



## GUIDANCE TO IMPLEMENT THE WATER QUALITY ENFORCEMENT POLICY

April 1996  
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*This document is intended to clarify the State Water Resources Control Board's (State Water Board's) policy on enforcement and to provide general guidance to The Regional Water Quality Control Boards (Regional Water Boards), their staff, the regulated community and the general public. Statements that appear in bold indicate an actual statement of State Water Board policy intended to be implemented by the State and Regional Water Boards or their staff. The remainder of the document is intended as guidance. Where the word "should" is used in a policy statement (bold), it is intended that the State and Regional Water Boards or their staff exercise their discretion, and that they be prepared to justify whatever decision is made or action is taken. Where the word "shall" is used in a policy statement (bold) requiring that State or Regional Water Board staff act or bring a matter to the attention of their respective Board, it is not intended to mandate that the State or Regional Water Board itself take any enforcement action. Unless otherwise specified, it is intended that the State or Regional Water Boards exercise their discretion in pursuing enforcement actions,*

### INTRODUCTION

The State Water Board and Regional Water Boards exercise the regulatory and adjudicatory powers of the State of California in the field of water resources. One of these powers is the implementation of statutes and programs to protect the quality of the waters of the State. Timely and consistent enforcement of these laws is critical to the success of the water quality program and to ensure that the people of the State have clean water. It is the policy of the State Water Board that enforcement actions throughout the State shall be consistent, predictable, and fair. In their review of State and Regional Water Board activities, the External Program Review's Regional Board Consistency Task Force specifically recommended that the State Water Board adopt a statewide enforcement policy that would ensure this.

Enforcement serves many purposes. First and foremost, it assists in keeping the State's waters clean. Swift and sure enforcement orders can prevent threatened pollution from occurring and can promote prompt cleanup and correction of existing pollution problems. It ensures compliance with State and Regional Water Board orders. Enforcement not only protects the public health and the environment, but also creates an "even playing field", ensuring that dischargers who comply with the law are not placed at a competitive disadvantage by those who do not. It will also deter potential violators and, thus, further protect the environment.

Other benefits result from a strong enforcement program. Monetary remedies, an essential component of an effective enforcement program, provide a funding source for needed cleanup projects, provide compensation for the often unquantifiable damage pollution causes the environment, and ensure that polluters do not gain a substantial economic advantage from violations of water quality laws. The State and Regional Water Boards have a wide array of enforcement options at their disposal. Enforcement actions are available to address many circumstances, including but not limited to the following:

- Violation of an effluent limit, receiving water limit, or discharge prohibition contained in an order or Water Quality Control Plan (Basin Plan) adopted by the State Water Board or a Regional Water Board.
- An unauthorized spill, leak, fill, or other discharge.
- Failure to perform an action required by the State Water Board or a Regional Water Board, such as submittal of a self-monitoring or technical report, or completion of a cleanup task by a specified deadline.

The procedures set forth in this document are not intended to be a substitute for the sound discretion of the State and Regional Water Boards in enforcement matters. Enforcement determinations are complicated decisions based ultimately on experience and professional judgment. Rather, the purpose of this document is to provide a framework within which such decisions may be better made.

In deciding which course of action should be pursued, Regional Water Board staff should consult with their supervisors and with legal counsel assigned to the Regional Water Board. The Regional Water Board's legal counsel is its expert on most aspects of enforcement, including precedents and conformity with existing laws, regulations, and guidance.

It is important to note that enforcement of the State's water quality statutes is not solely the purview of the State and Regional Water Boards and their staff. State law allows for members of the public to bring enforcement matters to attention of the State and Regional Water Boards and authorizes aggrieved persons to petition the State Water Board to review any action or inaction by the Regional Water Board. In addition, the Water Code provides for public participation in the issuance of orders, policies and water quality control plans.

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## I. DISCOVERY OF VIOLATION

Violation of waste discharge requirements (WDRs), enforcement orders, or applicable provisions of law administered by the State or Regional Water Boards can be discovered through discharger self-monitoring reports (SMRs), compliance inspections, facility reporting, complaints, or file review. Unauthorized discharges, those for which WDRs have not been issued, are most commonly discovered through complaints and interagency notifications.

### A. SELF-MONITORING REPORTS

The State and Regional Water Boards ensure compliance with WDRs by requiring all dischargers to implement a monitoring and reporting program and to periodically submit SMRs. Reporting frequency for regulated dischargers will depend on the nature and effect of the discharge. Most dischargers, however, are required to submit SMRs monthly.

### B. COMPLIANCE INSPECTIONS

The Regional Water Board staff under the authority provided in Water Code Sections 13267 and 13383 conducts compliance inspections on-site. Compliance inspections address compliance with WDRs; laboratory quality control and assurance; record keeping and reporting; time schedules; best management plans; and any other pertinent provisions. The inspections are also used as a verification of the accuracy of the discharger's SMR. In addition, the U.S. Environmental Protection Agency (USEPA) has authority to inspect facilities which discharge to surface waters.

### C. DIRECT FACILITY REPORTING

Dischargers with regulated facilities are generally required to report to the Regional Water Board by phone, usually immediately or within 24 hours, followed by a written report and a discussion in the next SMR, when certain events occur, such as: Bypass of raw or partially treated sewage from a treatment unit or discharge of wastewater from a collection system. Treatment unit failure or loss of power, which threatens to cause a bypass. Any other operational problems which threaten to cause significant violations of WDRs or impacts to receiving waters.

### D. COMPLAINTS

Often information regarding an actual or potential violation or unauthorized discharge is obtained through telephone or written notification from a member of the public, another public agency or an employee working at a regulated facility. Complaints may also involve nuisance conditions, such as noxious odors that extend beyond a wastewater treatment plant boundary.

