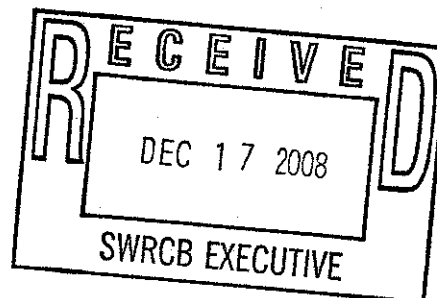


Construction Industry Coalition on Water Quality

December 17, 2008

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento CA 95814



Email: commentletters@waterboard.ca.gov

**Re: Comments of the Construction Industry Coalition on Water Quality, et al.,
Concerning the Questions of Whether and, If So, How the State's Anti-
Degradation Policy Should Be Revised.**

Ladies and Gentlemen:

The Construction Industry Coalition on Water Quality ("CICWQ") appreciates this opportunity to comment on the questions that were set forth by the Board's staff in connection with the workshop conducted on November 17, 2008: whether and, if so, how the State's anti-degradation policy should be revised. CICWQ is comprised of the four major construction and building industry trade associations in Southern California: the Associated General Contractors of California (AGC), the Building Industry Association of Southern California ("BIA/SC"), the Engineering Contractors Association (ECA) and the Southern California Contractors Association (SCCA). The membership of CICWQ is comprised of construction contractors, labor unions, landowners, developers, and homebuilders throughout the region and state. These organizations work collectively to provide the necessary infrastructure and support for the region's business and residential building needs.

Joining in these comments are the California Building Industry Association ("CBIA") and the Building Industry Legal Defense Foundation ("BILD"). CBIA is a statewide trade association representing over 5,600 member companies involved in residential and light commercial construction. CBIA member companies account for over 70% of all new homes sold in California each year. CBIA has been active in developing the water quality regulations and permit conditions that our members can apply when building the homes and facilities that California needs.

BILD is a non-profit mutual benefit corporation and wholly-controlled affiliate of BIA/SC., which is a non-profit trade association representing more than 1,700 member companies. The mission of BIA/SC is to promote and protect the building industry to ensure its members' success in providing homes for all Southern Californians. BILD's purposes are to monitor legal developments and to improve the business climate for the construction industry in Southern California. BILD's mission is to defend the legal rights of current and prospective home and property owners, and to accomplish this mission BILD participates in and supports

litigation necessary for the protection of such rights. BILD focuses on matters with a regional or statewide significance to its mission.

As is explained below, CICWQ, CBIA and BILD believe that the Statement of Policy dated October 28, 1968 is excellent; and it needs no revision. However, we recommend that the administrative procedures for implementing the policy, which were last addressed in 1990, should be revised in two key respects. First, the administrative procedures should be revised to take into account the natural conditions and – especially – the natural variability of storm water. Second, the administrative procedures should be revised to clarify and streamline the processes by which “use attainability analyses” can be undertaken and concluded.

I. Resolution No. 68-16 is an excellent statement of policy which needs no revision.

Resolution No. 68-18 is an excellent statement of policy. It is concise, complete, straightforward, understandable, and wise. Most importantly, it is appropriate as a statement of policy concerning the proper balances that should be struck when determining whether to (i) maintain high water quality standards in California, or (ii) adjust them only when most necessary.

We view Resolution No. 68-18 as similar to Cal. Water Code section 13241, which was enacted just one year later (in 1969), and which sets forth the only substantive guidance from the Legislature to the water boards concerning water quality planning in the state. Resolution No. 68-18 and Water Code section 13241 are both credits to the sound judgment of the authors at the time. Both are commendable in terms of their clarity and appropriateness. Accordingly, we urge that the Board make no revisions to the statement of policy at issue.

II. The administrative procedures for implementing the anti-degradation policy should be revised to account for the natural variability and conditions of storm water.

Notwithstanding our strong support for the 1968 statement of policy, we believe that the implementing procedures can be improved. First, we note that the Environmental Law Foundation, et al., (“ELF”) petitioned the Board for the instant review of the anti-degradation policy and related implementing procedures. At page 9 of their July 17, 2007 petition, ELF quoted page 4 of APU 90-004 for the proposition that “[b]aseline water quality is defined as the best quality of water that has existed since 1968 when considering Resolution No. 68-16, or since 1975 under the federal policy, unless subsequent lowering was due to regulatory action consistent with State and federal anti-degradation policies.” From this, ELF argues that the baseline water quality “should, therefore, only be allowed to be adjusted upward, not downward as the state’s guidance allows.”

We believe that both APU 90-004 and the suggestions set forth by ELF should be considered carefully in light of the fact that the natural variability of storm water will frequently result in “baseline” water quality measurements that are themselves naturally variable.

Accordingly, the above-quoted passage from page 4 of APU 90-004 seems to be properly applicable only to a situation where a water body receives influent from natural sources (e.g., storm water) having a constant water quality, and receives "pollution" from anthropogenic sources. In such circumstances, the above-quoted statement from APU 90-004 has very proper applicability.

