

BS/EACD Enforcement Plan

(Adopted by the Board on 6-25-09)

The purpose of this enforcement plan is to establish a structure with procedures and guidelines within which the District General Manager (GM) will make decisions relative to the initiation, pursuit, and resolution of enforcement efforts in response to violations of the Barton Springs - Edwards Aquifer Conservation District (District) Rules and Bylaws. The plan is not binding upon the District Board of Directors when acting as the final decision makers in contested cases. The Board of Directors is only bound by the limitations imposed by the District Rules and Bylaws; State statutes, specifically including Chapter 36 of the Texas Water Code; and the District's enabling legislation, SB 988 of the 70th Legislature.

1.0 Enforcement Policy

This plan shall constitute the general policy and procedures of the District in all matters relating to compliance, enforcement, and litigation. This policy does not restrict the District from taking any other actions ordered by the Board of Directors, nor does this policy create any procedural rights for any person inside or outside the District's jurisdiction. It is the policy of the District to file suit to enforce its rules only as a last resort.

2.0 Rule References

The Enforcement Plan conforms to the District Rules and Bylaws currently in effect. It will be modified, if and as necessary, to conform to future rules changes approved by the Board.

3.0 Enforcement Procedures

District enforcement efforts shall be conducted in accordance with the procedures described below. These procedures will be used during the period before litigation is initiated, unless there is a nearly certain and imminent danger to public health or the environment. **Figure 1** depicts the general procedures in a process flowchart form. The enforcement protocol for violations of drought management rules specifically, which is consistent with these procedures, is elaborated in the Appendix to this Plan.

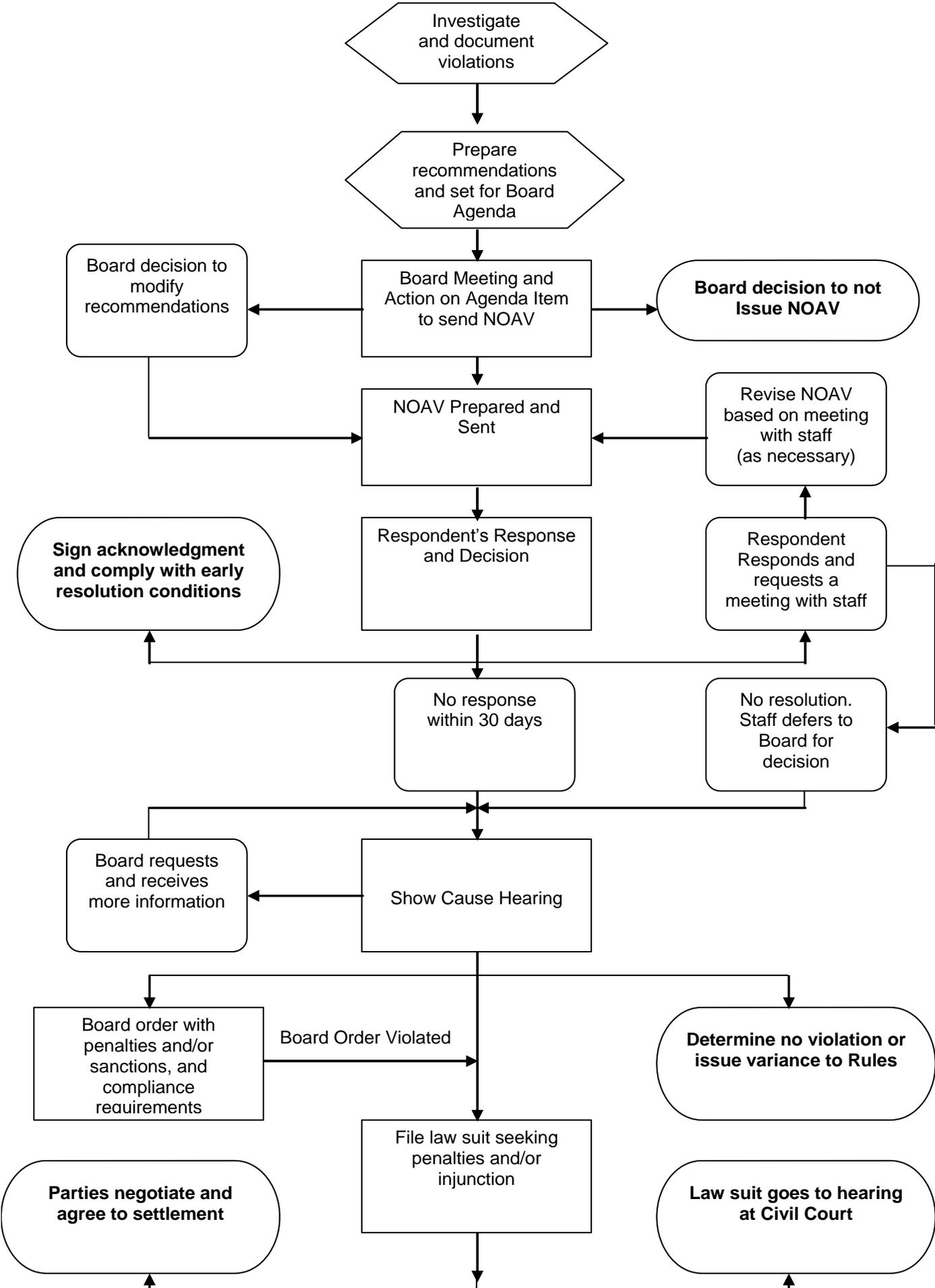
3.1 Complaint Received/Violation Discovered