### E. FILE REVIEW

WDRs frequently mandate completion of tasks, which the dischargers must confirm by submission of appropriate reports to the Regional Water Boards. Failure to submit the reports or to complete the required tasks may be the basis for initiating enforcement.

## II. ENFORCEMENT TRIGGERS

Violations of WDRs or applicable statutory or regulatory requirements should result in a prompt enforcement response against the discharger. It is recognized, however, that Regional Water Board resources are limited, and that resources may be best used and water quality may be best protected by focusing on violations and discharges that pose the greatest threat to human health and the environment. What follows is an outline of violations and discharges that should trigger an immediate enforcement response from the Regional Water Board. Regional Water Boards are encouraged to ensure that violations of WDRs or unauthorized discharges of waste not listed below also receive an appropriate enforcement response. At a minimum, Regional Water Board staff shall bring the following to the attention of their Regional Water Board for possible enforcement action:

### A. POLLUTANTS

For major NPDES permittees, as defined in 40 CFR Section 122.2 (July 1, 1994), the enforcement criterion is: exceedance of Category I pollutants by 1.4 times the monthly average effluent limit for any two months in a six month period; or exceedance of Category 2 pollutants by 1.2 times the monthly average effluent limit for any two months in a six-month period. Category I and Category 2 pollutants are defined as Group 1 and Group 2 pollutants respectively, as listed in 40 CFR Section 123.45, Appendix A (July 1, 1994). The Categories are shown in Attachment 1.

### B. CHRONIC VIOLATIONS

For major NPDES permittees, as defined in 40 CFR Section 122.2 (July 1, 1994), the enforcement criterion for chronic violations is exceedance of the monthly average effluent limit for any pollutant in any four months in a six month period, or exceedance of the monthly average effluent limit for any pollutant in the same season for two years in a row.

### C. TOXICITY

Regional Water Board staff shall bring any incidence of acute toxicity, which violates WDRs, Basin Plans, or other provisions of law to the attention of their Regional Water Board for possible enforcement action. Where acute toxicity can be shown to be the result of failure of a discharger to exercise normal care in handling, treating, or discharging waste, an enforcement action with a monetary assessment should be issued. Similarly, staff shall bring violations of narrative toxicity standards contained in WDRs or Basin Plans due to chronic toxicity to the attention of their Regional Water Board for possible enforcement action. Regional Water Boards should develop enforcement triggers to implement narrative toxicity standards due to chronic toxicity. The Regional Water Boards enforcement provisions will remain in effect until the State Water Board adopts either statewide plans or a policy with provisions for enforcement of narrative toxicity standards. Regional Water Boards must amend their toxicity enforcement provisions and criteria to conform to such statewide plans or policies after they are adopted.

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## **D. PROHIBITIONS**

Regional Water Board staff shall bring violations of prohibitions contained in WDRs, Basin Plans, or enforcement orders to the attention of their Regional Water Board for possible enforcement action. The level of response and whether that response is a formal enforcement should depend on the degree of discharger culpability, environmental damage, independent action by the discharger to: correct the violation, etc.

## **E. SPILLS**

Spills generally refer to unauthorized discharges and are considered to be significant violations of State law and basin plans. Because the significance of the spill in terms of environmental impact depends on the amount of material spilled, the nature of the spilled material, size of the affected water body, or the proximity of the spill to a water body (if the spill was not directly to the water body) Regional Water Boards have discretion to determine the appropriate enforcement level and monetary liability. In making this determination Regional Water Boards may consider actions taken by the discharger to immediately notify appropriate authorities, and to initiate cleanup and other actions to minimize potential effects of the spill.

## **F. FAILURE TO SUBMIT REPORTS**

In some cases, reports required by WDRs, Cease and Desist Orders, Cleanup and Abatement Orders, and Basin Plans measure progress in implementing long-term corrective actions intended to achieve permanent compliance with permits, Basin Plans, and state and federal laws and regulations. Failure to submit reports required in WDRs, orders, or Basin Plans within 30 days from the due date, or submission of reports which are so deficient or incomplete as to cause misunderstanding and thus impede the review of the status of compliance are serious violations which staff shall bring to the attention of their Regional Water Board for possible enforcement action. An exception to this will occur when it is recognized in program work plans that some categories of self-monitoring reports will not be reviewed. Violations of these types of reporting requirements should include monetary assessments.

## **G. COMPLIANCE SCHEDULES**

Violations of compliance schedule milestones for starting construction, completing construction, or attaining final compliance by 90 days or more from the date of the milestone specified in an enforcement order or WDRs shall result in staff bringing the matter to the attention of their Regional Water Board for possible enforcement action.

## **H. PRETREATMENT PROGRAM IMPLEMENTATION**

Staff shall bring failure of a publicly-owned treatment works, as defined in 40 CFR Section 122.2 July 1, 1994), to implement its approved pretreatment program, as defined in 40 CFR Section 403.3 July 1, 1994), as required in its WDRs, including failure to enforce industrial pretreatment requirements on industrial users to the attention of their Regional Water Board for possible enforcement action. This includes pretreatment program compliance schedules.

## **L. STORM WATER PROGRAM**

Discharges of storm, water associated with industrial activities require compliance with the General Industrial Activities Storm Water Permit. Failure to submit a Notice of Intent for coverage under the general permit, develop a Storm Water Pollution Prevention Plan (SWPPP), implement a SWPPP, conduct monitoring, and submit annual reports after specific notification to the discharger are significant violations and shall warrant staff bringing the matter to their Regional Water Board for possible enforcement action.

