Public Comment
Water Quality Enforcement Policy
Deadline: 10/18/16 12:00 noon

California Council for Environmental and Economic Balance
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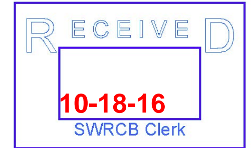

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

RE: SWRCB's Proposed Revisions to the Enforcement Policy

Dear Ms. Townsend:

On behalf of the California Council for Environmental & Economic Balance (CCEEB), I am pleased to provide comments in response to the proposed revisions to the State Water Resources Control Board's (SWRCB) Enforcement Policy (Policy). We appreciate the Board's interest in ensuring consistent and transparent approaches statewide to enforcement. Additionally, we understand the revisions are intended to provide for a documented, progressive penalty approach statewide that CCEEB views conceptually as highly positive. We are concerned, however, that the revisions make the Policy overly complex, confusing and more subjective going against the stated intent of the changes.

CCEEB is a coalition of business, labor, and public leaders that works together to advance strategies to achieve a sound economy and a healthy environment. Founded in 1973, CCEEB is a non-profit and non-partisan organization.

Notwithstanding concerns with the Policy, we very much support the provisions throughout the Policy that convey the SWRCB's strong support of eliminating the ability for non-compliant entities to realize a competitive economic advantage over compliant entities. More specifically, the proposed amendments state the following (and variations of it throughout the Policy):

> *"Formal enforcement should always result when a non-compliant member of the regulated public begins to realize a competitive economic advantage over compliant members of the regulated public. The principle of fairness in enforcement requires that those who are unwilling to incur the expenses of regulatory compliance not be rewarded for making that choice. It is the intent of the state Water Board that formal enforcement should be used as a tool to maintain a level-playing field for those who comply with their regulatory obligations by setting appropriate and counter-balancing civil liabilities for those that do not."* (page 1)

Revision to the Policy also includes the exclusion of attorney and staff costs for enforcement and accounting (p. 29-30) and a voluntary Supplemental Environmental Program (SEP) settlement component, which CCEEB also views as very positive.

Further, the Policy reaffirms the Board's principle of progressive enforcement on the whole such that an escalating series of actions would be enlisted beginning with notification of violations, ramping up to a complaint for civil liabilities where compliance cannot be/is not achieved in a reasonable time or compliance is refused. Such revisions and clarity could help ensure regional boards consistently approach enforcement such that those that are striving to be in compliance be given the opportunity to correct at the notification stage rather than the boards seeking immediate civil penalties (except in the more egregious situations or willful noncompliance situations). That said, a number of the revisions within the Policy complicate such an approach.

While we are highly appreciative of these beneficial additions, we note that a number of the changes and additions proposed are overly complex, confusing, and subjective and will undoubtedly result in higher proposed monetary penalties on responsible entities who strive for compliance.

First, Section I aims to ensure fair, firm, consistent and transparent enforcement, stating:

> *"The Water Boards acknowledge that contractors or agents for legally responsible persons (the discharger(s) named in the underlying order, or the owner and operator in the case of an unpermitted discharge) frequently bear some of the responsibility for violations. In appropriate cases, the Water Boards may bring enforcement actions against contractors and/or agents, in addition to the legally responsible person(s) or permittees, for some or all of the same violations." (p.2)*

This new language provides that the contractor, in addition to the legally responsible person (LRP), may be enforced upon. In order to ensure fairness in the application of this Policy, it should instead provide that the party(ies) (i.e., LRP and/or contractor) that took the action that caused the alleged violation should be the party against whom the enforcement is taken. For example, when a contractor acts outside the scope of its contract by conducting its activities in an illegal fashion, it would be unreasonable to also take enforcement action against the LRP. In this regard, we recommend the Policy be revised to clarify that enforcement actions are to be taken against the party(ies) (i.e., LRP and/or contractor) that took the action that caused the alleged violation. To be clear, this may include not only a contractor, but any and all other parties on the property who may be responsible for the violation including other tenants. The violation should be evaluated for culpability even if a particular potential culprit is not designated on the permit.

