February 7, 2008

Via Electronic Mail and Hand-Delivery

Tam Doduc, Chair, and Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

ATTN.: Jeanine Townsend, Clerk to the Board
commentletters@waterboards.ca.gov

SUBJECT: **WATER QUALITY ENFORCEMENT WORKSHOP – 2/19/08**

Dear Chair Doduc and Members:

The California Association of Sanitation Agencies, Tri-TAC, the Bay Area Clean Water Agencies, the California Water Environment Association, the Central Valley Clean Water Association and the Southern California Alliance of POTWs appreciate the opportunity to provide comments on the proposed revisions to the Water Quality Enforcement Policy. Our associations represent more than 90 percent of municipal wastewater collection, treatment and water recycling agencies, as well as thousands of wastewater professionals, throughout the State. Our members regulate those entities that discharge into our systems and are regulated by the State and regional boards, as well as other State and federal agencies. We understand the importance of firm, fair and consistent enforcement to the success of water quality programs.

We agree strongly with the stated intent of the Policy, to "create a framework for identifying and investigating instances of noncompliance, for taking enforcement actions that are appropriate in relation to the nature and severity of the violation, and for prioritizing enforcement resources to achieve maximum environmental benefits." The goal of enforcement should be compliance. In an ideal world, an effective enforcement program would yield fewer enforcement actions and fewer penalties over time, as compliance records improve through deterrence, corrective actions and improvements. This cover letter addresses the most significant issues in the proposed Policy, and the attachment provides detailed comments and recommended language changes.

The Proposed Approach to Classifying Violations is a Significant Improvement Over the Existing Policy.

We support the approach to classifying violations into classes based on the impact to the environment and the conduct of the discharger. One of the challenges with the current Water Quality Enforcement Policy is that the sections on Enforcement Priorities (Section I.E, Section III, and Section V) identify so many activities as priorities that it is difficult to determine which of these violations is truly deserving of a "high" (or other) priority status. It appears that the universe of triggers for "high priority" enforcement is overly broad and, therefore, of limited usefulness. In practice, we understand that Regional Water Board senior staff and management have followed the protocol identified in the Water Quality Enforcement Policy (Section I.E, p. 4) of holding monthly meetings to assign relative priority designations to violations and determine enforcement actions that should be pursued on a priority basis. However, because of the limited information available about the priority-setting process and about the results of that process, it is quite difficult for outside stakeholders to evaluate whether the current approach is working well or not. The proposed approach will facilitate targeting enforcement resources toward those violations that pose a serious threat to water quality or are the result of willful or knowing noncompliance with orders, laws and regulations. It will also render the enforcement decision-making process more transparent to the public. Although we support the proposed approach as a whole, we do have concerns over prioritization of violations relating to chronic toxicity. These comments are detailed in the Attachment.

The SEP Provisions are Seriously Flawed and Should be Significantly Revised.

While many aspects of the WQEP would be improved by the proposed changes, the draft provisions regarding the availability of Supplemental Environmental Projects (SEPs) are seriously flawed. As acknowledged in the Policy, SEPs are an important tool for encouraging settlement. What the Policy does not recognize is the value of SEPs in restoring and protecting the environment within local communities and watersheds. If adopted as proposed, the Policy will preclude numerous beneficial projects, discourage settlement, and result in many more enforcement actions going to formal hearing before the Regional Water Boards. We oppose the following elements of the SEP provisions:

The Policy should not arbitrarily limit SEPs for other than mandatory minimum penalties to a percentage of the total ACL amount. The approach of limiting the SEP amount to a percentage of the ACL appears to be based upon a view that the Legislature intended money from enforcement actions to go to the State Water Board rather than the regions, as well as a belief that SEPs are not

sufficiently punitive to serve the Policy goals.[1] Both premises are incorrect. As to the first point, the Water Code is largely silent on the issue of allocation of ACL monies to the regions. However, section 13443 provides a means for the State Water Board to provide funding to regional boards from the Cleanup and Abatement Account for overseeing and tracking the implementation of SEPs. This indicates a policy leaning in favor of SEPs by regions. Similarly, the Legislature's most recent action in the area of SEPs was the amendment of Water Code section 13385(l) to codify the availability of SEPs in mandatory minimum penalty actions. In specifying that a portion of the penalties *greater than 50%* could be directed toward SEPs, the statute recognizes the validity of keeping a significant portion of the penalty revenue within the community where the alleged violations and impact occurred. As for the punitive aspect of requiring payment to the Cleanup and Abatement Account *versus* undertaking a SEP, the impact on the local public agency budget is the same. However, as public agencies with responsibilities to ratepayers and taxpayers, we are far more interested in seeing that ACL-related dollars remain in the regions, where the public can see that locally generated revenues are being used to achieve environmental benefits.

Not all violations, nor all violators, are created equal. Regional Water Boards should be able to take into account the specific facts giving rise to the enforcement action, the discharger's conduct subsequent to the violation (including voluntary cleanup efforts), and the importance and value of the proposed SEP in determining the appropriate amount to be directed to a SEP. We do not believe it is necessary or appropriate to establish a cap on the SEP amount, as all ACL settlements are subject to public review and comment, as well as the State Water Board petition process. We also do not believe that the proposed process for the State Water Board to review SEPs that exceed 25% of the total monetary assessment is necessary or appropriate. First, as noted above, the State Water Board already has the authority to review ACL settlements on its own motion. Second, it would be very problematic, from a due process point of view, for the State Water Board staff (or the Board) to have the ability to review a SEP that is part of a proposed settlement of an enforcement action before that settlement is approved by a Regional Water Board. Settlement negotiations are confidential between the parties, thus precluding State Board review during the settlement negotiation process. Furthermore, the State Water Board is the appellate body, and it would be improper for it to insert itself into the process of negotiating a settlement.

