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Summit Partners:
- Bay Area Clean Water Agencies (BACWA)
- California Association of Sanitation Agencies (CASA)
- Central Valley Clean Water Association (CVCWA)
- California Water Environment Association (CWEA)
- Southern California Alliance of Publicly Owned Treatment Works (SCA)

June 20, 2008

Via Electronic Mail and U.S. Mail

Tam Doduc, Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812

Re: Preliminary Comments on the Water Quality Improvement Initiative

Dear Chair Doduc:

On behalf of the Clean Water Summit Partners, we appreciate the opportunity to provide you with our initial thoughts regarding the proposed Water Quality Improvement Initiative (WQII). The Clean Water Summit Partners meet quarterly to explore opportunities for working together on issues of critical importance to our collective memberships. Together, our member agencies provide wastewater collection, treatment and water recycling services to millions of Californians throughout the state. We share your interest in implementing meaningful changes to the Water Boards' structure and processes in order to improve the accountability, effectiveness and consistency of Water Board programs.

The proposed WQII represents significant thought and leadership, and we applaud the Boards for tackling some very important and controversial issues in the proposal. The purpose of this letter is to highlight for your consideration concerns regarding the proposal that would preclude a support position, as well as to identify recommended changes to certain provisions that we believe are needed if the WQII is to achieve its goals. We look forward to the opportunity to discuss these issues further with you and your staff, and will be pleased to provide additional specific revisions to the legislative language as appropriate.

We are concerned, however, that time is short, and the legislative vehicle for the WQII has yet to be established. We emphasize the importance of a full and fair public debate on this ambitious proposal and our view that the WQII should be the subject of a stand-alone bill and not attached to the State Budget approval.

1. Regional Water Board Provisions

10 Percent Rule Changes: (Amendment 17, pp. 15-16)¹—Support

As you know, the limitations imposed on Regional Water Board appointments due to the so-called “10 Percent Rule” have been a significant concern for the public wastewater community. The proposed amendment is a reasonable approach to broadening the candidate pool despite the existing federal constraints, and we support this proposed amendment.

Delegation of NPDES Permit Issuance to the Executive Officers (Amendment 8, p. 5)—Oppose, Unless Amended

If approved by U.S. EPA, this proposed change would effectively eliminate the applicability of the 10 Percent Rule to Regional Water Board appointments. While that result is desirable, we have concerns that there are a number of other problems that would be created by this proposed delegation. First, due to the woeful state of basin planning, broad policy issues are now often addressed on a permit-by-permit basis. We understand that the intent of this change is, in part, to free up the Regional Water Board members to focus on basin planning, but even if these efforts ultimately bear fruit, there will be a significant interim period within which staff will be setting policy for the Boards. We are also unclear on how the rules on *ex parte* communications will apply to the Executive Officer (“EO”) if he or she is the ultimate issuing authority. As we understand it, the *ex parte* constraints that currently attach to the Regional Water Board members would apply equally to the EO if he or she serves as the permit hearing officer.² We would not support a situation in which NPDES permitted entities were foreclosed from communicating with Regional Water Board EOs due to their permitting role; the legislation would have to include provisions to ensure that the regulated community can continue to interact with the EO despite the delegation.

On a related matter, we are not comfortable with the ability of the EO to delegate the permit hearing/issuance responsibility to a lower level staff member. We also do not believe that a hearing in front of the EO or his or her designee is an adequate substitute for the current opportunity to have a hearing before a multi-person Regional Water Board that is intended to reflect the regional and community interests. Finally, it is not clear to us how the proposed new approach would address certain situations that occur frequently,

¹ All page references are to the “2008 Proposal for Water Quality Improvement Initiative Legislative Language, Consolidated Text of All Amendments” (5-19-2008).

² *Ex parte* communications to the presiding officer are prohibited. “Presiding officer” is defined to include “the agency head, member of the agency head, administrative law judge, hearing officer, or other person who presides in an adjudicative proceeding.” (Gov.Code, § 11405.80.) Furthermore, the provisions regarding disqualification and *ex parte* communications apply to “the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.” (Gov.Code, § 11425.40(c); see also Gov.Code, § 11430.70.)

such as the contemporaneous issuance of a compliance schedule in an outside-the-permit time schedule order, which the authority to issue may or may not be delegated to the EO within a particular Regional Water Board. There are also circumstances where an entity has both an NPDES permit and a WDR or WRRs, or WDR-only provisions in an NPDES permit.³

That said, we recognize several advantages to the proposed delegation, including improved efficiencies and the above-mentioned elimination of the 10 Percent Rule problem. We would be able to accept this amendment if the proposal were amended to replace the right to a hearing before the EO to a right to a hearing before an Environmental Appeals Board or other objective body. The ability to file a petition, which the State Water Board may or may not choose to take up, is not an adequate substitute for a meaningful evidentiary hearing. By providing a right to a hearing before an independent board, the delegation of NPDES permitting functions would continue to free up the Regional Water Board members to focus on other issues and eliminate the 10 Percent Rule problem while ensuring that permittees and other interested persons have appropriate due process.

