and submit evidence of actual harm resulting from a discharge. In those cases, the Water Boards must necessarily rely on potential for harm. The Policy provides ample guidance as to what may constitute different factor scores under the actual harm or potential harm to beneficial uses factor. (See Step 1, Factor 2.) The differences between minor, moderate, and major, potential for harm scores are adequately defined. |
| VI.A Step 1 - Harm | 21 | 6 | SCAP agrees that the factor for susceptibility of cleanup and abatement is unclear. SIR, p. 3. Thus, SCAP would support the change to consideration of whether 50 percent or more of the discharge was actually cleaned up or abated. | Noted. |
| VI.A Step 1 - Harm | 23 | 8 | The Policy should be revised to clarify that potential harm can be used only when actual harm is not quantifiable, and that any determination of potential harm be limited to that which could actually occur under the relevant factual setting and be supported by peer-reviewed literature. | See response to Commenter 21, Comment 5. |
| VI.A Step 1 - Harm | 23 | 9 | The phrases "indirect actual harm" and "indirectly impact beneficial uses" are overly broad and vague, may be misused to increase the penalty factor for an unauthorized discharge that has little to no direct threat to water quality or beneficial uses, and do not provide the intended improvements in clarity of penalty assessments. The use of poorly defined terms can result in inconsistency in enforcement outcomes, contrary to the intent of the Policy. Recommend deleting those terms. | See response to Commenter 21, Comment 5. |
| VI.A Step 1 - Harm | 24 | 4 | The "Susceptibility to Cleanup or Abatement" factor should better account for potable water related discharges. Under this factor, an oil spill may receive a more favorable rating than a potable water discharge. | The intent is to provide an incentive for dischargers to voluntarily conduct cleanup in a timely manner. Allowing a discharge to attenuate naturally requires no affirmative act by the dischargers that should warrant a decrease in liability. An oil spill may receive more favorable treatment depending on the consideration of the other ten evidence-supported factors, but it may not. |
| VI.A Step 1 - Harm | 26 | 6 | CCA supports and recommends defending the proposal that establishes the ability to use "potential for harm to human health" when determining liability. | Noted. |

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| VI.A Step 1 - Harm | 26 | 7 | CCA supports and recommends defending the proposal that establishes "susceptibility to cleanup" is based on whether clean up actually occurred. | Noted. |
| VI.A Step 1 - Harm | 27 | 10 | Language is vague and undefined will prove problematic. The term "potential harm" as used in the proposed Policy should, at a minimum, be grounded in potential harm that could actually occur under the relevant factual setting, and must be supported by peer-reviewed literature, or other supportable scientific basis. Further, if evidence of actual harm (or lack thereof) is available and presented to the Water Boards, the Policy should state that such evidence should be utilized in favor of more speculative potential" harm. Finally, more guidance is needed to distinguish between the differences of minor, moderate, and major "potential" harm. | Additional language is unnecessary. The Policy provides ample guidance as to what may constitute different factor scores under the actual harm or potential harm to beneficial uses factor. (See Step 1, Factor 2.) The differences between minor, moderate, and major, potential for harm scores are adequately defined. |
| VI.A Step 1 - Harm | 28 | 9 | Commenter requests that the Water Board clarify the duration of 'reasonable time' as used in the cleanup and abatement factor. | The Water Boards are capable of determining what is a reasonable time based on the facts surrounding the discharge event. Any numeric or bright line rule would be arbitrary. |
| VI.A Step 1 - Harm | 29 | 3 | Susceptibility to cleanup or abatement should properly reflect the nature of the discharge, whether it is possible to clean it up, and the natural attenuation of chlorine in discharges from drinking water systems. | The consideration of whether a discharge is susceptible to cleanup or abatement is a factor the Water Boards must consider pursuant to statute. The Policy attempts to place a value on this factor in a manner that considers the impact of a discharge that is able to be cleaned up versus one that is not, and recognizes that generally a discharge that is not subject to cleanup will have a greater impact on the environment. Therefore, as part of the consideration of the initial liability amount, a discharge that is not subject to cleanup should generally be treated as warranting a higher penalty than a discharge that is subject to cleanup |
| VI.A Step 1 - Harm | 33 | 5 | The inclusion of "potential harm" within Section VI.A for enforcement purposes is of concern as it seeks to make a legal argument that the plaintiff does not need to prove a loss in recovering a penalty. The concern is exacerbated by the possibility that a permitted user could be assessed a penalty based on a potential harm to a potential beneficial use. "Known risk factors" and "risk factors" should be defined and the definitions provided for review and comment prior to adoption of the Policy. Recommends revising Step 1, Factor 2 language to read: "The Water Boards may consider actual harm or potential harm to human health, in addition to harm to applicable beneficial uses including human health related beneficial uses." Revise to reduce compounding factors through penalty calculation process. | The Policy language is intended to provide a consistent approach to violations while recognizing that there are differences in the quality and impact of the violations. The Policy provides ample guidance as to what may constitute different factor scores under the actual harm or potential harm to beneficial uses factor, which will ensure consistency. (See Step 1, Factor 2.) Furthermore, there are other factors that can be utilized to ensure consistent outcomes are achieved. (See Step 8.) |
| VI.A Step 1 - Harm | 34 | 6 | The term "potential for harm" is too vague. Potential for harm should be grounded in potential harm that could actually occur under the relevant factual setting and must be supported by peer-reviewed literature or other supportable scientific basis. Further, if evidence of actual harm is available, the Policy should state that it should be used in favor or more speculative "potential" harm. | Additional language is unnecessary. The Policy provides ample guidance as to what may constitute different factor scores under the actual harm or potential harm to beneficial uses factor. (See Step 1, Factor 2.) The differences between minor, moderate, and major, potential for harm scores are adequately defined. |
| VI.A Step 1 - Harm | 36 | 10 | If potential for harm is used rather than actual harm, it should be based on science. If evidence of actual harm is available, or lack thereof, and presented to SWRCB, Policy should state that such evidence be favored over more speculative "potential" harm; | When sufficient and timely evidence of actual harm exists, the Policy guides the Water Boards to account for that evidence. Dischargers, however, often fail to collect, analyze, and submit evidence of actual harm resulting from a discharge. In those cases, the Water Boards must necessarily rely on potential for harm. The Policy provides ample guidance as to what may constitute different factor scores under the actual harm or potential harm to beneficial uses factor. (See Step 1, Factor 2.) The differences between minor, moderate, and major, potential for harm scores are adequately defined. |
| VI.A Step 1 - Harm | 36 | 11 | Factor 1: The policy should also take into account whether the material is harmful or beneficial to human health, such as drinking water. Otherwise drinking water has the potential be considered as toxic as sewage, which is entirely inappropriate, and would fail to account for all of the characteristics of the drinking water prior to discharge. | The statute requires the Boards to consider certain factors. To some extent, all materials are beneficial to humans. Appropriate management of sewage is beneficial, as is appropriate management of hydrocarbons. The Water Boards must consider how a substance affects the natural environment when introduced, sometimes where it should not be. |
| VI.A Step 1 - Harm | 36 | 12 | Factor 2: The Draft Policy states, "The Water Boards may consider actual harm or potential harm to human health, in addition to harm to beneficial uses." Draft Policy at 12. To that end, the policy should acknowledge that by its very nature drinking water is beneficial to human health. | See response to Commenter 36, Comment 11. |
| VI.A Step 1 - Harm | 36 | 13 | Factor 3: The way the language currently exists, an oil spill would receive a more favorable score than a de minimus potable water discharge simply by virtue of the fact that oil is more susceptible to cleanup than potable water. The Draft Policy should include special exception language in Factor 3 to account for the low threat nature a potable water discharge. | The Policy already allows for a lower monetary assessment for discharges where the potential or actual harm is low. Other factors in the Policy also may be used where the impact in a particular case is relatively small. |
| VI.A Step 1 - Harm | 39 | 6 | Page 14. 2nd to last paragraph. a. The following needs to be added to this paragraph: "When using potential harm for a violation the agency must state the reason why actual harm was not used or only used in certain aspects of the calculation. In calculating potential harm all data used in such calculations shall be presented to all parties for transparency." | See response to Commenter 4, Comment 2. |

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| VI.A Step 1 - Harm | 39 | 7 | Amend Factor 3 or add another factor regarding how soon a cleanup or abatement was started and how much money was spent on it. Good faith efforts should be rewarded. | Timeliness of cleanup efforts is considered in the Cleanup and Cooperation factor, while money spent may be considered in determining economic benefit. |
| VI.A Step 1 - Harm | 40 | 6 | Commenter is concerned that the vague, undefined notion of "potential harm" will prove problematic in many cases, as the term is theoretical and subject to multiple interpretations. Must support the term "potential harm" with peer-reviewed literature or other supportable scientific basis. Evidence of actual harm, or lack thereof, should, if available, be used in favor of more speculative potential harm. More guidance is needed to distinguish between minor, moderate, and major potential harm. | Additional language is unnecessary. The Policy provides ample guidance as to what may constitute different factor scores under the actual harm or potential harm to beneficial uses factor. (See Step 1, Factor 2.) The differences between minor, moderate, and major, potential for harm scores are adequately defined. |
| VI.A Step 1 - Harm | 42 | 4 | Susceptibility to cleanup and abatement should properly reflect the nature of the discharge, whether it is possible to clean it up, and the natural attenuation of chlorine in discharges from drinking water systems. | The consideration of whether a discharge is susceptible to cleanup or abatement is a factor the Water Boards must consider pursuant to statute. The Policy attempts to place a value on this factor in a manner that considers the impact of a discharge that is able to be cleaned up verses one that is not, and recognizes that generally a discharge that is not subject to cleanup will have a greater impact on the environment. Therefore, as part of the consideration of the initial liability amount, a discharge that is not subject to cleanup should generally be treated as warranting a higher penalty than a discharge that is subject to cleanup |
| VI.A Step 1 - Harm | 47 | 2 | An evaluation of actual harm and/or potential harm must be a major factor in prioritization of enforcement. Appropriate and beneficial outcomes must also consider the current status of the waters affected. The criteria for assessment and prosecution of an enforcement action should include consideration of whether the discharge is diminishing a beneficial use or otherwise contributing to impaired status. | Staff agrees. The classification of a violation is an important consideration in case prioritization. These issues are considered under the second factor of harm to designated beneficial uses. |
| Step 2 - Assessment for Discharge Violations | | | | |
| VI.A Step 2 - Discharge Assessments | 2 | 7 | Under High Volume Discharges, the option to use maximum of \$1.00 per gallon for recycled water discharges should also be extended to potable water discharges, reflecting the similar chemistry of these discharges with recycled water. | Staff disagrees. Potable water discharges can cause significant damage to aquatic wildlife. The Water Boards are currently trying to promote recycled water and this suggested reduction is intended to be in furtherance of that recycled water policy. Moreover, Boards need not reduce the multiplier when the chemistry and harm to beneficial uses results in significant damage to aquatic wildlife. |
| VI.A Step 2 - Discharge Assessments | 3 | 11 | The Initial Statement of Reasons does not provide adequate rationale for the proposed changes in the Per Gallon Factors in Table 1 and Per Day Factors in Table 2. With the single exception of factors with a Potential for Harm score of 8, all factors were increased. The SFPUC recommends providing the basis for the proposed numeric changes in Tables 1 & 2, as these changes will cause significant increases in penalties for discharge violations. | The existing Enforcement Policy has two of sharp transitions between Potential for Harm scores, particularly between four and five, which are problematic when trying to fairly apply the Enforcement Policy. Adjustments were made to smooth the sharp transitions and provide more evenly increased penalties. |
| VI.A Step 2 - Discharge Assessments | 3 | 12 | Eliminate the per gallon amount range and instead maintain the standard of a maximum penalty of \$2.00/gallon to fairly and consistently assess large volume discharges. | The amendments to the high volume discharge section are intended to clarify existing practices and remove any perceived limitation on the Water Boards' authority to impose an appropriate per gallon penalty between \$2 per gallon and \$10 per gallon for high volume discharges after taking into consideration the nature and circumstances of the violation, rather than always applying a default maximum penalty of \$2 per gallon. The amendments define the term "high-volume" as between 100,000 gallons and 2,000,000 gallons and allow the high volume reduction to apply to any type of high volume discharge. |
| VI.A Step 2 - Discharge Assessments | 3 | 13 | Potable water (which is similar to recycled water) should have a cap of \$1 per gallon | The recommendation to allow Regional Boards to apply a reduced multiplier of \$2.00 per gallon for recycled water is solely based on the Water Boards' policies favoring increased development and use of recycled water to reduce demands on potable water supplies. |
| VI.A Step 2 - Discharge Assessments | 5 | 5 | For high volume discharges, drinking water discharges should receive similar treatment to discharges of recycled water because they are similar in nature and toxicity. | Staff disagrees. Potable water discharges can cause significant damage to aquatic wildlife. The Water Boards are currently trying to promote recycled water and this suggested reduction is intended to be in furtherance of that recycled water policy. Moreover, Boards need not reduce the multiplier when the chemistry and harm to beneficial uses results in significant damage to aquatic wildlife. |
| VI.A Step 2 - Discharge Assessments | 6 | 6 | Opposes the removal of language assessing only per day penalties for effluent limitation violations and suggests retention with modifications. | Additional language is unnecessary, since the proposed amendments describe when per gallon penalties should also be sought.. |
| VI.A Step 2 - Discharge Assessments | 6 | 7 | Allow \$2/gallon penalty for discharges <2,000,000 gallons or discharges that don't pose a threat to water quality, particularly turbidity. | See response to Commenter 3, Comment 12. |
| VI.A Step 2 - Discharge Assessments | 9 | 8 | Requests that construction and municipal storm water discharges be excluded from the per gallon assessments, unless there is an objective way to determine the source and extent of any alleged discharge on a per gallon basis in storm water. It is well established that numeric effluent limits for storm water discharges are largely infeasible. | Enforcement staff disagrees that effluent limits for storm water discharges are infeasible, but acknowledges that permits do not contain them. Staff disagrees that there is no way to determine gallons discharged, and most engineers are fully capable of doing so. Accommodations to penalty amounts can be had under various factors such as harm to beneficial uses, toxicity, the high volume discharge provisions, culpability and other factors as justice may require. |
| VI.A Step 2 - Discharge Assessments | 9 | 9 | For high volume discharges, the County requests that construction and municipal storm water discharges be excluded from the per gallon assessments. | This would be inappropriate as the statute contemplates such liabilities. The amount of such penalties can be mitigated as described in response to Commenter 9, Comment 9. |
| VI.A Step 2 - Discharge Assessments | 10 | 2 | Not enough guidance on the high volume discharges, which could result in significant increases in potential liability. Please impose CASA's suggested revisions. | See response to Commenter 3, Comment 12. |