If a complaint is received or an alleged violation is reported, staff shall obtain sufficient preliminary information to determine if further investigation is necessary:

- Does the District have jurisdiction over the matter?
- Is there enough reliable information to proceed with an investigation?

Once this is determined, staff may proceed with an investigation. Investigations may also be initiated if staff discovers a violation that satisfies these criteria.

Figure 1 - BS/EACD Enforcement Process



3.2 Conduct of Investigation

Investigations shall be conducted by staff in accordance with District Rule 3-8.3. Once the determination has been made to proceed with an investigation, staff shall conduct a full investigation and provide a written report with all of the pertinent findings and information to include:

- Basic Information (i.e. Respondent/Permittees name, contact information, well location if applicable, etc.);
- Investigation Summary;
- Alleged Violations;
- Chronology of Pertinent Events; and
- Pertinent Documentation.

Upon completion of the investigation report, the GM shall determine if sufficient information exists to support Board discussion and possible action related to the issuance of a Notice of Alleged Violation (NOAV).

3.3 Board Action

Should the GM make this determination, the matter will be set on the Board's regular meeting agenda for possible Board action. Staff shall prepare the appropriate materials to be provided with the backup for the next available board meeting to include the investigation report and staff's recommendations. Staff recommendations should include:

- recommended action (i.e. issuance of NOAV);
- indicated penalties for each alleged violation;
- possible sanctions and/or compliance requirements; and
- prospective early resolution conditions.

Penalties recommended by the staff shall be determined in accordance with the *Violations and Penalty Assessment Guidelines* (see Section 4 below) and shall include a discussion of the factors used to determine what amount within the specified penalty range was chosen. Early resolution conditions shall be included to provide an option and an incentive for more or less immediate resolution and compliance, before litigation. The GM will generally recommend a reduced penalty associated with an early resolution incentive based on a 50-75% reduction of the recommended penalty amounts. A reduction outside of this range may also be recommended if appropriate.

If the Board determines that the violations are not substantiated and that an NOAV should not be prepared and sent, the case will then either be investigated further or considered closed, at the Board's direction. Otherwise, staff will prepare an NOAV incorporating the staff recommendations or modify the allegations and conditions in accordance with the instructions provided by the Board.

3.4 Notice of Alleged Violation

Staff will send an NOAV with the Board-approved allegations, penalties, and conditions and a 30 day response time. The NOAV shall also offer an early resolution incentive that shall include an acknowledgment of the violations to be signed by the Respondent, a reduced penalty amount, and a commitment to all necessary compliance requirements. The option for early resolution shall only be available if the acknowledgment is signed and the penalties are paid within the 30-day response time. This requirement will be included in proposed rule-making.

Upon receipt of the NOAV, the Respondent has the option to accept the conditions of the early resolution offer and resolve the case or to contact staff and arrange a meeting for the purpose of discussing the alleged violations. If a meeting is scheduled, staff may modify the original NOAV as necessary based on the discussions or may defer to a public hearing for a Board decision on the matter. If no response is received within the response time, the case will default to a public hearing for a Board decision on the matter. Pursuant to Rule 3-8.2, the public hearing (Show Cause Hearing) is a hearing where the Respondent will be cited to appear before the Board to show cause why an enforcement action should not be initiated.