## **III. TYPES OF ENFORCEMENT ACTIONS**

The State and Regional Water Boards have a variety of enforcement tools to use in response to non-compliance by dischargers. This section describes the range of options and discusses procedures that are common to some or all of these options.

An enforcement action is any informal or formal action taken to address an incidence of actual or threatened non-compliance with existing regulations or provisions designed to protect water quality. Formal enforcement actions fall into two basic categories: those that direct future actions by dischargers and those that address past violations. Actions, which generally direct future action, include imposition of time schedules and issuance of Cease and Desist Orders and Cleanup and Abatement Orders. Actions taken to address past violations include issuance of notices to comply (minor violations), rescission of waste discharge requirements, administrative civil liability, and referral to the Attorney General or District Attorney. In some instances, both types are used concurrently to deal with a specific violation (e.g., discharger has had past violations but has not yet corrected the problem).

Determination of who is responsible for a particular violation can sometimes be difficult. For a regulated discharge, the discharger is usually the same individual to whom the WDRs were issued. For unauthorized discharges, the discharger is usually the property owner, tenant, or lessee. The Regional Water Board's legal counsel should be consulted where determination of the discharger is in question.

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Enforcement actions should be initiated as soon as possible after discovery of the violation. If the violation continues, Regional Water Board staff shall consider escalating their response from less formal enforcement actions, such as notice of violation (NOV) Letters, to increasingly more formal and severe enforcement actions, and if necessary, shall bring this to the attention of their Regional Water Board for possible escalation of enforcement action.

Any person aggrieved by an action or failure to act by a Regional Water Board may petition the State Water Board to review the decision. The State Water Board must receive the petition within 30 days of the Regional Water Board action or refusal to act, or 60 days after a request has been made to the Regional Water Board to act. In addition, the State Water Board may, at any time and on its own motion, review any action or failure to act by a Regional Water Board.

#### **A. INFORMAL ENFORCEMENT**

For minor violations, the first step is usually informal enforcement action. Staff should contact the discharger by phone and document the conversation in a follow-up letter. Staff should inform the discharger of the specific violations, discuss how and why the violations occurred, and discuss how and when the discharger will come back into compliance. This step can be deleted for significant violations, such as repeated or intentional illegal discharges, falsified reports, etc.

The NOV letter is an informal enforcement action. The purpose of a NOV letter is to bring a violation to the discharger's attention and to give the discharger an opportunity to correct the violation before formal enforcement actions are taken. Continued noncompliance should trigger formal enforcement action.

An NOV letter should be signed by the Executive Officer and should cover the following points: description of specific violations, summary of applicable enforcement options (including maximum ACL), and a request for a written response. The letter should always go to the discharger named in the Regional Water Board order, even if staff normally deals with a consultant. See Attachment 2 for an example of a NOV.

A special form of the NOV letter is the Field Notice of Violation, a form used by Regional Water Board staff in the field (Attachment 3). This form describes the violation and requests corrective action as appropriate. The purpose is to alert the discharger immediately to the violation and the potential for civil liability.

#### **B. TIME SCHEDULE ORDER**

Pursuant to Water Code Section 13300, actual or threatened discharges of waste in violation of requirements can result in imposition of a time schedule that sets forth the actions a discharger shall take to correct or prevent the violation.

#### **C. NOTICES TO COMPLY**

Notices to Comply are issued pursuant to Chapter 5.8 (commencing with section 13399) of Division 7 of the Water Code. This Chapter provides an expedited approach for dealing with minor violations. Commonly referred to as the "fix-it-ticket" legislation, this law requires the use of field-issued notices to comply as the sole enforcement option in given situations involving minor violations. An authorized representative of the State or Regional Water Board to require a discharger to address minor violations that can be corrected within 30 days ordinarily writes notices to Comply during the course of an inspection. Major features of this law include the following:

- An inspector has the discretion not to issue a notice to comply for a minor violation.
- A notice to comply is not required if there is immediate correction.
- A single notice to comply is used to cite all minor violations detected during the same inspection.
- With exceptions, a notice to comply is the sole means by which an inspector may cite a minor violation.
- If testing is required to determine if there has been a violation, a notice to comply may be issued at a latter date.
- Other enforcement actions may be taken upon a failure to comply or if necessary to prevent harm to public health or the environment.
- The new law does not limit criminal proceedings.
- Civil penalties may still be assessed for minor violations if warranted or required by federal law.

The violations listed below are considered to be minor in nature provided the violations do not include the following:

- Any knowing, willful, or intentional violation of Division 7 (commencing with section 13000) of the Water Code.
- Any violation of Division 7 of the Water Code that enables the violator to benefit economically from noncompliance, either by realizing reduced costs or by gaining a competitive advantage.
- A recalcitrant violator commits any violation that is a chronic violation or that.
- Any violation that cannot be corrected within 30 days.

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#### Minor Violations.

- A. Inadvertent omissions or deficiencies in record keeping that do not prevent an overall compliance determination.
- B. Records not physically available at the time of the inspection provided the records do exist and can be produced in a timely manner.
- C. Failure to have permits available during an inspection.
- D. Inadvertent violations of insignificant administrative provisions that do not involve a discharge of waste or a threat thereof.
- E. Violations that result in an insignificant discharge of waste or a threat thereof, provided, however, there is no significant threat to human health, safety, welfare or the environment and provided further that such violations do not violate any other order or prohibition issued by the State or Regional Boards. Significant threat means the threat of or an actual change in water quality that could result in a violation of water quality objectives or a condition of pollution or nuisance.

#### **D. CEASE AND DESIST ORDERS**

Cease and Desist Orders (CDOs) are adopted pursuant to Water Code Sections 13301-13303. CDOs are normally issued to dischargers regulated by WDRs and often remain in force for years.