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| VI.A Step 2 - Discharge Assessments | 11 | 3 | A high volume discharge should include a consideration of the average daily flow or the size of the operation. For example, for small dischargers, a 5,000 gallon discharge may be a high volume discharge as compared to the average dry weather flow and therefore any per gallon assessment should be at a much lower level than \$10.00 per gallon. The Policy should be revised to recognized the disparities of penalties to small agencies. | See response to Commenter 3, Comment 12. |
| VI.A Step 2 - Discharge Assessments | 19 | 10 | For agriculture, a penalty based on gallons is speculative and potentially massive and as such the specific factors will have to be modified and reasonably evaluated. | Penalties cannot be speculative and must be based on substantial evidence. Remainder of comment noted. |
| VI.A Step 2 - Discharge Assessments | 20 | 8 | Include in the factor table a score of zero for minor or negligible harm or toxicity and reclassify any discharge with a total base liability of zero to compliant. Specific recommended addition to the beginning of Step 2: " <u>Under Step 2 of the penalty calculator, if violations are assessed: (i) under Step 1 Factor 1 as presenting negligible or minor for risk of toxicity (scores of 0 or 1); and (ii) under Step 1 Factor 2 as presenting negligible or minor (scores of 0 or 1) risk of potential to harm to beneficial uses, then such discharges shall be assigned a total base liability of 0.</u> <u>Any discharge with a total base liability of 0, regardless of classification as a violation, shall be reclassified as compliant (not in violation) for purposes of administration of the Enforcement Policy, including any record of a history of violations.</u> " | Comment noted. The Regional Boards have successfully applied toxicity and harm to beneficial uses as separate factors in hundreds of enforcement actions. The Regional Boards would rarely prioritize a case against a discharge with little or not impact. Additional changes are unnecessary since the Enforcement Policy allows discretion in pursuing violations. |
| VI.A Step 2 - Discharge Assessments | 20 | 10 | Potable water (which is similar to recycled water) should have a cap of \$1 per gallon. | See response to Commenter 3, Comment 13. |
| VI.A Step 2 - Discharge Assessments | 20 | 11 | There is no information supporting the reasons that establishment of a \$2 per gallon minimum and the proposed \$8 per gallon increase in the maximum applicable penalty is important to attaining the goals of fairness and transparency. Commenter requests that, at a minimum, adequate supporting information regarding the need for these significant increases in potential per gallon penalties be provided as justification for the proposed modifications. | All findings in support of a penalty must be supported by substantial evidence, including one made in support of an adjustment to the maximum \$10 per gallon multiplier. The enumerated list is advisory to the Regional Boards based on technical and policy considerations. |
| VI.A Step 2 - Discharge Assessments | 20 | 12 | Requests that the definition of a small or large discharge volume should correspond to the size of the operation or the program being implemented. Specific recommended language provided. Requiring system discharges exceeding 2,000,000 gallons to be eligible for reduced penalties inequitably impacts water users served by small systems. In order to enable Water Boards to appropriately take the low threat posed by discharges to receiving waters and/or the overall program and system size into consideration in reducing penalties for high volume, low threat discharges, CWA recommends specific text revisions to the High Volume Discharges provisions. | See response to Commenter 3, Comment 12. |
| VI.A Step 2 - Discharge Assessments | 20 | 13 | The previous language, which supports penalty assessments for effluent limit violations on a per day basis only should be retained. Recommended modifications to text at p. 18: "This step addresses per gallon and per day assessments for discharge violations. Generally, <u>it is intended that NPDES permit effluent limit violations should be addressed on a per day basis only. However, where deemed appropriate, such as for willful or reckless effluent limit violations, spills or releases with significant demonstrable adverse impacts on beneficial uses and aquatic resources, some NPDES permit effluent limit violations, and violations such as effluent spills or overflows, storm-water discharges, or unauthorized discharges, the Water Board should consider whether to assess both per gallon and per day penalties.</u> " | Additional language is unnecessary, since the proposed amendments state effluent limits without more should be addressed on a per day basis. |
| VI.A Step 2 - Discharge Assessments | 21 | 1 | SCAP opposes the removal of language assessing only per day penalties for effluent limitation violations. See Proposed Redline Version at p. 19 (removing "Generally, it is intended that effluent limit violations be addressed on a per day basis."). This proposed modification would allow for supplemental per gallon penalties for such discharges. | This comment fails to recognize that the change being made is only a clarifying change. The current Policy already allows for supplemental per gallon penalties for effluent limitation violations. |
| VI.A Step 2 - Discharge Assessments | 21 | 7 | SCAP agrees that modifying the weighting irregularities in the factors would be helpful. SIR, p. 4. This change would also eliminate the ability to game the score by leveraging these anomalies to get higher or lower penalties. However, there still seems to be anomalies in the numbering. | Noted. |
| VI.A Step 2 - Discharge Assessments | 21 | 8 | Rename "High Volume Discharges" to "Per Gallon Assessment for Specific Discharges and Volumes" and allow for more flexibility for other categories of discharges. | Additional language is unnecessary, since the proposed amendments allow for other categories of discharge. |

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| VI.A Step 2 - Discharge Assessments | 21 | 9 | SCAP does not support the amendments to remove the lower dollar levels for the identified types of discharges discussed in the last paragraph. SIR, p. 4. However, SCAP could support adding more flexibility for other types of discharges. For other types of discharges, SCAP would support additional text specifying a \$2.00 per gallon maximum for other non-sewage, non-construction storm water, non-recycled water discharges between 50,000 and 2,000,000 gallons and \$1.00 per gallon for all discharges over 2,000,000 gallons. The Policy should also state that the maximum amounts in each category need not be used if reasons exist not to use the maximum per gallon amount. Currently, the highest allowable number is automatically used as the default value. | All findings in support of a penalty must be supported by substantial evidence, including one made in support of an adjustment to the maximum \$10 per gallon multiplier. The enumerated list is advisory to the Regional Boards based on technical and policy considerations. The statutory default is \$10 per gallon. |
| VI.A Step 2 - Discharge Assessments | 23 | 10 | On pages 18, 20, and 21, where categories for Deviation from Requirement are listed, the sentence "there is general intent by the discharger to follow the requirement" has been deleted. The consideration of intent, evaluated through actions and prior history of the discharger, provides incentive for dischargers to avoid deviations from requirements and to comply. Recommend keeping prior language. | Intent is subjective and very difficult to prove. Staff believes deviation should be an objective technical consideration, rather than an exploration of intent. |
| VI.A Step 2 - Discharge Assessments | 23 | 2 | Reinstate the original language on page 19, "Generally, it is intended that effluent limit violations be addressed on a per day basis," and strike the phrase "NPDES permit" in the following sentences on page 18: "Generally, NPDES permit effluent violations should be addressed on a per day basis only. However, where deemed appropriate, some NPDES permit effluent limit violations..." | The language is merely clarifying and no substantive change is intended. |
| VI.A Step 2 - Discharge Assessments | 23 | 11 | The existing Policy states that a \$2.00 per gallon rate should be applied to all sanitary sewer overflows and other types of listed spills regardless of volume. The commenter recommends the maximum per gallon assessment for all sewage spills and stormwater should be \$2.00 per gallon up to 2,000,000 gallons and \$1.00 per gallon thereafter. The maximum per gallon assessment for recycled water spills should be \$0.50 per gallon, or on a per day assessment, whichever is less. | See response to Commenter 3, Comment 12. |
| VI.A Step 2 - Discharge Assessments | 24 | 6 | The Policy proposes several numeric changes in Table 1 and Table 2 which are the multipliers used to determine the initial administrative civil liability amount for discharge violations. The SWRCB has provided neither explanation of the need to increase these numbers nor any justification of the numbers chosen. Because the revised multipliers have the potential to dramatically increase the amount of final liability, we believe it would be appropriate for the SWRCB to provide a meaningful explanation of the proposed higher multipliers, including why they are needed, why the selected numbers were chosen, and which policy goals the SWRCB believes would be achieved. | The existing Enforcement Policy has two sharp transitions between Potential for Harm scores, particularly between four and five, which are problematic when trying to fairly apply the Enforcement Policy. Adjustments were made to smooth the sharp transitions and provide more evenly increased penalties. On average, penalties should not necessarily be higher. |
| VI.A Step 2 - Discharge Assessments | 24 | 7 | Recycled water and potable water should be treated the same by the Policy. The District recommends adding potable water to the high volume discharge factor, with a presumption of \$1 per gallon. | See response to Commenter 3, Comment 13. |
| VI.A Step 2 - Discharge Assessments | 24 | 8 | The District would appreciate an explanation as to what information was used to establish this volume range as that data has not been provided for review. Discharges less than 100,000 gallons that pose low-risk to beneficial uses still have the potential to result in an inordinately high penalty unless a reduced price-per-gallon factor is used. | See response to Commenter 3, Comment 12. |
| VI.A Step 2 - Discharge Assessments | 24 | 9 | Under the existing Policy, most types of high-volume discharges qualify for a high-volume adjustment of \$2 per gallon unless that adjustment would result in an inappropriately small penalty. The Policy amendment would now make \$2 the floor, while reserving a discretionary ability to go up to \$10 per gallon. The District recommends providing general considerations on how a number in this range would be selected and requests an explanation on how the proposed range was developed. If a \$10 per gallon assessment is used, then this factor would have no practical purpose. | See response to Commenter 3, Comment 12. |
| VI.A Step 2 - Discharge Assessments | 25 | 2 | The Revised Water Quality Enforcement Policy appears to eliminate language in the current policy that supports penalty assessments for effluent limit violations on a per day basis only. This approach should be retained to clarify and establish a general intent to apply only the per day assessment for effluent limit violations. Based on the typical short-term occurrence of stormwater and agricultural runoff, exceedance of effluent limits for these types of discharges should only be addressed on a per day basis. Proposed changes: "This step addresses per gallon and per day assessments for discharge violations. Generally, it is intended that NPDES permit effluent limit violations should be addressed on a per day basis only. However, where deemed appropriate, such as for unauthorized discharges, a large scale spill or release with significant impacts, some NPDES permit effluent limit violations, and violations such as effluent spills or overflows, stormwater discharges, or unauthorized discharges, the Water Boards should consider whether to assess both per gallon and per day penalties." | Additional language is unnecessary, since the proposed amendments clarify when penalties should be calculated per day as opposed to per day and per gallon. |

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| VI.A Step 2 - Discharge Assessments | 25 | 3 | The Revised Water Quality Enforcement Policy gives discretion to apply a penalty of \$2 to \$10/gallon for discharges that are between 100,000 and 2,000,000 gallons. Defining a range for stormwater or agricultural runoff is too prescriptive because the discharge volume is related to the size of a storm event or the area contributing to runoff. To allow program or event size considerations, the lower boundary for designating high volume discharges should be removed. Proposed changes: "However, recognizing that the volume of certain discharges can be very high or not have significant impacts on water quality, the Water Boards have the discretion to select a value between \$2.00 per gallon and \$10.00 per gallon with the above factor to determine the per gallon amount for discharges that are less than between 100,000 gallons and 2,000,000 gallons for each discharge event, whether it occurs on one or more days. For discharges in excess of 2,000,000 gallons, or for discharges of recycled water that has been treated for reuse or stormwater, the Water Boards may elect to use a maximum of \$1.00 per gallon with the above factor to determine the per gallon amount." | Comment noted. The statutes allows for penalties based on a per gallon assessment. See response to Commenter 3, Comment 12. |
| VI.A Step 2 - Discharge Assessments | 26 | 8 | Supports and recommends defending proposal to change high-volume discharges definition to be between 100,000 and 2,000,000 gallons. | Comment noted. |
| VI.A Step 2 - Discharge Assessments | 27 | 2 | A \$2/gallon be applied to all high volume discharges rather than a sliding scale of \$2 - \$10/gallon | See response to Commenter 3, Comment 12. |
| VI.A Step 2 - Discharge Assessments | 27 | 3 | The Policy reaffirm the original intent of this section, which was to apply the \$2.00 per gallon figure to, at a minimum, all sewage and storm water releases. | See response to Commenter 3, Comment 12. |
| VI.A Step 2 - Discharge Assessments | 27 | 4 | Lower the initial high volume definition from 100,000 gallons to 50,000 gallons | The commenter's suggestion to lower the high volume threshold to 50,000 gallons is generally not consistent with the Water Board historical application of this provision. See also response to Commenter 3, Comment 12. |
| VI.A Step 2 - Discharge Assessments | 27 | 7 | Clarification is Needed on the Recommendation Favoring Per Day Assessments for Effluent Violations--we request that the State Water Board simply strike "NPDES permit" from the proposed language on page 18 of the proposed Policy, in order to retain the flexibility to apply the per day penalty under all permitting circumstances. | Additional language is unnecessary, since the proposed amendments state that should be addressed on a per day basis. |
| VI.A Step 2 - Discharge Assessments | 29 | 4 | Both Tables 1 and 2 in Section VI.A. Step 2 of the draft Enforcement Policy update outline new factors for discharges. However, the proposed Policy update does not provide rationale for any of these new factors. For High Volume Discharges, there is no justification for the changes, which will dramatically increase penalties for all high volume discharges. In the interest of the stated goal of transparency in enforcement actions, additional information should be provided to demonstrate why these factors are being changed. | The existing Enforcement Policy has two sharp transitions between Potential for Harm scores, particularly between four and five, which are problematic when trying to fairly apply the Enforcement Policy. Adjustments were made to smooth the sharp transitions and provide more evenly increased penalties. On average, penalties should not necessarily be higher. |
| VI.A Step 2 - Discharge Assessments | 29 | 5 | The proposed Policy update also includes a provision for discharges of recycled water that "the Water Boards may elect to use a maximum of \$1.00 per gallon" (at p. 19). Since the chemistry of potable water is very similar to that of recycled water that has been treated for reuse, this provision should be extended to discharges from drinking water systems. | See response to Commenter 3, Comment 13. |
| VI.A Step 2 - Discharge Assessments | 30 | 2 | Under the proposed revisions, agricultural return flows or stormwater from agricultural operations that are less than 2,000,000 gallons and that are subject to an enforcement action would be assessed on a per gallon basis higher than recycled water. This would occur even if the only pollutant of concern was sediment. Such an application of the per-gallon assessment for high-volume discharges is inequitable. | See response to Commenter 3, Comment 13. |
| VI.A Step 2 - Discharge Assessments | 32 | 3 | The Revised Water Quality Enforcement Policy appears to eliminate language in the current policy that supports penalty assessments for effluent limit violations on a per day basis only. This approach should be retained to clarify and establish a general intent to apply only the per day assessment for effluent limit violations associated with specific types of discharges. Based on the typical short-term occurrence of stormwater, discharges of stormwater that exceed permit limitations should only be addressed on a per day basis. | Additional language is unnecessary, since the proposed amendments state that should be addressed on a per day basis. |
| VI.A Step 2 - Discharge Assessments | 32 | 4 | The Revised Water Quality Enforcement Policy gives the State and Regional Water Boards discretion to apply a penalty of \$2 to \$10/gallon for discharges that are between 100,000 and 2,000,000 gallons. The definition of a small or large discharge volume should be related to the size of the operation or the program being implemented. In particular, defining a range for stormwater is too prescriptive because the discharge volume is related to the size of a storm event and the area contributing to runoff. To allow program or site size considerations, the lower boundary for designating high volume discharges should be removed. | See response to Commenter 3, Comment 12. |
| VI.A Step 2 - Discharge Assessments | 32 | 5 | Discharges with minimal impacts on water quality and very high volume stormwater discharges from infrequent large storm events should be considered for lower penalty amounts. | See response to Commenter 3, Comment 12. |