We have provided suggested language to implement these recommendations in the attachment.

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[1] The Policy also refers to a 2003 Cal/EPA guidance document as the source of the 25% cap. There is a significant difference however, between advisory guidance and a binding State Water Board Policy, which must be followed by the Regional Water Boards. It is our understanding that neither the Air Resources Board nor the Department of Toxic Substances Control views the 25% as a binding standard. ARB determines the SEP amount on a case-by-case basis. (Personal Communication between Kari Fisher, attorney at Somach Simmons & Dunn, and George Poppic, attorney at ARB, Jan. 24, 2008.) Similarly, DTSC determines the particular components of a SEP on a case-by-case basis, depending on the violation and needed penalties and generally allows SEPs in larger cases with higher violations and penalties than smaller cases. (Personal Communication between Kari Fisher, attorney at Somach Simmons & Dunn, and Richard Sherwood, attorney at DTSC, Jan. 24, 2008.)

The Policy should emphasize that dollar-for-dollar credit is appropriate for SEPs. The draft Policy suggests that Regional Water Boards should give less than dollar for dollar credit for SEPs. However, the SEP program has worked very well in many areas with a dollar for dollar credit, and this is a reasonable approach for a SEP. We understand that State Water Board staff borrowed this concept from the U.S. EPA SEP Policy. However, the EPA Policy does not cap SEPs to a specified percentage of the ACL. Moreover, this provision is unnecessary, because the Regional Water Boards can accomplish the same purpose by setting the ACL amount at a level sufficient to achieve the goal of deterrence.

The Policy should allow SEPs for education and outreach programs. We do not understand what eliminating these programs from eligibility for SEPs would accomplish. Much of today's water quality problems will only be addressed through changing behavior, and public education and understanding are of no less importance and value in protecting water quality than capital improvements, studies, monitoring and treatment. Moreover, there is no statutory prohibition against allowing SEPs that are educational in nature, and it is within the Water Board's discretion to decide whether particular projects proposed as SEPs are worthy or not. Eliminating SEPs for education and outreach is directly contrary to the goals of the Water Boards' draft Strategic Plan, Principles and Values on Education/Outreach, which states:

> "We promote knowledge and awareness of the value of water resources, the importance of water rights and water quality protection, public engagement in the protection of water resources, and an understanding of the mission of the Water Boards."

The definition of the requisite nexus between a SEP and a violation is overly narrow. The Policy would define a nexus to exist only if "the project remediates or reduces the probable overall environmental or public health risks to which the violation at issue contributes." While we do not believe this is the State Water Board's intent, the way in which the nexus requirement is expressed may make it difficult or impossible to use SEPs in the circumstances where they may be most appropriate—e.g. relatively minor violations with no quantifiable adverse water quality impacts. It is sufficient to specify that a project must have a geographic, category or beneficial use nexus.

Waivers for MMPs should include an option to direct a portion of the liability amount to a SEP. The proposed Policy states that there is no legal authority for an ACL complaint to include a proposed SEP, and that SEPs can only be imposed in a stipulated ACL order as a settlement. (Policy at p. 47.) The Water Code, however, does address the use of SEPs for MMPs. Given the mandatory nature of these penalties, once a violation is established, there is generally no debate about the dollar amount. Rather than requiring these cases to be settled through a stipulated order, Regional Water Boards should include two alternatives on the ACL waiver form: payment of the full amount to the appropriate account or payment of a portion to a SEP (up to the statutory maximum) and the remainder as a penalty.

We urge the State Water Board to significantly revise these provisions in accordance with the suggested language changes we have provided in the attachment.

The Proposed Extension of Economic Benefit Recovery to Non-NPDES Violations is Inconsistent with Statute and Legislative Intent.

The Policy incorrectly states that both sections 13351 and 13385(e) of the Porter-Cologne Act require that civil liabilities be set at a level that accounts for any economic benefit or savings gained through violations. (Proposed Policy at p. 31) Under the Clean Water Act, economic benefit is *one* factor to be considered in determining the appropriate penalty for violations. Until recently, this was also the law in California. In 2000, the California Legislature amended Water Code section 13385(e), which applies to surface water discharges, to specify that "[a]t a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation." The Legislature did not, however, similarly amend Water Code section 13351. In fact, legislation proposed during the 2005-2006 session would have amended section 13351 to require recovery of economic benefit for enforcement actions brought pursuant to Water Code section 13350. This amendment was rejected. The State Water Board may not override statute by policy.

Economic benefit must already be considered as a factor in determining the amount of civil liability, consistent with the Clean Water Act requirements for establishing penalties. Recovery of economic benefit as a floor has understandable appeal, but in practice the requirement for surface water discharges has proven to be problematic, as it is difficult to calculate economic benefit with specificity, particularly for municipalities. The process for calculating economic benefit is more art than science, and lacks the precision necessary for establishing mandatory minimums for ACL amounts. Regional Water Boards seldom provide their methodology for calculating economic benefit to the discharger and simply summarize it cursorily in an ACL finding. In the draft proposed Policy, the other factors set forth in the Water Code, such as conduct of the discharger, environmental harm, and history of violations become overshadowed and economic benefit becomes the primary focus. While economic benefit is clearly relevant to assessing a penalty amount, we believe it is appropriately one of multiple factors to be considered in imposing liability.