CDOs are typically issued to regulate dischargers with chronic non-compliance problems. These problems are rarely amenable to a short-term solution; often, compliance involves extensive capital improvements or operational changes. The CDO will usually set a compliance schedule, including interim deadlines (if appropriate), interim effluent limits (if appropriate), and a final compliance date. CDOs may also include restrictions on additional service connections (referred to as a "connection ban") to community sewer systems. These have been applied to sanitary sewer systems but can be applied to storm sewer systems, as well. Violations of CDOs should trigger further enforcement in the form of an ACL or referral to the Attorney General for injunctive relief or monetary remedies.

#### **E. CLEANUP AND ABATEMENT ORDERS**

Cleanup and Abatement Orders (CAOs) are adopted pursuant to Water Code Section 13304. CAOs are generally issued to dischargers that are not being regulated by WDRs with the exception of ground water cleanups, CAOs are typically short-lived enforcement orders.

CAOs are issued by the Regional Water Board, or by the Executive Officer under delegation from the Regional Water Board pursuant to Water Code Section 13223. Executive Officer-issued CAOs should be used when speed is important, such as when a major spill or upset has occurred and waiting until the Regional Water Board can meet to approve a CAO would be inappropriate. Regional Water Boards should keep an accurate record of staff oversight costs for CAOs since dischargers are liable for such expenses. If staff costs are not recovered voluntarily or through civil court actions, the amount of the costs constitutes a lien on the affected property and foreclosure may be used. Violations of CAOs should trigger further enforcement in the form of an ACL or referral to the Attorney General for injunctive relief or monetary remedies.

#### **F. MODIFICATION OR RESCISSION OF WASTE DISCHARGE REQUIREMENTS**

In accordance with the provisions of the Water Code, and in the case of NPDES permits, the Federal Water Pollution Control Act, the Regional Water Board may modify or rescind WDRs in response to violations. Rescission of WDRs generally is not an appropriate enforcement response where the discharger is unable to prevent the discharge, as in the case of a wastewater treatment plant.

#### **G. ADMINISTRATIVE CIVIL LIABILITY**

Administrative civil liability (ACL) means monetary assessments imposed by a Regional Water Board. The Water Code authorizes ACLs in several circumstances:

Water Code	Section Type of Violation
13261	Failure to furnish report of waste discharge or to pay required fees.
13265	Unauthorized discharge of waste.
13268	Failure to furnish technical report.
13308	Failure to comply with time schedule.
13350	Intentional or negligent violation of CDO; CAO; WDRs; or Regional Water Board prohibition (Basin Plan), which results in pollution, or unauthorized release of any petroleum product.
13385	Violation of NPDES permits, Basin Plan Prohibition, etc.

Water Code Sections 13323-13327 describe the ACL process to be used. The Water Code authorizes Regional Water Board Executive Officers to issue an ACL Complaint. The Complaint describes the violation, proposes a specific monetary assessment, and sets a hearing date (no more than 60 days after the Complaint is issued).

The discharger may either waive their right to a hearing or appear at the Regional Water Board hearing to dispute the Complaint. In the latter case, the Regional Water Board has the choice of dismissing the Complaint, adopting an ACL order (ACL amount need not be the same as in the Complaint), or adopting a different enforcement order (e.g. referral to Attorney General).

ACL actions are intended to address past violations. If the underlying problem has not been corrected, the ACL action should be accompanied by a Regional Water Board order to compel future work by the discharger (e.g. CAO or CDO). One exception involves late reports, where a revised submittal deadline could have the effect of encouraging further delay for some dischargers.

*'Americans have stood as one in saying, 'no' to things like dirty, water and 'yes' to giving our children an environment as unspoiled as their hopes and dreams.' President Bill Clinton, May 1995*



## **H. REFERRALS TO ATTORNEY GENERAL OR DISTRICT ATTORNEY**

The Regional Water Board can refer violations to the state Attorney General or ask the appropriate county District Attorney to seek criminal relief. In either case, a superior court judge will be asked to impose civil or criminal penalties. In some cases, the Regional Water Board may find it appropriate to request the U.S. Attorney's Office to review potential violations of federal environmental statutes, including the Clean Water Act, Migratory Bird Treaty Act, or the Resource Conservation and Recovery Act.

### **1. Attorney General**

The Attorney General can seek civil enforcement of a variety of Water Code violations, essentially the same ones for which the Regional Water Board can impose ACL. Maximum per-day or per-gallon civil monetary remedies are two to ten times higher when imposed by the court instead of the Regional Water Board. The Attorney General can also seek injunctive relief in the form of a restraining order, preliminary injunction, or permanent injunction pursuant to Water Code Sections 13262, 13264, 13304, 13331, 13340 and 13386. Injunctive relief may be appropriate where a discharger has ignored enforcement orders.

For civil assessments, referrals to the Attorney General should be reserved for cases where the violation merits a significant enforcement response but where ACL is inappropriate. For example, when a major oil spill occurs, several state agencies can seek civil monetary remedies under different state laws; a single civil action by the Attorney General is more effective than numerous individual actions. A violation (or series of violations) with major public health or water quality impacts should be considered for referral, in order to maximize the monetary assessment because of its effect as a deterrent. Referral for recovery of natural resources damages under common law theories, such as nuisance, may also be appropriate.

Normally, a case should not be recommended for referral to the Attorney General unless it has been informally determined that the Attorney General is able and willing to handle the case. Even with the Attorney General in the lead role, referrals often consume considerable staff time, especially if staff members are requested to testify at trial.

The majority of cases referred are settled out of court, although the process takes many months (or years). Since the Regional Water Boards gained the authority to impose ACL for substantial amounts, fewer cases need be referred to the Attorney General.