Full Time Regional Water Board Chairs: (Amendments 4, 5 and 6, pp. 3-4)—Oppose

We understand the desire to improve consistency and accountability through appointment of full time chairpersons. We question the necessity for full time chairs, particularly in light of the proposed delegation of NPDES permitting to the EOs. NPDES permitting currently takes up a significant portion of Regional Water Board members' time, and if that responsibility is removed, we are unclear as to the need for a full time chair. Even if the delegation of permitting were deleted, however, we would still be concerned that the appointment of full time Regional Water Board chairs will have several unintended and undesirable consequences. First, and perhaps most obviously, the establishment of nine new full time gubernatorial appointees will come at significant cost. We vastly prefer those resources be devoted to establishment of an EAB or other meaningful hearing process. Secondly, we believe that creating one "super" board member will render the remaining board members marginalized at best and irrelevant at worst, as there will be significant deference to the full time, presumably expert chair. The value-added by the Regional Water Boards is that they are laypersons with a breadth (rather than depth) of experience and knowledge. The full time chair proposal appears to be an attempt to be both a board system and a department, something we do not think is possible.

For these reasons, we oppose the creation of full time Regional Water Board chairpersons.

³ Indeed, the inclusion of state law WDR provisions in an NPDES permit is specifically contemplated under the NPDES permit template.

Reduction in Water Board Size, Changes to Regional Water Board Appointment Categories and Staggered Terms (Amendments 4 & 5, pp. 3-4)—Support, if Amended

As noted above, we do not support the creation of full time Regional Water Board chairs. However, we do not oppose the reduction in size of the Regional Water Boards from nine to seven members and the staggering of terms, which will be helpful both for the appointment process and the maintenance of a quorum. We request, however, that the reduction in size be accomplished without consolidating the city and county seats. We suggest instead that the two seats be part of a single category, as follows: “*Two persons associated with municipal or county government. Each of these persons shall be a city council member, or mayor, or a county supervisor, on the date of appointment and any reappointment.*” This will allow qualified individuals to be appointed without regard to whether the long-term 10 Percent Rule change is effected. Also, instead of consolidating the water supply and industrial slot, we recommend reducing the number of unaffiliated appointees from three to one.

2. TMDL Provisions

“Constructive” State Water Board Approval of TMDLs (Amendment 9, p. 5)—Support

We support the proposed amendments to Water Code section 13245 that would allow TMDLs to become effective without affirmative State Water Board action unless an interested person files a written request for State Water Board consideration. We request that both the action that triggers the 30-day clock (i.e., the Regional Water Board vote on the proposed TMDL Basin Plan amendment) and the form of the request (e.g., a letter to the State Water Board chair) be clarified.

Water Board Revisions to TMDL Implementation Plans (Amendment 9, p. 5)—Request Amendment

Our organizations are still evaluating the proposal to allow the State Water Board to make changes to a TMDL implementation plan without remand to the Regional Water Board. We do request that the Board consider two amendments to this section. First, the State Water Board’s authority to make revisions should not be limited to the implementation plan but should extend to the “technical TMDL.” Second, the bill should clarify the notice and comment process for State Water Board revisions to a TMDL.

CEQA Exemption for TMDLs (Amendment 9, p. 5)—Oppose

The proposed exemption from CEQA for TMDLs presumes that water quality impacts are the only relevant impacts for CEQA analysis. We disagree with this premise, and believe that the Regional Water Boards are appropriately required to evaluate and disclose, as part of the decision-making process, potential adverse impacts that may result from TMDL implementation, including increased air pollution, greenhouse gas emissions, residuals requiring disposal, increased traffic, noise, and construction impacts.

We are troubled that the Water Boards would be proposing this type of “free pass” on environmental impact analysis at a time when cross media impacts of regulatory decision making are receiving heightened attention. We recommend that this exemption be deleted from the WQII.

3. Enforcement Provisions

Civil Penalties for Submittal of Fraudulent Information (Amendment 12, p. 7 and Amendment 14, p. 9)—Oppose, Unless Amended

We understand the need for a mechanism to allow the Water Boards to take enforcement action against entities and persons who deliberately mislead the Boards by filing false information. However, as drafted, these amendments apply a strict liability standard to these statements. Any false statement, no matter how innocently made, or how innocuous the impact to water quality, would subject persons to sizeable civil penalties. In addition, the burden of proof required of the Water Boards when bringing these actions must be commensurate with the seriousness of the allegations. We oppose these amendments unless they are revised to require (1) that the false statement be submitted intentionally and (2) that the Regional Water Board be required to demonstrate, through a preponderance of the evidence (at a minimum) that the false statement was submitted intentionally.