3.5 Show Cause Hearing

A Show Cause Hearing shall be conducted 1) for all cases not resolved after the issuance of an NOAV, and 2) for all cases where no response to the NOAV was received before the expiration of the response timeframe. At the hearing, staff shall provide the investigation report, pertinent documentation, and testimony to the Board to substantiate the alleged violations. A Show Cause Hearing will follow the contested hearing rules, including notice requirements, under Bylaw 4-9. The Respondent will also have an opportunity to participate and present evidence to show cause to the Board why an enforcement action should not be initiated. The enforcement action(s) by the Board that may result from a show-cause hearing include both seeking of civil penalties to be assessed by a court and/or authorizing sanctions for permittees including written warnings, reprimands, suspension, or revocation of a permit.

On the basis of evidence presented at the hearing, the Board may: 1) dismiss the NOAV because it determines that no violations have occurred; 2) grant a Variance to the District rules; 3) issue an order that amends, revokes, suspends, or otherwise modifies the permit; or 4) file a lawsuit seeking civil penalties and injunction. If a Variance is sought by the Respondent, the Respondent must request the Variance in advance of hearing and also satisfy all of the specified criteria in accordance with Rule 3-1.25 or 3-7.10 to obtain a Variance. The Board may also request additional information and reconsider the additional information once received at a subsequent Show Cause Hearing at a later date.

3.6 Board Order/Civil Suit

If the Board determines that an enforcement action should be initiated, a Board Order will be issued that outlines the findings and either initiates a lawsuit or specifies the appropriate penalties, compliance requirements, and/or sanctions resulting from the Show Cause Hearing. In the latter instance, if the Board Order is violated, the District will send a Notice of Intent to Sue to initiate legal proceedings against the Respondent in District Court. The lawsuit will generally seek civil penalties, court costs, attorney's fees, and/or injunctive relief. Once a

lawsuit is initiated, the parties may at that point negotiate a settlement. If a settlement is not negotiated, the lawsuit will go forward in civil court.

4.0 Violations and Penalty Assessment Guidelines

The Barton Springs/Edwards Aquifer Conservation District (the District) may pursue enforcement penalties in addition to other District compliance efforts and options. Pursuant to Section 3-8.9 of the District's Rules, the District may assess penalties for each act of violation and for each day of violation, and each day a violation continues may be considered a separate, specific violation. Multiple violations of District Rules may result in the assessment of multiple penalties. Pursuit of a penalty outside of the penalty matrix may be permitted only with the express approval of the Board when exceptional circumstances warrant a departure from the Guidelines. Penalties assessed under these Guidelines may be waived by the District Board, following completion by the violator of one or more conservation projects approved by the District. Provisions associated with assessment and pursuit of penalties will be included in proposed rule-making.

4.1 Penalty Assessment Criteria: In determining the amount of a civil penalty to be assessed within the ranges presented, the District will consider the following factors:

- (1) The severity or seriousness of the violation;
- (2) Whether the violation was willful, intentional, or could have been reasonably anticipated and avoided;
- (3) Whether the violator acted in good faith to avoid or mitigate the violation, or to correct the violation after it became apparent and compensate those affected;
- (4) The economic gain obtained by the violator through the violation;
- (5) Whether similar violations have been committed in the past;
- (6) The amount necessary to deter future violations;
- (7) Any other matter that justice may require;

The Board may also choose to assess sanctions, including permit suspension or revocation, based on the consideration of these factors. Provisions of this subsection will be included in proposed rule-making.

4.2 Violations by Type and Penalty Ranges

The violations and associated ranges of penalties in the subsections below, including the tiers of non-compliance with drought provisions shown in the Appendix for targeting enforcement activities, will be included in proposed rule-making.

4.2.1 General Violations: Violations of District Rules not covered by other penalty categories, including but not limited to the following specific Rules:

- § 3-1.1: failure to register wells;
- §§ 3-1.11(E), 3-1.15, 3-8.7: failure to timely report or failure to report accurate pumpage reports and water-quality reports for non-exempt wells;
- § 3-1.11(F): failure to provide access to well site during normal business hours or emergencies, or the failure to cooperate fully in any reasonable inspection of the well site or in any well monitoring or sampling by the District;
- § 3-1.16(C): non-payment of fees following past due notice by District;
- § 3-5.1: failure to register abandoned, open or uncovered well; and
- § 3-6.7: failure to prepare, adopt or implement a user conservation plan.