The concept of economic benefit contained in the draft revised Policy and as calculated in the U.S. EPA's BEN Model is based on ensuring the discharger does not gain financially as a result of not installing the appropriate pollution control measures or facilities. While the application of this concept is appropriate for a private entity to ensure that they do not achieve an unfair advantage over their competition or profit from non-compliance, it is inappropriately applied to public agencies. The monies collected from ratepayers are limited by statute to the costs related to providing service. Even if, in the opinion of the Regional Water Board staff, the public agency has avoided the cost of implementing pollution control facilities that would have prevented the violation, revenues would not have been collected to pay for them. The public agency did not have use of those additional funds and no financial gain was realized based on the cost of money approach as calculated using the

BEN model. Therefore, we recommend that the BEN model be used only as a guide in determining economic benefits for a public agency.

We are also concerned that in calculating economic benefit, Regional Water Boards engage in a process of "second-guessing" the actions of dischargers after the fact. Regional Water Boards are, appropriately, precluded by statute from specifying the manner of compliance with water quality orders. (Wat. Code §13360(a).) Yet, when calculating economic benefit, the Regional Water Boards do not hesitate to identify the actions that, in their opinion, the discharger "should have done" in order to comply and the avoided costs of taking these steps becomes the basis for the economic benefit calculation. The use of the term "in the exercise of reasonable care" in the current version of the Policy was intended to establish an objective standard for evaluating the discharger's actions. This should be clarified and emphasized in the revised version of the Policy.

The Policy Should Provide Additional Guidance Regarding Mandatory Minimum Penalty Provisions.

We appreciate that the proposed Policy provides greater detail regarding mandatory minimum penalties (MMPs). We believe the Policy should go further, however, and address a number of issues that remain subject to varying Regional Water Board interpretation. To assist in consistent and clear application of the law to NPDES permit holders throughout the State, we recommend that the Policy be amended to:

Require MMPs to be assessed within one year of reporting. One key purpose of the MMP law was to draw prompt attention to violations and ensure that compliance issues be addressed as quickly as possible. While not all violations subject to MMPs can be quickly remedied, we have become increasingly concerned that many Regional Water Boards wait three years or more to assess MMPs—by which time, significant penalties may have accumulated. It is unfair to dischargers to have a penalty become immediately payable in full for liabilities that have gradually built up over several years. This is especially challenging for smaller communities with limited budgets and cash flow. Further, there are questions about the legality of enforcement actions that are delayed more than three to five years.[2]

The Policy carries forward language from the existing policy that MMPs should be assessed within seven months. (Policy at p. 21.) This guidance has, in our view, been ineffective. We recommend that the Policy require a Notice of Violation be issued within one year of the date that the violation was reported to the Regional Water Board, followed by an MMP Complaint, where warranted.

Specify that in order to trigger MMPs for "repeat violations," the violations must be of the same pollutant parameter. Water Code section 13385(i)(1)(a) requires that an MMP for "chronic"

[2] These are the relevant statutes of limitation for enforcement actions brought under federal law (28 U.S.C. 2462 (5 years)) and state law (Civil Code §338(i) (3 years).) There are also issues related to laches for untimely enforcement.

violations be assessed where a discharger exceeds "a waste discharge requirement effluent limitation" four times in any period of six consecutive months. To date, the interpretation of this provision has been that *any combination of effluent limitation violations* triggers the penalty. In other words, a violation of a copper effluent limitation, a violation of a TSS limit, a violation of a temperature limit, and a violation of a coliform limitation would result in an MMP. However, this interpretation is arbitrary and has no basis.

For several reasons, the better interpretation of this section is that the chronic violations must be of the same pollutant parameter to result in liability because:

(1) The purpose of allowing three violations without penalty is to allow the discharger to identify and correct the problem that led to the violations. Applying the provision to unrelated effluent limitations does not serve this purpose, as the causes of the violations may be similarly unrelated and the timing of separate violations merely coincidental. Further, under this approach, a discharger could get a penalty for "repeat" or "chronic" violations based upon a single sampling event on a single day; and

(2) The MMP law incorporates by reference federal regulations (see Water Code §13385(h)(2) referencing Appendix A to 40 C.F.R. §123.45), which provide that "effluent violations should be evaluated on a parameter-by-parameter and outfall-by-outfall basis" and, similar to the MMP law, "chronic violations must be reported … if the monthly average permit limits are exceeded any four months in a six-month period." This federal regulation supports the suggested approach to addressing truly chronic violations; and

(3) The statute refers to violations of "a" waste discharge effluent requirement. The use of the word "a" rather than the word "any" indicates that the Legislature intended to penalize repeat violations of a single effluent limitation; and

(4) Each of the other three categories of violations under subsection (i)(1) is very specific—one must fail to file the same report four times, etc.

Specify that, for violations involving effluent limitations expressed as "rolling" averages or medians, a new rolling average should be calculated following an exceedance. The OCC currently advises Regional Water Boards that where the permit specifies that an effluent limitation is to be computed on a rolling basis, there will be "violations for each new time period that the average or median was exceeded." The problem with this approach is that a single sample result yields multiple penalties where the averaging period "straddles" the exceedance. We are aware of at least one discharger that received 21 penalties for a single sample because of the way in which the period of the rolling average was specified. To prevent the unfairness and multiple counting under this circumstance of a single data point, the Policy should direct the Regional Water Boards when enforcing this type of effluent limit, to "start over" with a new rolling average following an

exceedance. This logic is similar to that applied with regard to repeat and serious violations, where the State Water Board has recognized the unfairness of "double counting" violations.

"Maximum Enforcement" Does Not Equate to Maximum Penalties.