Eliminate Notice Requirement for Illegal Discharges (Amendment 10, p. 6)—Oppose

Despite several discussions with State Water Board members and staff, the need for this provision remains unclear. Elimination of the notice requirement will unfairly affect smaller, less sophisticated dischargers that may not be aware of the need to apply for waste discharge requirements. In some cases, the entity’s obligation to obtain WDRs will be less than clear. We do not believe it is overly burdensome for the Water Boards to first notify an alleged illegal discharger and provide them a reasonable opportunity to conform their conduct to the law before taking punitive enforcement actions against them.

Allow District Attorneys and City Attorneys to Impose Civil Liability (Amendments 12-14, pp. 8-10)—Oppose, Unless Amended

We continue to have concerns about authorizing District Attorneys and numerous City Attorneys to file actions for civil penalties. We believe this amendment will lead to inconsistencies in enforcement throughout the state as 58 District Attorneys and several City Attorneys begin filing civil actions previously brought by a single division in the Attorney General’s office. We also believe special expertise is needed to prosecute cases in this highly technical area and the Attorney General’s office has accumulated the necessary expertise. It is simply not possible for that expertise to be replicated in 58 counties throughout the State. Moreover, the legislation would delete the requirement that the referral come from a Regional Water Board following a hearing, meaning that the

staff will have absolute discretion as to which matters to refer.

We understand that this provision is intended, in part, to allow local prosecutors who may already be involved in enforcement matters that span different environmental laws to bring the Water Code claims as part of a single action. If that is the primary motivation for this amendment, we believe that the bill should set forth specific criteria for when an Executive Officer can refer an action to a District Attorney or City Attorney.

4. Mandatory Minimum Penalty Provisions

Modifications to Small Community Provisions (Amendments 14 & 15, pp. 13-15)—Support

We strongly support the amendments that would increase the population criteria for small community compliance projects to 20,000 and limit the exposure of small communities to MMPs for failure to file reports. We have been concerned for some time about the increasing burden that MMPs impose upon small communities that are already facing significant compliance costs, and we appreciate the Water Boards including these reforms as part of the WQII.

Expediting MMP Payments (Amendment 16, p. 15)—Support; Seek Clarification

We support offering permit holders an option to “pre-pay” MMPs at the time of filing self-monitoring reports. In order to ensure that this option is used, and that it does not unfairly disadvantage entities, we believe it is critical that the implementing regulations address two points: First, the “waiver” that accompanies payment must clearly be characterized as a settlement offer and not an admission of liability, as the permit holder will still be subject to discretionary enforcement for the violations until the Regional Water Board posts the notice. Second, the waiver should allow the option of directing the statutorily allowable portion of the MMP amount to a supplemental environmental project.

5. Water Quality Council

Establish a Water Quality Council (Amendment 2, pp. 1-2)—Seek Amendment

As noted above, we do not support the establishment of full time Regional Water Board chairs. However, we do not object to the creation of the Water Quality Council in order to improve consistency among the Regional Water Boards. We believe this can be accomplished by providing additional per diem to the chairs for the time that they spend on the Council. In addition, we do not believe there is any justification for a public advisory body to conduct “private fact finding” and we ask that this provision be deleted. We also believe a sunset clause to allow re-evaluation of the effectiveness of this Council after some period of time (three to five years) would be appropriate.

6. Regulations

Emergency Regulations (Amendment 23, pp. 22-23)—Oppose, Unless Amended

Many of the implementation details for the WQII will be set forth in regulations. It is difficult to develop a position on many of the proposed reforms without knowing what the regulations will address. Therefore, we request that the Regional Water Board provide an outline of the regulations to interested persons as soon as possible. In addition, we are not aware of any particular urgency that would warrant adoption of emergency regulations. We anticipate the regulations to be extensive, and emergency regulations are subject to very condensed timeframes for public review and comment. While there may be individual components of the regulations that warrant elevating speed over public participation, we are doubtful that this applies to the entire regulatory package.

7. Additional Reforms

In addition to the broad set of changes called for in the WQII, we believe there are additional reforms that should be considered as part of the final package. Briefly, these are:

- For purposes of the 10 Percent Rule, revise the definition of income from an NPDES permit holder to exclude income from PERS. The overly narrow definition that considers income from a statewide public employees retirement system with millions of members, the vast majority of whom worked for agencies without NPDES permits, precludes highly qualified retirees from public service from serving on the Regional Water Boards.
- Revise the provisions of law governing Regional Water Board Executive Officer salaries. It is our understanding that EOs in some cases earn less than some of their subordinates. This situation must be remedied in order to attract and retain capable individuals for these key positions.
- In addition to allowing for per diem for a day of preparation, increase the per diem for Regional Water Board members to \$200 per meeting. The current \$100 is unreasonably low.

Tam Doduc, Chair
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Thank you for your consideration of our comments. We look forward to working with the State Water Board as the WQII moves forward.

Sincerely,

Michele Pla, Executive Director
Bay Area Clean Water Agencies



Catherine Smith, Executive Director
California Association of Sanitation Agencies



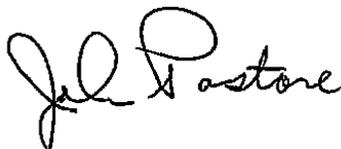
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