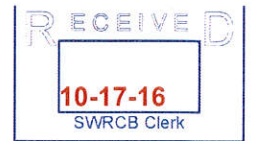




CALIFORNIA WATER SERVICE

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Tel: (408) 367-8200



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

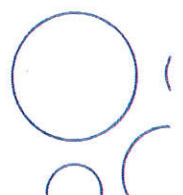
Subject: Comment Letter – Water Quality Enforcement Policy

Dear Ms. Townsend:

I am submitting these comments on the State Water Resources Control Board's proposed amendments to the Water Quality Enforcement Policy (Draft Policy) on behalf of the California Water Service Company (Cal Water). Cal Water is the largest investor-owned American water utility west of the Mississippi River and the third largest in the country. Cal Water serves more than 477,900 customers with drinking water through 28 Customer and Operations Centers throughout the state. Cal Water is a permittee under the SWRCB's statewide NPDES permit for drinking water system discharges, Order WQ 2014-0194-DWQ (Drinking Water Systems Discharge Permit).

I. General Comments

- The Draft Policy should clarify that unplanned, emergency discharges from drinking water systems should not be subject to formal enforcement proceedings provided timely notice of such a discharge is provided and appropriate BMPs are implemented in accordance with the SWRCB's Drinking Water Systems Discharge Permit. The SWRCB recognized the importance of providing a regulatory mechanism for addressing unplanned, emergency discharges from drinking water systems when it adopted the Drinking Water Systems Discharge Permit.

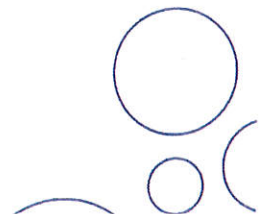




CALIFORNIA WATER SERVICE

Unplanned, emergency discharges of drinking water cannot be completely avoided, despite strict compliance with regulatory requirements that apply to drinking water systems. Accordingly, if a water purveyor suffers an unplanned, emergency discharge of drinking water, but provides timely notice of the discharge and implements all appropriate BMPs, it should not be subject to formal enforcement proceedings.

- The Draft Policy focuses on discharges related to Publicly Owned Treatment Works (POTW) and thus does not encompass some of the issues specific to potable water, for which the Draft Policy is also being used to guide enforcement actions. The SWRCB should include language to provide some flexibility for enforcement related to low threat *de minimus* discharges, similar to the recycled water discharge language. Moreover, some items in the Policy contradict the SWRCB's new General NPDES Permit for Drinking Water Related Discharges. For example, natural degradation of residual chlorine is an authorized BMP in the permit but it is not considered for cleanup credit in the susceptibility to clean up factor. These inconsistencies need to be reconciled.
- The SWRCB should clarify if the Draft Policy is a policy or a regulation. The Statement of Reasons references the findings an agency must make pursuant to the Government Code before adopting a proposed regulation, but the Draft Policy by its title and format is not a regulation. If the Draft Policy is a policy, then it provides general, but non-binding guidance. If it is instead a regulation, then it is binding. But if that is the case, the Draft Policy needs to be re-noticed for public comment and a more rigorous evidentiary basis should be required before it is adopted.
- An overarching objective of the Draft Policy is to promote fairness and consistency in enforcement proceedings. In order to evaluate whether the Draft Policy may achieve its stated goal, there should first be an assessment of whether prior enforcement actions have been unfair or





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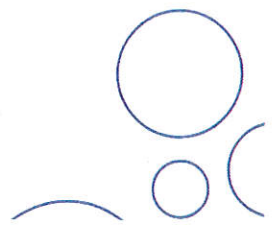
inconsistent. Without an understanding of the existing policy's limitations, there can be no assurance that the Draft Policy will correct them. The Statement of Reasons explains that except for an economic impact assessment (that does not appear to be available for review) "the SWRCB did not rely on technical, theoretical, or empirical studies, reports, or similar documents in proposing the amended regulations." This appears to be an acknowledgment that the Draft Policy is not supported by substantial evidence in the record.

- The Draft Policy would increase the various factors that are considered when calculating a civil penalty in relation to the existing policy. This means that a violation would be assessed a larger penalty under the Draft Policy than the current one. The SWRCB should explain why it believes penalties as a general proposition should be increased and how this promotes a fair, effective, efficient and consistent enforcement policy. It is not apparent that penalties need to be increased to achieve these goals.

II. Draft Policy Introduction

The SWRCB states in its Draft Policy that "[f]ormal 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." Draft Policy at page 1.