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| VI.A Step 2 - Discharge Assessments | 33 | 7 | The revisions to #2 above suggest extending ("where deemed appropriate") the use of "per day" and "per gallon" penalties to: "...some NPDES permit effluent limit violations and violations such as effluent spills or overflows, stormwater discharges, or unauthorized discharges..." instead of to just large scale spills or releases. In this regard, CCEEB recommends the proposed Policy should be revised to reduce the compounding of factors through the penalty calculation process. | The statute provides for both per day and per gallon assessments, and requires the Water Boards to consider a variety of factors. The language is not a change, but a clarification, of existing practices. The policy has been used effectively by the Regional Boards in hundreds of cases. |
| VI.A Step 2 - Discharge Assessments | 34 | 3 | The Water Board should maintain the \$2.00 maximum for high volume discharges rather than the sliding scale of \$2.00-\$10.00; Maintain original intent to apply high volume reduction to sewage and storm water releases, at a minimum and maintain reduction for recycled water; Also, the minimum threshold for high volume discharges should be 50,000 rather than 100,000 gallons. | See response to Commenter 3, Comment 12. |
| VI.A Step 2 - Discharge Assessments | 36 | 14 | The Draft Policy almost universally increases the per gallon penalty factor, thereby increasing the calculated penalty that would otherwise apply. The Statement of Reasons explains that under the existing "rubric" there are weighting irregularities for penalties with potential for harm scores of "7" and "8". This does not explain why the penalty factors are increased across the board. Nor does it explain why this increase is necessary to promote the stated goals behind the policy. | The existing Enforcement Policy has two sharp transitions between Potential for Harm scores, particularly between four and five, which are problematic when trying to fairly apply the Enforcement Policy. Adjustments were made to smooth the sharp transitions and provide more evenly increased penalties. On average, penalties should not necessarily be higher. |
| VI.A Step 2 - Discharge Assessments | 36 | 15 | At Table 1 and Table 2, the extent to which a discharge deviates from a requirement affects the per gallon or per day penalty factor. However, the policy does not adequately explain how the Water Boards should evaluate the extent to which a discharge deviates from a regulatory requirement. The Draft Policy should clarify that an unplanned, emergency discharge of potable water that is otherwise in compliance with the Drinking Water Systems Permit is not a deviation from a regulatory requirement. | Compliance with permit conditions is not a violation. |
| VI.A Step 2 - Discharge Assessments | 36 | 16 | The Draft Policy gives the Water Board discretion to impose per gallon penalties of between \$2.00 and \$10.00 for discharges that are between 100,000 gallons and 2,000,000 gallons for each discharge event. The current Policy sets \$2.00 as the maximum. The State Water Board should provide some justification for this five-fold increase. Given that drinking water is already treated to standards protective of human health, the Draft Policy should clarify that, just as with recycled water treated for reuse, the maximum per gallon fee for high volume discharges should be \$1. | See response to Commenter 3, Comment 13. |
| VI.A Step 2 - Discharge Assessments | 36 | 17 | Table 2: The Draft Policy increases the per day factor for calculating multi-day penalties compared to the existing policy. The State Water Board should explain why this increase is necessary to achieve the stated goals of the policy. | The commenter mistakenly construes Table 2. Some points on the deviation line are higher, while some are lower. |
| VI.A Step 2 - Discharge Assessments | 39 | 8 | Regarding Table 1 on Page 18 "Per Gallon Factor for Discharge Violations," the manner in which the substitute numbers are put in is confusing. It would be more readable if the proposed number were complete and not partial numbers. For example, the first row replacement number should be 0.01 rather than 01. | Comment noted. The Regional Boards effectively use the table. |
| VI.A Step 2 - Discharge Assessments | 40 | 3 | Commenter expresses concern that the Policy as currently drafted does not provide clear guidance as to how exceedance of effluent limitations in a non-NPDES setting [i.e., CWC 13350(e) instead of 13385] should be handled with respect to per-day and per-gallon assessments and requests that "NPDES permit" be stricken from the proposed language on page 18 of the proposed Policy, in order to retain flexibility to apply the per-day penalty under all permitting circumstances. | The flexibility does exist, but is not recommended. Per gallon penalties are provided by various statutes and are often appropriate. |
| VI.A Step 2 - Discharge Assessments | 42 | 5 | Maximum penalties of \$1.00 per gallon provided for recycled water should be extended to potable water. | See response to Commenter 3, Comment 13. |
| Step 3 - Per Day Assessments for Non-Discharge Violations | | | | |
| VI.A Step 3 - Non-Discharge Assessments | 21 | 10 | SCAP is unclear of the reasons for the need for the change to findings of potential harm and the assessments for non-discharge violations. SIR, p. 4. More clarity is needed to determine how these proposed modifications will work in actual enforcement situations. | The amendments 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. |
| VI.A Step 3 - Non-Discharge Assessments | 33 | 8 | "Most non-discharge violations should be considered to present a moderate potential for harm." CCEEB questions whether there is sufficient rationale or support for including this statement. We're concerned it may be an arbitrary and capricious assignment of Potential Harm. In this regard, we recommend this sentence be deleted from this section. | No change is recommended. |
| Step 4 - Adjustment Factors | | | | |

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| VI.A Step 4 - Adjustment Factors | 3 | 14 | History of Violations: (A) The minimum multiplier is proposed as 1.0, removing the possibility of "credit" for a discharger with a good compliance history. The SFPUC requests that this Policy incentivize good behavior by including a minimum multiplier of 0.75 to recognize dischargers with positive compliance history; (B) Use of the history of past violations in penalty calculations will result in public agencies with large systems being identified as relative bad actors even though their noncompliance incidents normalized to agency size may be the same or even better than the industry average. The SFPUC requests that this penalty factor be adjusted to account for the size of the discharger (e.g., miles of pipeline); (C) The SFPUC requests that the language "history of repeat violations" remain. It is also recommended that there should be a prescribed timeframe (e.g., five years) that the Regional Water Boards can consider when determining this multiplier; (D) The Policy does not define what "numerous dissimilar violations" means and how that will be quantified or applied. The SFPUC requests that this term be further clarified; (E) The SFPUC requests that an upper limit of 1.5 be specified in the Policy and guidance be provided for determining when to use this maximum multiplier. | (A) This comment mistakenly suggests that the previous Policy gave credit for a Discharger with a good compliance history. It did not. Regardless, credit should not be given to a Discharger for complying with the law; compliance with the law instead should be a baseline for liability. (B) The amendments to the history of violations section clarify that a discharger should not receive a reduction in penalty for having a clear history with no violations. This position emphasizes that the Water Boards expect the regulated community to maintain compliance at all times. Additionally, the amendments clarify that any history of violations warrants an increase in liability, and that a history of similar violations should warrant an even greater increase in liability. The changes are intended to encourage the regulated community to maintain compliance and deter against repeat violations. (C) This is unnecessary. The Proposed language includes "similar or numerous dissimilar violations," which is sufficient guidance. We disagree that there should be a prescribed timeframe that the Regional Boards be limited to when determining this multiplier. The Regional Boards has discretion to apply a 1.1 for old history of violations. (D) Defining numerous and dissimilar violations is not necessary. The plain language of the text suffices to serve as an appropriate guideline. (E) There is no ceiling for the multiplier related to consideration of "history of violations" and the Policy has never included a ceiling for this factor. The amendments to the history of violations section clarify that a discharger should not receive a reduction in penalty for having a clear history with no violations. This position emphasizes that the Water Boards expect the regulated community to maintain compliance at all times. Additionally, the amendments clarify that any history of violations warrants an increase in liability, and that a history of similar violations should warrant an even greater increase in liability. The changes are intended to encourage the regulated community to maintain compliance and deter against repeat violations. It is a reasonable expectation that Dischargers take reasonable steps to avoid discharges and that they do not commit violations intentionally. Credit should not be given to a Discharger for attempting to comply with the law. Every finding by the Regional Board must be supported by evidence in the record. Whatever multiplier the Regional Board elects to apply must be based on specific evidence. |
| VI.A Step 4 - Adjustment Factors | 5 | 6 | (A) Degrees of culpability, should keep an option of less than 1.0 multiplier for instances when a 3rd party hits a fire hydrant or a pipe during construction. (B) There is no time limit on the history of violations factor; a more prescriptive policy with a maximum value and time period would allow for fairer implementation across the State. | (A) It is a reasonable expectation that dischargers take reasonable steps to avoid discharges and that they do not commit violations on purpose. Credit should not be given to a discharger for attempting to comply with the law; attempting to comply with the law instead should be a baseline for liability. (B) The amendments to the history of violations section clarify that a discharger should not receive a reduction in penalty for having a clear history with no violations. This position emphasizes that the Water Boards expect the regulated community to maintain compliance at all times. Additionally, the amendments clarify that any history of violations warrants an increase in liability, and that a history of similar violations should warrant an even greater increase in liability. The changes are intended to encourage the regulated community to maintain compliance and deter against repeat violations. |
| VI.A Step 4 - Adjustment Factors | 5 | 7 | There is no time limit on the history of violations factor; a more prescriptive policy with a maximum value and time period would allow for fairer implementation across the State. | See response to Commenter 3, Comment 14. |
| VI.A Step 4 - Adjustment Factors | 6 | 8 | Allow credit for good compliance history and limit History of Violations multiplier applied to dischargers with past violations. Allow use of lower multipliers. | The dischargers good conduct is appropriately considered under cleanup and cooperation. See also response to Commenter 3, Comment 14. |
| VI.A Step 4 - Adjustment Factors | 6 | 9 | Disastrous Circumstances, Water Boards have discretion to determine degree of culpability. - Revise and add new circumstances that warrant adjustments based on "Other Factors." Existing regulations should be considered and costs incurred for investigations should be included. | The policy allows for all of the circumstances suggested to be accounted for by the Regional Boards, both in their prioritization of discretionary enforcement actions, or "whether" to take discretionary enforcement and in their determination of an appropriate liability. Every finding made by the Regional Board must be supported by facts in the record and these types of facts are those upon which a Regional Board may ordinarily rely. |
| VI.A Step 4 - Adjustment Factors | 10 | 3 | Requiring staff to use a minimum multiplier of 1.1 for history of violations if any occurred in the past could result in harsh penalties. More justification is needed if this factor and other factors are being changed to result in higher penalties. | See response to Commenter 3, Comment 14. |
| VI.A Step 4 - Adjustment Factors | 13 | 1 | The revised draft stipulates that dischargers with no history of violations would be assigned a factor of 1, eliminating the option of acknowledging a good compliance history with a lesser factor. CLFP requests that the draft be revised to allow the enforcement staff the discretion to assign multipliers of less than 1 to acknowledge past compliance and cooperation. | See responses to Commenter 3, Comment 14, and Commenter 6, Comment 8. |

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| VI.A Step 4 - Adjustment Factors | 13 | 2 | Under the existing policy, dischargers with a track record of violations could be assigned a "History of Violations" factor of up to 1.5 to increase the severity of the penalty. The revised draft only states that "...the Water Board should consider adopting a multiplier above 1.1" with no reference to the 1.5 ceiling. This proposed change does not provide the regulatory staff with sufficient guidance as to appropriate maximum penalty levels, and without a prescribed ceiling unreasonably high arbitrary factors could be assigned. The revised draft sets a minimum multiplier of 1.0, eliminating the discretion of the Board to reduce the penalty. CLFP believes that the current policy should be retained, that fairness dictates that some allowance should be made for mistakes that are beyond the control of the discharger. | There is no ceiling for the multiplier related to consideration of "history of violations" and the Policy has never included a ceiling for this factor. The amendments to the history of violations section clarify that a discharger should not receive a reduction in penalty for having a clear history with no violations. This position emphasizes that the Water Boards expect the regulated community to maintain compliance at all times. Additionally, the amendments clarify that any history of violations warrants an increase in liability, and that a history of similar violations should warrant an even greater increase in liability. The changes are intended to encourage the regulated community to maintain compliance and deter against repeat violations. It is a reasonable expectation that Dischargers take reasonable steps to avoid discharges and that they do not commit violations intentionally. Credit should not be given to a Discharger for attempting to comply with the law. Every finding by the Regional Board must be supported by evidence in the record. Whatever multiplier the Regional Board elects to apply must be based on specific evidence. |
| VI.A Step 4 - Adjustment Factors | 13 | 3 | Commenter believes the current, rather than proposed, policy regarding the Culpability Factor should be retained, offering the possibility of a factor of less than 1 that might reduce the penalty level. | See responses to Commenter 3, Comment 14, and Commenter 6, Comment 8. |
| VI.A Step 4 - Adjustment Factors | 14 | 3 | Adjustment factors have been revised to result in less overall potential reductions and greater increases in penalties. | See responses to Commenter 3, Comment 14, and Commenter 6, Comment 8. |
| VI.A Step 4 - Adjustment Factors | 16 | 13 | Previously, the multiplier for the "History of Violations" factor was capped at 1.5. Now, however, the proposal is to "consider adopting a multiplier above 1.1. This could result in much higher multipliers that would significantly increase the proposed calculated penalty. We urge the Board to retain both the cap on the multiplier for the history of violations and credit opportunity under the culpability factor range. | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 2. |
| VI.A Step 4 - Adjustment Factors | 16 | 14 | Modification of the Culpability factor range from 0.5-1.5 to 1.0-1.5 would remove any "credit" in the proposed penalty calculation for unavoidable, non-negligent, non-intentional violations as allowed under the current Policy. We urge the Board to retain both the cap on the multiplier for the history of violations and credit opportunity under the culpability factor range. | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 2. |
| VI.A Step 4 - Adjustment Factors | 20 | 15 | Recommend revisions to "Culpability" factor section: To first sentence of first paragraph, append "or emergency-induced discharge". Change "1.0" to "0.5". To the end of the first sentence in second paragraph, add "and the lowest factor for non-negligent violations or violations resulting from factors that are not within the discharger's control". As new final sentence: "Water Boards have discretion to determine the degree of culpability and determine the appropriate multiplier." The multiplier approach used for the "Cleanup and Cooperation" factor should be extended to "Culpability" as the range and general direction provides the necessary framework for a fair and consistent application of the multiplier and encourages good actors. | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 2. |
| VI.A Step 4 - Adjustment Factors | 20 | 16 | The "History of Violations" multiplier eliminates incentives to establish an excellent compliance history and is too open-ended to be applied fairly and consistently. The multiplier approach used for the "Cleanup and Cooperation" factor should be extended to "History of Violations" as the range and general direction provides the necessary framework for a fair and consistent application of the multiplier and encourages good actors. Recommended policy revision: " Any prior History of violations <u>within the past 5 years</u> : Where the discharger has a <u>good compliance</u> no prior history <u>within the past 5 years of any violations</u> , this factor should be <u>neutral, or 1.0</u> 0.5 to 1.0. Where the discharger has <u>any</u> a history of prior violations <u>within the past 10 years</u> , a <u>minimum</u> multiplier of <u>1.0 to 1.5</u> should be used. <u>Where the discharger has a history of similar or numerous dissimilar violations, the Water Board should consider adopting a multiplier above 1.1. Water Boards have discretion to evaluate the 5-year history of compliance and determine the appropriate multiplier.</u> " | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 2. |
| VI.A Step 4 - Adjustment Factors | 20 | 14 | The Enforcement Policy should encourage and reward "good behavior" by including multipliers less than 1.0 (neutral) in all categories. | See response to Commenter 13, Comment 2. |
| VI.A Step 4 - Adjustment Factors | 21 | 11 | SCAP does not agree that dischargers with a good history of no violations should not be given "credit" for that history. The proposed amendment would eliminate that possibility of credit for good compliance. | See responses to Commenter 6, Comment 8, and Commenter 13, Comment 2. |

