



Tri-TAC

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League of California Cities
California Association of Sanitation Agencies
California Water Environment Association
Reply to: Jim Colston, OCSD
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Via Electronic Mail

Tam Doduc, Chair, and Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
Attn: Jeanine Townsend, Clerk to the Board
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Comment Letter – Baseline Enforcement Report

Dear Chair Doduc and Members:

CASA and Tri-TAC appreciate the opportunity to provide comment on the State Water Resources Control Board and Regional Water Quality Control Board's (Water Boards') *Baseline Enforcement Report, Fiscal Year 2006-2007* (Baseline Report). We support the Water Boards' efforts to improve their enforcement program and to implement performance-based measures to gauge the success of such measures. We do, however, believe that some changes should be made to the proposed performance metrics and to the recommendations for improvements to the enforcement program, as described below, to better strengthen the program and more accurately depict performance.

Proposed Performance Metrics

The proposed performance measures include metrics to assess activity levels (inputs), the results of those activities (outputs), and the effects of actions taken (outcome). We believe that the Baseline Report appropriately identifies metrics for inputs and outputs such as the percentage of monitoring reports reviewed, the percentage of facilities inspected, the percentage facilities in violation receiving an enforcement response, and mandatory minimum penalty (MMP) violations addressed. However, we believe that there is room for improvement in metrics selected to assess the outcomes of enforcement actions, particularly with respect to compliance rates and enforcement activities.

Compliance Rates

The rate of compliance is a key metric, as it is an indication of the overall effectiveness of the Water Boards' enforcement program. While the details of how compliance rates would be calculated are not provided in the Baseline Report, we believe that as this metric is developed it needs to account for the vast number of limitations and permit requirements for which compliance is necessary. It does not provide an accurate portrait of compliance to simply

determine the percentage of facilities that had no violations in a given time period. Some facilities may literally have thousands of “compliance points” that must be met every month, where a compliance point is a particular limit that has to be met for a particular time period (for example, a daily maximum limit for BOD would be counted as 365 compliance points over the course of a year). If there is a single exceedance of a limit for one compliance point in a given month, it does not accurately depict the situation to state that the facility is in non-compliance, when it may have been in compliance with several thousand compliance points but out of compliance with one of them. Therefore, we recommend that the compliance rate be determined by the percentage of compliance with compliance points. Although it appears that it would be cumbersome to calculate such a compliance rate, the state’s CIWQS system will have the information necessary to do this calculation once it is fully operational. Alternatively, the number of compliance points could simply be determined each time a permit is issued, and percent compliance determined by comparing parameters in non-compliance with the number of compliance points.

Enforcement Activities

The proposed performance metrics include a measure to report the number and type of enforcement actions. While it may be interesting to see this information, it is not clear how to interpret this metric or what information would be gained by tracking it. It is important to keep in mind that if an enforcement program was fully effective, there would be no enforcement activities because every facility would be in compliance. Ideally, therefore, the number of enforcement activities would decline over time. However, such a decline could be misinterpreted as a lack of attention to enforcement. Therefore, this metric is troublesome because it is not clear what the desired value for this metric should be. Additionally, this metric does not appear to be useful. Whether a Regional Board is responding adequately to violations is captured already in the Enforcement Response metric. Whether discharges are in compliance is captured already in the Compliance Rates metric. If this metric continues to be included, clarification should be provided as to what it is meant to assess and whether Regional Boards should be expected in the long run to maximize or minimize their enforcement actions.

Recommendations for Improvements in Water Board Enforcement Programs

CASA and Tri-TAC agree with a number of the recommendations for improvement in the Water Boards’ enforcement program including creation of procedural consistency, prioritizing enforcement to address the most serious threats to water quality, enhancing training, and encouraging flexibility in allocation of enforcement resources. We believe that implementation of these recommendations will bring about a stronger, more effective enforcement program. We do, however, have concerns about two of the recommendations, as detailed below.

Citizen Enforcement of the Water Code

The focus of the enforcement report should be on how the water boards are performing with regard to their administrative enforcement responsibilities. For this reason, we were surprised that the report included a recommendation to authorize third party citizen litigation. While allowing individuals and groups to bring lawsuits for alleged Water Code violations will certainly lead to *more* enforcement, it is almost equally certain that doing so will not advance the Water Boards’ stated enforcement goals of consistent, fair, and firm enforcement of the highest priority violations. If experience with citizen suits under federal law is any indication, plaintiffs’ attorneys will look for the “low hanging fruit”—enforcing violations of specific Waste Discharge Requirements that are set forth in self monitoring reports—without regard to the environmental impacts of the alleged violations, their seriousness, or the conduct of the violator. The most

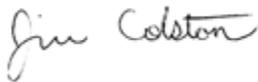
consistently cited current problems with the Water Boards' enforcement program are that resources are not spent on addressing those violations that will yield the greatest water quality benefit and that the underlying data upon which enforcement decisions are made is not complete or reliable. Opening up the enforcement arena to third party litigation will not further either of these goals.

Notwithstanding these concerns, if authorization of such citizen enforcement is brought under consideration, the potential impacts to recycled water usage should be carefully considered before any action is taken. Recycled water usage is governed under the Water Code, through Water Recycling Requirements and Waste Discharge Requirements. Potential recycled water users may be reluctant to engage in usage of recycled water if they would be potentially incurring liability from third party lawsuits. Thus, authorization for third citizen enforcement of the Water Code could hinder the state's progress toward meeting recycled water usage goals.

Evaluate Establishing Minimum Penalties for Water Code Violations

We disagree with the recommendation for the Water Boards to evaluate establishing minimum penalties for Water Code violations. As the Water Boards have seen through the NPDES MMP program, it is a drain on the Regional Board's enforcement resources to pursue MMPs. When resources are limited, the statutory requirement to pursue MMPs means that other, more pressing enforcement priorities may go unaddressed. It is clear from the statistics presented in the Baseline Report that the Regional Boards are already struggling to assess MMPs. In particular, the Baseline Report indicates that only 141 out of 1,659 MMPs incurred in fiscal year 06-07 have been addressed. Until the Regional Boards can keep up with their current MMP caseload, it is premature to consider expansion of the MMP program. Additionally, expansion of the MMP program to include Water Code violations is in direct conflict with Recommendation No. 13, to "Encourage Flexibility in the Allocation of Resources to Target Priority Needs." Flexibility is already severely hampered by the existing MMP program; expansion of the MMP program would further reduce much needed flexibility.

In conclusion, while CASA and Tri-TAC support the State Board's efforts to improve its enforcement program, we recommend several changes to metrics and recommendations in the Baseline Report. Thank you for the opportunity to provide this input.



Jim Colston, Tri-TAC Chair

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Roberta Larson, CASA