EAST BAY
MUNICIPAL UTILITY DISTRICT

October 18, 2016

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

Via E-mail: *commentletters@waterboards.ca.gov*

Subject: Comment Letter – Water Quality Enforcement Policy

Dear Ms. Townsend:

The East Bay Municipal Utility District (District) appreciates the opportunity to submit comments on the Amendments to the State Water Resources Control Board's (SWRCB) Water Quality Enforcement Policy (Policy). The Policy plays a significant role in determining liability for the District, and any changes have the potential to fundamentally alter how enforcement and liability for our discharges occurs in the future. The District supports the SWRCB's effort to implement a fair and transparent Policy.

The District provides safe, high-quality drinking water to 1.4 million water customers in Alameda and Contra Costa Counties over a 331-square-mile service area. The District's wastewater system serves approximately 680,000 people in an 88-square-mile area along the east shore of the San Francisco Bay. Additionally, the District operates water treatment and distribution systems and wastewater treatment facilities in Amador and Calaveras counties for local customers in the Pardee Reservoir and Camanche Reservoir areas. Thus, District facilities are regulated by both the San Francisco Bay (Region 2) and the Central Valley (Region 5) Regional Water Quality Control Boards.

The proposed Policy does not appropriately account for de minimis discharges, such as potable water, that may experience episodes of non-compliance yet have a very low risk of impacting beneficial uses. Furthermore, the Policy has been amended to omit the opportunity for good actors, such as publicly owned municipal agencies with comprehensive environmental protection and stewardship programs, to reduce their potential penalties by going above and beyond when responding to emergency incidents that may result in violations. There is little discernment in how the Policy will be applied to egregious violators vs. municipalities who operate essential services systems, such as publicly-owned treatment works (POTW) and potable water providers, for the general public in accordance with industry-wide practices. The District recommends that the Policy be written with a focus on promoting positive behavior by dischargers when non-compliance events occur.

COMMENTS

1. **The proposed violation classification system is overly streamlined and does not provide flexibility for enforcement on a case-specific basis or the ability to prioritize cases. (Page 6 of proposed 2016 Policy)**

The elimination of Class III violations reduces the opportunity for enforcement staff to prioritize incidents for enforcement. It appears that most discharges will now always be Class I priority violations, which assumes severe risk and or impacts, regardless of specific case factors. There is currently a detailed definition of Class II violations, but the proposed changes would inexplicably delete that definition and leave Class II undefined. The Policy should provide specific criteria for Class II violations and explain how Class II violations will be enforced differently than Class I. The Policy should acknowledge that all violations are not the same, all incidents do not cause impacts to beneficial uses, and some responses are more comprehensive than others and should, therefore, be candidates for some penalty relief.

Certain criteria listed in the Class I category warrants further explanation. First, the District recommends not including acute toxicity exceedances as a default Class I violation due to the test's propensity for false-positive results. Acute toxicity exceedances would be more appropriate in a less severe Class pending any confirmed impacts to beneficial uses. Second, the reference to construction materials needs to be clarified as it is unclear what exactly is meant by this or how it would be used for penalty calculation. Last, with respect to discharges from drinking water systems, the 100 NTU turbidity limit is inconsistent with the General NPDES Permit for Drinking Water Discharges which includes a numeric action level that triggers BMP evaluation. One alternative would simply be to reference regional basin plans and include language to meet those regional requirements.

2. **Environmental justice and disadvantaged communities exceptions should apply to all essential public services. (Page 4 of proposed 2016 Policy)**

Presently the Policy only provides hardship exceptions for POTW systems, and the changes proposed would not expand that scope. The Policy should be amended to also include drinking water systems in these same categories, as the financial challenges are the same regardless of the infrastructure that experienced the non-compliance.