Penalty Range: \$50-\$250 per violation per day

4.2.2 Well Violations: Violations of District Rules relating to the drilling and operation of wells, including but not limited to the following specific Rules:

- §§ 3-1.2, 3-1.4, 3-4.1: constructing a well, drilling a well, modifying a well, completing a well, changing type of well use, performing dye tracing operations on a well, plugging a well, abandoning a well or altering well size without District authorization or advance notice;
- § 3-1.3: pumping from or operation of non-exempt wells without a permit;
- § 3-2.1: failure to employ water meter where required;
- § 3-4.4: failure to drill or complete a well in accordance with State well construction standards, District Rules, and/or District Well Construction Standards
- § 3-4.5: installation of pump and /or equipment on wells not registered with the District; and
- § 3-5.3: failure to plug or cap abandoned, open or uncovered wells in accordance with District Rules and Well Construction Standards.

Penalty Range: \$250-\$500 per violation per day

4.2.3 Falsification/Tampering Violations: Violations of District Rules relating to the falsification of information provided to the District regarding pumping from and monitoring of the groundwater, including but not limited to the following specific Rules:

- § 3-1.4: falsifying information in application for well registration, permits, or well drilling or modification authorization;
- § 3-2.4: false reporting or logging of meter reading, intentionally tampering with or disabling a meter, or similar actions to avoid accurate reporting of groundwater use and pumpage; and,
- § 3-2.5: tampering with, altering, damaging, or removing a water meter seal or tag.

Penalty Range: \$500 – \$1,000 per violation per day

4.2.4 Waste/Pollution Violations: Violations of District Rules relating to the sealing of abandoned, open or uncovered wells, the wasteful use of groundwater, and the pollution of the groundwater, including but not limited to the following specific Rules:

- § 3-3.1, 3-3.2, 3-3.5: producing or using groundwater in such a manner or under such conditions as to constitute waste;
- § 3-3.3: causing or allowing the introduction of saline-water pollutants or other deleterious matter from another stratum, from the surface of the ground, or from the operation of a well;
- § 3-3.4: causing or allowing pollutants to enter the groundwater reservoir through recharge features, whether natural or manmade; and,
- § 3-5: failure to properly plug or cap an abandoned, open, or uncovered well allowing pollutants to enter the groundwater reservoir through an improperly sealed or capped well.

Penalty Range: \$500 - \$1,000 per violation per day

4.2.5 Drought Violations: Penalties for the violations of District Rules §§3-1.11(E), 3-1.15, 3-2.4, 3-3, and 3-8.7 will be assessed in accordance with the ranges specified above during Alarm Stage Drought and at twice that amount during Critical Stage Drought. Violations of District Rules relating to the implementation of user drought contingency measures and other drought related violations, including but not limited to the following specific rules:

§3-7.5 Failure to implement measures of the user drought contingency plan

Penalty Range: \$250 - \$500 per violation per day and at twice the amount during Critical Stage Drought

§3.7.7 Failure to reduce pumpage during District declared drought in accordance with monthly pumpage limits of the UDCP

Penalty Range: Penalties for violations of 3-3.7 shall be determined on a monthly basis, with each month constituting a new violation. Daily penalties shall be assessed according to the following penalty matrices:

Daily Penalties During Alarm Stage Drought			
Rule 3-7.7.B(1)			
Permitted Pumpage	Overpumpage Level		
	<i>Level A</i>	<i>Level B</i>	<i>Level C</i>
<i>Tier 1</i>	\$50-\$100	\$100-\$200	\$200-\$400
<i>Tier 2</i>	\$200-\$400	\$400-\$800	\$800-\$1,600
<i>Tier 3</i>	\$800-\$1,600	\$1,600-\$3,200	\$3,200-\$5,000

Daily Penalties During Critical Stage Drought Rule 3-7.7.B(2)			
Permitted Pumpage	Overpumpage Levels		
	Level A	Level B	Level C
Tier 1	\$100-\$200	\$200-\$400	\$400-\$800
Tier 2	\$400-\$800	\$800-\$1,600	\$1,600-\$3,200
Tier 3	\$1,600-\$3,200	\$3,200-\$6,400	\$6,400-\$10,000

Where:

