

**12/05/2023 BOARD MEETING – ITEM 5
CHANGE SHEET #1 - (CIRCULATED 12/01/2023)**

This change sheet shows revisions to the November 20, 2023, versions of the proposed Water Quality Enforcement Policy and corresponding Resolution and Response to Comments. Additions are shown as underline and deletions are shown as ~~strikeout~~.

On page 21 of the proposed Enforcement Policy, change as follows:

The Water Boards should be thoughtful when reducing the per gallon liability in order to avoid rewarding or incentivizing the failure to mitigate the number of gallons discharged and to further consistency in enforcement ~~so that more egregious violations are assessed a higher liability than less egregious violations.~~

On page 26 of the proposed Enforcement Policy, change as follows:

History of Violations	Any prior history of violations: Where the discharger has no prior history of violations, this factor should be neutral, or 1.0. Where the discharger has prior violations within the last five years, the Water Boards should use a multiplier of 1.1 . Where the discharger has a history of similar or numerous dissimilar violations, the Water Boards should consider adopting a multiplier above 1.1. For the purpose of this factor, “violation” means a self-reported (when monitoring and reporting of violations is required and not part of a voluntary compliance assessment) , stipulated, or adjudicated violation of the Water Code, Health and Safety Code, or other environmental protection statute for which the Water Boards have enforcement authority. Under no circumstances shall this factor ever be below 1.0 .
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In Finding 8 of the proposed Resolution, change as follows:

The State Water Board published a public notice of the proposed Policy revisions on ~~February 10~~ February 17, 2023, and accepted written comments until April 28, 2023.

On page 18 of the Response to Comments, change as follows:

<p>VI.B. - Settlement Considerations</p>	<p>5</p>	<p>2</p>	<p>While we support the proposed removal of footnote 4 (p. 34 of the proposed Enforcement Policy), we believe a more robust, transparent discussion of the how laches must be interpreted and applied by the Water Boards is warranted in the proposed Enforcement Policy. We recommend the proposed Enforcement Policy clearly explain the concept of laches, and state that enforcement actions must be taken within three (3) years of the alleged violation consistent with the recent appellate case, Malaga Cnty. Water Dist. v. State Water Res. Control Bd. (“Malaga”), 58 Cal.App.5th 447, 467 (Cal. Ct. App. 2020) (confirming that the common law defense of laches necessitates application of the same three (3) year statute of limitations in administrative enforcement actions that is applicable to judicial enforcement actions of the same alleged violation pursuant to Code of Civil Procedure section 338(i)). In that case, the Court of Appeal ruled that: “Nothing in the statutory scheme or the case law suggests that</p>	<p>Staff disagrees with the recommendation. The commenter's statement that the Malaga decision stands for the proposition that administrative enforcement actions "must" be taken within three years is incorrect. The Malaga decision holds that if an administrative action is initiated after three years and a defense of laches is raised, the burden shifts to the prosecuting agency to show that the delay was reasonable and there was no prejudice caused by the delay. The application of laches in is not a universal or easily applied rule, but a fact specific inquire inquiry that must be made on a case by case basis because it is a fact specific inquiry.</p>	
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		<p>the Legislature intended to limit potentially stale actions brought in court but permit those same actions to proceed through administrative hearings.”</p> <p><u>Recommendation:</u> Because of the importance of timely enforcement, where facts are still fresh in people’s minds and witnesses are still available, the Enforcement Policy should expressly recognize the importance of prompt action as is done in Section VII.A. with Mandatory Minimum Penalties (MMPs), and not just as a general statement in the introduction or as a settlement consideration in Section VI.B.</p>		
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On page 19 of the Response to Comments, change as follows:

VII.A. - Timeframe for Issuance of MMPs	3	18	<p>LADWP recommends reinstatement of timeframe for issuance in the following statement: This 18-month period shall not apply to MMPs assessed for discharges regulated by state or regional municipal separate storm sewer systems (MS4) permits or state general permits for stormwater discharges that include numeric effluent limitations.” LADWP understands that SWRCB staff are having to manually</p>	<p>Staff disagrees and recommends adopting the original proposed language excluding discharges regulated by state or regional municipal separate storm sewer systems (MS4) permits or state general permits for stormwater discharges that include numeric effluent limitation form the recommended 18 month period. The Water Boards always</p>	
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		<p>search the SMARTS database for stormwater violations unlike the CIWQS database where violations are readily generated, yet a defined timeframe should be established.</p> <p><u>Of significant concern is newly proposed language that states that the Water Boards need to issue mandatory minimum penalties within 18 months from when the violation is reported except that the 18 month period does not apply to state or regional MS4s, or state general permits for stormwater that include numeric effluent limitations. CASQA appreciates that the reasoning for excluding mandatory minimum penalties for stormwater violations is because the SMARTS database does not readily generate reports of violation. (Notice of 2023 Policy, p. 8.) However, with that said, the 2023 Policy should also clarify that mandatory minimum penalties against stormwater entities also need to be brought in a timely and efficient manner regardless of the problems associated with the SMARTS database. Failure to bring actions timely causes potential prejudice against stormwater permittees because those with knowledge of prior alleged violations may no longer be available with valuable information that</u></p>	<p>endeavor to issue timely enforcement, especially for mandatory minimum penalties. Office of Enforcement works with the State Water Board and the regional boards to encourage timely enforcement and enhancement of technology, including SMARTS, to streamline the process. It is also worth noting, that all MMPs are based on self monitoring data allowing the regulated community to always be aware of their own compliance status.</p>	
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		<p><u>may in fact change the outcome if an alleged violation should or should not be subject to mandatory minimum penalties. Further, CASQA's members are concerned that excessive delays over numerous years may also result in large mandatory minimum penalty fines that are disruptive to limited budgets and current permit compliance.</u></p> <p><u>Recommendation: Revise Section VII.A. of the 2023 Policy to incorporate the Malaga holding, in particular as it applies to the issuance of mandatory minimum penalties on dischargers regulated under state and regional stormwater permits. Include a reasonable timeframe for the issuance mandatory minimum penalties for stormwater numeric effluent limitation violations that does not exceed three years.</u></p> <p><u>Include a reasonable timeframe for the issuance mandatory minimum penalties for stormwater numeric effluent limitation violations that does not exceed three years.</u></p>		
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On page 22 of the Response to Comments, change as follows:

VIII. COMPLIANCE PROJECTS	9	19	<p>Reinsert the struck language with the preference that the State encourage implementation of Compliance Projects through non-monetary avenues first.</p> <p><u>Recommendation:</u> Maintain the struck language from the second paragraph of Section VIII on page 43 and top of page 44: <u>Absent such statutory authorization, if the underlying problem that caused the violations addressed in the ACL has not been corrected, the appropriate manner for compelling compliance is through an enforcement order with injunctive terms 2017 Enforcement Policy, Page 44 such as a Cleanup and Abatement Order (CAO), Cease and Desist Order (CDO), or Time Schedule Order (TSO).</u></p>	<p>Staff agrees with the commentor and the language regarding CAOs, CDOs, and TSOs that was previously proposed to be deleted is restored and the reference to Corrective Action Projects is deleted. The purpose of restoring the language is to make it abundantly clear than that Compliance Projects may only be used in cases involving MMPs against a small community with a financial hardship. It is never appropriate for the Water Boards to suspend a portion of the liability imposed conditioned on the discharger returning to compliance in any other context. As the original language makes clear, if the discharger is out of compliance, the appropriate enforcement mechanism to compel a return to</p>	
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				compliance is a CAO, CDO, or TSO.	
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On page 26 of the Response to Comments, change as follows:

