

Regional Water Quality Control Board
North Coast Region

Executive Officer's Summary Report
Thursday, April 7, 2022
Regional Water Board Office
Santa Rosa, California

ITEM: 5

SUBJECT: Overview of the Enforcement Process, Policy, and Penalty Calculation Methodology (Kason Grady; Office of Enforcement legal counsel Laura Drabandt and Heather Jidkov)

BOARD ACTION: This item is an informational item only; no action will be taken by the Regional Water Board.

BACKGROUND: The purpose of this item is to provide an overview of the Water Boards' enforcement process, the 2017 Water Quality Enforcement Policy (Enforcement Policy, Attachment 1), and the 2017 Policy on Supplemental Environmental Projects (SEPs and SEP Policy, Attachment 2) with specific emphasis on the factors considered in calculating a penalty for water quality violations.

The Enforcement Policy provides guidance to all Water Boards "to protect and enhance the quality of the waters of the State by defining an enforcement process that addresses water quality problems in the most fair, efficient, effective, and consistent manner." This process includes ranking of enforcement priorities; reaffirmation of the principle of progressive enforcement; use of a standardized methodology to assess administrative civil liabilities (ACLs); and the allowance for alternatives to the assessment of ACLs through settlement, such as supplemental environmental projects (SEPs), compliance projects (CPs), and enhanced compliance actions (ECAs).

The use of a progressive enforcement process means that staff will generally respond to observed violations through "an escalating series of actions beginning with notification of violations and compliance assistance, followed by enforcement orders compelling compliance, culminating in a complaint for civil liabilities." The Enforcement Policy acknowledges that, at times, it may be appropriate for staff to proceed directly to penalty assessment "when violations result from intentional or grossly negligent misconduct, or where the impacts to beneficial uses are above moderate or major."

When a case progresses to the point of assessing ACL, staff utilize the standardized penalty calculation methodology in the Enforcement Policy, which includes a 10-step process requiring that staff do the following:

1. Assess Actual Harm or Potential for Harm for Discharge Violations
2. Calculate the Per Gallon and Per Day Assessments for Discharge Violations
3. Calculate the Per Day Assessments for non-Discharge Violations
4. Assess and Apply Certain Adjustment Factors (Degree of Culpability, History of

Violations, Cleanup and Cooperation)

5. Calculate the Total Base Liability Amount
6. Assess the Ability to Pay and Ability to Continue in Business
7. Assess the Economic Benefit from the Violations
8. Assess Other Factors as Justice May Require
9. Calculate the Maximum and Minimum Liability Amounts per Statute
10. Calculate the Final Liability Amount by Adjusting the Base Liability Based on Steps 6-9

Staff utilize the 2017 Penalty Methodology Spreadsheet (Attachment 3) as a standardized tool to ensure consistent and accurate implementation of this methodology.

Upon utilization of this methodology to draft a proposed penalty, staff may issue pre-ACL letters and invitations to enter confidential settlement negotiations. Generally, settlement is an opportunity for dischargers to obtain reductions in ACL assessments based a voluntary agreement to resolve violations, rather than requiring an administrative hearing. The Enforcement Policy does not comprehensively address the settlement process, but it does acknowledge that “It is appropriate to adjust the ACLs calculated pursuant to the methodology in consideration of hearing and/or litigation risks, including: equitable factors, mitigating circumstances, evidentiary issues, or other weaknesses in the enforcement action that the prosecution reasonably believes may adversely affect the ability to obtain the calculated liability from the administrative hearing body.”

“In addition to a reduction of ACLs, a settlement can result in the permanent suspension of a portion of the liability when the discharger voluntarily agrees to fund a Supplemental Environmental Project (SEP)...or an Enhanced Compliance Action.” SEPs provide an opportunity for enforcement penalties to be directed towards environmental enhancement/restoration projects within the region that the violations occurred. The Enforcement Policy only allows the use of SEPs to offset ACLs through settlement.

To ensure a fair hearing, the Regional Water Board staff and attorneys that have issued an ACL Complaint (the Prosecution Team) are separated from the Regional Water Board staff and attorneys that will provide legal and technical advice to the Regional Water Board (Advisory Team) regarding the adjudication of the Complaint. This separation of functions ensures the Advisory Team will be able to advise the Board while allowing the Board to remain a neutral trier of fact. Parties to the proceeding cannot communicate with the Regional Water Board nor the Advisory Team regarding any substantive matter related to the Complaint in the absence of other parties to the matter and without notice and opportunity for all parties to participate in the communication.

Discussion: During its presentations, staff will provide an overview of the enforcement process, with focuses on settlement and the penalty methodology. Staff

will also present some example enforcement case studies to demonstrate how the Enforcement Policy penalty methodology is used to calculate proposed penalties.

Recommendation: N/A

Supporting Documents: Attachment 1: [2017 Water Quality Enforcement Policy](#)
Attachment 2: [2017 SEP Policy](#)
Attachment 3: [2017 Penalty Methodology Spreadsheet](#)