### **2. District Attorney**

District Attorneys may seek civil or criminal penalties under their own authority for many of the same violations the Regional Water Board pursues. While the Water Code requires a formal Regional Water Board referral to the Attorney General, the Regional Water Board's Executive Officer is not precluded from bringing appropriate matters to the attention of a District Attorney. A major area where District attorney involvement should be considered is for unauthorized releases of hazardous substances. In most of these cases, the Regional Water Board is not the lead agency, and the referral action is intended to support the local agency that is taking the lead (e.g. county health department or city fire department). In many cases, Regional Water Board staff lacks the time to prepare an enforcement action, and a District Attorney referral is another option to seeing the matter pursued. Many District Attorney offices have created task forces specifically staffed and equipped to investigate environmental crimes including water pollution. These task forces may ask for Regional Water Board support, which should be given within available resources.

In addition to the criminal sanctions and civil fines, the District Attorney often pursues injunctive actions to prevent unfair business advantage. The law provides that one business may not gain unfair advantage over its competitors by using prohibited tactics. A business that fails to comply with its WDRs or an enforcement order competes unfairly with other businesses that obey the law.

### **3. Civil versus Criminal Action**

Enforcement actions taken by the Regional Water Board are civil actions. In cases where there is reason to believe that specific individuals or entities have engaged in criminal conduct, the Regional Water Board or Executive Officer may request that criminal actions be pursued by the District Attorney. Under criminal law, individual persons, as well as responsible parties in public agencies and business entities, may be subject to fines or imprisonment.

It is not expected or desired that Regional Water Board staff will attempt an in-depth analysis of whether environmental criminal conduct has occurred in each individual case. While criminal statutes differ, many require some type of intent or knowing behavior on the part of the violator. This intent may be described as knowing, reckless, or willful. In addition to the required intent, criminal offenses consist of a number of elements, each one of which must be proven. Determining whether the required degree of intent and each of the elements exists often involves a complex analysis. If a potential environmental criminal matter comes to the attention of staff, consultation with Regional Water Board management and counsel should take place first before making any contact with other enforcement authorities.

When evaluating whether a case should be referred for criminal investigation, particular attention should be given to the degree of intent and the gravity of the violation. A good rule of thumb is that if the conduct appears to be intentional or reckless and constitutes a serious threat to human health or the environment, careful consideration should be given to pursuing the case criminally.

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## 1. SPECIAL SITUATIONS

### 1. Violations at State or Federal Facilities

For violations caused by a department or other entity of the State of California, the Executive Officer should notify the director or head of the department or entity of the nature of the violation, the actions needed to abate or clean up the discharge, and the potential of a State or Regional Water Board enforcement action. Depending upon the significance of the violation and/or the willingness and ability of the department to comply, an enforcement action (ACL, CAO, or CDO) may be issued to correct the violation and to deter future violations.

Violations at federal facilities should be handled similarly. Due to sovereign immunity; however, the State cannot obtain penalties from federal agencies for past violations (e.g., no ACLs) under most circumstances. One significant exception is provided by the Federal Facilities Compliance Act of 1992, which allows the States to penalize federal agencies, under specified circumstances, for violations of state hazardous waste management requirements. In addition, under Water Code Section 13308 a Regional Water Board may seek ACL, up to a maximum of \$ 10,000 per day of violation, against federal facilities for violation of a time schedule order, which was adopted to ensure future compliance with an existing enforcement order.

### 2. Integrated Enforcement

State and Regional Water Board staff shall cooperate with other environmental regulatory agencies, where appropriate, to ensure that enforcement actions are coordinated. The aggregate enforcement authority of the Boards and Departments of the California Environmental Protection Agency (CA / EPA) should be coordinated to eliminate inconsistent, overlapping and redundant efforts. The following steps should be taken by Regional Water Board staff to assist in integrated enforcement efforts: participate in multi-agency enforcement coordination; share enforcement information; participate in cross-mining efforts; participate with other agencies in enforcement efforts focused on specific individuals or categories of discharges.

The exchange of information among the Boards and Departments is especially important. Recent case law imputes the knowledge of each state agency to all others. CA / EPA will be maintaining a database for information on all enforcement actions. Quick and accurate filing of enforcement data with the State Water Board and CA / EPA is essential.

### 3. Oil Spills

Responses to oil spills to marine or estuarine waters should be coordinated through the Department of Fish and Game's Office of Oil Spill Prevention and Response (OSPR). OSPR staff may pursue enforcement action administratively or through referral to the local District Attorney, and, in such cases, the Regional Water Board generally should not invest staff time in a parallel effort. Staff should assist in an investigation by providing documentation, sampling, etc. If the discharger has not prepared a plan acceptable to the Regional Water Board to prevent recurrence, the Regional Water Board should request such a technical report under Water Code Sections 13267 or 13383. Major oil spills, those in excess of 10,000 gallons, usually involve a number of governmental jurisdictions. Such spills should be brought to the Regional Water Board for consideration of referral to the Attorney General for recovery of civil monetary remedies and damages. Oil spills to inland (fresh) waters are not within the jurisdiction of OSPR. If formal enforcement actions are taken, they are usually enforced by either the county District Attorney under either the Fish and Game Code or Health and Safety Code, or by the Regional Water Board under the Water Code. In general, if the District Attorney is interested in pursuing the case, the Regional Water Board should consult with the District Attorney before pursuing its own enforcement action to avoid any potential double jeopardy issues. However, staff should always request that any settlement include recovery of staff costs and any actions that appear necessary to prevent recurrence of a spill and to mitigate damage to the environment.

