



## A COOPERATIVE STRATEGY FOR RESOURCE MANAGEMENT & PROTECTION

October 18, 2016

Electronic Submission: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

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

**Subject: Comment Letter – Water Quality Enforcement Policy**

Dear Ms. Townsend:

The Stakeholders Implementing Total Maximum Daily Loads (TMDLs) in the Calleguas Creek Watershed (Stakeholders) appreciate the opportunity to provide comments on the Proposed Amendments to the State Water Resources Control Board's (State Water Board) Water Quality Enforcement Policy (referred to hereinafter as the "Revised Water Quality Enforcement Policy").

The Stakeholders include wastewater agencies, stormwater agencies, and agricultural interests that implement water quality management and monitoring programs in the Calleguas Creek Watershed. The Stakeholders support the intent of the proposed amendments to provide clarity, consistency, and fairness as enforcement actions are developed for violations of water quality laws, regulations, policies, and plans. However, changes are suggested to allow consideration of the impacts, operating conditions, and funding restrictions associated with Stakeholder operations. Our key concerns and recommendations are presented below.

## Section II.A. Ranking Violations (Page 5-6)

The Revised Water Quality Enforcement Policy includes a list of Class I priority violations that should be considered significant when setting enforcement action priorities. Some of the cited priority violations should be revised or removed since they do not always result in serious impacts to receiving waters. For example, exceedance of a primary MCL when discharging to a MUN designated waterbody should not be a Class I violation because there are many waterbodies with this designation that are not used as a drinking water source. Use of an MCL exceedance will result in enforcement actions when the discharge is benign and presents no risk to public health. Many of the waterbodies in the Calleguas Creek Watershed are designated as P\* which in the Los Angeles Basin Plan means that the beneficial use designation requires further study to determine whether or not the MUN beneficial use is applicable under the Sources of Drinking Water Policy. Requiring that violations associated with a MUN objective when the beneficial use designations require further study is inappropriate. In addition, the selection of 100% as a benchmark for California Toxics Rule (CTR) priority pollutant violations is not based on risks to the environment. Priority pollutant standards were developed by evaluating toxicity to sensitive organisms and cancer risks to humans. The impact of each constituent is different and doubling a standard does not necessarily double the impact. The State and Regional Water Boards should consider constituent-specific impacts when assessing violations of CTR priority pollutant limitations. Finally, violations of acute toxicity effluent limitations should not be an enforcement priority because toxicity test results are not consistent, reliable indicators of environmental impacts.

***Recommendation:*** “Class I priority violations are those that pose an immediate and substantial threat to water quality and/or that have the potential to individually or cumulatively cause significant detrimental impacts to human health or the environment. Class I violations ordinarily include, but are not limited to, the following:

*Discharges causing or contributing to exceedances of primary maximum contaminant levels in receiving waters with a beneficial use of municipal or domestic supply (MUN);*

*Discharges violating acute toxicity effluent limitations;*

*Discharges exceeding water quality based effluent limitations for priority pollutants as defined in the California Toxics Rule, depending on the magnitude of the exceedance and possible impacts to uses of the receiving waters by 100 percent or more.”*

## VI.A. Penalty Calculation Methodology Step 2 – Assessments for Discharge Violations (Page 13)

The Revised Water Quality Enforcement Policy appears to eliminate language in the current policy that supports penalty assessments for effluent limit violations on a per day basis only. This approach should be retained to clarify and establish a general intent to apply only the per day assessment for effluent limit violations. Based on the typical short-term occurrence of stormwater and agricultural runoff, exceedance of effluent limits for these types of discharges should only be addressed on a per day basis.

**Recommendation:** “This step addresses per gallon and per day assessments for discharge violations. Generally, it is intended that ~~NPDES permit~~ effluent limit violations ~~should~~ be addressed on a per day basis only. However, where deemed appropriate, such as for unauthorized discharges, a large scale spill or release with significant impacts, 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.”

#### **VI.A. Penalty Calculation Methodology Step 2 – Assessments for Discharge Violations, High Volume Discharges (Page 14)**

The Revised Water Quality Enforcement Policy gives the State and Regional Water Boards discretion to apply a penalty of \$2 to \$10/gallon for discharges that are between 100,000 and 2,000,000 gallons. The definition of a small or large discharge volume should be related to the size of the operation or the program being implemented. In particular, defining a range for stormwater or agricultural runoff is too prescriptive because the discharge volume is related to the size of a storm event or the area contributing to runoff. To allow program or event size considerations, the lower boundary for designating high volume discharges should be removed. In addition, discharges with minimal impacts on water quality and very high volume stormwater discharges from infrequent large storm events should be considered for lower penalty amounts.

**Recommendation:** “However, recognizing that the volume of certain discharges can be very high or not have significant impacts on water quality, the Water Boards have the discretion to select a value between \$2.00 per gallon and \$10.00 per gallon with the above factor to determine the per gallon amount for discharges that are less than ~~between 100,000 gallons and 2,000,000 gallons~~ for each discharge event, whether it occurs on one or more days. For discharges in excess of 2,000,000 gallons, or for discharges of recycled water that has been treated for reuse or stormwater, the Water Boards may elect to use a maximum of \$1.00 per gallon with the above factor to determine the per gallon amount.”