We are concerned about a theme that runs through the Policy that achieving maximum enforcement impact equates to maximum monetary penalties. For example, we strongly disagree with the premise that a per gallon approach is appropriate for calculating penalties for *permitted* discharges that may exceed one of dozens of effluent limitations. (Policy at p. 33.) This is especially disconcerting in light of the assertion in the Policy that the statutory maximum penalty is, in many cases, the appropriate penalty for water quality violations. (*Id*. at p. 31.) The statutory maximum penalties for a typical POTW permitted discharge, calculated on a per gallon basis, may be in the millions, or even *billions* of dollars. No one can seriously believe that these types of penalties are appropriate for these effluent violations, which typically have little or no impact on water quality. It is counter-productive to set forth penalty amounts of this magnitude and require the discharger to demonstrate that a number other than the statutory maximum is appropriate. In our experience, none of the Regional Water Boards currently approach ACLs in this way, and we urge the State Water Board not to direct them to do so.

The goal of enforcement should be compliance. In an ideal world, an effective enforcement program would yield fewer enforcement actions and fewer penalties over time, as compliance records improve through deterrence, corrective actions, and improvements. It is important to resist the temptation to "bean count" numbers of enforcement actions and dollars of penalties assessed and instead focus on environmental results and the high rate of compliance by permit holders.

It is Critical that the State Water Board Maintain an Adequate Separation of Functions if State Water Board Staff is Going to be Increasingly Involved in Regional Enforcement Actions.

Several aspects of the proposed policy, including statements about the importance of State Water Board involvement in enforcement actions raises concerns for the regulated community about the State Water Board staff playing the role of both prosecutor and decision maker. There is often a great deal at stake in enforcement actions—monetary and otherwise—and alleged violators are entitled to due process, including an impartial decision maker. The State Water Board reviews Regional Water Board enforcement actions through the petition process in Water Code section 13320. It is critical that safeguards be in place to ensure that Office of Enforcement staff are not advising the State Water Board as well as serving as co-prosecutors with the Regional Water Board staff.

As a related matter, the Policy should briefly set forth the minimum hearing procedures to be used by Regional Water Boards when taking enforcement actions. (Policy at p. 19.)

Thank you for the opportunity to provide our comments regarding the proposed revisions to the Policy. The attachment provides additional comments as well as suggested language changes to implement the revisions recommended in this letter.

Sincerely,

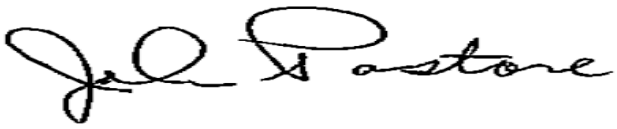
Roberta Larson
CASA

Michele Pla
BACWA

(for) Jim Colston
Tri-TAC

Maura Bonnarens
Tri-TAC

Debbie Webster
CVCWA



John Pastore
SCAP

Attachment

ATTACHMENT

PROPOSED LANGUAGE CHANGES
WATER QUALITY ENFORCEMENT POLICY
JANUARY 8, 2008 DRAFT

Classification of Chronic Toxicity Violations as Class I Priority Violations: (Policy at p. 7)

Comment No. 1: The draft revised Policy states that class I priority violations include, "violations that result in, or present a substantial risk of, causing acute or chronic toxicity to fish or wildlife or a threat to public health." While we concur that violations resulting in significant harm to fish or wildlife should be a priority, we are concerned that this provision of the Policy will be interpreted to mean that *any* violation of a limitation or trigger for whole effluent toxicity (WET) would be considered a class I priority violation. Such an interpretation would be troublesome, in particular for chronic toxicity, due to a high rate of false positives inherent in procedures used to determine chronic toxicity and a lack of nexus between chronic toxicity detection and actual harm to the ambient environment. The current Water Quality Enforcement Policy (at p. 10) acknowledges these shortcomings by stating that numeric whole effluent toxicity effluent violations are not priority violations if appropriate actions are taken to address the violations. We recommend that language similar to that in the current Water Quality Enforcement Policy be retained in the draft revised Policy.

Proposed Revision:

1. Violations that result in, or present a substantial risk of, causing acute or chronic toxicity to fish or wildlife or a threat to public health[2,3];

Add footnote 3:

[3]Violations of numeric chronic toxicity limits are not considered class I priority violations if the relevant WDRs contain requirements for responding to the violations by investigating the cause of the violation (e.g., a Toxicity Identification Evaluation and/or a Toxicity Reduction Evaluation) and the facility is in compliance with these requirements.

Staff Costs: (Policy at p. 19)

Comment No. 2: The draft revised Policy states that "It is the policy of the State Water Board that the maximum amount permissible be recovered to defray the staff costs in bringing the ACL action." This statement is confusing, and infers that the Board's policy is to collect the statutory maximum liability in order to recover staff costs. Typically staff costs are accounted for separately and are added to the total amount of the ACL.

Proposed Revision:

It is the policy of the State Water Board that the ~~maximum~~ ACL amount ~~permissible~~ be ~~recovered~~ adequate to defray the full amount of staff costs in bringing the ACL action.

Mandatory Minimum Penalties for NPDES Violations: (Policy at p. 20)

Comment No. 3: The policy does not accurately reflect the language of the statute.

Proposed Revision:

A Water Board is required by California Water Code section 13385(i) to assess mandatory minimum penalties of $3,000 for each non-serious violation. A non-serious violation occurs if the discharger does any of the following a fourth time in any period of six consecutive months:

a. ~~exceeds~~ Violates a WDR effluent limitation~~s~~;
b. fails to file a report of waste discharge pursuant to California Water Code section 13260;
c. files an incomplete report of waste discharge pursuant to California Water Code section 13260; or
d. ~~exceeds~~ Violates a toxicity discharge limitation where the WDRs do not contain pollutant-specific effluent limitations for toxic pollutants.

