



June 13, 2007

Reply to:

813 Sixth Street, Third Floor
Sacramento, CA 95814
(916) 446-7979
blarson@lawssd.com

Via Electronic Mail & Hand-Delivery

Ms. Tam M. Doduc, Chair & Members
State Water Resources Control Board
1001 "I" Street, 24th Floor
Sacramento, CA 95814

Attention: Ms. Song Her, Clerk to the Board
commentletters@waterboards.ca.gov

Re: **Water Quality Enforcement Workshop**

Dear Chair Doduc & Members of the Board:

The California Association of Sanitation Agencies, Tri-TAC, the Bay Area Clean Water Agencies, and the Southern California Alliance of POTWs appreciate the opportunity to provide comments on the Water Quality Enforcement Policy (WQEP). The Policy has been in place for five years, and we agree it is prudent to periodically review plans and policies to assess their effectiveness and identify areas that require revision. In general, we believe the WQEP has worked well, and the appropriate approach would be to update and make clarifying amendments to the existing policy, rather than undertake wholesale revisions.

As you know, the WQEP is an important document for the regulated community. The Policy sets forth the State Water Board's approach to enforcement and provides important guidance to the Regional Water Boards for undertaking and structuring enforcement actions. While we welcome the chance to provide you with our thoughts on the WQEP, we stress that these comments are very preliminary in nature and were compiled within a very limited time frame. If the State Water Board undertakes revisions to the WQEP, we request that the process for doing so involve stakeholders in a meaningful way and that further input not be limited to comments on a revised draft policy developed by staff.

1. What modifications do you recommend to the WQEP?

A. The WQEP Should Focus Regional Water Board Enforcement Efforts on Violations that Significantly Threaten Water Quality.

The WQEP discussion of “Enforcement Priorities” is heavily weighted toward enforcing violations of NPDES permits. Our members take compliance with their permits seriously, and do not suggest that meeting the terms and conditions of these permits is not important. However, from a water quality standpoint, enforcement of permit violations that are administrative in nature is not the best use of Regional Water Board staff resources. Rather, we recommend that the WQEP specify that enforcement of non-permitted activities and discharges, such as General Permit non-filers and unauthorized spills be the focus of State and Regional Water Board enforcement efforts. The existing Mandatory Minimum Penalty (MMP) program already addresses NPDES permit violations, including most reporting issues.

B. The WQEP Should be Modified to Reflect Recent Statutory Changes.

Perhaps the most obvious area in which the WQEP requires revision relates to Water Code revisions that have been enacted by the Legislature since 2002. Particularly, with regard to the sections dealing with MMPs, a series of bills have altered the statutory framework for this type of enforcement.¹ In addition, last year’s SB 729 (Simitian) made a number of changes to various enforcement-related code provisions. These legislative changes should be incorporated into the WQEP.

C. The WQEP Should Clarify Key Aspects of the Calculation and Assessment of MMPs.

Not only have we had five years to work with the WQEP, but we have also had seven years of experience with the MMP law. While the statute sets forth the general framework, many aspects of MMP implementation remain subject to interpretation. To assist in consistent and clear application of the law to NPDES permit holders throughout the State, we recommend that the WQEP be amended to:

- Require, as a matter of policy, that a Notice of Violation be issued within one year of the date the violation was reported to the Regional Water Board, followed by an MMP Complaint, where warranted.

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

¹ These bills include AB 2351 (Canciamilla); AB 1541 (Montanez); and AB 1733 (Aanestad).

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. This is especially challenging for smaller communities with limited budgets and cash flow. Further, as discussed below, there are questions about the legality of enforcement actions that are delayed more than three to five years.

- 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” 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 Office of Chief Counsel’s interpretation of this provision is 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.

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

- (1) 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;
- (2) Each of the other three categories of violations under subsection (i)(1) are very specific—one must fail to file the same report four times, etc.;
- (3) 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. 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

(4) 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 guidance supports the suggested approach to addressing truly chronic violations.

- Specify that where a numeric effluent limit remains in a permit, but (1) the limit, or the basis for the limit, has subsequently been invalidated or removed from the Basin Plan, or (2) other changes in applicable law or policy have rendered the limit no longer applicable to the discharge, MMPs should not be assessed in those cases. Similarly, where an effluent limitation was included in a previous permit and was removed or modified in a subsequent permit, the Regional Water Boards should not “reach back” to the obsolete permit to assess MMPs².
- 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 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. At least one discharger 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 WQEP should direct the Regional Water Boards to avoid the use of rolling effluent limits, or if enforcing this type of existing limits, 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.

² The occurrence of this type of MMP complaint would be largely avoided by requiring that MMPs be timely assessed, as recommended above.