Within Section II.A. (Ranking Violations-Class I and Class II) – Section I. and I.A. discuss the SWRCB's "policy" to be "transparent" and "consistent" in enforcement actions. Further, Section II.A. describes two "classes" of violations and identifies a number of specific criteria that would constitute Class I violations, but prefaces the criteria with the following statement:

> *"…ordinarily include, but are not limited to, the following:…".*

Of note, as dictated by the Policy, Class II violations are defined as:

> *"All other violations…".*

CCEEB is concerned with the use of the term "ordinarily" and the phrase "include, but not limited to" as they significantly blur the distinction of what will be considered (within RWQCBs and between RWQCBs) Class I and Class II violations. This is seemingly contrary to the SWRCB's "policy" to be "transparent" and "consistent" since the scope of Class I violations could be expanded without limitation. To address this inconsistency, we recommend revision of this language to provide that Class I violations are limited to a specific list of significant violations.

The last two bullets in Section II.A (Ranking Violations-Last two bullets) describe two types of discharges that would be Type 1 violations. However, CCEEB argues these types of violations should not apply to discharges that are made in compliance with an approved discharge permit. For example, a construction activity conducted pursuant to a CWA 404 permit/CWA 401 certification could result in authorized discharges of construction materials to a water of the state or US as part of the authorized construction activity (e.g., construction of a culvert).

Further, some turbidity levels in excess of 100 ntu may be authorized. For example, Table A in the SWRCB Ocean Plan sets a maximum effluent limit of 225 ntu. Also, the San Diego RWQCB Basin Plan, in situations where natural turbidity exceeds 100 ntu, the maximum allowable increase in turbidity is "10% over the natural turbidity level" for increases that are attributable to controllable water quality factors. Further, some dredging activity permits or NPDES permits may include a mixing zone in which increased turbidity levels are authorized.

Consequently, these two violations should be clarified that they do not apply to <u>permitted</u> discharges that are conducted in compliance with the conditions of the permit. This could be easily addressed by prefacing each of these violations with the word "Unpermitted."

In Section II.B Factor No. 3.b. requires consideration of whether the entity has a "history of non-compliance." This factor previously considered whether the history of non-compliance was "chronic." Neither of the terms "history of non-compliance" nor "chronic" are defined for use within this Policy. Therefore, it is unclear how this section will be applied differently with the proposed revision. For "history of non-compliance," it would appear that this could be interpreted to be as few as two events that could have occurred years apart, whereas, "chronic" would seem to imply an on-going pattern of non-compliance. Since this is a factor in determining the case priority, considering whether a discharger's violation is chronic (i.e., multiple violations over a period of time demonstrating a pattern of violation) would be a more appropriate factor to use than a "history of non-compliance" that could be as little as two events that are separated by a long period of time. The term "chronic" would likely provide for a more equitable application of this factor.

CCEEB recommends retaining the term "chronic" rather than changing it to "history of non-compliance." Additionally, the definition of chronic should also be based on an evaluation on

a per outfall review of discharge data of all outfalls that may be on the site rather than an evaluation of the site as a whole. Since compliance activities are outfall specific, the use of determining chronic violations based on a review of all outfalls negates individual activities conducted by the permittee to rectify the problem.
In Section II.C related to Setting Statewide and Regional Priorities, the revisions call for annual outreach and public participation opportunities. CCEEB is highly concerned about the public participation opportunity associated with enforcement matters. Specifically, the section provides:

> *"It is recommended that, on an annual basis, enforcement staff for each Regional Water Board seek input at a regularly noticed public meeting of the Regional Water Board and consider identifying general enforcement priorities based on input from members of the public and Regional Water Board members within thirty (30) days thereafter."*

Our concern with this proposed approach is that various interest groups will undoubtedly use this public forum to target specific sites and/or companies for issues unrelated to issues under regional water board authority. Further, such sites and/or companies would not have prior notice that they would be the subject of such discussions, nor the issues to be addressed or the factual basis of the concerns. In addition, such forums will likely be used to inappropriately pressure enforcement staff to make commitments on prioritizing enforcement actions against a company who they normally would not consider of significant concern based on an objective evaluation. This is further complicated by CCEEB's concern that a number of the revisions to the policy make the Policy less objective and more subjective further heightens this concern.

It should be noted that the public currently has other options for raising concerns they may have about any issue, including enforcement. More specifically, each regional board has a "public session" in their monthly meetings; the public can contact staff directly; and the public can participate in any particular enforcement action that the Board hears at a meeting.