3. **Promote long-term compliance by promoting use of Enhanced Compliance Actions (ECA) projects and increasing the caps for all dischargers regardless of community size. (Page 39 of proposed 2016 Policy)**

We strongly support the Policy's continued inclusion of ECAs, as we believe ECAs maximize the positive impact of the enforcement process on the environment. While the ability to dedicate up to 50 percent of an Administrative Civil Liability towards an ECA is appreciated, the District recommends that this cap be increased or removed to support long-term sustainable compliance by reinvesting penalty dollars into infrastructure improvements in all communities regardless of size or socioeconomic status. Agencies should be encouraged to enter into ECAs and put those

dollars into meaningful capital investment projects over and above their existing plan to prevent reoccurrence of non-compliance, to enhance environmental response programs, and to ultimately protect the environment for the public and the rate payers being served by the agency. The SWRCB should also consider additional ECA allowances in areas of special biological significance when the ECA will ultimately result in enhanced protection of these designated critical areas.

4. **The "Susceptibility to Cleanup or Abatement" factor should better account for potable water related discharges which are feasible to clean up. (Page 16 of proposed 2016 Policy)**

Under this factor, an oil spill may receive a more favorable score than a de minimis potable water discharge. When potable water is released during an unplanned emergency main break incident, the water that leaves the pipe cannot be contained and recaptured. Often times these discharges are reported to the water agency directly by the general public which triggers an immediate response to deploy BMPs to the maximum extent practicable and to repair the broken pipe. This means that the water lost from the pipe before the agency is notified by the public is lost, as it cannot be removed once it has mixed with the base flow in the receiving water. Even though potable water cannot be "cleaned up" in the manner of oil or similar substances, the potable water does abate quickly through the natural degradation of residual chlorine. In fact, natural chlorine degradation is recognized as an authorized BMP in the General NPDES Permit for Drinking Water Discharges, yet it is explicitly excluded from consideration for cleanup credit in the "susceptibility to cleanup or abatement" factor (see Factor 3; pg. 17 of proposed 2016 Policy). The Policy needs to include language within the "susceptibility to cleanup" factor that accounts for the low-threat, fast-abating nature of low-threat potable water discharges so that such discharges are not disproportionately penalized under this factor relative to other substances that are plainly more harmful.

5. **The proposed amendments to the Table 4 "conduct factors" significantly reduce the positive credit a discharger may receive for acting in good faith and conscientiously responding to an incident, thereby inappropriately devaluing and disincentivizing positive dischargers' conduct. (Page 23 of proposed 2016 Policy)**

The proposed Policy would remove the ability to score less than "1.0" in the Degree of Culpability factor category for violator conduct. This means that no matter what a responder does to prevent or mitigate a discharge, they cannot possibly lower their penalty. Retaining the ability for dischargers to receive a downward penalty adjustment where culpability is low will promote enhanced environmental protection.

The proposed Policy would amend the History of Violations factor such that a neutral score is not likely to ever be used and therefore the 1.1 multiplier is the default. The Policy should recognize that not all violations are the same just because the nature of the discharge may be similar, and this should be considered when evaluating what constitutes a history of similar violations. Each case has specific extenuating circumstances the may influence a response and impacts. The purpose of this factor is to encourage dischargers to address violations to avoid

higher penalties if the same violation occurs in the future. However, this factor as amended would capture unrelated prior violations and therefore fail to serve a useful purpose other than to serve as a tool to increase penalties. Application of this factor should not be a simple numbers exercise with no opportunity to explain why a current violation is uniquely different. Additionally, the Policy should include a statute of limitations for this factor. As written this is a "one-strike you're out" approach with no ability to ever lower this factor once a single violation has taken place. Historic violations beyond a three year rolling time frame should not be held against dischargers if lessons were learned to try to prevent reoccurrence. Corrective actions implemented by a discharger after such an incident should be commended as they are evidence that the Policy has worked as intended to promote compliance. The amended Policy also would provide discretion to consider adopting a multiplier above 1.1 with no ceiling, and no rationale is provided in the proposed Policy to calculate a higher number, which risks arbitrary, inconsistent, and potentially punitive enforcement decisions. Lastly, the Policy does not define what "numerous dissimilar violations" means and how that will be quantified or applied. The District recommends modifying the History of Violations factor to provide clarity on how the proposed additional features would be implemented.

