



**Matthew Rodriguez**  
Secretary for  
Environmental Protection

# State Water Resources Control Board

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## Office of Enforcement

801 K Street • Sacramento, California 95814 • (916) 341-5272  
Mailing Address: P.O. Box 100 • Sacramento, California • 95812-0100  
Fax (916) 341-5284 • <http://www.waterboards.ca.gov>



**Edmund G. Brown Jr.**  
Governor

TO: David Boyers, Assistant Chief Counsel  
**Office of Enforcement**

FROM: Catherine Hawe, Attorney  
**Office of Enforcement**

DATE: September 12, 2017

SUBJECT: APPLICATION OF 2010 AND 2017 ENFORCEMENT POLICIES

### QUESTION PRESENTED

Which version of the Enforcement Policy applies when the Water Boards are prosecuting a violation?

### SHORT ANSWER

Generally, the Water Boards should use the version of the Enforcement Policy in effect on the date of the violation at issue. Amendments in the 2017 Enforcement Policy that are mere clarifications may be used immediately to assist the Water Boards in interpreting the 2010 Enforcement Policy. Procedural changes may be applied to new or pending enforcement matters immediately upon Office of Administrative Law approval of the 2017 amendments. Amendments in the 2017 Enforcement Policy that are substantive in nature can only be applied prospectively once the 2017 amendments are approved by the Office of Administrative Law.

## BACKGROUND

The State Water Resources Control Board (State Water Board), the regional water quality control boards (regional water boards), and the Office of Enforcement (OE) rely on the Water Quality Enforcement Policy as a regulatory document to bring enforcement actions for violations of California's water quality laws. The current version of the Enforcement Policy ("2010 Enforcement Policy") was adopted in 2009, approved in 2010 and remains in effect. The terms of the 2010 Enforcement Policy direct the State Water Board to "review and revise" the Enforcement Policy every five years. (State Water Board, Water Quality Enforcement Policy (2010), p. 31, §8.) Pursuant to that directive, the board approved the 2017 amendments ("2017 Enforcement Policy")<sup>1</sup> on April 4, 2017.

The 2017 Enforcement Policy will be effective upon approval by the Office of Administrative Law (OAL). (See Gov. Code §11353.) OAL has 30 working days to approve the 2017 Enforcement Policy after it is submitted. (Gov. Code §11349.3.) Therefore, the 2017 Enforcement Policy will have an effective date sometime in the summer of 2017.

Until the 2017 Enforcement Policy takes effect, the 2010 Enforcement Policy remains in effect. The 2017 amendments to the Enforcement Policy raise the issue of which version should be applied to the prosecution of a violation. This memo addresses the question of which version of the Enforcement Policy applies when prosecuting violations and provides guidance on how certain clarifying and procedural changes may be used to interpret and implement the 2010 Enforcement Policy. This memo also includes a chart identifying significant

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<sup>1</sup> The "effective date" refers to the date on which the Office of Administrative Law approves the 2017 amendments to the existing Enforcement Policy, and the "2017 Enforcement Policy" refers to the Enforcement Policy, including those amendments.

updates to the 2017 Enforcement Policy and classifies them based on whether they are considered clarifications, procedural, or substantive changes.<sup>2</sup>

### LEGAL ANALYSIS

The standard presumption is that the law in place at the time of a violation is controlling. (*Consumer Financial Protection Bureau v. Gordon* (2016) 819 F.3d 1179, 1197-1198.) Therefore, in most instances the version of the Enforcement Policy in place at the time of the violation will be controlling.

In determining what version should be applied, the date of “the last act or event necessary to trigger application of the statute,” is determinative. (*People v. Grant* (1990) 20 Cal.4th 150, 157.) When the last act or event occurs after the effective date, even if “some of the facts or conditions ... came into existence prior to its enactment,” a new law may be applied to some portion of conduct that occurred prior to its effective date. (*Id.* at p. 158.) Thus, the 2017 Enforcement Policy could be applied to conduct that begins before but ends after the effective date of the 2017 Enforcement Policy, as long as the final triggering event occurred after the effective date of the 2017 Enforcement Policy.

There are some exceptions to the general rule that the version in place at the time of the violation is the version that controls in prosecuting an action. However, applying the 2017 Enforcement Policy to violations that predate its effective date raises concerns regarding the presumption against retroactivity. A law is considered retroactive when it “relates back to a previous transaction and

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<sup>2</sup> The attached chart identifies some of the most significant updates to the Enforcement Policy; however, it is not comprehensive. Technical and other non-substantive differences between the 2010 and 2017 Enforcement Policy have not been addressed. For specific questions on whether an update to the Enforcement Policy is a clarification, procedural, or substantive change contact your OE lawyer regarding pending enforcement matters or your OCC attorney for general questions.

gives it a different legal effect from that which it had under the law when it occurred.” (*Bear Valley Mut. Wat. Co v. County of San Bernardino* (1966) 242 Cal.App.2d 68, 72.) The presumption against retroactivity holds that in most instances a new law is not relevant to the adjudication of conduct that occurred before the law was officially adopted. (*Georgia-Pacific Corp. v. California Coastal Com.* (1982)132 Cal.App.3d 678, 694.)