In this regard, CCEEB recommends modification of this provision to mitigate this concern by including the following conceptual language:

- Clarify that only issues specific to general enforcement priorities will be discussed at the meetings and that enforcement proceedings related to a specific entity (i.e. proposed or on-going) will not be discussed.
- Specify that public meetings be formally structured and explained to the public in advance that only issues under Board authority would be considered;
- Establish ground rules for these hearings so that all attendees are aware that they are informational hearings only and that Board members or enforcement staff would not be making commitments at the hearings; and
- Set a clear limitation on time for comments be provided in these hearings that is equitable to all (no extended presentation time be given for any one group) so that everyone would have an opportunity to present.

Additionally, CCEEB urges staff to be clear that only existing, designated beneficial uses be used for compliance purposes not potential beneficial uses that have not been formally designated.

The inclusion of "harm" within Section VI.A for enforcement purposes is of concern as it seeks to make a legal argument that based on the intent of the California Water Code and in reviewing various environmental statutes, the plaintiff does not need to prove a loss in recovering a penalty. Based on this analysis, the amended enforcement policy allows potential harm to be used in determining violations of toxicity and impacts to beneficial uses of a receiving stream. (Enforcement Guide, Step 1, page 10.).

This concept of using potential harm of a beneficial use to assess a penalty allows for a wide range of discretion and subjectivity in assessing what is or is not considered a violation for enforcement purposes. Added to the concept that Basin Plans designate both existing and potential uses of reaches of a receiving stream, it is plausible that a permitted user could be assessed a penalty based on potential harm to a potential beneficial use. This concern is further exacerbated by CCEEB's concerns with the public hearing process noted above as it may also provide a mechanism to have a facility penalized for a discharge based on public opinion that they have been harmed or potentially harmed. This vague and subjective approach seemingly undermines the goal of seeking consistency in enforcement decision making.

Section VI.A (Penalty Calculation Methodology, Footnote 1) states that this Policy *"…extends the requirement to recover a minimum of all economic benefit to all ACL actions…"* Since the recovery of all economic benefits is apparently authorized only for specific types of enforcement actions under CWC §13385, CCEEB questions whether the SWRCB has the legal authority to extend it to all types of administrative civil liability (ACL) enforcement actions. To address this questionable legal authority, we recommend the Policy be revised to provide the legal foundation for extending the requirements of §13385 to all ACL enforcement actions. Alternatively, if the CWC does not provide this authority, the Policy should be revised to conform with CWC §13385.

Within the paragraph under "*Factor 1: The Degree of Toxicity of the Discharge"* within Section VI.A. (Penalty Calculation Methodology, General Approach, STEP 1 – Actual or Potential for Harm for Discharge Violations-Factor 1)(p. 15) it states:

> *"Evaluation of the discharged material's toxicity should account for all the characteristics of the material prior to discharge, including, but not limited to, whether it is partially treated, diluted, concentrated, and/or a mixture of different constituents."*

This approach of considering the characteristics of the material prior to discharge may not be appropriate in all situations. For example, if a non-authorized discharge were made from a permitted facility (e.g., a bypass of a treatment system) that had a dilution factor, the degree of toxicity used for this analysis should not be that of the material prior to discharge. Rather, the toxicity should be evaluated after application of the dilution factor.

CCEEB recommends staff clarify in the Policy that when a discharge permit contains a dilution factor, that the dilution factor needs to be taken into consideration when assessing the potential for harm based on the degree of toxicity.

Scores 2 and 4 within Section VI.A (Penalty Calculation Methodology, General Approach, STEP 1 – Actual or Potential for Harm for Discharge Violations-Factor 1-Score 3 & 4) refer to "known risk factors" and "risk factors." Given these terms are used to assess whether a discharge violation scores as a "3" or "4" for the degree of toxicity it represents, they should be defined and the definitions provided for review and comment prior to adoption in this Policy.

Section VI.A (Penalty Calculation Methodology, General Approach, STEP 1 – Actual or Potential for Harm for Discharge Violations-Factor 2-1st paragraph)(p. 16) states:

> *"The Water Boards may consider actual harm or potential harm to human health, in addition to harm to beneficial uses."*

This statement is confusing in that the Water Board should evaluate the harm in terms of the impact to beneficial uses, some of which are related to human health (e.g., contact and non-contact recreation). The manner in which this is stated appears to refer to some other standard. To address this ambiguity, CCEEB recommends revising the language as follows:

> "The Water Boards may consider actual harm or potential harm to ~~human health, in addition to harm to~~ applicable beneficial uses including human health related beneficial uses."