D. The WQEP Should Set Forth the Relevant Statutes of Limitations for Bringing Enforcement Actions.

The ability of Regional Water Boards to reach back in time to enforce violations is not unlimited. The WQEP should refer to 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).) Alternatively, under a theory of laches, delinquent enforcement actions should be disallowed. Such tardy enforcement lacks the policy reasons for enforcement (early notice, opportunity for correction, etc.) and becomes merely a rote exercise that has little to no effect on water quality.

E. The Funding of Supplemental Environmental Projects Should Be Encouraged and the Process Streamlined.

Supplemental Environmental Projects (SEPs) present an opportunity to allow a portion of monetary penalties to be expended locally for the benefit of the community and watershed affected by the alleged violations. The opportunity to direct some of the ACL amount toward a SEP is often a key factor in resolving enforcement actions without a hearing—an important consideration as the number of formal enforcement actions continues to increase.

Unfortunately, SEPs are sometimes viewed with suspicion by Regional Water Boards. The WQEP should encourage Regional Water Boards and staff to use SEPs, and to follow the qualification and nexus criteria that best fits the violations leading to the enforcement action. The self-certification approach used by several Regional Water Boards could be included in the WQEP as a way for dischargers to demonstrate completion and/or compliance without requiring large amounts of Regional Water Board staff resources for oversight. We also recommend that the Regional Water Boards establish standing mitigation funds or “banks” to which SEP payments can be made, and which can be administered by neutral third party organizations. There are several advantages of such a banking approach, including the ability to amass a larger total dollar amount and, therefore, take on larger projects; establishing the contract and structure for the bank up front and not having to go through the contract process repeatedly with each enforcement action; and limiting the need for oversight and monitoring by individual Regional Water Board staff.

Section IX.A. “Process for Project Selection”, calls for a list of candidate SEPs to be made available on the Internet along with information on completed and in progress SEPs. The “Status of SEPs”, <http://www.swrcb.ca.gov/ciwqs/publicreports.html#sep>, lists SEPS that are in progress or completed, but a list of candidate SEPS has never been completed and made available on the web. We recommend that a non-exclusive statewide database be generated, perhaps using a similar search engine to “Enforcement

Orders”, <http://ciwqs.waterboards.ca.gov/ciwqs/enforcementOrders.jsp>, whereby the public can easily search for candidate SEPs by Region, criteria, or nexus. SEPs that include outreach and education by non-profit groups could greatly assist the Regional Water Boards in their current outreach and education efforts. SEPs are a way to increase resources to improve the environment and water quality and, therefore, should be encouraged through easy access for approved projects throughout the state. A list of projects contained in such a database, while requiring vetting by State and/or Regional Water Board staff prior to inclusion in the database, should not need to be approved by the Board itself, and should not be considered the exclusive list from which projects can be selected.

Another alternative would be for the SEP funds to be contributed to a regional program, such as the Regional Monitoring Program in Region 2 or the Southern California Coastal Water Research Project. Both of these programs have no shortage of special studies that often have to wait for funding. SEP funds could easily be directed into these programs and provide immediate benefits.

F. The Compliance Project Provisions Should be Updated and Revised to Clarify the Ability to Apply Small Community Wastewater Grant Funds to Compliance Projects.

As discussed above, the WQEP should be updated to reflect recent changes in governing statutory provisions. Water Code section 13385(k) has been amended to require POTWs to prepare a financing plan for a proposed compliance project, and also re-defines eligible communities. Section X.A(c) of the WQEP should be revised to reflect these changes.

The compliance project provisions are silent with regard to whether eligible communities may apply funds from Small Community Wastewater Grants (SCWG) to compliance projects. Currently, some Regional Water Boards have concluded that SCWG funding may not be used for compliance projects. We note that the use of these funds is not precluded by the language of the Water Code, and are concerned that this interpretation undermines the intent of the SCWG funding under Propositions 40 and 50.

The SCWG program was created to aid small, financially disadvantaged communities in correcting public health and water quality problems. Small communities for the SCWG program are defined as municipalities with a population of less than 20,000 persons. The State Water Board has further determined that to be eligible for funding, the small community must have an annual median household income (MHI) of \$37,994 or less. (*See* SCWG Guidelines at p. 1.) In ranking projects, those projects designed to address existing problems are given preference over those that address potential problems. (*Id.* at p. 6.) Thus, to be eligible for very limited funding, a

community must already have a problem, and thus is likely subject to enforcement, including MMPs. Yet, some Regional Water Boards preclude the use SCWG funding to fix the problem and bring the community into compliance—actually exacerbating the financial hardship. Many small communities cannot afford to pay the penalties because of the need to make facility upgrades, which was the primary impetus behind the Legislature’s enactment of the compliance project provisions in lieu of mandatory minimum penalties. To avoid such a result, we recommend that the enforcement policy be amended to clarify that the source of funding for the compliance project is not a relevant factor in the Regional Water Boards decision to allow a compliance project.