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| VI.A Step 4 - Adjustment Factors | 21 | 12 | SCAP does not agree with the required findings in the "Multiple Day Violations" section. SIR, p. 5. There is no definition or explanation of what would constitute "daily detrimental impacts to the regulatory program." Could this include that a staff person is working on that violation, or is unable to work to address another violation? If so, then it would be impossible to demonstrate an absence of this factor. Similarly, a long term violation could probably always be alleged to have had a daily detrimental impact to the environment, even if miniscule. Thus, this first finding should be removed as impossible to meet, or should be further clarified that these impacts must be discrete and separable from impacts on other days. It is also unclear why a 5 day unit of time is used to collapse the penalty instead of 7 days to correspond with a week. Justification for the unit selected needs to be provided. | These provisions of the policy are intended to provide guidance for Regional Boards regarding when to mitigate against the strict application of the statutory penalty language imposing penalties for "each day of violation." Mitigation beyond the guidance can be achieved in appropriate circumstances based on an evidence-supported finding that "other factors as justice may require" so requires. Accordingly, in order to provide this mitigation, the Regional Boards must explain why, based on evidence, they consider there to be no daily detrimental impacts. This can arise in a variety of circumstances and the Regional Boards have already successfully applied this provision in hundreds of enforcement cases. |
| VI.A Step 4 - Adjustment Factors | 22 | 4 | LADWP recommends clarification regarding the "history of violations" language. Specifically, what is regarded as an "unreasonably long period after being brought to the entity's attention" and "whether the entity has a history of non-compliance." Recommends clarifications to these issues to include whether the violations have continued for more than 30 days after being brought to the entity's attention and are recurring and whether an entity has had five or more violations within a single year. | The commenter's proposed revisions are too granular for a policy. See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 2. |
| VI.A Step 4 - Adjustment Factors | 23 | 12 | The proposed revisions do not allow any reduction in the degree of culpability, even for cases of unavoidable, non-negligent, not-intentional violations, as allowed under the current policy. This is problematic for POTWs, especially when combined with the proposed deletions for consideration of the discharger's intent. A discharger's historical performance and prior history of violations should be considered as factors that may be used to infer the discharger's intent and potentially reduce the degree of culpability. The degree of culpability factor should remain in the range of 0.5 to 1.5. | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 2. |
| VI.A Step 4 - Adjustment Factors | 23 | 13 | This "history of violations" factor is being revised with no regard as to the type and severity of any past violation that may have occurred, or the time elapsed since the time when the past violation(s) occurred. POTWs with a long history of operation are likely to have some history of past violations and would receive a higher than neutral factor in perpetuity. As such, a five-year limitation should be applied. In addition, the commenter recommends that dischargers with no history of violations for five years be recognized for good past performance and be allowed to reduce their liability by using a factor of 0.75. An upper limit not to exceed a value of 1.25 for this factor should be set. | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 2. |
| VI.A Step 4 - Adjustment Factors | 23 | 14 | In the Policy section dealing with Multiple Violations Resulting from the Same Incident, the Water Board is proposing to delete the criterion that "the violation continues for more than one day." A single incident that is not an operational upset may have an impact for more than one day, as constituents that enter a POTW with the influent may require time to flow through and exit the plant and therefore may result in effluent exceedances over multiple days. Assessing such an incident as multiple violations would be overly punitive. | The deletion addresses the redundancy between section b and c. The policy clarifies that Regional Boards may consider a single operational upset where violations occur on multiple days as a single violation. |
| VI.A Step 4 - Adjustment Factors | 23 | 15 | The opposed revisions to the method for collapsing days of violations for violations lasting more than 30 days will result in a significant increase in penalties in comparison to the current policy. The State Board has not provided any rationale for this increase in assessment of penalties. This is problematic for POTWs where correcting multiple day violations may require expensive facility upgrades. Such violations may be due to new pollutants being present in plant effluent which POTWs have not had time to address. | The previous policy resulted in inconsistent liabilities when collapsing days for violations lasting more than 30 days, vs. those lasting fewer. The circumstances noted by the commenter can be accounted for under other findings such as harm, culpability, cleanup and cooperation and other factors as justice may require. See also response to Commenter 21, Comment 12. |
| VI.A Step 4 - Adjustment Factors | 24 | 5 | The proposed amendments to the Table 4 "conduct factors" significantly reduce the positive credit a discharger may receive for acting in good faith and conscientiously responding to an incident, thereby inappropriately devaluing and disincentivizing positive dischargers' conduct. Retaining the ability for dischargers to receive a downward penalty adjustment where culpability is low will promote enhanced environmental protection. The Policy should include a statute of limitations for the History of Violations factor. Historic violations beyond a three year rolling time frame should not be held against dischargers if lessons were learned to try to prevent reoccurrence. The Policy does not define what "numerous dissimilar violations" means. | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 1. |

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| VI.A Step 4 - Adjustment Factors | 25 | 4 | The Revised Water Quality Enforcement Policy increases the lower multiplier (from 0.5 to 1.0) when assessing degree of culpability. The option of applying multiplier values < 1.0 should be retained for non-negligent violations or violations that result from disastrous circumstances (e.g., floods, earthquakes, terrorism). The State and Regional Water Boards should be allowed discretion to use a lower multiplier when establishing a discharger's degree of culpability. Recommended changes: In Table 4, for the first paragraph of the Degree of Culpability Adjustment, add "and disastrous circumstances" to the end of the first complete sentence. Revise the second paragraph of the same Adjustment to read as follows: "Adjustment should result in a multiplier between 0.5-1.0 1.0 to 1.5 with a higher multiplier for intentional misconduct and gross negligence, and a lower multiplier for <u>conditions not in the discharger's control or more</u> simple negligence. A neutral assessment of 1.0 should be used when a discharger is determined to have acted as a reasonable and prudent person would have. <u>Water Boards have discretion to assess degree of culpability and determine the appropriate multiplier.</u> | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 1. |
| VI.A Step 4 - Adjustment Factors | 25 | 5 | A clear cap on the history of violations factor should be established. Recommended changes to Table 4, History of Violations Adjustment: Any prior history of violations: Where the discharger has <u>a good compliance no prior history of any violations</u> , this factor should be <u>neutral, or 1.0 0.75 to 1.0</u> . Where the discharger has any a history of prior violations, a minimum multiplier of 1.1 should be used. Where the discharger has a history of similar or numerous dissimilar violations, the Water Boards should consider adopting a multiplier of 1.1 to 1.2. <u>Water Boards have discretion to evaluate history of compliance and determine the appropriate multiplier."</u> | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 1. |
| VI.A Step 4 - Adjustment Factors | 26 | 9 | The State Water Board should collapse violations days by a unit of five days to one, rather than 30 to one, for all violations that occur over 30 days -- without any ceiling. This will remedy the irregularity caused by capping the proposed change at 60 days. | See response to Commenter 21, Comment 12. |
| VI.A Step 4 - Adjustment Factors | 27 | 8 | The "Degree of Culpability" factor in the existing policy ranges between 0.5 and 1.5, and this has been revised in the proposed Policy to a range between 1 and 1.5. This removes any credit for an entity's positive compliance history and reduces the flexibility of staff undertaking enforcement actions to account for such compliance. The proposed Policy should, wherever appropriate and feasible, take steps to encourage compliance and ensure that such efforts are recognized, even if a near term item results in enforcement. This includes retaining the "Degree of Culpability" factor as a range from 0.5 to 1.5. | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 1. |
| VI.A Step 4 - Adjustment Factors | 27 | 9 | History of Violations: This change punishes the regulated community in the present for what may be completely disparate compliance circumstances in the past, reduces the flexibility of enforcement staff to look at a discharger's individual compliance history, fails to recognize the slight variability well-operated municipal treatment plants can experience from time to time, and has an unduly harsh effect on dischargers who may have experienced many years without a discharge violation, but may have minor past exceedances on occasion. We request that this language be restored to its original scale (with enforcement staff having discretion to apply a multiplier of .75 to 1.5), or only slightly modified to allow for more flexibility in use of this factor and recognition of an entity's positive compliance history. Most importantly, the proposed Policy must be modified to place a clear cap on the multiplier if enforcement staff seek to elevate above a 1.1 (the existing policy places a cap of 1.5, yet no such cap exists in the proposed Policy). | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 1. |
| VI.A Step 4 - Adjustment Factors | 27 | 15 | The existing policy prescribes that a single act that violates multiple requirements in the same permit, plan, or order may be addressed with a single base liability amount. This approach avoids an unduly harsh enforcement response in the event of a single act violating duplicative and/or connected requirements, which supports reasonable and fair assessment of penalties. The proposed Policy appears to eliminate this approach. (See Policy, strike through subsection (e) on p. 24, under "Multiple Violations Resulting from the Same Incident") Instead, the proposed Policy promotes a new subsection (e), which states, "[a] single act that violates similar requirements in different applicable permits or plans, but which are designed to address the same water quality issue." (Emphasis added). The proposed provision is too limiting as it does not afford the recommendation to circumstances where the duplicative provisions are in the same permit, rather than different permits. We request the existing subsection (e) be retained, and that the new subsection (e) be moved to new subsection (f). | The revisions are consistent with case law interpreting the Clean Water Act concerning violations arising from the same act that relate to different water quality concerns. The Regional Boards retain the discretion to take the approach described by the commenter under the existing language, both in the prioritization process and exercising discretion over how to style a complaint and in applying a civil liability under other factors justice may require. |
| VI.A Step 4 - Adjustment Factors | 29 | 6 | Changes to the conduct factors should properly incentivize good behavior by including multipliers that are less than 1. In addition, the commenter recommends that a time limit be applied to the history of violations timeframe., as well as an upper limit to the multiplier. | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 1. |

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| VI.A Step 4 - Adjustment Factors | 32 | 6 | The Revised Water Quality Enforcement Policy increases the lower multiplier (from 0.5 to 1.0) when assessing degree of culpability. The option of applying multiplier values < 1.0 should be retained for non-negligent violations or violations that result from disastrous circumstances. The State and Regional Water Boards should be allowed discretion to use a lower multiplier when establishing a discharger's degree of culpability. | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 1. |
| VI.A Step 4 - Adjustment Factors | 32 | 7 | The Revised Water Quality Enforcement Policy eliminates use of a multiplier < 1.0 for dischargers with a good compliance history. If a discharger has had no violations in the past, a neutral multiplier of 1.0 is applied. Almost all dischargers have had some violations in the past, so the neutral multiplier may never be used. The State and Regional Water Boards should be allowed discretion when deciding if a discharger has a good compliance history and if those dischargers should be rewarded with a lower penalty based on use of a multiplier ≤ 1.0. Most importantly, a clear cap on the multiplier should be established if the State and Regional Water Boards seek to elevate above the 1.1 multiplier. | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 1. |
| VI.A Step 4 - Adjustment Factors | 33 | 9 | Urges retention of both cap on multiplier for history of violations and credit opportunity under culpability factor range. | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 1. |
| VI.A Step 4 - Adjustment Factors | 34 | 5 | The Policy's "degree of culpability" and "history of violations" factors should not be modified from the existing Policy since changes do not incentivize compliance. Few municipal facilities operate without some sporadic exceedance. Therefore, a multiplier of 1.1 for history of violations will almost always be the starting point. If the Board continues to pursue the proposed changes, a cap of 1.5 for history of violations should be included. | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 1. |
| VI.A Step 4 - Adjustment Factors | 34 | 9 | The commenter suggests keeping language in paragraph "e" on page 24 regarding multiple violations resulting from the same incident. | See response to Commenter 27, Comment 15. |
| VI.A Step 4 - Adjustment Factors | 35 | 3 | The Policy should retain the adjustment multiplier range of 0.5 to 1.5 for degree of culpability and 0.75 to 1.5 to take into account the discharger's history of violation. The Regional Board should retain the discretionary authority to apply a multiplier between those ranges on a case by case basis. | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 1. |
| VI.A Step 4 - Adjustment Factors | 36 | 18 | Table 4- Violator's Conduct Factors. Degree of Culpability-- Please explain why an increase in this factor is necessary to fulfill the stated goals of the Draft Policy. Without any supporting evidence, this appears to be an arbitrary increase. In addition, if the record shows that the discharger is non-negligent and took appropriate steps to avoid or minimize the discharge, there should be an opportunity for the adjustment factor to reduce the penalty. | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 1. |
| VI.A Step 4 - Adjustment Factors | 36 | 19 | Table 4- Violator's Conduct Factors. History of Violations--Under the Draft Policy, a multiplier of 1.1 should apply where the discharger has any history of prior violations. As a result, a discharger could face a significantly increased penalty because it was penalized in the past for something that was wholly unrelated. Cal Water operates 28 different drinking water systems in California. What may have transpired in one district should have no bearing on another. Cal Water recommends that the Water Boards retain flexibility when considering this factor when unplanned, emergency discharges of potable water are at issue, taking into account the unique circumstances involving drinking water purveyors. Finally, a reduction in the penalty should be potentially available if the discharger does not have a recent history of violations. | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 1. |
| VI.A Step 4 - Adjustment Factors | 36 | 20 | Table 4- Violator's Conduct Factors. Cleanup and Cooperation The State Water Board should explain why an increase in this multiplier, relative to the existing policy, is necessary to achieve the Draft Policy's stated goals. Without any supporting evidence, this appears to be an arbitrary increase. | The discharger's culpability is considered in step two of the prioritization process and in the penalty calculation methodology. There is no change to the policy regarding the discharger's cleanup and cooperation, which allows a Regional Boards to apply a mitigating factor of up to .75% for those who make extraordinary efforts to cleanup or cooperate. |
| VI.A Step 4 - Adjustment Factors | 40 | 4 | Urges retention of credit opportunity under culpability factor range (i.e., range of 0.5 to 1.5). | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 1. |
| VI.A Step 4 - Adjustment Factors | 40 | 5 | Urges retention of cap of 1.1 on multiplier for history of violations. | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 1. |
| VI.A Step 4 - Adjustment Factors | 42 | 6 | Should be a multiplier of less than 1 for all three factors. Limits should be set on how far back the Board can apply History of Violations. The History of Violations factor should have an upper limit and additional rationale for how to apply the multiplier. | See responses to Commenter 3, Comment 14; Commenter 6, Comment 8; and Commenter 13, Comment 1. |