Permitted Pumpage (gallons/year):		% Pumpage over Monthly Limits:	
Tier 1:	< 12,000,000	Level A:	< 25%
Tier 2:	≥ 12,000,000 and < 120,000,000	Level B:	> 25% and < 100%
Tier 3:	≥ 120,000,000	Level C:	> 100%

Appendix ***Drought Management and Enforcement Process***

1.0 Drought Enforcement Strategy

The District's approach to drought management described here flows from and is consistent with District Rules 3-7.8 and 3-8. It describes the appropriate implementation mechanisms, public awareness efforts, aquifer and drought monitoring, and permittee performance monitoring and assessment to be used during drought. Compliance and enforcement efforts specified below elaborate District Rule 3-8 and center on assessment of permittee performance on a monthly basis to identify the various levels of non-compliance with mandatory pumpage reductions. This monthly assessment will focus the District's early efforts on permittees with the more egregious levels of over-pumpage, on the basis of both the percentage of pumpage over their monthly pumpage limits and the volumes of their permitted pumpage.

2.0 Implementation Mechanisms

2.1 Drought Declaration Notices

The District will declare the commencement of drought by sending written notice to all District permittees when specified aquifer conditions are met in accordance with the approved District drought trigger methodology and after the Board has approved the declaration. The staff will assess the continuation of and stage of an indicated drought continuously, and notify all permittees when a more or less severe drought stage is declared and when the drought no longer exists

2.2 Public Awareness

Once drought is officially declared by the District, the District will implement measures to provide public awareness including but not limited to:

- Web site updates on aquifer conditions and permittee pumpage performance
- Press releases and guest columns in the local newspapers
- Recurring articles and columns in District newsletter
- Drought and aquifer condition updates provided via e-newsletter to permittees
- Outreach and education by District educators.

2.3 Monthly Compliance Evaluations

- Monthly evaluations of permittee performance and compliance with monthly drought limits will begin on the latest date that all meters readings are required to be submitted each month (the 5th of each month). Staff will identify permittees who have failed to report meter readings by the monthly reporting deadline while in District-declared drought. District will notify all those who have not reported that the District will obtain the meter readings at a fee of \$50 to the permittee. District staff will follow up with meter readings for all delinquent permittees to ensure necessary readings are available to assess drought compliance.

- Should a more or less severe drought stage be declared in the middle of a particular month, the District will evaluate and measure compliance with the less stringent drought stage requirements for that month that the status change occurred. Compliance with the measures of the newly declared stage will be required in the following month.
- Staff will generate a list of non-compliant permittees based on permitted volume and percentage over-pumped. Non-compliance will be categorized in tiers in accordance with the following criteria:

Permitted Pumpage (gallons/year)		% Pumpage over Monthly Limits	
Tier 1:	< 12,000,000	Level A:	< 25%
Tier 2:	≥ 12,000,000 and < 120,000,000	Level B:	≥ 25% and 100%
Tier 3:	≥ 120,000,000	Level C:	≥ 100%

- Staff will send notices of overpumpage to all non-compliant permittees to notify them of their overpumpage and to inform them of their level of non-compliance. This notice will also include the amount of a drought management fee if a fee is assessed without an equivalent credit.
- Staff will identify and red flag suspect permittee meter readings, on the basis of previous readings, and conduct follow-up meter reading verifications.
- Staff will monitor pumping trends of those permittees that repeatedly over-pump monthly limits while in Drought and take action based on Enforcement Procedures outlined below.
- Staff will evaluate compliance trends of all other permittees to identify efforts to comply or escalating overpumpage.
- Staff will report and update monthly, all non-performing permittees after the third consecutive enforceable month of District declared drought, by posting a list of those permittees not meeting their monthly pumpage limits on the District website and at the District office for public review.

2.4 Imposition of the Drought Management Regulatory Fee for Non-compliance

In accordance with District Rule 3-7.9, the District will impose a drought management fee to all individual permittees permitted for more than 2,000,000 gallons annually (excluding all permittees under general permits) starting after two full months of District declared Alarm or Critical Stage Drought. A credit of the fee will be applied for each month that an individual permittee that does not exceed the monthly pumpage limits as specified in the prevailing UDCP by more than five (5%). The appropriate fees are determined based on the outside diameter of the production zone casing of the permitted well or an average of the casing size of all wells in an aggregate system. The fees are as follows:

- ≤ 5" outside diameter = \$100/month
- > 5" or ≤ 10" outside diameter = \$250/month
- > 10" outside diameter = \$500/month

2.5 Determination of Occurrence of Non-compliance

Determinations of an occurrence of substantial non-compliance will be made based on 1) repeated events of non-compliance, 2) specific causes of overpumpage, and 3) the permittee's response to the reported overpumpage. In determining an occurrence, the District will take into consideration the permittee's demonstrated efforts to achieve pumpage reductions and any documented trends in prior water use reductions.