Comment No. 4: Additional clarity is needed with regard to the assessment of MMPs. As discussed in the cover letter, the following language changes are recommended:

- Require MMPs to be assessed within one year of reporting.
- Specify that in order to trigger MMPs for "repeat violations," the violations must be of the same pollutant parameter.
- For violations involving effluent limitations expressed as "rolling" averages or medians, a new rolling average should be calculated following an exceedance.

Proposed Revisions:

The six-month time period is calculated as a "rolling" 180 days.

In enacting Water Code section 13385(i)(1)(A), the Legislature intended to address repeat or chronic violations. For this reason, the statute specifies that violation of "a" waste discharge effluent limitation more than three times in a six month period is subject to MMPs. In applying this section, the Regional Water Boards should consider each pollutant parameter separately. For example, a discharger who exceeded an effluent limitation for coliform, one for copper, one for chlorine and one for pH in a six month period would not be subject to penalties under this section (though they may be subject to MMPs as a "serious violation" under subsection h.) On the other hand, a discharger that exceeded coliform four times in that period, would be subject to MMPs for the fourth, and any subsequent, coliform violation(s) during that rolling six month period.

In some cases, an effluent limitation is expressed as a "rolling" average or median. In these cases, a new rolling average should be calculated following an exceedance to avoid accruing multiple penalties for a single violation.

The intent of these portions of the California Water Code is to assist in bringing the State's permitted facilities into compliance with WDRs. Water Boards ~~should~~ shall issue mandatory minimum penalties within ~~seven months~~ one year of the time that they became aware of the violations. This will encourage the discharger to correct the violation in a timely manner.

California Water Code section 13385(j) includes several limited exceptions to the mandatory minimum penalty provisions. The primary exceptions are for discharges that are in compliance with a cease and desist order or TSO under narrowly specified conditions.

Petitions of Enforcement Actions: (Policy at p. 25)

Comment No. 5: The Policy states: "Persons affected by *most* formal enforcement actions or failures to act by a Regional Water Board may file petitions with the State Water Board for review of such actions or failures to act." (Emphasis added.)

We are not aware of any formal actions that are not subject to State Water Board review. Therefore, we recommend the following language revision. If, however, the State Water Board believes some formal enforcement actions to be outside the scope of the Board's petition process, the Policy should specify those actions.

Proposed Revision:

Persons affected by ~~most~~ formal enforcement actions or failures to act by a Regional Water Board may file petitions with the State Water Board for review of such actions or failures to act.

Monetary Assessments in Administrative Civil Liabilities: (Policy at p. 31)

Comment No. 6: We strongly disagree with the statement that the statutory maximum penalty is, "in many cases" the appropriate penalty. To the contrary, we contend that the statutory maximum penalty is *rarely* a fair or appropriate penalty. As noted in the cover letter, in the case of permitted discharges that exceed an effluent limitation, the statutory maximum may be millions or even billions of dollars.

Proposed Revision:

Option 1: ~~In many cases, a strong argument can be made that consideration of the statutory factors can support the statutory maximum as an appropriate penalty for water quality violations, in the absence of any other mitigating evidence.~~ **Option 2**: While in ~~many~~ most cases, consideration of the statutory factors will warrant a reduction from the statutory maximum, ~~a strong argument can be made that~~ in some cases consideration of the statutory factors can support the statutory maximum as an appropriate penalty for water quality violations, in the absence of any other mitigating evidence.

Comment No. 7: As noted in the cover letter, the Policy misstates the law with regard to economic benefit recovery.

Proposed Revision:

Moreover, as discussed below, with the exception of mandatory minimum penalty actions, the Porter-Cologne Act requires that civil liabilities for violations involving surface water discharges be set at a level that accounts for any "economic benefit or savings" violators gained through their violations. (Water Code sections ~~13351,~~ 13385(e).)

Harm to Beneficial Uses: (Policy at p. 33)

Comment No. 8: The Policy states that Water Boards should take into account the "additional" economic harms beyond harms to beneficial uses. It is unclear what additional harms are intended to be captured here, and whether protection of those other activities are within the Water Boards' authority and mission.

Proposed Revision:

Option 1: ~~However, when it is possible to determine such harm, the Water Boards should assess the extent to which the harm to beneficial uses represents the entire economic harm resulting from the violations or whether there are additional harms that should be evaluated.~~

Option 2: However, when it is possible to determine such harm, the Water Boards should assess the extent to which the harm to beneficial uses represents the entire economic harm resulting from the violations or whether there are additional harms that should be evaluated. Examples of such non beneficial use harm that should be evaluated include [specify]

Base Liability: (Policy at p. 34)

Comment No. 9: While our member agencies are committed to reducing sanitary sewer overflows, we disagree with the statement that a sewage spill will "typically" result in a broad range of impacts, including "fish kills." SSOs are primarily a public health concern, and many SSOs do not even reach waters of the state.

Proposed Revision:

For example, a ~~sewage~~ hazardous materials spill ~~will typically~~ may result in a wide variety of impacts, such as fish kills, degradation of wildlife habitat, and public health threats. ~~beach closures~~. For a sewage spill to the ocean in an urban area with high beach use, impacts on beach recreation may represent most of the harm resulting from the spill.