2. What factors should the Water Boards consider in ranking their enforcement priorities? What particular water quality issues should the Water Boards make a priority for enforcement?

As touched on briefly above, we believe that the Water Boards should set the highest priority on enforcement of those violations that present the greatest threat to water quality and public health. We recommend the following factors be considered in undertaking enforcement action, particularly administrative civil liability complaints:

- Impact/threat of the violation to water quality and public health.
- Chronic or repeat violations.
- Willful violations of law.
- Whether the violations could have been prevented in the exercise of reasonable care.

With regard to which water quality issues should be a priority for enforcement, we caution against including specific issue or program priorities in the WQEP itself. While specific program emphases and enforcement target areas may need to be reviewed and potentially revised almost annually, the Policy should have a longer “shelf life” and provide more of a general framework. That said, we think the Water Boards’ focus in the near term should be on the following issues:

- Non-filers and unpermitted discharges that are required to obtain permits.
- Sanitary Sewer Overflows that are chronic where the agency has not complied with the terms of the Statewide WDRs for Sanitary Sewer Systems in accordance with the enforcement discretion provisions of the WDRs. (Order WQ 2006-003.)
- Submittal of falsified information.

3. How can and should the Water Boards measure the effectiveness of their water quality enforcement programs in such areas as compliance rates, environmental quality indicators, etc?

A strong, fair and adequately staffed enforcement effort is key to achieving the Water Boards' mission to protect the State's groundwaters and surface waters. In the current enforcement climate, it is sometimes forgotten that not all violations rise to the level that warrants the amount of staff time required to bring a formal enforcement action. Regional Water Boards staff should be allowed to exercise their enforcement discretion in a way that best protects water quality, maximizes dwindling staff resources, and ultimately leads to compliance, not only with substantive permit requirements, but more importantly, with water quality standards. Compliance assistance tools, or informal enforcement actions, are often the most effective and resource-efficient tools for bringing about compliance, and their use should be encouraged as part of a progressive approach to enforcement. Thus, the use of tools such as meetings with dischargers to discuss compliance issues or concerns, audits and communication of audit results to dischargers, enforcement letters, and notices of violation, should be encouraged and given a high priority for staff.

The true measure of whether water quality enforcement has been effective is water quality protection. We urge the State Water Board to resist the temptation to measure effectiveness by "bean counting" the numbers of enforcement actions, numbers of violations enforced, and the dollars in penalties collected in favor of measuring true water quality benefits. With regard to compliance rates, we think it is critical that the measures selected to quantify these benchmarks are fair and do not paint an unnecessarily bleak picture. The majority of permitted entities comply day in and day out with hundreds of effluent and receiving water limitations, prohibitions, special provisions and monitoring and reporting requirements. Perhaps reporting percent compliance and non-compliance as a whole would provide a realistic metric, with a goal of increasing the percentage for compliance. Similarly, reporting percent compliance and non-compliance with water quality standards as a State or region would provide additional metrics with which to measure progress, understanding that not all waters have been fully assessed for compliance.

It is also essential that any baseline for comparison be clear and well understood. For example, in-permit compliance schedules in NPDES permits for effluent limitations derived from California Toxics Rule (CTR) criteria will no longer be available after May 2010 (unless this Board acts to modify that date). This sunset of potential CTR compliance schedules is expected to result in a higher number of permit holders being subjected to enforcement orders, such as time schedule orders and cease and desist orders, and likely citizen suits. However, this should not be considered a true or significant increase in noncompliance, since the only change is the legal mechanism by

which time to comply is provided.

4. What information on enforcement should the Water Boards make available to the public through their websites?

The public should have access to enforcement information once the applicable data have been subject to proper quality control, and once the enforcement information is sufficiently developed. Tentative enforcement orders, notices of hearing on proposed actions, proposed settlements and final enforcement orders should all be made available on the website. In addition, compilations of enforcement information, such as Executive Officer reports, reports to the Legislature, etc. should be accessible on the website. It is not appropriate to include preliminary information, such as initial unverified reports or investigative documents on the website. Allowing broad unqualified access to this type of information could have a chilling effect on Water Board's prosecutorial discretion and result in premature adversarial relationships with the regulated community.

5. How can the Water Boards more effectively use existing water quality enforcement tools? Are there specific additional enforcement tools, methodologies, or protocols you would recommend?