#### **VI.A. Penalty Calculation Methodology Step 4 – Adjustment Factors, Table 4 Violator’s Conduct Factors, Degree of Culpability (Page 17)**

The Revised Water Quality Enforcement Policy increases the lower multiplier (from 0.5 to 1.0) when assessing degree of culpability. The option of applying multiplier values < 1.0 should be retained for non-negligent violations or violations that result from disastrous circumstances (e.g., floods, earthquakes, terrorism). The State and Regional Water Boards should be allowed discretion to use a lower multiplier when establishing a discharger’s degree of culpability.

**Recommendation:** “Discharger’s degree of culpability prior to the violation: Higher liabilities should result from intentional or negligent violations than for accidental, non-negligent violations and disastrous circumstances. A first step is to identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation. The test for whether a discharger is negligent is what a reasonable and prudent person would have done or not done under similar circumstances.

*Adjustment should result in a multiplier between 0.5 ~~1.0~~ to 1.5 with a higher multiplier for intentional misconduct and gross negligence, and a lower multiplier for conditions not in the discharger's control or more simple negligence. A neutral assessment of 1.0 should be used when a discharger is determined to have acted as a reasonable and prudent person would have. Water Boards have discretion to assess degree of culpability and determine the appropriate multiplier."*

#### **VI.A. Penalty Calculation Methodology Step 4 – Adjustment Factors, Table 4 Violator's Conduct Factors, History of Violations (Page 17)**

The Revised Water Quality Enforcement Policy eliminates use of a multiplier < 1.0 for dischargers with a good compliance history. If a discharger has had no violations in the past, a neutral multiplier of 1.0 is applied. Almost all dischargers have had some violations in the past, so the neutral multiplier may never be used. The State and Regional Water Boards should be allowed discretion when deciding if a discharger has a good compliance history and if those dischargers should be rewarded with a lower penalty based on use of a multiplier  $\leq 1.0$ . Finally, a clear cap should be established if State and Regional Water Boards seek to elevate above the 1.1 multiplier.

***Recommendation:** "Any prior history of violations: Where the discharger has a good compliance ~~no prior history of any violations~~, this factor should be neutral, or 1.0 ~~0.75 to 1.0~~. Where the discharger has ~~any~~ a history of prior violations, a minimum multiplier of 1.1 should be used. Where the discharger has a history of similar or numerous dissimilar violations, the Water Boards should consider adopting a multiplier of 1.1 to 1.5. Water Boards have discretion to evaluate history of compliance and determine the appropriate multiplier."*

#### **VI.A. Penalty Calculation Methodology Step 6 – Ability to Pay and Ability to Stay in Business (Page 19)**

The Revised Water Quality Enforcement Policy indicates that a discharger's "ability to pay" ACLs will be determined solely by its income and net worth. For public agencies, the "ability to pay" should include impacts to ratepayers. Service area population, existing rates, and planned capital improvement projects are important considerations, especially for smaller agencies. The current policy allows lower fines "if there is strong evidence that an ACL would result in widespread hardship to service area population." This approach should be retained and the State and Regional Water Boards should be allowed to consider financial impacts to the public agency and service area population when evaluating "ability to pay."

***Recommendation:** "The ability of a discharger to pay an ACL is determined by its income (revenues minus expenses) and net worth (assets minus liabilities). For public agencies, the ability to pay may also consider service area population, available funding mechanisms and ability to raise funds, and the costs, schedules, anticipated financial impacts to the community of other planned stormwater, water and wastewater expenditures, and other relevant factors impacting the utility's rate base."*

*In most cases, it is in the public interest for the discharger to continue in business and bring its operations into compliance. However, the Water Boards are not required to ensure that civil liabilities are set at levels that allow violators to continue in business. If there is strong evidence that an ACL would result in widespread hardship to the service population or undue hardship to the discharger, the amount of the assessment may be reduced on the grounds of ability to pay.*

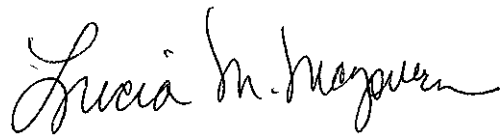
#### **VI.A. Penalty Calculation Methodology Step 7 – Economic Benefit (Page 20)**

The Revised Water Quality Enforcement Policy defines economic benefit as “*any savings or monetary gain derived from the act of omission that constitutes a violation.*” This definition and numerous statements in the revised policy regarding “eliminating unfair competitive advantages from non-compliance” do not reflect public agency operations. The definition of economic benefit should be expanded to allow different assessment approaches for public agencies. State and Regional Water Boards should be allowed some flexibility and discretion when assessing economic benefits of violations for public agencies.

***Recommendation:*** “*The Economic Benefit Amount shall be estimated for every violation. Economic benefit is any savings or monetary gain derived from the act of omission that constitutes the violation. When calculating the economic benefit for public agencies, Water Boards have discretion to exclude staff time, assess benefits of the alternative use of funds (i.e. for implementation of higher priority capital improvement projects), and consider potential for harm.*

Thank you for your time and consideration of these comments. If you have questions, please contact Ashli Desai at (310)-394-1036.

Sincerely,



Lucia McGovern

Chair of Stakeholders Implementing TMDLs in Calleguas Creek Watershed

Cc: CJ Croys-Schooley, State Water Resources Control Board