Economic Benefit: (Policy at p. 35-36)

Comment No. 10: As discussed in the cover letter, we are concerned with the manner in which economic benefit is calculated for public agencies. The concept of economic benefit contained in the draft revised Policy and as calculated in the U.S. EPA's BEN Model is based on ensuring the discharger does not gain financially as a result of not installing the appropriate pollution control measures or facilities. While the application of this concept is completely appropriate for a private entity to ensure that they do not achieve an unfair advantage over their competition or profit from non-compliance, it is inappropriately applied to public agencies. First of all, public agencies are by their very nature non-profit entities charged in part with complying with all discharge standards and therefore have no motivation to violate standards for economic gain. Secondly, operations and capital expenditures of public agencies are funded by ratepayers. The monies collected from ratepayers are limited by statute to the costs related to providing service. Even if, in the opinion of the Regional Water Board staff, the public agency has avoided the cost of implementing pollution control facilities that would have prevented the violation, revenues would not have been collected to pay for them. The public agency did not have use of those additional funds and no financial gain was realized based on the cost of money approach as calculated using the BEN model.

In addition, the draft revised Policy indicates that "[e]conomic benefit may have nothing to do with the intent of the discharger." It is unclear why this statement is included and therefore must be elaborated on and discussed, for the purpose of identifying the relevance it has to the determination of economic benefit. A couple of examples would be appropriate.

Proposed Revisions:

Economic benefit should be calculated as follows:

1. Determine those actions required by an enforcement order or an approved facility plan, or that were ~~necessary~~ forseeably necessary in the exercise of reasonable care and could have been feasibly implemented, to prevent the violation. Needed actions may have been capital improvements to the discharger's treatment system, implementation of adequate BMPs or the introduction of procedures to improve management of the treatment system.

* * *

Calculate the present value of the economic benefit. The economic benefit is equal to the present value of the avoided costs plus the "interest" on the delayed costs. For private entities, ~~T~~his calculation reflects the fact that the discharger has had the use of the money that should have been used to avoid the instance of noncompliance. This will seldom be the case for public entities. ~~This~~ The economic benefit calculation, at a minimum, should be done using the USEPA's BEN computer program (the most recent version is accessible at http://www.waterboards.ca.gov/plnspols/docs/wqplans/benmanual.pdf) unless the discharger is a public entity or, in the case of a private discharger, the Water Board determines, or the discharger demonstrates to the satisfaction of the Water Board, that, based on case-specific factors, an alternate method is more appropriate for a particular situation.

Comment No. 11: The Policy states that the economic benefit calculation should reflect "the fact" that the discharger has had use of the money that should have been used to avoid the violation. This is not "a fact" in every situation, particularly where a public agency is involved. In the example of a municipal stormwater discharge, where local agency rate authority is severely restricted by Proposition 218, the funds to implement measures that could have avoided the violation may simply not exist.

Proposed Revision:

4. Calculate the present value of the economic benefit. The economic benefit is equal to the present value of the avoided costs plus the "interest" on the delayed costs. ~~This calculation reflects the fact that the discharger has had the use of the money that should have been used to avoid the instance of noncompliance.~~ This calculation~~, at a minimum, should~~ may be done using the USEPA's BEN[1] computer program (the most recent version is accessible at http://www.waterboards.ca.gov/plnspols/docs/wqplans/benmanual.pdf) unless the Water Board determines, or the discharger demonstrates to the satisfaction of the Water Board, that, based on case-specific factors, an alternate method is more appropriate for a particular situation. . . . The assumptions and information used in the economic benefit calculation should be provided to the discharger upon request.

Staff Costs: (Policy at p. 37)

Comment No. 12: The use of the word "all" when describing which government agency staff costs need to be included in an ACL is confusing.

Proposed Revision:

Staff costs may be one of the "other factors that justice may require", and should be considered when setting an ACL. Staff should calculate the cost that investigation of the violation and preparation of the enforcement action(s) has imposed on ~~all~~ investigating government agencies. Staff costs should be calculated based on the total costs incurred by the Water Boards enforcement or prosecution staff, including legal costs, that are reasonably attributable to the enforcement action. Costs include the total financial impact on the staff of the Water Board, not just wages, and should include benefits and indirect overhead costs.

Statutory Maximum Limits: (Policy at p. 39)

Comment No. 13: As noted above, the Policy language regarding economic benefit is inconsistent with statute. Economic benefit is the minimum that must be assessed under Water Code section 13385(e) but not under 13350. (See also comment No. 13, below.)

Proposed Revision:

Minimum statutory penalties apply only in the case of Mandatory Minimum Penalties under Water Code Section 13385. These minimum penalties are discussed at length in Chapter IV.C.10. ~~It is the policy of the State Water Board that all~~ In addition, ACLs brought pursuant to Water Code section 13385(e) that are not Mandatory Minimum Penalties ~~should~~ must be assessed at a level that at a minimum recovers the economic benefit.

Supplemental Environmental Projects: (Policy at pp. 41-49)

Comment No. 14: As discussed in detail in the cover letter, the proposed provisions regarding SEPs are seriously flawed and should be significantly redrafted. We recommend deleting the selective reference to the U.S EPA SEP policy, which is not binding on the Water Boards and has not been followed in the proposed Policy in other respects (e.g. U.S. EPA places no cap on the percent of penalty that can be directed toward a SEP.)

Proposed Revision:

5. Project Credit

~~There is no requirement that~~ Generally, a SEP should be given a dollar-for-dollar credit against what would be the assessed penalty. ~~A similar approach is taken by USEPA where the credit that a SEP is entitled to receive could be no more than 80% of the value of the SEP unless the SEP is of outstanding quality. USEPA places this general limitation on the amount of project credit based on the fact that acceptable SEPs vary in quality in terms of the environmental benefits provided. similarly~~. The financial consequence and deterrent effect of payment to a SEP is the same as requiring payment to the Cleanup and Abatement Account.