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| VI.A Step 4 - Adjustment Factors | 40 | 9 | Requests that existing subsection (e) ["A single act may violate multiple requirements, and therefore constitute multiple violations. For example, a construction dewatering discharge to a dewatering basin located on a gravel bar next to stream may violate a requirement that mandates the use of best management practices (BMPs) for sediment and turbidity control, a requirement prohibiting the discharge of soil silt or other organic matter to waters of the State, and a requirement that temporary sedimentation basins be located at least 100 feet from a stream channel. Such an act would constitute three distinct violations that may be addressed with a single base liability amount"] be retained and that the proposed new subsection (e) be moved to a new subsection (f). | See response to Commenter 27, Comment 15. |
| VI.A Step 4 - Adjustment Factors | 43 | 2 | Water Board should incentivize Public Water Systems to invest in and implement state-of-the-art discharge management practices that exceed industry standards, which includes: adjustment factors that would reduce financial liability of non-compliant discharges that were mitigated with the use of technology that exceeds industry practices. | Many Water Board policies do exactly this and the enforcement policy does allow Regional Boards to consider this when establishing an appropriate liability under other factors as justice may require. |
| VI.A Step 4 - Adjustment Factors | 47 | 3 | The policy consideration of the factor of the discharger's history and conduct is appropriate. Dischargers that are culpable for violations and/or that have demonstrated serious negative histories should be subject to serious compliance standards and the possibility of extensive penalties. | Comment noted. Staff agrees. |
| Step 5 - Determination of Total Base Liability Amount | | | | |
| Step 6 - Ability to Pay & Ability to Continue in Business | | | | |
| VI.A Step 6 - Ability to Pay | 1 | 2 | Changes and additions proposed will result in higher proposed monetary penalties on responsible recyclers who strive for compliance and are already struggling to stay in business. In this regard, we appreciate the proposed revisions that suggest consideration of the "ability to pay" enforcement penalties. This paired with the progressive enforcement will be helpful to our responsible members who strive for compliance. We also applaud the proposed revisions that are clear that for those entities willfully avoiding compliance such consideration will not weigh heavily with the priority interest being to not reward willful noncompliance even to the extent of penalties putting an entity out of business to avoid noncompliance and a corresponding economic benefit over those who strive to be in compliance. | Comment noted. |
| VI.A Step 6 - Ability to Pay | 6 | 10 | Ability to pay should include impacts to ratepayers. Language regarding service area population was removed. Language regarding possible hardships to service population should remain in the policy. | The proposed language is broader than the original and accounts for the circumstance suggested by the commenter, so long as evidence in the record support a finding. The policy also provides an additional avenue for consideration of impacts to ratepayers and service populations in its environmental justice and enhanced compliance action sections. The policy amendments, when read as a whole, provide greater flexibility to address impacts to ratepayers and disadvantaged service populations. |
| VI.A Step 6 - Ability to Pay | 10 | 5 | We agree with CASA that the Policy needs to include language to make it clear that public wastewater systems still have the opportunity to make "ability to pay" arguments during enforcement proceedings. | The policy is clear in this regard. Every discharger has the ability to make this argument and all findings by the Regional Boards must be supported by substantial evidence in the record. |
| VI.A Step 6 - Ability to Pay | 11 | 1 | Concerned about the application of the Enforcement Policy on small POTWs in the Central Valley and how it can result in extraordinarily high penalties on small agencies that lack staff resources to address violations. | See response to Commenter 6, Comment 10 regarding enhanced opportunities for environmental justice communities. |

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| VI.A Step 6 - Ability to Pay | 17 | 4 | <p>We thank staff for the explicit consideration of the potential for large fines to cause water rates to soar beyond what is affordable to the ratepayers. It is the unfortunate truth that regulated systems often pass off any fines levied upon them to their customers, and in areas where there are high numbers of low-income residents this poses a significant issue and public health risk. Unaffordable rates violate the HRTW, and thus creative solutions are often necessary in these situations. Staff lays out alternatives such as informal enforcement mechanisms such as compliance projects. These are often more productive than levying heavy fines at ensuring the customers of the system gain access to safe drinking water. Especially when compliance projects are paired with financial assistance through helping the failing system find available funding sources. Often times the cause of the violation arises from an inability (technically, managerially, or financially) to fix the problem. If a system is unable to raise rates or the ratepayers are unable to pay the higher rates, existing water quality violations can continue to go unresolved. However, we recognize that just because a water system serves a DAC does not necessarily mean the system has an inability to pay the fine or fund any necessary improvements to the system. Water systems which have the funds available to make necessary improvements should expend their own capital so systems which do not have the financial ability to be in compliance are able to benefit from state assistance. Staff should request financial statements of a system as proof of inability to pay before providing additional assistance, and additionally should, to the extent possible, monitor violating systems to ensure they do not pass off the additional costs onto ratepayers when there are sufficient surplus funds available.</p> <p>Affordability should be determined by ensuring rates do not exceed 2% of the median household income of the rate base. This number is consistent with US EPA's threshold of 2-2.5% which is for water and wastewater bills, and is found within literature and other states' programs¹.</p> | <p>The policy extends considerations for service providers in disadvantaged communities previously reserved for "small" communities to all disadvantaged communities. The office of enforcement frequently works with DFA and Regional Boards to resolve difficult funding issues in DACs. See response to Commenter 6, Comment 10.</p> |
| VI.A Step 6 - Ability to Pay | 21 | 13 | <p>SCAP would like the "Ability to Pay" to be a broader analysis than just analyzing individuals or business entities and to also consider public agencies. SIR, p. 5. A public agency's income and net worth are not the correct metrics to evaluate ability to pay as this revenue is committed to capital projects, and operation and maintenance of publicly funded facilities. An agency's net worth also includes the value of public facilities that cannot be leveraged or mortgaged to free up funding to pay a regulatory penalty. In many cases, public entities have had to do rate increases to pay penalties and these increases are subject to the requirements of Propositions 218 and 26. These unique situations of public agencies must be included, and not be deleted as proposed. The proposed changes include removal of language considering "widespread hardship to the service population or undue hardship to the discharger." See Proposed Redline Version at p. 26. These concepts must be maintained in the proposed amendments.</p> | <p>See response to Commenter 6, Comment 10.</p> |
| VI.A Step 6 - Ability to Pay | 23 | 3 | <p>The revision states that the ability of a discharger to pay an ACL will be determined by its income and net worth, without allowing for any differentiation between private businesses and public agencies. These are not appropriate indicators of ability to pay for public agencies. For a public agency, ability to pay should be based on factors such as current service rates and mean household income.</p> | <p>See response to Commenter 6, Comment 10.</p> |
| VI.A Step 6 - Ability to Pay | 25 | 6 | <p>For public agencies the ability to pay should include impacts ratepayers. Recommends adding the following sentence to the end of the first paragraph of Step 6: "<u>For public agencies, the ability to pay may also consider service area population, available funding mechanisms and ability to raise funds, and the costs, schedules, anticipated financial impacts to the community of other planned stormwater, water and wastewater expenditures, and other relevant factors impacting the utility's rate base.</u>" and the following sentence after the second sentence of the second paragraph of Step 6: "<u>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.</u>"</p> | <p>The language is unnecessary as the regional boards already consider these issues when appropriate. See response to Commenter 6, Comment 10.</p> |
| VI.A Step 6 - Ability to Pay | 26 | 10 | <p>The Policy should declare the Board's ability to issue subpoena to discover information on whether a business has the ability to pay, and only allow "ability to pay" penalty reduction if discharger has provided proof of that inability.</p> | <p>Staff believes this is precisely what the policy states.</p> |
| VI.A Step 6 - Ability to Pay | 27 | 14 | <p>We request that the proposed Policy specifically note in the "Ability to Pay" section on pages 25 and 26 that staff can consider a Disadvantaged Community and/or a Small Community's (as discussed on pages 4-5 of the proposed Policy) "ability to pay," and to cross reference page 4 of the Policy in the "Ability to Pay" section.</p> | <p>The amendment is unnecessary as the policy is intended to be read as an integrated whole. See also response to Commenter 6, Comment 10.</p> |

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| VI.A Step 6 - Ability to Pay | 30 | 5 | The new revision suggests the financial evidence submitted would become public record when in reality it should not. It removes due process for alleged violators, and such revisions should be rejected. | The policy is carefully designed to allow for consideration of mitigating a proposed liability based on ability to pay, but also based on evidence, as is required for any finding. Staff believes the policy appropriately balances due process considerations with the need for transparency. |
| VI.A Step 6 - Ability to Pay | 32 | 8 | The Revised Water Quality Enforcement Policy indicates that a discharger's "ability to pay" ACLs will be determined solely by its income and net worth. For public agencies, the "ability to pay" should include impacts to ratepayers. Service area population, existing rates, and planned capital improvement projects are important considerations, especially for smaller agencies. The current policy allows lower fines "if there is strong evidence that an ACL would result in widespread hardship to service area population." This approach should be retained and the State and Regional Water Boards should be allowed to consider financial impacts to the public agency and service area population when evaluating "ability to pay." | See response to Commenter 6, Comment 10. |
| VI.A Step 6 - Ability to Pay | 34 | 8 | The proposed policy strikes out the portions of the "ability to pay" analysis applicable to public agencies. The Water Code requires consideration of ability to pay and it is an important factor for public agencies whose ratepayers must absorb the consequence. The only remaining discussion of the topic is on page 4 under the heading "Disadvantaged communities." The Commenter joins CASA's request as to how to define this term and clarify that a "disadvantaged community" is not the same as a "POTW serving a small community." | See response to Commenter 6, Comment 10. |
| VI.A Step 6 - Ability to Pay | 47 | 1 | The ability to pay language should be framed in terms of equity, where equity considers the likelihood of compliance, degree of seriousness of the violation, cooperativeness of the discharger, time period of compliance attainment, and resource costs to the public agency. It is true smaller or disadvantaged communities have limited resources, however that does not mean they are not culpable or responsible. | The comment conflates the statutory factors, but each is considered separately in application of the policy. |
| VI.A Step 6 - Ability to Pay | 47 | 6 | In the case where the discharger claims inability to pay, payment over time should be considered if the violation is reasonably and timely corrected. | Comment noted. |
| VI.A Step 6 - Ability to Pay | 48 | 6 | Ability to pay language should have the following considerations: degree of violation, time period for attaining compliance, cooperation of discharger, and resource costs to the public and agency. All of these factors must be considered in light of equity. Payment over time can be considered in settlement of these issues. | See response to Commenter 6, Comment 10, Commenter 47, Commenter 1. |
| Step 7 - Economic Benefit | | | | |
| VI.A Step 7 - Economic Benefit | 2 | 8 | SDCWA supports the proposed changes to enhance consideration of disadvantaged communities in the Enforcement Policy. The commenter recommends the Enforcement Policy include changes to extend consideration of the cost of compliance for disadvantaged communities not only to POTWs and sewage collection systems but also to potable water systems regulated by NPDES permits. | Staff agrees that consideration of cost of compliance should apply to potable water systems with NPDES permits which serve disadvantaged communities. Staff has added proposed language to address this recommendation to section I.G. |
| VI.A Step 7 - Economic Benefit | 10 | 7 | Requiring recovery of all economic benefit to all discretionary ACL actions is inconsistent with the Water Code. | Staff disagrees. It is mandated under water code section 13385 and comports with the notion of fairness to compliance members of the regulated public in almost all other cases. |
| VI.A Step 7 - Economic Benefit | 23 | 4 | The Policy provides language which states that civil liability shall only be imposed at a level below the economic benefit in cases where imposing a higher liability would be unjust or against public policy. This concept should be expanded to allow the same consideration if imposing a penalty equal to or higher than the economic benefit would result in widespread hardship to the service population of undue hardship to the discharger. | This consideration is accounted for under ability to pay and continue in business. |
| VI.A Step 7 - Economic Benefit | 23 | 16 | The BEN model should not be used to set a minimum penalty level for public agencies for the following reasons: (1) calculation of any economic benefit value is subject to substantial variability, (2) in many cases, the permittee incurs a negative economic impact when the construction of facilities needed for compliance are delayed, (3) the premise of economic benefit rests on the assumption that a permittee did not exercise "due care" and failed to take appropriate measures to prevent the violations, and (4) the BEN model does not consider the difference between public agencies and private entities. Amend to allow alternatives of the BEN model for determining economic benefit for POTWs. | Staff disagrees with the commenter's blanket criticism of the BEN model, but acknowledges that the Office of Enforcement and the Regional Boards frequently do economic benefit analysis outside the BEN model. Public agencies often have evidentiary input on the issue. The BEN model provides a baseline for calculation of economic benefit in many cases, but where facts and evidence indicate it falls short of an accurate measurement, the Water Boards prepare a more refined analyses. |
| VI.A Step 7 - Economic Benefit | 25 | 7 | When assessing economic benefits for public agencies, the Board should have flexibility. Recommends adding the following sentence between the current second and third sentences of the first paragraph of Step 7: " <u>When calculating the economic benefit for public agencies, Water Boards have discretion to exclude staff time, assess benefits of the alternative use of funds (i.e., for implementation of higher priority capital improvement projects), and consider potential for harm.</u> " | The proposed amendment is unnecessary. See response to Commenter 23, Comment 16. |
| VI.A Step 7 - Economic Benefit | 27 | 5 | So as to be consistent with State law, we request that the State Water Board remove its statements in the proposed Policy that require recoupment of economic benefit "to all discretionary ACL actions" and instead, ensure the proposed Policy recognizes that economic benefit recoupment is simply a factor for consideration in the non-NPDES setting. | Staff disagrees with the approach because it is only fair to the regulated public who voluntarily incurs the costs of regulatory compliance to level the playing field by imposing liabilities at least as high as economic benefit on those who do not. |