### 4. Hazardous Materials Spills

Hazardous materials are those meeting the criteria specified in Title 22, Division 4.5, Chapter 11, California Code of Regulations. Regional Water Board staff shall coordinate enforcement actions with the Department of Toxic Substances Control and/or any local or county hazardous material program. Spills constitute unlawful disposal of hazardous waste pursuant to the Health and Safety Code. Regional Water Board staff shall consider referring spills in all but the smallest amounts to the appropriate District Attorney, (generally in the 100-10,000 gallon range). If the District Attorney chooses not to pursue the case, Regional Water Board staff shall consider issuing an ACL Complaint unless the spill was very small or limited in impact. Due to the nature of the materials discharged, the Regional Water Board staff should consider issuing the ACL Complaint in an amount at or near the legal maximum.

Large spills of hazardous materials, 10,000 gallons or more, should be treated like large oil spills, and should be considered for referral to the Attorney General. If necessary, Regional Water Board staff should coordinate with the District Attorney or U.S. Attorney to determine whether criminal prosecution is warranted. In addition, such spills may constitute the unlawful disposal of hazardous waste pursuant to the Hazardous Waste Control Act (Health and Safety Code Section 25 100 et seq.) and, in most cases, should be investigated in conjunction with the Department of Toxic Substances Control.

### 5. Spills of Non-hazardous Materials

Spills of materials that do not meet the formal criteria, as being hazardous can still be highly toxic, such as some petroleum hydrocarbons

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## 5. Spills of Non-hazardous Materials

Spills of materials that do not meet the formal criteria, as being hazardous can still be highly toxic, such as some petroleum hydrocarbons or detergents, or of only limited toxicity, such as corn syrup. For this reason, such spills must be evaluated case-by-case for enforcement.

## 6. Storm Water Discharges

As compliance with the State Water Board's General Industrial Activities Storm Water Permit has costs associated with it, industries that are currently in compliance are at an economic disadvantage as compared to industries that are not. The imposition of ACL for noncompliance with the General Industrial Activities Storm Water Permit will be based on factors required by statute, including the costs that the facility avoided by not complying. These costs include: the annual fee, the cost of Storm Water Pollution Prevention Plan development, the cost of implementing best management practices, and the cost of monitoring and reporting. ACL will be in addition to the requirement of submitting a notice of intent to comply with the permit along with the first year's annual permit fee. ACL may be assessed by either the State Water Board or the Regional Water Boards.

## 7. Solid Waste Facilities

Provisions were added to the Public Resources Code (PRC) in 1995, which impact on enforcement activities at solid waste facilities:

(a) Where a Regional Water Board has issued, or is likely to issue in enforcement action against a solid waste facility, they must provide a statement to the local enforcement agency, the Solid Waste Management Board, the air pollution control district and the Department of Toxic Substances Control, if the violation involves the jurisdiction of that agency. This statement must be provided at least 10 days prior to the date of issuance of an enforcement order which is not an emergency, within five days from the date of issuance of an enforcement order for an emergency, or within 15 days of the discovery of a violation of a state law, regulation, or term or condition of a solid waste facilities permit for a solid waste facility, which is likely to result in an enforcement action. The statement must provide an explanation of and justification for the enforcement action, or a description of the violation (PRC Section 45019).

(b) The appropriate Regional Water Board must inspect a solid waste facility within 30 days of receipt of an enforcement action or proposed enforcement action from one of the above agencies if such action stems from a complaint concerning a solid waste facility and if a water quality violation is at issue (PRC Section 45020).

(c) If a Regional Water Board receives a complaint concerning a solid waste facility, which is not within its jurisdiction, it must refer the complaint to the appropriate state agency within 30 days (PRC Section 45021).

(d) If a Regional Water Board receives a complaint concerning a solid waste facility, either directly or by referral from another state agency, it shall either take appropriate enforcement action, refer the complaint to the Attorney General, the district attorney, or city attorney, whichever is applicable, or provide, within 60 days, to the person who filed the complaint a written explanation as to why enforcement action is not appropriate (PRC Section 45022).

(e) Regional Water Board enforcement activities at solid waste facilities shall comply with the following (PRC Section 45020):

(1) Enforcement activities shall eliminate duplication and facilitate compliance.

(2) Facility operators must be notified before administrative civil liability (ACL) is imposed.

(3) Prior to imposing ACL, and upon the request of a solid waste facility operator, the Regional Water Board must meet with the operator to clarify regulatory requirements and to determine how the operator could come into voluntary compliance. The operator may request a meeting with all agencies involved in the enforcement matter.

(4) The Regional Water Board must consider the factors listed in PRC Section 45016 in determining the appropriate enforcement action.

## IV. DETERMINING ACL AMOUNTS

The Water Code gives the Regional Water Board substantial discretion in setting ACL amounts. How this discretion is exercised is based upon several factors, some of which relate to the discharger and some of which relate to the discharge itself. The Regional Water Board is required to consider ten factors when setting ACL amounts but has latitude in how it applies and weighs each factor. This discretion is helpful, since no two cases are alike, but this often results in significant staff effort to recommend a reasonable ACL amount. In addition, maximum potential assessments are huge for some violations. Setting ACL amounts at or near the maximum often is not practical nor is it always good public policy.

One goal of this policy in calculating ACL amounts is consistency. Similar violations should result in similar amounts; dischargers should have some idea of their potential exposure. Another goal is deterrence; ACL amounts should create a strong disincentive for future violations. Finally, dischargers should not gain an economic benefit from the violations.

### A. MINIMUM AND MAXIMUM ACL AMOUNTS

The Water Code establishes maximum ACL amounts for each type of violation. These amounts are expressed as a function of violation duration (dollars per day) or violation magnitude (dollars per gallons discharged). Maximum ACL amounts range from \$1,000 to \$10,000 per day and \$10 per gallon. (See Attachment 4).