Comment No. 15: SEPs should not be limited to 25% of the ACL amount.

Proposed Revisions:

Pages 42-43:

[X] SEP Credit Relative to Penalty Amount

Except in certain expressly recognized circumstances, the Water Code imposes civil liability on a discharger for violations in the form of monetary payments to designated funds managed by the State Water Board (e.g., Water Code sections 13350, 13385). Therefore, the State Water Board believes that the imposition of such monetary assessments is an important component of its enforcement program for its deterrent effect on potential violations. ~~Unless otherwise required by statute, the credit permitted for a SEP generally should not exceed 25% of the total monetary assessment. This limit is consistent with the Cal/EPA Recomended Guidance on Supplemental Environmental Projects, dated October 2003. Such credit does not include any projected administrative costs incurred by the discharger that are associated with the implementation of a SEP. Only in exceptional circumstances should the value of the SEP be greater than 25% of the total monetary assessment that the discharger is required to pay (exclusive of any future administrative costs paid to a Water Board for the oversight of the implementation of a SEP).~~ However, the Water Board also recognizes that the availability of SEPs is an important tool in settlement of ACL complaints and that SEPs are a valuable source of resources for watershed and water quality improvements.

The amount of an ACL liability that can be directed to a SEP depends upon the particular facts of the case, including the value and scope of the SEP, the seriousness of the violations and the environmental harm, and the conduct of the discharger following the violations, including voluntary clean up and response efforts.

In all cases, the actual monetary liability or civil penalty paid by the discharger should be ~~no less than the amount of economic benefit that the discharger received from its unauthorized activity, plus an additional amount consistent with the factors for monetary liability assessment, so~~ established at a level such that the monetary liability or civil penalty serves as a deterrent to illegal activity and is not viewed by the discharger or the regulated community as an acceptable cost of doing business. A deterrent premium is consistent with the SEP policy of the United States Environmental Protection Agency (April 10, 1998) and is consistent with the statutory factors for liability assessments. Consistent with any ACL settlement every order allowing a SEP must include an analysis of the statutory factors ~~economic benefit~~, as specified in Section VII.~~E, to the discharger resulting from the violations~~ to ensure that the SEP meets these valuation requirements.

Pages 46-47: As noted in the cover letter, we disagree that the State Water Board has such a compelling interest in accumulating money in the Cleanup and Abatement Account as to require severe limitations on SEPs.

~~**F. Addressing the State Water Board's Interest in Supplemental Environmental Projects**~~

~~By statute, the funds generated by civil liabilities under the Water Code are placed into the Waste Discharge Permit Fund or the State Water Pollution Cleanup and Abatement Account (CAA), both of which are under the direction of the State Water Board (see Water Code sections 13350(k), 13385(n) and 13440 – 13443). These funds allow the State Water Board to assist Regional Water Boards and other public agencies to clean up waste or abate the effects of waste. Among the authorized uses, the CAA provides funds specifically for a regional board, upon application to the State Water Board, to pay moneys from the account to a regional board for overseeing and tracking the implementation of a SEP required as a condition of an order imposing administrative civil liability.~~

~~The State Water Board has a strong interest in the use of funds for SEPs that would otherwise be paid into accounts for which it has statutory responsibilities to manage and disperse. As such, the State Water Board must have the option to review SEPs which are greater than 25% of the total monetary assessment against a discharger.~~

~~If a Regional Water Board accepts a SEP that exceeds 25% of the total monetary assessment, that Regional Water Board shall affirmatively notify the State Water Board of that acceptance and the State Water Board may review the Regional Water Board's action on its own motion. The Regional Water Board shall ensure that such a SEP will not be commenced until Regional Board advises the discharger that the State Water~~

~~Board has not exercised its opportunity to review the SEP or the State Water Board has viewed the SEP and made no modifications. The notification shall be by the Regional Board to the Executive Director of the State Water Board and shall describe in detail the proposed SEP, the settlement value of the SEP, the reasons why the Regional Water Board accepted the SEP in lieu of monetary penalties, and the reasons why the SEP amount exceeds the limits on percentage set forth in this section. If the State Water Board chooses to review the settlement, it shall notify the Regional Water Board within thirty (30) days of receipt of the completed notice. The State Water Board will review the SEP after public notice pursuant to its procedures for review of Regional Water Board actions.~~

The Water Boards shall post on the Internet, by March 1 of each year, a list of the completed SEPs for the prior calendar year, and shall post information on the status of SEPs that are in progress during that period. The Water Boards are encouraged to provide information to the public on the status of SEPs on a more frequent basis.

Comment No. 16: (Policy at pp. 43-44)

Education and outreach projects should continue to be eligible for SEP funding. In addition, we believe that projects related to sewer laterals should be eligible for SEPs. Laterals are a portion of the sanitary sewer collection system over which most public agencies do not have jurisdiction, but which may significantly affect the performance of the collection system. Lastly, we request that the Policy reflect the current terminology – "water recycling" instead of reclamation, an outdated and more confusing term.

Proposed Revision:

The SEP should directly benefit or study groundwater or surface water quality or quantity, and the beneficial uses of waters of the State. Examples include but are not limited to:

1. monitoring programs;
2. studies or investigations (e.g., pollutant impact characterization, pollutant source identification, etc.);
3. water or soil treatment;
4. <u>Public education and outreach;</u>
5. habitat restoration or enhancement;
6. pollution prevention or reduction;
7. <u>sewer lateral improvement</u>;
8. wetland, stream, or other waterbody protection, restoration or creation;
9. conservation easements;
10. stream augmentation;
11. water <u>recycling</u> ~~reclamation~~.