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| VI.A Step 7 - Economic Benefit | 27 | 6 | Should the State Water Board continue to insist, as a policy matter, that economic benefit be recouped in every instance, then we would suggest including an exception or safety valve for circumstances involving municipal agencies facing significant compliance costs, or, at a minimum, an alternative set of criteria for determining economic benefit applicable to municipal wastewater dischargers. | The policy does suggest such a safety valve where allowed by statute. |
| VI.A Step 7 - Economic Benefit | 30 | 4 | To extend minimum economic benefit recovery to all discretionary enforcement actions, including non-NPDES discharges is inconsistent with the law and should be rejected. The policy needs to remain consistent. | See response to Commenter 30, Comment 4. |
| VI.A Step 7 - Economic Benefit | 33 | 6 | Commenter questions whether the State Water Board has the legal authority to extend the economic benefit recovery requirement from CWC 13385 enforcement to all types of administrative civil liability enforcement actions and recommends revising the Policy to provide the legal foundation for the extension. | The proposed provision was already a part of the previous policy and is a lawful extension of the Water Board's authority. The rationale for it is explained in detail under the concept of fairness in assessing discretionary liabilities throughout the policy and the policy provides for a safety valve in non-13385 cases when the action would be unjust. |
| VI.A Step 7 - Economic Benefit | 34 | 4 | The policy should separately address economic benefit for municipalities so that the enforcement process does not lead to disproportionate and devastating consequences to local agencies which cannot shut down or stop providing public health and safety services. | These considerations are accounted for in the policy. The economic benefit provisions of the policy have been applied in hundreds of enforcement cases since 2009, and no public agency has been shut down or compelled to stop providing public health and safety services. |
| VI.A Step 7 - Economic Benefit | 39 | 9 | Retain the old verbiage. The new stuff doesn't make sense. | Staff disagrees. |
| VI.A Step 7 - Economic Benefit | 40 | 2 | Requests that statements that require recoupment of economic benefit "to all discretionary ACL actions" and instead ensure that the proposed Policy recognizes that economic benefit recovery is simply a factor for consideration in the non-NPDES [CWC 13385] setting. Alternatively, commenter suggests including an exception or safety valve for circumstances involving municipal agencies facing significant compliance costs, or, at a minimum, an alternative set of criteria for determining economic benefit applicable to municipal wastewater dischargers. | Staff disagrees with the proposed approach. See responses to Commenter 23, Comment 16, and Commenter 33, Comment 6 concerning fairness and the safety valve. |
| VI.A Step 7 - Economic Benefit | 47 | 4 | The policy application of "Equity" does consider issues of: competitive advantage, ability to pay, deferred expenses gained by not employing BMPs, etc. However, the total cost consideration of applicable penalties, resource loss, recovery costs, and Board case management costs need more work. All costs attributable to actions needed to recover Water Quality Standards, including loss of beneficial uses, and related enforcement activity must be considered in terms of Equity. | Staff generally agrees and it is staff's intent is to recover all benefit attained from violation and to recoup staff costs consistent with due process limitations. Economic benefit calculations are intended to account for deferred and/or avoided costs and the time value of money. |
| Step 8 - Other Factors As Justice May Require | | | | |
| VI.A Step 8 - Other Factors | 6 | 11 | Language "insufficient to provide substantial justice to a disadvantaged group" may lead to extraction of additional fund from public agencies by fringe groups and is vague, inconsistent, and untransparent. | Staff disagrees. Any finding adjusting a liability based on this factor must be based on substantial record evidence. Public agencies may counter any such record evidence with evidence of their own. |
| VI.A Step 8 - Other Factors | 6 | 12 | Factors such as TMDL deadlines, future TMDL reopener elements and studies to improve scientific knowledge should also be taken into consideration under this factor. | Staff agrees that these specific facts may be considered under this factor if the regional boards deem that appropriate. |
| VI.A Step 8 - Other Factors | 6 | 13 | The City supports including the cost of investigation, but the cost of studies and mitigation efforts used during investigations should also be considered. | The other factors as justice may require factor is intended to account for relevant facts that do not fall within the other mandated statutory considerations, such as those suggested by the commenter in appropriate circumstances. |
| VI.A Step 8 - Other Factors | 7 | 10 | Page 29 Other Factors. Step 8 a is open season undermining everything else. | Staff disagrees. All findings reducing or enhancing a liability must be supported by substantial evidence and this factor is recited in the relevant liability statutes. |
| VI.A Step 8 - Other Factors | 8 | 6 | While staff time spent on a specific enforcement action will have to be documented, a limit should be set on the number of staff hours that can be included in the ACL. | Staff believes the limits are appropriately set forth in the policy and that a pre-determined "hard cap" would be potentially arbitrary. |
| VI.A Step 8 - Other Factors | 21 | 14 | Has issues regarding the new requirements about recouping staff costs. SIR, p. 6. SCAP understands that the State Auditor has raised issues with this practice and that the State Water Board put a moratorium on this practice. Since these costs do not and should reimburse the agency for its staff costs, and are merely paid to the Cleanup and Abatement Account, it is unclear why these costs need to be added. In addition, there are no controls on staff "churning the file" to increase the penalty amounts. Finally, it is not clear why overhead and benefits would be included since, again, this is not a reimbursement issue. Those costs are paid by the taxpayers or by discharge permit holders, and in the case of public entities would be paid again by the ratepayers, equating to a double payment of the same costs. We would urge the State Water Board to remove staff costs from the equation. | The rationale for staff cost recovery under the circumstances provided is that these are not ordinary staff enforcement costs. Recovered costs would go to the cleanup and abatement account or waste discharge permit fund and would provide an enhanced benefit to the people of the state by allocation through those accounts. The method of recovery is transparent and objective, and complies with the auditor's recommendations. The commenter is correct that this is not an issue of reimbursement. |

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| VI.A Step 8 - Other Factors | 23 | 17 | The policy includes new language in "other factors as justice may require" indicating that a penalty may be adjusted if the penalty "would be insufficient to provide substantial justice to a disadvantaged group." This is a new concept and it is unclear what a "disadvantaged group" may be or how compensation to provide "substantial justice" might be calculated. Environmental Justice is already covered in section I.G; this language should be removed. | See responses to Commenter 6, Comments 11 and 13, and Commenter 7, Comment 10. |
| VI.A Step 8 - Other Factors | 23 | 18 | The policy includes new language in "other factors as justice may require" indicating that a penalty may be adjusted if it is "entirely disproportionate to assessments for similar conduct in the recent past using the same Enforcement Policy." If assessments for similar conduct made in the recent past are found to be disproportionate, considerations of any adjustments that may be warranted should not be contingent on vague qualifying conditions such as "entirely" disproportionate. The word "entirely" should be deleted. | Staff does not believe the adjustment is necessary to achieve the result suggested by the commenter. |
| VI.A Step 8 - Other Factors | 26 | 11 | Do not preclude recovery of attorney costs and the cost of preparing for a hearing. | Attorney fees can only be recovered by statutory authorization or contract. Staff does not recommend recovery of the cost of preparing for a hearing because it could be considered to have a chilling effect on a person's desire to present his or her issues to the appointed regulatory body. |
| VI.A Step 8 - Other Factors | 27 | 16 | We request the State Water Board eliminate this provision in its entirety, or, in the alternative, better define what this means, how it might be used, and how it specifically could impact a penalty under the Policy. | Other factors as justice may require is a provision the boards are required to consider under the statute, if applicable. This factor will not be relevant in every case. See also response to Commenter 6, Comment 13. |
| VI.A Step 8 - Other Factors | 27 | 17 | As noted above, dischargers (and the Water Boards' enforcement staff) should be able to look to similar situations and similar conduct for guidance in enforcement proceedings, without them having to be "entirely disproportionate" to each other, or them having to be assessed under the proposed Policy (as that will significantly limit the ability to discuss similar enforcement precedent for a number of years, until enough enforcement has occurred under the proposed Policy). We request staff revise this step to state, "The calculated amount is not dissimilar to assessments for similar conduct." | Staff agrees. Dischargers and enforcement staff may introduce evidence and argument relating to other violations and liabilities. |
| VI.A Step 8 - Other Factors | 34 | 10 | The additional language to Step 8 regarding adjusting penalties if a "consideration of environmental justice issues indicates that the amount would have a disproportionate impact on a particular disadvantaged group, or would be insufficient to provide substantial justice to a disadvantaged group" is vague and unclear. This factor may modify a proposed penalty in an arbitrary manner to benefit a particular interest group. This language should be eliminated or better defined in meaning and use. | See response to Commenter 6, Comment 11. |
| VI.A Step 8 - Other Factors | 36 | 21 | This section explains that an adjustment to a penalty may be appropriate if "The calculated amount is entirely disproportionate to assessments for similar conduct made in the recent past using the same Enforcement Policy." Cal Water believes this is appropriate. It should be noted that this evaluation expressly requires consideration of other, similar enforcement actions but elsewhere in the policy it is stated that such an evaluation is not required. | Staff disagrees that this analysis should be required. It is in no way prohibited by the policy. See also response to Commenter 27, Comment 17. |
| VI.A Step 8 - Other Factors | 40 | 10 | Proposed addition stating that adjustments might be warranted if "[a] consideration of environmental justice issues indicates that the amount would have a disproportionate impact on a particular disadvantaged group, or would be insufficient to provide substantial justice to a disadvantaged group" to the "Other Factors" consideration is vague and unclear. Requests elimination of this provision in its entirety or, in the alternative, a better definition of what this means, how it might be used, and how it specifically could impact a penalty. Requests revising subdivision (c) to read: "The calculated amount is not dissimilar to assessments for similar conduct." | See responses to Commenter 6, Comment 11; Commenter 27, Comment 17; and Commenter 36, Comment 21. |
| Step 9 - Maximum & Minimum Liability Amounts | | | | |
| VI.A Step 9 - Max and Min | 30 | 6 | The proposed policy would mandate that maximum and minimum liability amounts be included in proposed settlement agreements, and that express findings to support the imposition of liability below the minimum needs to be provided. These revisions should be rejected as they apply to proposed settlement agreements as it makes it more difficult for dischargers to negotiate appropriate settlements. | Staff disagrees. These facts in a settlement agreement provide transparency and allow the public to scrutinize the agreement reached by the prosecution team. They do not affect negotiations, although depending on public comment, they might affect the outcome. |
| Step 10 - Final Liability Amount | | | | |
| VI.A Step 10 - Final | 9 | 10 | "Analytical route it traveled" needs clarification. | Analytical route is specifically described in the section. |
| VI.A Step 10 - Final | 36 | 22 | Under Step 10(B), Settlement Considerations, footnote 3, the Draft Policy sets forth a conclusory legal opinion regarding the applicability of statutes of limitations and the equitable defense of laches in administrative proceedings. Whether these defenses apply in any specific enforcement circumstance should be addressed during that enforcement action, based on the applicable law and precedent at that time. It is not appropriate to include such conclusory legal statements within the context of a generalized policy that could hamper a party's ability to appropriately raise such defenses in a site-specific enforcement setting. SWRCB should remove footnote 3. | Staff disagrees. The footnote states equitable defenses have <i>limited</i> application and state board precedent so holds. The courts have held equitable defenses do not apply to MMPs. The footnote is accurate and provides helpful guidance to the public and regulated public. |

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| B. Settlement Considerations | | | | |
| VI.B Settlements | 21 | 16 | Time schedules for ECAs should be able to be extended for good cause for anyone, not just economically disadvantaged communities. See Proposed Redline Version at p.40. The Water Boards should be able to grant an extension to anyone that can provide reasons beyond their control that hamper meeting the ECA implementation deadline. | The policy provides for the result requested by the commenter. Extensions can always be granted by the Regional Boards for good cause shown, and can sometimes be granted administratively if authority is delegated in the enabling order. |
| VI.B Settlements | 27 | 23 | Footnote 4 on page 31 of the proposed Policy sets forth a general legal opinion and conclusion regarding the applicability of statutes of limitations and/or the equitable defense of laches in administrative proceedings. Whether these defenses apply in any specific enforcement circumstance should be addressed during that enforcement action, based on the applicable law and precedent at that time. It is not appropriate to include such conclusory legal statements within the context of a generalized policy, which could hamper a party's ability to appropriately raise such defenses in a site-specific enforcement setting. As such, we recommend removal of footnote 4. | See response to Commenter 36, Comment 22. |
| VI.B Settlements | 30 | 7 | Footnote 4 is a legal conclusion with respect to statutes of limitation, laches, etc. and is inappropriate for inclusion in the Policy. It should be deleted. | See response to Commenter 36, Comment 22. |
| VI.B Settlements | 34 | 12 | Remove all opinions regarding the applicability of Statues of Limitation and/or Laches. Whether these defenses apply in any specific enforcement circumstance should be addressed during the enforcement action based on the applicable law and precedent at the time. Footnote 4 on page 31 should be deleted. | See response to Commenter 36, Comment 22. |
| VI.B Settlements | 40 | 12 | Remove all opinions regarding the applicability of Statues of Limitation and/or Laches. | See response to Commenter 36, Comment 22. |
| VI.B Settlements | 47 | 5 | The justification of the terms of any settlement and/or penalty should be supported by an accounting of costs and findings, with information available for public review. | It is unclear what is meant by an accounting of costs and findings. The Water Boards strive to provide a description of the alleged violations and their seriousness, disputed issues and a justification for the resulting proposed settlement. Water Boards retain records relating to the proceeding and make them available to the public, which has the right and opportunity to comment on all settlements. |
| VI.B Settlements | 49 | 5 | Disadvantaged communities facing HRtW related violations should be allowed to redirect more than 50% of any fine to an SEP, since paying a high fine may simply make it less likely that problems can be fixed. | Agreed. Revisions to the policy allow for DACs to apply up to 100% of a penalty to a SEP or ECA. |
| C. Other Administrative Civil Liability Settlement Components | | | | |
| VI.C Other ACL Components | 3 | 15 | Allow the proposed waiver of the 50% SEP/ECA limit for economically disadvantaged areas to also be allowed for improvements near environmentally sensitive areas. | The proposed expansion of the limitation on SEPs and ECAs is unquantifiable and undefinable at this time. The cleanup and abatement account is an available source of funds for such projects and should not be diminished without careful consideration, supported by established water board policies, such as the Human Right to Water and other policies furthering environmental justice. |
| VI.C Other ACL Components | 17 | 6 | We are pleased to see the inclusion of an exemption from the 50% cap on ECAs as applied to DACs with a financial hardship. While we understand that SEPs are covered by a separate guidance document, we would like to see a similar exemption be applied for DACs which propose to complete a SEP. In particular, SEPs which propose to address the HRtW in DACs should be allowed to allocate more than 50% of the fines in the region. We would like to work with staff to look into a revision of the SEP policy to allow for such a reduction. | Comment noted and the Office of Enforcement looks forward to working with the commenter and other stakeholders on the revised SEP policy in 2017. |