Several aspects of the 2017 Enforcement Policy can be utilized when bringing enforcement actions that are related to conduct prior to the 2017 Enforcement Policy’s effective date. Changes that are clarifications or procedural changes can be applied immediately. Substantive changes, in contrast, can only be applied to violations that occur after the effective date of the 2017 Enforcement Policy unless a party consents to its application.

I. Clarifications or procedural changes contained in the 2017 Enforcement Policy do not trigger concerns about retroactivity.

Neither clarifications to the law nor procedural changes trigger the presumption against retroactivity. Clarifications do not trigger the presumption against retroactivity because they represent the current state of the law, albeit in new terms. Similarly, procedural changes can be applied to pending cases because they only affect proceedings that occur after the effective date of the new regulation.

A. Clarifications can be applied immediately because they do not represent a change in the law but rather are a clearer restatement of existing law.

Courts assume that legislative bodies intend to change or alter a regulation when they amend it. (*Marina Village v. California Coastal Zone Conservation Com.* (1976) 61 Cal.App.3d 388, 392-393.) Regulatory agencies

can overcome this presumption by clearly indicating an amendment is a clarification. (Id. at p. 393.) A clarification does not change the effect of previous acts, but merely clarifies the meaning of the original law. (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 252.)

Absent express language of intent to clarify, courts look to the circumstances surrounding the adoption of statutory amendments to find intent to clarify or change the law. (*Western Security*, 15 Cal.4th at p. 243.) Even material changes to statutory language can be a clarification if the intent is to reveal the true meaning of a statute. (Ibid.) In *Western Security*, the court looked to corresponding legislative materials and considered the fact that the amendments had been adopted in response to a “perceived problem with a judicial construction of a statute.” (Id. at p. 246.)

Several of the changes between the 2010 and 2017 Enforcement Policy qualify as clarifications because they represent the current state of the law in clearer terms. While the 2017 Enforcement Policy does not contain express language stating that it is a clarification of the earlier policy, supporting documents, such as the Initial Statement of Reasons (ISOR) indicate that several of the provisions in the 2017 Enforcement Policy are mere clarifications. Generally, the ISOR states, “the amendments would clarify certain principles that are central to the Enforcement Policy,” while also recognizing that some changes are substantive in nature. (State Water Board, Amendments to the State Water Resources Control Board’s Water Quality Enforcement Policy, Initial Statement of Reasons.)

The ISOR goes on to specifically identify several of the provisions in the 2017 Enforcement Policy as clarifications. These clarifications include the meaning of the term “fairness,” the proper manner of determining toxicity, establishing a minimum multiplier of 1.0 for history of violations, and the timing of

calculating staff costs (i.e., to exclude staff costs to prepare for or attend a hearing). The ISOR goes on to state that the amendments would not create “any significant change in the cost of compliance or regulatory personnel needed for compliance with the amended policy, or change to the civil administrative penalties ultimately reached utilizing the amended policy.” In addition, the ISOR indicates that several of the updates were in direct response to a perceived misunderstanding and inconsistency in the application of the law as intended by the State Water Board.

Many aspects of the 2017 Enforcement Policy provide clarification of and insight into the intent of the 2010 Enforcement Policy. The 2017 Enforcement Policy is a regulation subject to the Administrative Procedure Act. (Gov. Code, § 11353; see also, *State Water Resources Control Bd. v. Office of Admin. Law* (1993) 12 Cal.App.4th 697.) The Enforcement Policy is subject to the same process for Office of Administrative Law (OAL) approval that applies to other water quality control plans and policies for water quality control, including basin plans. Even though a plan or policy does not take effect until OAL approves it, the State Water Board’s expression of its intent in adopting prior regulatory language can be used as an interpretive tool as soon as the board states that intent, without regard to OAL approval. The distinction between clarifying language and a substantive change is critical when relying on new language as an interpretive tool. Staff relying on clarifying language before OAL approves the 2017 Enforcement Policy should consult their OE attorney.

Any clarifying amendments in the 2017 Enforcement Policy serve as evidence of what the board intended when it adopted the prior language. Items identified as clarifications can be applied as interpretive tools immediately, without waiting for Office of Administrative Law approval. Those provisions become regulatory upon approval by the Office of Administrative Law.

B. Procedural changes must be applied immediately upon Office of Administrative Law approval because their application is prospective and the prioritization process does not apply to pending cases.

The presumption against retroactivity is not implicated when procedural changes are applied to cases that are pending, even when the underlying events occurred before the effective date of the new regulation. (*Romero v. Hern* (1969) 276 Cal.App.2d 787, 791.) The immediate implementation of new procedures is not retroactive because “the effect of such statutes is actually prospective in nature since they relate to procedure to be followed in the future.” (*Brown v. Friesleben Estate Co.* (1956) 193 Cal.App.2d 1, 4.) Procedural changes are those that affect the conduct of adjudicative proceedings including principles of discovery. (*Tapia v. Superior Court* (1991) 53 Cal.3e. 282, 288, 301.) The 2017 Enforcement Policy provides a new process for prioritizing cases. (State Water Board, Amendments to the State Water Resources Control Board’s Water Quality Enforcement Policy, Initial Statement of Reasons.) This procedural rule must be applied immediately once the 2017 Enforcement Policy is approved by OAL, regardless of when the underlying violations occurred.