* * *

Comment No. 17: (Policy at p. 45)

The general nexus requirement is overly narrow and could preclude the availability of SEPs for certain types of violations.

Proposed Revision:

There must be a nexus between the violation(s) and the SEP. In other words there must be a relationship between the nature or location of the violation and the nature or location of the proposed project. ~~A nexus exists only if the project remediates or reduces the probable overall environmental or public health impacts or risks to which the violation at issue contributes, or if the project is designed to reduce the likelihood that similar violations will occur in the future.~~ A SEP that does not meet one of the following criteria should not be approved. Projects meeting more than one of the criteria should receive extra consideration.

Comment No. 18: (Policy at p. 44)

The proposed revised Policy includes contradictory language regarding when SEPs are legitimate for supplementing Regional Water Board funding for programs. For example, on page 44, Item 17, the draft revised Policy states: "A SEP should never directly benefit a Water Board's *functions*, members of its staff, or family or friends of staff members." (Emphasis added.) However, a couple of paragraphs later (same page, Item 3), the draft revised Policy states, "Projects that provide the Water Boards with added value to existing regulatory activities are encouraged." While some examples are given, they are very vague and it is still unclear which SEPs are appropriate for Regional Water Board activities. We request that additional clarity and examples be provided.

Comment No. 19: (Policy at p. 47)

For Orders allowing SEPs, we request that if the Regional Water Board staff determines that a milestone has not been met, and that penalty funds are at stake, that this determination is made by the Executive Officer, not a designated Water Board representative. A decision that a milestone has not been met, especially in this context, is a very important one, and should not be left to lower level staff to make.

Proposed Revision:

The order must either include a time schedule or reference to a time schedule order with single or multiple milestones and state the amount of liability that will be permanently suspended or excused upon the timely and successful completion of each milestone. Except for the final milestone, the amount of the liability suspended for any portion of a SEP cannot exceed the projected cost of performing that portion of the SEP. The ACL order should state that if the final total cost of the successfully completed SEP is less than the amount suspended for completion of the SEP, the discharger will be required to remit the difference to the CAA or other fund or account as authorized by statute. The ACL order should state that if any SEP milestone is not completed to the satisfaction of the ~~designated Water Board representative~~ Executive Officer of the applicable Water Board by the date of that milestone, the previously suspended liability associated with that milestone will be immediately due and payable to the CAA or other fund or account as authorized by statute. It is the discharger's responsibility to pay the amount(s) due, regardless of any agreements between the discharger and any third party contracted to implement the project. Therefore, the discharger may want to consider a third-party performance bond or the inclusion of a penalty clause in their contract, or secure an agreement that no payment be made from the discharger to the third-party until ~~an authorized representative of the Water Boards~~ the Executive Officer determines that the associated work satisfies the order.

Comment No. 20: (Policy at p. 48, item No. 1)

In the section of the Policy discussing allocation of funds for project tracking, reporting, and oversight, it is indicated that costs for these activities should be fully covered by the discharger and not made a part of the SEP. However, the requirement for oversight is fundamentally a part of the SEP, and only exists because the State Water Board and/or Regional Water Board require this service as part of the SEP. Therefore, this activity should be allowed to be part of the SEP, as has historically been the case. This new requirement is a whole new burden on dischargers, which is unfair and has no basis.

We understand the concern of some State and Regional Water Board staff that SEP oversight can be resource intensive. However, rather than severely restrict SEPs, we think the Policy should encourage the use of third party oversight. This system has been used in the San Francisco Bay region, where it has worked well. For SEPs of more than $10,000, the Regional Water Board requires third party oversight of the project. The Regional Water Board has made arrangements with the Association of Bay Area Governments (ABAG) to provide this oversight, or a Discharger may choose an alternative third party acceptable to the Executive Officer. If ABAG is chosen, six percent of the SEP funds are directed to ABAG for oversight services (the remaining 94% of funds go directly to the SEP). If an alternative third party is chosen, the amount of funds directed to the SEP, as opposed to oversight, may not be less than 94% of the total SEP funding.

Proposed Revision:

For any SEP that requires any oversight by the State Water Board or Regional Water Board, the SEP should include an allowance for the full costs of Water Board staff or third-party oversight ~~must be fully covered by the discharger. Such payments should be made so that the money supplements rather than offsets existing budgets. In many cases, t~~This ~~will~~ may mean that a disinterested contractor will be hired to provide oversight and report to the State Water Board or Regional Water Board. ~~If no arrangement for the payment of necessary oversight can be made, the SEP should be not be approved except under extraordinary circumstances.~~

Comment No. 21: (Policy at p. 51)

The draft revised Policy includes a provision for "Enhanced Compliance Actions, As we understand it, a discharger would be subject to both the full amount of civil liability PLUS an additional amount over and above that amount that will become due if the compliance project is not completed. In many cases, this approach will be unnecessarily punitive because "the monetary liability which is not suspended should be no less than the amount of the economic benefit that the discharger received from its unauthorized activity, plus an additional amount consistent with the factors for monetary liability assessment in section VII." The Policy should specify that these projects should be required only in exceptional circumstances where the discharger's conduct has shown that needed improvements are unlikely to be completed without the threat of additional monetary enforcement.

Comment No. 22: (Policy at p. 53)

The draft revised Policy indicates that Regional Water Board staff will enter all data relating to sanitary sewer overflows. However, we understand that collection system agencies are currently entering these data. If this statement is left as is, it will cause confusion among collection system agencies and therefore we request that you revise it to be more precise concerning what reporting is expected and if more than one entity is reporting, describe the purpose for the multiple-agency reporting.