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| VI.C Other ACL Components | 21 | 15 | SCAP would like more flexibility for the percentage of penalties that can be transitioned into Supplemental Environmental Projects (SEPs) or Enhanced Compliance Actions. The SIR incorrectly states that "Current regulations apply a 50 percent limit on the amount of liability that can be applied to SEPs, and thus to ECAs." SIR, p. 6. The SEP policy sets the 50% amount "[a]s a general rule,"[1] yet the Office of Enforcement has determined this to be a hard "limit" not only in the 2009 Enforcement Policy and SIR, but also in practice. This interpretation flies in the face of the clear language of the SEP policy that the Director of the Office of Enforcement has the authority to move this "limit,"[2] yet normally chooses not to. The SEP policy and the Enforcement Policy should be modified to allow for a higher percentage "limit" to take this decision out of one person's hands. In addition, there is not the same "limit" for ECAs because, although the Enforcement Policy states "any such settlement [using an ECA] is subject to the rules that apply to Supplemental Environmental Projects," there is a large qualifier stating "Except as specifically provided below." See 2010 Enforcement Policy at p. 30, Section IX. Below in the same section, the text states: "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 that is generally consistent with the factors for monetary liability assessment to deter future violations." Id. Thus, the statement that ECAs is limited to 50% is inaccurate and the Policy should not add this as a new limit. ECAs should be encouraged for all public entities and should not be arbitrarily capped, even for non-economically disadvantaged communities. Rate payers should not be forced to pay for the costs of compliance AND the cost of penalties for non-compliance. Instead, the best use of ratepayer funds is to bring the entity into compliance so non-compliance does not occur in the future. | Amendments to the SEP policy will be proposed to the Board in 2017. The relaxation of limits on SEPs and ECAs in disadvantaged communities is proposed by staff because staff believes doing so is consistent with adopted Board policies relating to the Human Right to Water and environmental justice. Any further relaxation of the limits would put a stress on the cleanup and abatement account and waste discharge permit fund and staff does not believe doing so is appropriate. The two funds serve important purposes and provide for discretion to apply funds to high value projects. Staff disagrees with the notion the penalty monies should go back into a discharger's capital improvement fund. Such an approach disincentivizes compliance and rewards inaction. |
| VI.C Other ACL Components | 26 | 13 | Regional Boards should have a pre-approved SEP lists that are updated annually, including the identification of SEPs in disadvantage communities. | Regional Boards have such lists and a comprehensive list will soon be available on the state board's webpage. Moreover, Regional Boards are working on outreach protocols to identify ways to develop additional SEP proposals for the benefit of DACs so that those can augment the current list. |
| VII. Mandatory Minimum Penalties for NPDES Violations | | | | |
| VII. MMPs Intro | 7 | 11 | Page 33-34 MMPs. As administered and without required disclosure of rationale this seems to us to be abused for Colfax. | Provisions relating to MMPs are derived from statute and largely mandatory. They do not relate to any particular discharger. |
| VII. MMPs Intro | 20 | 19 | Consideration for an alternative to assessing MMPs should be extended to drinking water systems that are subject to NPDES permits and WDRs and that serve small or disadvantaged communities. | The Water Boards lack authority to engage in this consideration, which should be directed to the Legislature. The MMP statutes impose mandatory obligations on the Water Boards. |
| A. Timeframe for Issuance of MMPs | | | | |
| B. MMPs for Small Communities | | | | |
| VII.B MMPs for Small Communities | 10 | 4 | Distinguish between small and disadvantaged communities and provide options for both. Provide more flexibility by allowing facilities that serve either small or disadvantaged communities to do compliance projects. | Additional guidance on compliance assistance and progressive enforcement is provided for disadvantaged communities that are not small in section II, and additional flexibility has been provided in section IX with respect to ECAs. |
| VII.B MMPs for Small Communities | 17 | 8 | Definition of "rural counties": The Policy's list of rural counties leaves out the entire San Joaquin Valley. Since being within a rural county is one of two possible criteria for determining whether a POTW serving a small community with a financial hardship is eligible for a compliance project rather than a fine, the use of this definition is concerning. The purpose of a requiring a compliance project in lieu of a fine is to allow the violator to apply the cost of the violation to a project which would put them in compliance. If a district has 10,000 customers they are more likely to have the economies of scale than say a district which has 500 (or fewer) customers. | See response to Commenter 10, Comment 4. |
| VII.B MMPs for Small Communities | 47 | 7 | Small community wastewater treatment plant violations can be just as devastating to water resources as larger treatment plant violations or industrial violations. Assessment of the appropriate penalty and imposition of the penalty may be a burden on the community. This burden can be mitigated by allowing payment of the penalty to be deferred over time. Failure to assess a reasonable/equitable penalty and remedy may encourage further failure to comply. Consideration of exceptional incidence is appropriate. | Staff notes that Regional Board staff and the boards themselves almost always consider these circumstances when deciding whether to pursue enforcement and in what form, as well as in the amount of the penalty and whether an alternative compliance measure is appropriate. |
| C. Single Operational Upset | | | | |
| D. Defining a "Discharge Monitoring Report" in Special Circumstances Under California Water Code 13385.1 | | | | |
| 1. Defining a "Discharge Monitoring Report" Where there Is a Discharge to Waters of the United States and the Discharger Fails to Conduct Any Monitoring During the Monitoring Period | | | | |
| 2. Defining a "Discharge Monitoring Report" Where There is No Discharge to Waters of the United States | | | | |
| E. Defining a "Serious Violation" in Situations Where the Effluent Limitation is Less Than or Equal to the Quantitation Limit. | | | | |

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| VIII. Compliance Projects (CP) | | | | |
| IX. Enhanced Compliance Actions (ECA) | | | | |
| IX. ECAs | 20 | 20 | Increase or eliminate 50% cap on use of assessed penalties for capital and operational improvements for water systems infrastructure new environmentally sensitive areas, allowing ECA funds to be allotted for such improvements. Options should be give for the Public Water System to put money into infrastructure, BMP enhancements, training or SOPs. A positive approach would benefit everyone involved. | See responses to Commenter 3, Comment 15, and Commenter 21, Comment 15. |
| IX. ECAs | 24 | 3 | Strongly supports ECAs. Recommends that the 50% cap be increased or removed to support long-term sustainable compliance. Requests consideration of additional allowances in areas of special biological significance when ECA will result in enhanced protection. | See responses to Commenter 3, Comment 15, and Commenter 21, Comment 15. |
| IX. ECAs | 26 | 12 | The Policy should impose a 75% limit on the amount of liability that can be applied to ECAs in economically disadvantaged communities and hold to a 50% limit when the discharger is the project manager. | Staff recognizes these may be important considerations in case specific circumstances, but recommends allowing the Regional Boards to retain discretion under the policy as proposed. |
| IX. ECAs | 29 | 7 | Supports this inclusion and would like to encourage to go beyond 50% cap on penalties and allow 100% of penalty dollars be applied to ECAs. Encourage additional ECA allowances in areas of special biological significance for enhanced protection of critical areas. | See responses to Commenter 3, Comment 15, and Commenter 21, Comment 15. |
| IX. ECAs | 36 | 23 | The 50% cap on an ECA (and/or SEP) imposes a counter-productive artificial constraint on settlement. In certain circumstances a proposed ECA or SEP may exceed 50% of the calculated penalty but will provide environmental benefits that make this worthwhile. Provided it meets the otherwise objective criteria for an acceptable project, an ECA or SEP in an environmentally sensitive area that exceeds 50% of the calculated penalty should be considered. | The director of the Office of Enforcement has the authority to approve such projects if exceptional circumstances exist. The director has done so on three prior occasions. Otherwise, see responses to comments 404 and 406. |
| IX. ECAs | 43 | 4 | Increase or eliminate 50% cap on use of assessed penalties for capital and operational improvements for water systems infrastructure new environmentally sensitive areas, allowing ECA funds to be allotted for such improvements. Options should be give for the Public Water System to put money into infrastructure, BMP enhancements, training or SOPs. A positive approach would benefit everyone involved. | See responses to Commenter 3, Comment 15, and Commenter 21, Comment 15. |
| IX. ECAs | 43 | 5 | A public water system should be given the option of an ECA and put, for instance, money back into infrastructure, BMP enhancements, training, and the revision of standard operating procedures. | See responses to Commenter 3, Comment 15, and Commenter 21, Comment 15. |
| IX. ECAs | 43 | 6 | The Policy should be modified to recognize the critical public services provided by public water systems and should be modified to (a) allow discounts or credits in assessed penalties and increased use of supplemental environmental projects and (b) increase the percentage of drinking water system penalties that may be applied to ECAs. | The penalty calculation methodology allows for penalty mitigation under a variety of factors as described in detail in responses to comments on Section VI. See also responses to comments 404 and 406. |
| X. Discharger Violation Reporting | | | | |
| XI. Violations of Enforcement and | | | | |
| XII. Enforcement Reporting | | | | |
| XII. Enforcement Reporting | 26 | 15 | The State Water Board should provide the public with a simple, understandable summary of TMDLs in the state and progress towards attaining the corresponding waste load allocation. | Comment noted. |
| XIII. Policy Review & Revision | | | | |
| APPENDIX A: Enforcement Actions | | | | |
| A. Standard Language | | | | |
| B. Progressive Enforcement | | | | |
| App. A. - B. Progressive Enforcement | 47 | 8 | Progressive enforcement fits with the need to manage limited resources and appears to be a logical approach for securing cooperation in goal attainment. If a violation is large and compromises beneficial uses, or when water quality standards are not being met (waterbody impaired status exists), or when the discharger has a history of not being cooperative, formal enforcement actions should be prompt. In cases where informal contacts are made seeking compliance, specific performance actions and deadlines should be made clear to the discharger and a record should be kept on these contacts and specific compliance details. | Staff agrees. |
| C. Informal Enforcement Actions | | | | |
| App. A. - C. Informal Actions | 13 | 4 | Commenter wishes to emphasize the importance of using these informal enforcement options to gain compliance. Suggests that the Boards need to develop a better real-time permit compliance monitoring system that will quickly notify dischargers and Board staff regarding errors, omissions, or anomalies in reports so that corrective action can be taken in a timely manner. In those cases, prompt informal enforcement action is the most appropriate course and would be the most efficient way to prevent more serious problems. | Staff agrees and notes the Water Boards are committed to this approach at the regional board level, and at OIMA and ORPP, and that the CIWQS database provides information to the public and regulated public relating to this comment. |
| App. A. - C. Informal Actions | 23 | 19 | Certified mail should be maintained as the required method of delivery for NOV's; there is no objection to additional/supplemental notification by email. | It is sometimes difficult to affect delivery by certified mail, which is more time consuming and costly. |

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| App. A. - C. Informal Actions | 46 | 4 | Commenter notes that dischargers have, in some regions, been experiencing a lack of informal enforcement in the form of telephone calls, e-mails, or staff enforcement letters prior to receiving the notice of violation type of informal enforcement. Commenter requests that notices of violation be considered formal enforcement. | A minority of regions differentiate between levels of staff enforcement letters and notices of violation; most do not. While progressive enforcement dictates that phone calls, emails or staff letters are the normal method of first contact, depending on the severity of the violation and other factors, an NOV may be the more appropriate tool. NOVs allow for the opportunity for a discharger to correct problems. See also response to Commenter 8, Comment 2. |
| App. A. - C. Informal Actions | 46 | 5 | Commenter requests that the process for providing notices of violation to dischargers be better defined, given the proposed removal of the certified mail requirement. | Providing NOVs to a discharger should be effectuated in the most practical manner so that violations are called to the discharger's attention as soon as practicable. A more formalistic approach would prevent the flexibility to achieve the appropriate balance. |
| D. Formal Enforcement Actions | | | | |
| E. Petitions of Enforcement Actions | | | | |
| APPENDIX B: Enforcement Reporting | | | | |
| A. Legislatively Mandated Enforcement Reporting | | | | |
| B. Elective Enforcement Reporting | | | | |
| General Comments | | | | |
| General Comments | 3 | 16 | SFPUC requests that the SWRCB provide several examples of hypothetical liability calculations in the Appendix so dischargers have a better understanding of how the complex methodology is applied. The SFPUC also requests examples of liability calculations under the existing Policy compared with the same facts under the proposed Policy to illustrate any changes the proposed amendments would create. | Hundreds of examples of application of the policy can be found on the Regional Board websites. Staff believes the changes to the penalty calculation methodology are accurately characterized as clarifications. There are too many different programs and factual scenarios under which violations arise to provide in an appendix, but staff would be pleased to work with SFPUC on any specific factual hypotheticals or scenarios it would like to discuss. |
| General Comments | 5 | 2 | Strongly encourages initiating a stakeholder involvement process prior to preparing final policy. Final Policy should include examples of how new approaches would be imposed, including sample calculations or monetary ACL assessments. | Changes to the policy are most accurately characterized as clarifications and minor adjustments. Staff has made itself available to and has met with all stakeholders who requested a meeting. The policy underwent substantial stakeholder outreach and input when adopted in 2009. Staff disagrees with the notion of providing examples, but would be pleased to discuss specific hypotheticals with dischargers or provide references to similar cases on Regional Board websites. |
| General Comments | 7 | 1 | We request a public workshop well in advance of the a December 6, 2016 hearing and adoption date. | See response to Commenter 5, Comment 2. |
| General Comments | 21 | 17 | The Economic Impact Assessment section makes unsubstantiated conclusions that the amendments will "not impose any new financial obligations on the business community or otherwise affect the cost of doing business," and will "not change the civil administrative penalties ultimately reached utilizing the amended policy." For the reasons stated above, many of the proposed changes have the ability to substantially modify and increase proposed penalties. Thus, these conclusions are inaccurate. In addition, as the ability of dischargers to comply with ever tightening regulations decreases and the penalties for non-compliance increase, more companies choose to leave California, which has rippling effects in the economy. This text fails to recognize that problem. SIR, p. 7. | Staff disagrees with the characterization of the results of the policy. See responses to Commenter 3, Comment 16, and Commenter 5, Comment 2. A statement of reasons is not required for the policy, but one was done for transparency considerations. Staff disagrees with the premise that penalties are a cost of doing business. Costs associated with regulatory compliance are a cost of doing business, but those costs are not changed by the policy and are driven by permit requirements. It is within the power of the regulated public to completely avoid penalties if they are expending the funds required to comply with their permits. |
| General Comments | 21 | 18 | The section on "Reasonable Alternatives Considered" states that "[n]o reasonable alternatives have been identified or brought to the attention of the agency." Id. This statement is inaccurate as this letter and other comment letters provide numerous alternatives to the agency that should be considered and implemented. Another alternative would be to implement the California Environmental Protection Agency (Cal/EPA) "Recommended Guidance on Incentives for Voluntary Disclosure" issued in October of 2003 and attached to the ARB Enforcement Policy, cited in footnote 2 above, as Appendix C. This Guidance is designed to encourage "regulated entities to prevent or to discover voluntarily, disclose, and correct violations of federal, state and local environmental requirements." Because Clean Water Act and California Water Code are self-monitoring and disclosure statutes, these same incentives should apply. The section on "Duplication or Conflicts with Federal Regulations" states that the amendments do not unnecessarily duplicate or conflict with federal regulations. However, for NPDES permit violations, which are limited by federal law to \$37,500 per day per violation, the imposition of per gallon penalties can be orders of magnitude higher than this federal statutory maximum. This raises equal protection issues since dischargers in California are penalized much more severely than a discharger with the exact same issues in the other 49 states. This discrepancy should at least be recognized. | Staff disagrees with the conclusions reached by the commenter and that revisions are required. The commenter ignores the Water Boards existing policy. No statement of reasons is required for the policy, but it was provided for transparency considerations. |