We know, however, that there are many water bodies that frequently achieve a high level of water quality from time to time (for example, some time after 1975), in which *natural* storm water conditions will also create much lower water quality measurements from time to time. In such circumstances, of course the "baseline" condition should not be highest water quality ever achieved after 1968 or 1975. Instead, the baseline water quality must be recognized as itself naturally variable, consistent with both (i) the overarching "restore and maintain" objective of the Clean Water Act, and (ii) California Water Code section 13241(b)'s mandate to consider, when planning for water quality, the "[e]nvironmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto."

Other states around the nation have taken appropriate steps to recognize the natural variability of water quality even more plainly in their statutes and regulations. For example, Florida's statutes include several provisions aimed at assuring that natural conditions and natural variability are honored in the regulatory process, including Florida Statutes section 403.021(11), which reads:

It is the intent of the Legislature that water quality standards be reasonably established and applied to take into account the variability occurring in nature. The [Florida Department of Environmental Protection] shall recognize the statistical variability inherent in sampling and testing procedures that are used to express water quality standards. The department shall also recognize that some deviations from water quality standards occur as the result of natural background conditions. The department shall not consider deviations from water quality standards to be violations when the discharger can demonstrate that the deviations would occur in the absence of any human-induced discharges or alterations to the water body.

(Emphasis added.)

Similarly, Rule 62-302.530 of the Florida Administrative Code, although stating that water quality criteria "express the maximum [standards] not to be exceeded at any time," also expressly provide that in "applying the water quality standards, the [Florida Department of Environmental Protection] shall take into account the variability occurring in nature...." See also Florida Statutes section 403 Admin. Code, Rule 62-302.300(15) ("Waters having water quality below the criteria established for them shall be protected and enhanced. However, the department shall not strive to abate natural conditions.").

Importantly, the U.S. Environmental Protection Agency ("EPA") successfully defended the applicability of these Florida statutes and regulations in federal litigation that was recently brought by a group of non-governmental organizations seeking to enforce water quality standards that nature itself violated – in *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904 (11th Cir. 2007). There, the federal court of appeals upheld the EPA's decision to respect the natural conditions of the water bodies at issue, and wrote:

Sierra Club asserts that the EPA acted arbitrarily or capriciously in approving Florida's delisting of seven waterbodies not meeting water quality standards due to natural conditions. In particular, Sierra Club claims that seven waterbodies with naturally occurring low dissolved oxygen levels were improperly delisted because the [federal Clean Water Act, "CWA"] does not provide a natural-conditions exception. * * * The CWA does not specifically address whether waterbodies not meeting water quality criteria because of naturally occurring conditions must be included on a state's impaired waters list. The EPA's interpretation of the CWA as not requiring such listings, however, is supported by a careful reading of the CWA and its regulations.

First, the CWA's express purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The phrase "restore and maintain" indicates that Congress sought to return waterbodies to their natural conditions, not modify waterbodies' natural conditions. Indeed, the House Report on the legislation states that "[t]he word 'integrity' as used is intended to convey a concept that refers to a condition in which the natural structure and function of ecosystems is maintained." H.R.Rep. No. 92-911, at 76 (1972).

Id., 488 F.3d at 920-21.

CICWQ respectfully submits that the California Legislature intended similar attention to the natural conditions and variability of water bodies, as reflected in the mandate to consider the "[e]nvironmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto[.]" and "[w]ater quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area." Cal. Water Code § 13241(b) and (c). Accordingly, we urge the Board and its staff to consider revising the implementing procedures for Resolution No. 68-16 to reflect proper attention to – and indeed forgiveness of – natural water quality conditions and the natural variability of storm water.

- III. The administrative procedures for implementing the anti-degradation policy should be revised to *clarify and streamline* the processes by which "use attainability analyses" can be undertaken and concluded.

Lastly, CICWQ urges the Board and its staff to clarify, streamline and publicize the administrative process by which an acceptable use attainability analysis should be undertaken. Presently, the regulated community suffers under some amount of uncertainty and confusion concerning the proper steps for undertaking a use attainability analysis and the regulatory review process. Some such confusion may result from anecdotal issues related to various individual and unsuccessful attempts to advance use attainability analyses. Regardless, the regulated community and others would benefit from an undertaking in which the water boards explain and streamline the UAA process.

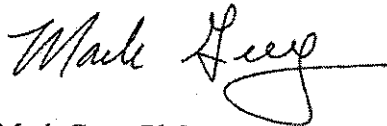
Some other states have, in recent years, recognized some need to clarify and streamline their UAA processes. For example, in 2006, the Virginia Legislature amended Virginia Code section 62.1-44.19:7 and added a new subsection (E) thereto, which reads:

If an aggrieved party presents to the Board reasonable grounds indicating that the attainment of the designated use for a water is not feasible, then the Board, after public notice and at least 30 days provided for public comment, may allow the aggrieved party to conduct a use attainability analysis according to criteria established pursuant to the Clean Water Act and a schedule established by the Board. If applicable, the schedule shall also address whether TMDL development or implementation for the water should be delayed.

CICWQ submits that, here, the Board and its staff should not require such a legislative mandate in order to undertake the workshops and collaboration needed to streamline and clarify the UAA process, working with all constituents – including EPA and regional boards. CICWQ would eagerly participate in such an undertaking.

CICWQ, CBIA and BILD very much appreciate the opportunity to provide these comments.

Sincerely,



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Construction Industry Coalition on Water Quality

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