- A. The State Water Board Should Develop a Mechanism for the Permit Holder to Address Minor NPDES Violations and Avert the Need for Further Action.

One of the recurring complaints about the Regional Water Boards is that they do not actively enforce violations reported by NPDES and WDR permit holders. With the advent of the CIWQS project, permit holders in some regions have begun to submit monthly monitoring reports into the electronic system. These reports will result in the automatic generation of alleged notices of violations. In many instances, these allegations will be resolved without formal enforcement action; however, outside parties may not understand the reason for the dismissal of these allegations or the lack of formal enforcement.

In order to provide an appropriate paper trail while implementing a defensible enforcement policy, we recommend that the State Water Board develop a brief, streamlined RESPONSE TO NOTICE OF VIOLATION procedure to be used by permit holders. This procedure would allow the permit holder to respond to the allegation with specified information, including a brief description of the alleged violation and its cause or an explanation why the allegation is not a violation of the permit. If the allegation is not a violation, then no further information would be necessary beyond an explanation as to why there is no violation of the permit. For minor violations, the permit holder could

describe corrective actions taken and any planned actions to prevent a recurrence of the noncompliance.

This information could be attached electronically to the monthly report that is submitted to the CIWQS project, and the Regional Water Board staff can use this report as the basis for resolving allegations of violations. Based on the experience of dischargers, we believe that many allegations will be resolved without the need for formal enforcement action. This report will supplement the record with an explanation for the reason for action or no action by the Regional Water Boards, and it will also allow for a streamlined review of reported violations to compare them with enforcement priorities.

B. The Regional Water Boards Should Utilize Alternative Dispute Resolution and Other Less Adversarial Mechanisms to Assist Small Dischargers.

The State Water Board's Enforcement Program be guided by the ultimate goal of compliance assurance. Toward that end, the State Water Board should explore the possibility of an Alternative Dispute Resolution process to help small dischargers to work together cooperatively on water quality compliance. In the current regulatory climate, smaller agencies are often overwhelmed, and do not have staff able to focus solely on compliance with numerous rules, regulations and permits. At the same time, these agencies often find it difficult to engage meaningfully with Water Board staff, knowing that everything said may end up in a formal complaint or enforcement action. In addition, it can be difficult for Regional Water Board staff and the entities that they regulate to get beyond past differences without a neutral facilitator.

6. What are the most significant inconsistencies, if any, between the Water Boards in their enforcement activities? What suggestions do you have to address any inappropriate inconsistencies?

Some of the most significant differences of concern to our members are procedural in nature. For example, some Regional Water Boards allow the Executive Officer to resolve ACL complaints through a settlement agreement without a hearing. Others require that a revised ACL reflecting the settlement be brought before the full Regional Water Board. Some Regional Water Boards facilitate the use of Supplemental Environmental Projects (SEPs) in lieu of payment of the full amount of the ACL to the Cleanup and Abatement Account; others are resistant to the use of SEPs and actively discourage them. Another area of some confusion is the types of information and documents available to target an enforcement action. Some Regional Water Boards are reluctant to provide key aspects of the basis for the action—such as the manner in which the recommended ACL amount was calculated—yet this information is essential to evaluate and defend against the action. It would be helpful if the WQEP were revised to provide clarity on issues such as these.

The WQEP currently provides that the State Water Board will compile and maintain examples of standard enforcement orders containing standard provisions. We are unaware of whether this has actually been done, but we encourage the State Water Board to develop these orders and make them available on the website as a way of developing more consistency in the enforcement program and to continue to try and maintain a "level playing field." (Pages 2 and 15 WQEP).

We appreciate the recognition in the public notice that not all differences among Regional Water Boards are necessarily inappropriate. We believe there are legitimate differences in enforcement priorities and the numbers of enforcement actions undertaken by the Regional Water Boards based upon the needs of their watersheds. For this reason, we believe each Regional Water Board should review its enforcement priorities annually.

CONCLUSION

We believe the WQEP should be updated to reflect changes in statutory law as well as to shift the primary focus from NPDES permit violations to other types of violations that have a greater potential to significantly affect water quality. On balance, however, we do not recommend a wholesale re-draft of the WQEP, which we believe provides a useful framework for the Regional Water Boards in setting enforcement priorities and exercising their enforcement discretion.

Sincerely,



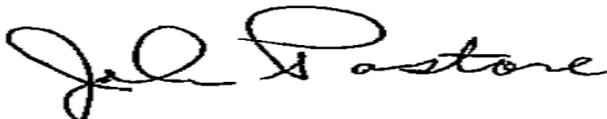
Roberta Larson, CASA



Michele Pla, BACWA



Chuck Weir
Chair of Tri-TAC



John Pastore
SCAP