Section VI.A. (Penalty Calculation Methodology, General Approach, STEP 2 – Assessments for Discharge Violations)(p. 18) states:

1. *"The mandatory penalty should be adjusted upward where the facts and circumstances of the violation(s) warrant a higher liability via discretionary action in accordance with the outcome of the enforcement prioritization processes described in Section II, above. (Step 2, first paragraph); and*

2. *"This step addresses per gallon and per day assessments for discharge violations. Generally, NPDES permit effluent limit violations should be addressed on a per day basis only. However, where deemed appropriate, some NPDES permit effluent limit violations, and violations such as effluent spills or overflows, storm water discharges, or unauthorized discharges, the Water Boards should consider whether to assess both per gallon and per day penalties."*

It should be highlighted that there is a significant compounding effect in the structure of the penalty assessment including, but not necessarily limited to, the following:

- A factor is obtained from Table 1 which is based on an assessment of Actual or Potential for Harm for Discharge Violations in Step 1 and the Deviation from Requirement analysis in Step 2. The calculation in Step 1 includes factors for both

the “Degree of Toxicity of the Discharge” and the “Actual Harm or Potential Harm to Beneficial Uses”. These two factors would most likely always be correlated (i.e., they measure the same effect) and, since these results are added together, will result in higher Step 1 scores. This will result in higher penalty assessments.

- In Step 2,
  - It states that the penalty should be adjusted upward based on the case prioritization process outlined in Section II;
  - It indicates that in some cases the penalties based on both “per day” and “per gallon” can be combined;
  - It states that penalties are to be based on the extent of the violation in terms of its adverse impact on the effectiveness of the “most significant requirement”, when a requirement has more than one part;
- Step 4 includes “adjustment factors”;
- Step 8 requires other factors to be considered as “Justice May Require”.

Most all of these factors involve subjective determinations by staff and consequently could result in significantly different penalties depending on who prepared the analysis. Further, it appears that it would, in general, tend to result in higher penalties rather than moderate penalties. The revisions to #2 above suggest extending (“where deemed appropriate”) the use of “per day” and “per gallon” penalties to:

> *“…some NPDES permit effluent limit violations and violations such as effluent spills or overflows, stormwater discharges, or unauthorized discharges…”*

instead of to just large scale spills or releases. In this regard, CCEEB recommends the proposed Policy should be revised to reduce the compounding of factors through the penalty calculation process. Additionally, the second quote above should clarify why it was revised and provide more clarity on when per day and per gallon penalties should be combined.

Also within Section VI under Step 3 related to the per day assessments for Non-Discharge Violations, it describes the categories for “Potential for Harm,” including the definition for “Moderate Harm.” In this definition, it states:

> *“Most non-discharge violations should be considered to present a moderate potential for harm.”*

CCEEB questions whether there is sufficient rationale or support for including this statement. We’re concerned it may be an arbitrary and capricious assignment of Potential Harm. In this regard, we recommend this sentence be deleted from this section.

In Section VI.A (Penalty Calculation Methodology, General Approach, STEP 4 – Adjustment Factors) revisions are made to remove the cap on the multiplier for the “History of Violations” category and adjust the Culpability factor range. These are of concern to CCEEB. Previously, the multiplier for the “History of Violations” factor was capped at 1.5. Now, however, the proposal is to “consider adopting a multiplier above 1.1. This could result in much higher multipliers that would significantly increase the proposed calculated penalty. Additionally, modification of the Culpability factor range from 0.5-1.5 to 1.0-1.5 would remove

any “credit” in the proposed penalty calculation for unavoidable, non-negligent, non-intentional violations as allowed under the current Policy. CCEEB urges retention of both the cap on the multiplier for the history of violations and credit opportunity under the culpability factor range.

Finally, CCEEB urges the Board and staff to consider providing the ability for an industrial user to demonstrate that the violation for which they are being enforced upon came from an offsite source that flowed on to their property. This would be a consideration under extenuating circumstances for industrial entities who have otherwise sought to be compliant and avoid violations and associated enforcement action.

On behalf of CCEEB, I appreciate your consideration of these comments. If you have questions regarding the points raised in this letter, please contact CCEEB Water, Chemistry and Waste Project Manager Dawn Koepke with McHugh, Koepke & Associates at (916) 930-1993. Thank you.

Sincerely,

Gerald D. Secundy
CCEEB President

cc: CJ Croyts-Schooley, SWRCB
Members, CCEEB Water, Chemistry & Waste Project
The Gualco Group