3.0 Timelines and Phasing of Determinations

Initial Month of a Drought Stage: No enforcement will be initiated for non-compliance in the initial month of Alarm Stage Drought if the timing of the declaration does not allow for a full month (after notice has been provided to the permittees) to begin assessing compliance with monthly limits. Overpumpage notices will be sent to all permittees who over-pumped their monthly pumpage limits to inform them of the on-going pumpage assessment being conducted by the District during drought and to notify them of the District's authority to enforce against non-compliance. For the initial month of Critical Stage Drought, the permittees will only be subject to the conditions of the Alarm Stage Drought until such time that a full month is available to assess compliance.

1-3 Months: Enforcement efforts will focus initially on the more egregious and sustained non-compliance by the large volume permittees. During the first three consecutive enforceable months of District declared drought, monthly assessment of overpumpage violations will focus on *Tier 3* permittees with *Level B/C* non-compliance. As a practical matter, the initial assessment and enforcement activities during this period will focus on *Tier 3* permittees with *Level C* non-compliance plus those who are irrigators.

4-6 Months: After the third consecutive enforceable month of District declared drought, monthly assessment of non-compliance will be expanded to include *Tier 2* permittees. Evaluation of compliance with Critical Stage Drought requirements will begin after the first full enforceable month and will focus on *Tier 2* and *Tier 3* permittees with *Level B/C* non-compliance.

After 6 Months: After the first six (6) consecutive enforceable months of District declared drought, monthly assessment of non-compliance will continue by the same criteria for *Tier 2* and *Tier 3* permittees and will be expanded to include *Tier 1* permittees. Enforcement efforts for *Tier 1* permittees permitted for more than 2,000,000 gallons annually will be reserved for only those occurrences that are egregious and/or recurrent in nature. This will be determined when a *Tier 1* permittee reports six (6) or more months of level B or greater overpumpage or when the monthly volume overpumped equals a volume that would trigger an enforcement action for a *Tier 2* permittee. Enforcement efforts for *Tier 1* permittees permitted for 2,000,000 gallons or less will generally be reserved only for non-compliance that warrants enforcement as determined by the Board.

4.0 Drought Enforcement Procedures

Levels of non-compliance will be assessed with actions taken in accordance with the Districts Enforcement Plan and Procedures and the following enforcement protocol for those permittees with consistent or increasing levels of non-compliance*.

1st Occurrence: For the initial occurrence of non-compliance, a meeting or teleconference will be arranged with the permittee representative and the District GM and staff to discuss the particular causes of the non-compliance. The discussion will focus on compliance with the measures of the UDCP and identifying causes of excessive water use/loss or other possible relevant causes for overpumpage. Specific commitments and timelines to achieve pumpage reductions will be requested and documented.

2nd Occurrence: For those permittees with a first occurrence of non-compliance and recurrent months of reported non-compliance, staff may refer the case to the Board with a recommendation to issue a NOAV. Further enforcement efforts will proceed in accordance with the District *Enforcement Procedures* and the *Penalty Assessment Guidelines*.

For those permittees with a first violation who continue to have recurrent months of reported non-compliance but with some improvement, a meeting will be arranged with the permittee representatives, GM and staff, and the appropriate District Director at the District office. Discussion will focus on the implementation of the documented measures, the success or failure of those specific measures, and the commitments to achieve pumpage reductions resulting from the first violation discussions. More detailed analysis of causes for continued non-compliance will be conducted to result in more specific and binding measures for committed pumpage reductions by the permittee.

3rd Occurrence:

For permittees with a second occurrence who continue to have multiple months of reported non-compliance, the GM may refer the case to the Board with a recommendation to issue an NOAV. Further enforcement efforts will proceed in accordance with the District *Enforcement Procedures* and the *Penalty Assessment Guidelines*.

* If a permittee is non-responsive to any of the bulleted elements of these enforcement procedures, the GM may recommend to Board that either an NOAV be issued, a Show Cause Hearing be conducted, or an enforcement action be pursued on the violation immediately, whichever is more likely to elicit a constructive response.