APPENDIX D: DETERMINING APPLICABILITY OF ENFORCEMENT POLICY	8	9	Several changes in the Draft Policy should be reclassified in Appendix D from their Draft Designation because of how the draft policy intends for them to be effective retroactively or for new or pending matters. The draft Enforcement Update includes a new section, Appendix D, which states that: "Amendments in the 2023 Policy that are mere clarifications may be used immediately to assist the Water Boards in interpreting previous versions of the Policy. Procedural changes may be applied to new or pending enforcement matters once the Policy is effective. Substantive changes can only be applied prospectively to violations which occur on or after the Policy's effective date unless a discharger	Staff appreciated the importance <u>appreciates the importance</u> of correctly identifying changes to the Policy as clarifications, procedural changes, or substantive changes in Appendix D. See staff's responses to specific comments on Appendix D from Commenter 8 below.	
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		<p>consents to their retroactive application."</p> <p>In essence, this language can be taken to mean that after the adoption of the Draft Enforcement Update, "clarifications" may be relied upon immediately and retroactively, while "procedural changes" may be applied retroactively to ongoing enforcement matters so long as it is after the Draft Enforcement Update's effective date, and "substantive changes" are applicable to violations which occur after the effective date.</p> <p><u>Recommendation:</u> Apart from the legalities and due process concerns of the newly proposed framework in Appendix D, in light of the disparate outcomes of the various categories, the impact of mis-identifying a change in the Draft Enforcement Update will be significant.</p>		
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On page 33 of the Response to Comments, change as follows:

<p>APPENDIX E: TEMPLATE HEARING PROCEDURE</p>	<p>9</p>	<p>29</p>	<p>Default set of procedures for an evidentiary hearing on an ACL. The following language in Appendix E is contrary to administrative law principles: "Other regulations, such as California Code of Regulations, title 23, sections 648 through 648.8, may also apply to the hearing on a Complaint. Where the hearing procedure conflicts with other applicable regulations, the hearing procedure issued with the Complaint, and as amended by the Presiding Officer, controls."</p> <p>In these situations, the regulations, not the hearing procedure, would control. (<i>See Rea v. Blue Shield of California</i> (Second Dist. 2010) 226 Cal.App.4th 1209 (not bound by administrative agency's position where it contradicts the language of the statute); <i>Cole v. City of Oakland</i> (First Dist. 1992) 3 Cal.App.4th 693, 697 (holding that administrative agency interpretation of a statute is not entitled to great weight when it is erroneous or unauthorized).)</p> <p><u>Recommendation:</u> Modify the language noted to reflect administrative law principles.</p>	<p>Staff disagrees. The regulations referenced specifically allow for the requirements in Article 2 of Title 23 of the California Code of Regulations (sections 648 et seq.) to be waived by the presiding officer so long as the requirements are not mandated by state or federal statute of <u>or</u> by the state or federal constitutions. (23 CCR 648(d).) Therefore, it is appropriate for the hearing procedures to control in the event they conflict with the provisions in Article 2.</p>	
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On Page 38 of the Response to Comments, change as follows:

VII.A. - Timeframe for Issuance of MMPs	7	10	The construction general stormwater permit, the State Water Board ultimately decided that for total suspended solids as a proxy represented numerous pollutants, if there was an exceedance of the total suspended solids proxy, then that counted as a violation for every pollutant represented by that proxy. Believes this section of the Policy goes against that provision of the permit, the violation should be enforced, but at a minimum the Policy should prevent the enforcement of a single violation from the multiple incident violations when the permit or the policy explicitly states that each exceedance should be consider a single <u>violation violations</u> .	Commet <u>Comment</u> noted.
VII.A. - Timeframe for Issuance of MMPs	7	12	Appreciates the removal of the 18-month limitation when it comes to the mandatory minimum penalties. Understands that this is a time-consuming process and happy to see that there is more flexibility.	Commet <u>Comment</u> noted.