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| General Comments | 21 | 19 | SCAP is including with this comment letter a redline/strikeout document to propose changes to and comment on the proposed language changes set forth in the Redline Version provided to stakeholders for review in July of 2016. Some of these comments will be to add back in language proposed for deletion and that will be so indicated in that document. Others are to change problematic language. There are also embedded comments where specific language was not proposed. One of these suggestions was to add a template for both an ACL Complaint and Hearing Procedures, so that there will be a greater level consistency in these documents. However, we understand that the facts and timelines may necessarily differ from document to document. | SCAPs' specific proposals in redline are addressed individually. |
| General Comments | 26 | 1 | Enforcement is overly focused on point source discharges. Require permits and policies to contain enforceable standards and a finding to that effect. Make the Water Board's capable of and committed to enforcing violations. | The Water Boards have prosecuted substantial non-point source enforcement actions under the 2010 Policy. The California Integrated Water Quality System (CIWQS) provides considerable information on this topic, and is accessible to the public. Enforcement Staff agrees that permits and policies should contain enforceable standards and that the Water Boards should be committed to enforcement. Office of Enforcement Staff is now regularly consulted about permit enforceability by permitting staff. |
| General Comments | 26 | 14 | Water Boards should invest in inspectors who are low-level, in-house staff familiar with water quality permits to perform audits, inspections, and compliance evaluations. Regional Boards should begin issuing enforcement notices for violations uncovered during audits and inspections. | Most inspections, audits and evaluations, are, in fact, conducted by State and Regional Water Board staff familiar with permits. Notices of violation are routinely issued following audits and inspections. |
| General Comments | 27 | 1 | Though we have developed comments responsive to the proposed amendments, we feel that it would be preferable to give stakeholders a greater opportunity to engage in the Policy update by providing alternative proposals, comments and suggestions on the Policy, including some provisions that are not addressed by the proposed amendments. There is no fixed deadline to revise the Policy, and opening up the Policy again soon after these amendments to address a broader suite of issues would be inefficient. We believe it would be beneficial to both the Water Board and the regulated community to take the time to ensure that there is robust communication as the Policy revisions are being developed, and to revisit some of the more fundamental approaches embodied in the Policy. | See responses to Commenter 3, Comment 16, and Commenter 5, Comment 2. |
| General Comments | 28 | 3 | Language throughout the Policy needs to be clarified as to type of enforcement mechanism that applies and assure terminology is applied correctly. "Civil liability" refers to a court-imposed assessment, as opposed to one imposed by an administrative entity such as the Water Boards. | Civil liabilities can also be imposed administratively. |
| General Comments | 28 | 10 | The City requests that the Policy be modified to provide the Water Board with a broader range of available monetary assessments and lower minimum penalties, especially for good faith actors, and restore the language allowing violations arising from the same incident to be enforced through a single liability amount. | The range of available monetary assessment under the Policy is extremely broad. Lower minimum penalties are set by statute and can not be altered by the Policy. The Policy provides discretion to lower a penalty based on good faith actors under Step 4. The language allowing violations arising from the same incident to be enforced through a single liability amount is still in the Policy. (See Page 24.) |
| General Comments | 30 | 1 | Defer adoption and extend stakeholder outreach for input on new policy issues, particularly because the Enforcement Policy fails to recognize the unique nature of agriculture and non-point source discharges. | The policy has been applied by the Regional Boards to hundreds of cases involving agriculture. See also responses to Commenter 3, Comment 16, and Commenter 5, Comment 2. |
| General Comments | 31 | 1 | The Water Board should engage with stakeholders in the process of updating the Enforcement Policy. In addition, it would be helpful if the Water Board would accept comments on sections of the Policy that are beyond the scope of the amendments. | Staff has responded to all comments on the policy, including those beyond the scope of the amendments. See also responses to Commenter 3, Comment 16, and Commenter 5, Comment 2. |
| General Comments | 33 | 10 | Consider providing ability for industrial user to demonstrate the violation which is being enforced came from an offsite source that flowed onto their property. | This may be considered by enforcement staff at the prioritization stage, when determining whether a violation was committed and/or under the penalty calculation methodology. |
| General Comments | 34 | 2 | Many of the proposed changes could significantly increase enforcement liability for public agencies and others who are expending resources towards compliance. The State's efforts should be more focused on compliance assistance, especially in disadvantaged communities. | Staff disagrees that the proposed changes will necessarily result in higher liabilities. Staff agrees that efforts should be focused on compliance assistance, particularly in DACs, but posits that the policy is focused on those issues. |
| General Comments | 36 | 1 | The Draft Policy should clarify that unplanned, emergency discharges from drinking water systems should not be subject to formal enforcement proceedings provided timely notice of such a discharge is provided and appropriate BMPs are implemented in accordance with the SWRCB's Drinking Water Systems Discharge Permit. | Discharges in compliance with permits are not violations. When a discharge is a violation and is the result of an emergency that could not have been avoided, the policy accounts for the exercise of discretion in both the prioritization process and under the mitigating penalty factors. |
| General Comments | 36 | 2 | The Draft Policy focuses on discharges related to Publicly Owned Treatment Works (POTW) and thus does not encompass some of the issues specific to potable water, for which the Draft Policy is also being used to guide enforcement actions. The SWRCB should include language to provide some flexibility for enforcement related to low threat de minimus discharges, similar to the recycled water discharge language. Moreover, some items in the Policy contradict the SWRCB's new General NPDES Permit for Drinking Water Related Discharges. For example, natural degradation of residual chlorine is an authorized BMP in the permit but it is not considered for cleanup credit in the susceptibility to clean up factor. These inconsistencies need to be reconciled. | Staff agrees that provisions relating to POTWs in DACs should be extended to purveyors and has proposed amendments to that effect. Discharges that comply with a permit are not violations subject to the policy. Regional boards can account for low threat or de minimus discharges that are violations both in their prioritization process and when applying the mitigating penalty factors. |

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| General Comments | 36 | 3 | The SWRCB should clarify if the Draft Policy is a policy or a regulation. The Statement of Reasons references the findings an agency must make pursuant to the Government Code before adopting a proposed regulation, but the Draft Policy by its title and format is not a regulation. If the Draft Policy is a policy, then it provides general, but non-binding guidance. If it is instead a regulation, then it is binding. But if that is the case, the Draft Policy needs to be re-noticed for public comment and a more rigorous evidentiary basis should be required before it is adopted. | Staff believes it has complied with the necessary regulations to have the policy adopted as a regulation and will seek confirmation of such from the OAL. |
| General Comments | 36 | 4 | Water purveyor suffers an emergency discharge of drinking water, but provides timely notice & implements appropriate BMPs, should not be subject to formal enforcement action's. Add language for enforcement related low threat discharges, similar to recycled water language. State if Policy or regulation. Statement of Reasons appears to be acknowledgment that draft Policy is not supported by substantial evidence in the record. | See responses to Commenter 36, Comments 1 and 3. |
| General Comments | 36 | 5 | The Draft Policy would increase the various factors that are considered when calculating a civil penalty in relation to the existing policy. This means that a violation would be assessed a larger penalty under the Draft Policy than the current one. The SWRCB should explain why it believes penalties as a general proposition should be increased and how this promotes a fair, effective, efficient and consistent enforcement policy. It is not apparent that penalties need to be increased to achieve these goals. | Staff disagrees that larger penalties will necessarily result under the revisions proposed. Staff believes the best characterization of the revisions to the methodology portion of the policy are clarifications and minor adjustments. The policy is wholly focused on assessing factors that mitigate against imposing the statutory maximum penalties. |
| General Comments | 38 | 1 | Because agriculture, along with forestry, are currently the #1 pollution problem degrading California streams, and because we can't restore beneficial uses by meeting water quality standards unless agricultural pollution is adequately controlled, we need to strengthen enforcement on agricultural lands. It is critical that the Board rejects the Farm Bureau's arguments that enforcement of the Clean Water Act and Porter-Cologne is not needed in agricultural landscapes. | The policy does not establish what a violation is, but is focused on the consequences of violations. Permits and water quality standards provide for the definitions of violation in the relevant contexts. |
| General Comments | 38 | 2 | Regional Boards have too many biologists in charge of enforcement and non-point source staff who have no interest in enforcement and insist on "stewardship" instead. It is time to stop protecting bad actors in agriculture and the way to do that is enhanced and effective enforcement performed by personnel who are trained to enforce laws, who are not easily intimidated, and who are actually willing to enforce the Basin Plans. | Staff agrees that violations should have consequences and that enforcement staff and the Regional Boards should not be intimidated by violators, no matter how well-heeled or politically connected they might be. To some extent, an active public can help provide staff and the Regional Boards with the wherewithal to achieve the suggested results. The Office of Enforcement believes a multi-disciplinary approach to enforcement is the best approach. |
| General Comments | 41 | 1 | PSSEP writes to express our support for and concurrence with the written comment letter submitted by the California Association of Sanitation Agencies dated October 18, 2016. In particular, PSSEP strongly supports the suggestion made to convene a work group of interested parties to develop a series of consensus recommendations for the State Board to consider in the near future. | See responses to Commenter 3, Comment 16, and Commenter 5, Comment 2. |
| General Comments | 43 | 1 | The revised Enforcement Policy appears to have been drafted with a predominant focus on point source discharge violations and POTW-related discharges and creates a substantial risk of enforcement against public water systems, including discharges that comply with the statewide general NPDES permit for drinking water system discharges, Order No. WQ 2014-0194-DWQ. | The policy addresses violations of every kind of permit and is derived from the enforcement statutes, rather than from looking at any particular program. |
| General Comments | 48 | 3 | BMPs: The use of BMPs in place of more rigorous oversight can be problematic. If used as a solution rather than a tool, it itself can be a compliance issue. | The policy does not address how a permit should be crafted or how a violation should be defined. |
| General Comments | 50 | 1 | Standard of Proof--A standard that requires staff to prove something akin to "beyond a reasonable doubt" undermines all enforcement activities. Water and our watersheds must be better protected and a low standard for threats needs to be set above which some action is triggered. The threshold for staff action could be where staff has a "reasonable concern" for water quality. I strongly encourage the resource agencies to work together to this end. This is fundamental and reasonable. | The burdens of proof for administrative adjudicatory proceedings are set forth in Code of Civil Procedure section 1094.5. |

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| General Comments | 50 | 2 | Permits inexplicably contain loop holes and are difficult to enforce--because they are creatures of the permit, some practices hampering compliance can be easily changed. For example, drop inlets and other on-site drains that direct water off site, are currently allowed in permits. Dischargers are allowed to direct polluted storm water underground out of sight into storm drains. These of course, in many cases, direct polluted water to a stream or river. This practice is inexplicably allowed in permits and is occurring on vast and very industrialized and disturbed sites. If the discharge is regulated at all, it is by "requiring" BMPs or an annual sample or some such minimum "peek-a-boo" event. This practice of allowing on-site drains linked to creeks without any monitoring, or minimal BMPs, greatly impairs compliance efforts. Like wise, permitting dischargers to "average" results, perform infrequent monitoring, perform reduced monitoring, carrying out infrequent inspections, no random inspections by staff, sampling only every five years in some instances, reliance on weak BMPs, a hands off approach to ministerial activities, and the like are voluntarily placed in permits by the Board and staff which in turn limits their abilities to protect water quality for wildlife and the public health. | The policy does not address how permits should be crafted or violations should be defined. |
| General Comments | 50 | 3 | Although known to be inadequate to maintain water quality, permits are still issued with the proviso that the permittee use best management practices (BMPs). When these fail, the discharger then enters the world of enforcement of water quality standards. Up front investment in effective technologies, permit requirements based on numeric limits, and management of an enterprise in a proper manner serves the goal of compliance and minimizes need for enforcement. Still being incorporated in permits as if they are effective, BMPs are widely known to be difficult to enforce and heavily reliant on land owner discretion. In order to off set these "built in" enforcement challenges, staff must have the additional discretion and responsibility to act on any "concern" of potential or suspected threats of pollution without the burden of precise, expensive, and time consuming presentations. Just as dischargers seek efficiencies, so must staff receive these courtesies in order to fulfill a common need. If allowed at all, BMPs must achieve zero discharge of pollutants all year round. State permits and enforcement must require this and incentivize this. So called BMPs like straw wattles that get over topped or simply direct polluted storm water to another off site location, detention ponds that regularly over flow and provide no settling time, inadequate buffer strips that are overwhelmed by runoff, ranch roads that are supposedly not significant sources, drop inlets that simply convey polluted stormwater off site where it will enter a watercourse - are just some of the practices referred to as BMPs. These continue to stay on the list as options for landowners to employ in exchange for the right to rip, dig, plow, spray, and clear land for development. Compliance would be greatly enhanced if BMPs were "sun setted" and numeric limits and frequent inspections and monitoring put in their place. | See response to Commenter 50, Comment 2. |
| General Comments | 50 | 4 | Deterrence is an effective enforcement tool. Some effective measures that can act as constructive deterrence include: placing communities on Notice of possible inspection when turbidity is high, robust protection of critical habitat and of listed species, numerous random inspections, increasing staffing for winter inspections, setting numeric limits, issuing strong and broad warnings, levying adequate fines, recommending reduction of operations where indicated, increasing setbacks, increasing transparency, requiring remotely accessible data loggers in impaired and listed streams in order to properly address pollution in a timely manner, and following up with adequate fines and required environmental projects to avoid polluted discharges. | Staff agrees with the comment. |

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| General Comments | 50 | 5 | To the extent pollution sources are often difficult to pin point, staff must be granted broad authorities to identify pollution sources and evaluate practices. Although there is some data already being gathered, it is inadequate to avoid the need for staff to conduct more inspections. Many sites are large and complex and pollution exits these sites in numerous areas. In addition, technology exists to monitor much more effectively and inexpensively than ever before. If they are given a permit to discharge to state and federal waters, permittees must be required to incorporate the latest technologies in order to properly allow monitoring and enforcement. Any landowner that engages in activities that threaten water quality must be engaging in effective and protective practices. This can only be verified through frequent testing, monitoring, and inspections. Staff must have access to all lands where discharges threaten beneficial uses. On-site drop inlets, or the like, must have remotely accessible data loggers or other effective monitoring to ensure pollution does not leave a site and enter waterways. This will enable staff to properly do their jobs. | Comment noted. |
| General Comments | 42 | 7 | Commenter encourages the State Board to consider holding technical workshops throughout the state to provide opportunities for public comment and interaction and to clarify the impact these changes will have on stakeholders. | See responses to Commenter 3, Comment 16, and Commenter 5, Comment 2. Staff does not believe changes to the penalties under the clarifications and minor revisions to the penalty methodology will be measurable different. |
| General Comments | 47 | 9 | Non-point source pollution is responsible for impairment of a significant portion of the State's waters. Evidence supporting the list of impaired waters indicates that responsibility for the pollutant inputs leading to impairment is from agricultural operations, including timber operations, and, to a lesser extent, other non-point sources. Pollution from non-point sources is occurring and is significant. Limiting or curtailing enforcement on non-point sources would be a disaster. All pollutants and water quality issues of concern need to be treated fairly and equitably in the application of the Enforcement Policy, regardless of the pollutant source. The specious argument that irrigated agriculture deserves a break relative to other dischargers is not credible. | Comment noted. |
| General Comments | 47 | 10 | The State and Regional Boards should require all permits and policies to contain discussion and findings that the specific activity meets Water Code, that the requirements and actions specified are enforceable, and that the State or Regional Board is capable and committed to reviewing and enforcing violations. | Comment noted. |
| General Comments | 47 | 11 | The State and Regional Boards must maintain sufficient trained staff to effectively employ permitting and enforcement processes necessary to protect and recover water quality standards. This means energy must be directed at development and retention of the necessary human resources to do this job. | Comment noted. |

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