Water Code Section 13350 also establishes minimum ACL amounts for certain violations. These amounts are either \$ 100 or \$500 per day of violation. The Regional Water Board is required to impose these minimum amounts unless it makes express findings based upon the factors specified in Water Code Section 13327.

*"Sites that need more monitoring because of marginal or dirty conditions, will of course be billed for extra time necessary, to note problems and work, with the superintendents." -Barbara White, Principle Building Inspector*

## **B. FACTORS TO BE CONSIDERED**

Section 13327 of the Water Code requires the Regional Water Board to consider ten factors when determining the amount of ACL: "(T) he nature, circumstances, extent, and gravity of die violation or violations, whether the discharge is susceptible to cleanup or abatement, he degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require."

The first three factors relate to the environmental significance of the violations. The remaining factors deal with the character, actions and economic worth of the violator. These factors should be used not only in determining an appropriate ACI amount, but also in deciding whether an ACL should be issued at all. Below is a discussion of some common issues for the ten factors, followed by a matrix for use as a guide in determining monetary assessments. (Note that several of the factors have been grouped together).

### **1. Nature, Circumstance, Extent, and Gravity of Violation and Degree of Toxicity**

These factors address the magnitude and duration of a violation. More fundamentally, they address the impact of a violation and its effect on beneficial uses, including public health and water quality. This factor should be weighted heavily in calculating ACL amounts. There are different methods to define the gravity of different types of violations. For spills, the main concern is the volume, duration, and toxicity of the material spilled. For effluent limit violations, the concern is the violation's significance (e.g., how much above the effluent limit). For time schedule violations, the length of the delay and its effects on overall compliance are the primary issues.

### **2. Degree of Culpability**

Higher ACL amounts should be set for intentional or negligent violations than for accidental, non-negligent violations. Showing intent or negligence is not always easy. A first step is to identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation. The test is what a reasonable and prudent person would have done or not done under similar circumstances.

### **3. Prior History of Violations**

Higher ACL amounts should be set in cases where there is a pattern of previous violations. If the Regional Water Board has already imposed ACL for past violations, then ACL for additional violations of the same type should be substantially higher however; a Regional Water Board cannot impose ACL on a discharger more than once for the same violation.

**4. Susceptibility to Cleanup and Voluntary Cleanup Efforts Undertaken** These two factors relate to cleanup efforts. The ACL amount should be reduced to reflect good-faith efforts by the violator to clean up wastes or abate the effects of waste discharges. In many cases, the violation is not amenable to cleanup or abatement, such as a regulated discharge to surface waters in excess of effluent limits or a time schedule violation for site investigation. In these cases, the ACL amount is unaffected by the cleanup or abatement factor.

### **5. Economic Savings**

Dischargers should not enjoy a competitive advantage because they flout environmental laws. Assessments for Water Code violations should at a minimum take away whatever economic savings a firm or agency gains as a result of those violations.

Economic savings fall into two categories: (1) deferred capital spending and (2) reduced or avoided costs of operation and maintenance (O&M). To estimate economic savings, the first step is to identify which capital improvement projects or O&M activities were delayed or avoided. The second step is to estimate these capital and O&M costs and express them as a present value.

Cost data may often be obtained from the discharger, especially when the discharger explains what it did to prevent future recurrence of the violations. If the discharger does not volunteer this cost information, staff can require it via a Water Code Section 13267 or 13383 request.

Financial management programs can convert capital and O&M costs into an economic savings estimate.

Savings from deferred capital spending is calculated based on the amount of interest that could have been earned on the capital funds during the delay period. Savings from O&M activities are calculated for the entire delay period and expressed as a present value.

*"We are mandated by the State, to enforce the Storm Water Pollution Prevention Program." -Barbara White,  
Principle Building Inspector*

### **6. Ability to Pay and Ability to Continue in Business**

Normally, assessments are not set so high as to put firms out of business or seriously harm their ability to continue in business. In a similar sense, government agencies have finite resources to pay assessments, notwithstanding their broad powers to raise revenue. At issue is how the Regional Water Boards calculate a firm's (or agency's) ability to pay.

Draft USEPA guidance provides one possible method for analyzing affordability. See 1994 "Draft Economic Guidance for Water Quality Standards Workbook" by USEPA. The draft guidance suggests analyzing four factors: liquidity (short-term ability to pay bills); solvency (long-term ability to pay bills); leverage (current debt load and ability to borrow additional funds); and earnings (how pollution-related costs affect profitability).

#### **7. Other Matters as Justice May Require**

This factor affords the Regional Water Board wide discretion. However, it applies only to matters not already addressed in the list above and it should be used primarily for any considerations that are specific to the violator. This factor can also be used as a basis for recovery of staff costs incurred in the ACL process. Staff costs should be added to the ACL amount derived from the other ACL factors to come up with the total ACL amount. Details on deriving staff costs are given below.

Finally, litigation considerations may justify a reduction in the amount due to applicable precedents, competing public interest considerations, or the specific facts or evidentiary issues pertaining to a particular case.

#### **ASSESSMENT MATRIX**

After an analysis of the above factors, the following matrix should be used as a guide to determine the appropriate ACL assessment based upon the determined level of "Environmental Significance" and "Compliance Significance". The overlap in the amounts in the matrix is intended to allow for flexibility in the amount assessed. The "Environmental Significance" relates to the violation itself the gravity of the violation(s)-nature, circumstances, extent, and degree of toxicity of the discharge; and whether the discharge is susceptible to cleanup or Abatement. The "Compliance Significance" deals with the discharger voluntary cleanup efforts undertaken by the violator, the violator's prior history of violations, and the violator's degree of culpability.