6. **The proposed numeric changes to Table 1 and Table 2 (the Per-Gallon and Per-Day Factor Tables for discharge violations) have not been explained and the basis of the new numbers should be provided to the regulated community for review. (Pages 18-19 of proposed 2016 Policy)**

The Policy proposes several numeric changes in Table 1 and Table 2 which are the multipliers used to determine the initial administrative civil liability amount for discharge violations. The SWRCB has provided neither explanation of the need to increase these numbers nor any justification of the numbers chosen. With few exceptions, the revised numbers are higher than the current numbers and, in some cases, represent a significant increased multiplier. In the absence of any other explanation for these numbers, the overall increase in these multipliers could be seen as an attempt to generate higher penalties merely for the sake of higher penalties. We believe the SWRCB has adequate authority under the existing Policy to collect very large penalties when appropriate and, therefore, increased multipliers are unnecessary. Because the revised multipliers have the potential to dramatically increase the amount of final liability, we believe it would be appropriate for the SWRCB to provide a meaningful explanation of the proposed higher multipliers, including why they are needed, why the selected numbers were chosen, and which policy goals the SWRCB believes would be achieved.

7. **The "High Volume Discharges" factor should expressly refer to potable water discharges and provide a default adjustment for them, and the revisions to the volume thresholds and dollar-per-gallon adjustments should be explained.**

Discharges of recycled water treated for reuse are allowed a maximum $1 per gallon amount. There is no mention of potable water discharges and their low de minimis threat to the environment. The predominant pollutant of concern in recycled water, chlorine residual, is the same pollutant found in potable water. In fact, recycled water usually has a higher chlorine concentration than treated drinking water, and yet the proposed Policy would not provide a

similar high-volume adjustment for drinking water as is presumed for recycled water. Recycled water and potable water should be treated the same by the Policy. The District recommends adding potable water to the high volume discharge factor, with a presumption of $1 per gallon. It is also concerning that the proposed Policy would alter the current direction that a $1 per gallon factor "should be used" for recycled water discharges to instead provide that the SWRCB "may elect to use" that factor. This watered-down language does not provide confidence that low-threat discharges will be assessed at a dollar amount commensurate with the relatively low risk they pose. This language should be amended to have the $1 per gallon amount be the default adjustment for chlorinated drinking water discharges unless there is cause not to do so for egregious behavior and/or blatant negligence.

The proposed Policy would define "high volume" as a range from 100,000 gallons to 2,000,000 gallons, and it would establish a separate category for discharges in excess of 2,000,000 gallons. The District would appreciate an explanation as to what information was used to establish this volume range as that data has not been provided for review. Discharges less than 100,000 gallons that pose low-risk to beneficial uses still have the potential to result in an inordinately high penalty unless a reduced price-per-gallon factor is used.

Under the existing Policy, most types of high-volume discharges qualify for a high-volume adjustment of $2 per gallon unless that adjustment would result in an inappropriately small penalty. The Policy amendment would now make $2 the floor, while reserving a discretionary ability to go up to $10 per gallon. The District recommends providing general considerations on how a number in this range would be selected and requests an explanation on how the proposed range was developed. If a $10 per gallon assessment is used, then this factor would have no practical purpose.

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The District strives to operate all of its drinking water and wastewater facilities in compliance with our many NPDES and WDR permits to protect our local watersheds. Our core values of stewardship, integrity, respect and teamwork support this goal. The goal of the Policy should be to promote compliance and not be punitive to those who work diligently to provide essential public services while simultaneously protecting our environment. We look forward to working with the SWRCB to maximize the value of the Policy for all parties and would appreciate an opportunity to discuss these comments at a stakeholder discussion session. If you have any comments or questions regarding the content of this letter, please feel free to contact me at (510) 287-0412 or via email at chandra.johannesson@ebmud.com.

Sincerely,

Chandra R. Johannesson
Manager of Environmental Compliance