C. Substantive changes cannot be applied to violations that occurred prior to the effective date of the 2017 Enforcement Policy unless the affected party consents to their application.

A change in law is considered substantive when “it imposes a new or additional liability and substantially affects existing rights and obligations.” (*Aetna Cas. Sur. Co. v. Industrial Acc. Commission* (1947) 30 Cal.2d 388, 395 [holding that an amendment to worker’s compensation law that expanded compensation for plaintiffs was substantive because it increased employer liability].) Therefore, when an aspect of the 2017 Enforcement Policy affects liability or creates new

rights or obligations it will be considered a substantive change and can only be applied to violations that occur after the effective date.<sup>3</sup>

Some of the changes to the 2017 Enforcement Policy provide grounds for calculating a different base liability than under the 2010 Enforcement Policy and therefore are considered substantive. Some of these changes include the new range for culpability multipliers and high volume maximums. Because substantive changes might increase or decrease penalties or affect legal obligations they only apply to violations that occur after the effective date of the 2017 Enforcement Policy.<sup>4</sup>

Even when the changes are substantive, a party against whom an enforcement action is taken can consent to application. (See Civ. Code, § 3515.) For instance, dischargers will likely not object to the application of the 2017 Enforcement Policy to events prior to its effective date when doing so reduces penalties.

Consent to the retroactive application of a new regulation can be inferred from the party's actions. (*McKeon v. Hastings College* (1986) 185 Cal.App.3d 877, 888.) When a party behaves in a manner "so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that it has been relinquished," a party may no longer assert those rights. (Civ. Code § 3513.) For example, relying on new guidelines retroactively and stating an intent to comply with them for pending transactions can make the new guidelines applicable to conduct that occurred before the guidelines' effective date. (*McKeon, supra*, 185 Cal.App.3d at 887-888.)

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<sup>3</sup> As noted above, a violation "occurs" when the last act of the violation occurs.

<sup>4</sup> In all cases, the Water Board issuing a penalty order has discretion to consider other factors as justice may require to change the amount of the calculated base penalty, consistent with the Water Code and the Enforcement Policy. This memorandum does not address the boards' ability to exercise that discretion.

Whether a party has waived the presumption against retroactivity will have to be addressed on a case by case basis.

### CONCLUSION

The Water Boards and OE should rely on the version of the Enforcement Policy's substantive requirements in effect at the time of the violation to prosecute any violations. Changes that are substantive and affect liability can only be applied prospectively (to violations that occur after the effective date) or with consent. On the other hand, certain aspects of the 2017 Enforcement Policy constitute clarifications of existing policy language, and can be applied immediately as an interpretive tool. Procedural changes must be applied as soon as the 2017 Enforcement Policy has been approved by the OAL.

<b>2017 Enforcement Policy Update</b>	<b>Type</b>
Defining fairness (p.1-3)	Clarification
Transparency (p.3)	Clarification
Independent enforcement action against Permittee's contractors or agents (p.2)	Clarification
Defining consistency (p.3)	Clarification
Case prioritization process (p. 5-7)	Procedural
Ranking violations (p.5)	Procedural
Case prioritization factors (p.6-7)	Procedural
Actual or potential for harm looks to potential impact to beneficial uses generally (p.10, 11-12)	Clarification
Potential harm can be used when actual harm cannot be determined due to practical limitations (p.11)	Clarification
Definitions for harm/potential for harm (p.12-13)	Clarification
Defining "susceptibility to cleanup" (p.13)	Substantive
Table 1 and Table 2 curves (p.14, 15)	Substantive
"High Volume Discharges" can be applied to any type of high volume discharge (p.14)	Substantive
Defining high volume (p.14)	Clarification
High volume max liability (p.14)	Substantive
Discharges in excess of 2 million g (p. 14)	Substantive
Non-discharge violations consider impact to Water Board's ability to carry out statutory and regulatory functions (p.15)	Substantive
Culpability multiplier range .75 to 1.5 (p.17)	Substantive
Standards for applying less than 1 culpability factor (p.17)	Substantive
Cleanup and cooperation language (p.17)	Clarification
History of violation instructions (p.17)	Substantive
Method of collapsing days (p.18-19)	Substantive
Method of collapsing days is the only allowed method and sole economic benefit measured on daily basis is time value of money (p.18-19)	Clarification
Violations that delay remedial action should not be collapsed (p.18)	Substantive
Ability to pay and economic benefit language (p.19-21)	Clarification

Waiver of ability to pay as issue for failure to respond to a subpoena (p.20)	Substantive
Staff costs based on hourly rate and overhead (p.22-23)	Clarification
Imposing liability less than economic benefit in non-§13350 cases (p.22)	Substantive
Timing for calculating staff costs (p.22-23)	Clarification
ECA's 50% limit waived in economically disadvantaged communities (p.31)	Substantive