After consulting the following matrix: the final amount to be assessed may be decreased by the violator's ability to pay and the effect on the violator's ability to continue in business; and the final amount to be assessed may be increased or decreased by other matters as justice may require. This should include recovery of staff costs. If the amount assessed is less than the minimums specified in Water Code Section 13350, findings based on consideration of the above factors to justify such an assessment are required.

Assessment Matrix

COMPLIANCE  
SIGNIFICANCE

(DISCHARGER)  
ENVIRONMENTAL  
SIGNIFICANCE

(DISCHARGE)

MINOR MODERATE MAJOR

MINOR \$100 - \$2,000 \$1,000 - \$20,000 \$10,000 - \$100,000

MODERATE \$1,000 - \$20,000 \$10,000 - \$100,000 \$50,000 - \$200,000

MAJOR \$10,000 - \$100,000 \$50,000 - \$200,000 \$100,000 to maximum amount

Examples of violations, which correspond to the above categories, may be found in Attachment 5.

#### **C. RECOVERY OF STAFF COSTS**

Enforcement orders issued under Water Code Section 13304 and ACL orders should address recovery of staff costs incurred in preparing the enforcement action, since most enforcement consumes significant amounts of staff time Water Code Section 13304 explicitly allows the recovery of staff costs, which are incurred in connection with a CAO. As discussed above, staff costs should also be considered as one of the "other matters as justice may require" when calculating ACL assessments.

CAOs should always include a provision that the Regional Water Board may seek recovery of staff costs, including costs for any staff investigation and oversight of cleanup, associated with the order. Below is an example of cost-recovery language:

"Pursuant to Section 13304 of the Water Code, the discharger is hereby notified that the Regional Water Board is entitled to, and may seek reimbursement for, all reasonable costs actually incurred by the Board to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action required by this Order. The discharger shall reimburse the Board upon receipt of a billing statement for those costs."

#### **D. SUPPLEMENTAL ENVIRONMENTAL PROJECTS**

The State Water Board supports the use of supplemental environmental projects, which are funded or implemented by dischargers in exchange for a suspension of a portion of an ACL or other monetary assessment, which would otherwise be paid directly to the State Cleanup and Abatement Account. Supplemental projects should mitigate damage done to the environment by the discharger, and usually should involve the restoration or enhancement of wildlife and aquatic habitat or beneficial uses in the general vicinity of the violation. However, projects may also consist of less direct environmental benefits, such as preparation of certain kinds of studies or an industry specific public awareness activity. Generally, acceptable projects should fall into one of five categories: pollution prevention, pollution reduction, environmental restoration, environmental auditing, and public awareness.

["It's no/ only governmental agencies that are issuing fines more and more civil cases are being filed for water quality, infractions](#)

Supplemental environmental projects may be considered if: (1) Violations are corrected through actions to ensure future compliance; (2) deterrence objectives are served by payment of an appropriate monetary assessment; (3) there is an appropriate relationship between the nature of the violation and the environmental benefits to be derived from the supplemental project; and (4) the project is not otherwise required or would not proceed in the absence of the proposal.

Supplemental environmental projects should only consist of measures that go above and beyond the obligation of the discharger to voluntarily undertake measures necessary to assure compliance with permits and regulations. For example, sewage pump stations should have basic reliability features to minimize the occurrence of sewage spills. A mitigation project following a pump station spill should not include installation of these basic reliability features nor should credit be given for the money spent on cleanup.

Supplemental environmental projects should not equal the total amount of the ACL assessment. Except in very minor cases, the ACL order should require a cash payment (to the State Cleanup and Abatement Account) of a portion of the ACL amount, which includes staff costs. The purpose of this is to deter future non-compliance. The supplemental project costs should equal or exceed the remainder of the ACL amount. Therefore, the total ACL package may include a monetary assessment, the supplemental project, plus staff costs.

The supplemental environmental project should be clearly described in the ACL order, including a detailed description of the mitigation project and a completion deadline; if the discharger fails to complete the project by this time, then the discharger should pay the ACL amounts, which were previously suspended, to the State Cleanup and Abatement Account. This feature provides the discharger an incentive for prompt implementation of mitigation projects. If the discharger completes the mitigation in a timely manner, this portion of the ACL may be suspended.

## **ATTACHMENT 1 - Pollutant Categories**

### **POLLUTANT CATEGORIES**

#### **Category 1 Pollutants:**

These are pollutants for which the enforcement criterion is 1.4 times the effluent limit for exceedences of monthly average effluent limits, which occur two months in a six-month period.

Oxygen Demand Minerals  
Biochemical Oxygen Demand Calcium  
Chemical Oxygen Demand Chloride  
Total Oxygen Demands Fluoride  
Total Organic Carbon Magnesium  
Sodium  
Potassium Solids  
Sulfur  
Total Suspended Solids Sulfate  
Total Dissolved Solids Total Alkalinity  
Other Minerals  
Nutrients  
Inorganic Phosphorous Metals  
Compounds Aluminum  
Inorganic Nitrogen Compounds Cobalt  
Iron  
Vanadium  
Detergents and Oils  
Methylene blue active substances  
Nitriflortriacefic acid  
Oil and Grease  
Other detergents or algicides

#### **Category 2 Pollutants:**

These are pollutants for which the enforcement criterion is 1.2 times the effluent limit for exceedences of monthly average effluent limits, which occur two months in a six-month period.

Metals  
All metals not specifically listed under Category 1.  
Inorganic  
Cyanide  
Total Residual Chlorine  
Organics  
All organics not specifically listed under Category 1.



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