In light of the above, the Policy should recognize that formal enforcement proceedings may be inappropriate when non-compliance is unintentional and there is no economic advantage. For example, a drinking water purveyor realizes no economic advantage when an unplanned, emergency discharge occurs. To the contrary, the drinking water purveyor suffers a loss because it loses the water that would otherwise be delivered to its customers and it must incur costs





CALIFORNIA WATER SERVICE

to repair the damage. Penalties are unnecessary to level the playing field under such circumstances. Again, when a drinking water purveyor is otherwise in compliance with the Drinking Water Systems Discharge Permit, it should not be subject to formal enforcement proceedings when an unplanned, emergency discharge occurs.

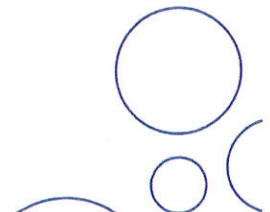
III. Draft Policy Section I: Fair, Firm, Consistent, And Transparent Enforcement

At section C, Consistent Enforcement, the Policy states, "This policy does not require a Water Board to compare a proposed penalty to other actions that it or another Water Board has taken...." This point is repeated at Section VI.A., at p. 9. However, without such an analysis there can be no confidence that enforcement is consistent. In fact, the failure to conduct this type of analysis undermines another stated goal of the Policy: promoting transparency. We have observed that a water board can be significantly inconsistent with itself and other boards in substantially similar enforcement actions.

IV. Draft Policy Section II.A: Ranking Violations

Under the current Policy, a water board ranks violations of the Water Code into three classes, depending on the significance of the violation(s). Class I violations are the most significant, often with an intentional or willful character to them, while Class II violations are characterized by negligent or inadvertent violations. Class III violation are those violations that pose only a minor threat to water quality and have little or no known potential for causing a detrimental impact on human health and the environment.

The Draft Policy greatly expands the scope of Class I violations, eliminating the distinction between intentional or willful acts and negligent or inadvertent acts. It also categorizes all other violations, without specification, as Class II, thus eliminating Class III for minor threats with little or no detrimental impact. Cal Water believes that by narrowing the rankings and eliminating the





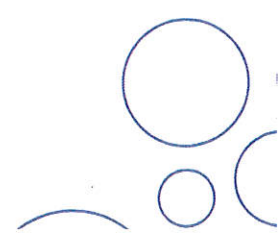
CALIFORNIA WATER SERVICE

distinction between intentional/willful and negligent/inadvertent, the SWRCB has inappropriately limited the flexibility of the water boards in categorizing violations based on the specifics of the circumstances involved.

For example, the current Policy lists as a Class I violation “Violations that result in *significant* harm to, or the destruction of, fish or wildlife.” The Draft Policy changes this language to “Discharges causing or contributing to *demonstrable detrimental* impacts to aquatic life and aquatic-dependent wildlife. (e.g., fish kill).” Draft Policy at p. 6. The fact that a discharge has caused fish kill without any consideration of the effect of the impact on the fish population should not be sufficient to elevate a violation to Class I. It is inappropriate for an enforcement policy to direct the water boards to disregard the scale of the impact of a discharge. The SWRCB does not present any evidence or reasoning to support this very significant change in policy.

Additionally, the Draft Policy proposes to categorize as a Class I violation “Discharges causing or contributing to in-stream turbidity in excess of 100 nephelometric turbidity units (NTU) in receiving waters with beneficial uses of COLD, WARM, and/or WILD, except during storm events.” Draft Policy at page 6. The current Policy does not set a number objective, rather it describes such a violation as “Significant measured or calculated violations of water quality objectives or promulgated water quality criteria in the receiving waters” or “Violations that result in significant demonstrated impacts on existing beneficial uses of waters of the State.” On its face, the proposed language does not allow for a situation where the receiving water turbidity has already surpassed 100 NTUs and the discharge contributes another 10 NTUs. This type of “violation” would automatically be categorized as Class I; whereas under current Policy, a water board would have the flexibility using the “significant” criteria to find the violation a Class II or Class III violation.

Finally, the Drinking Water Systems Permit specifies that receiving water limitations do not apply to unplanned, emergency discharges, given their unique





CALIFORNIA WATER SERVICE

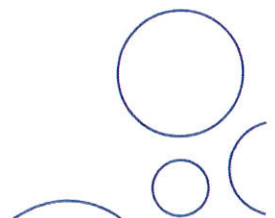
nature. For the same reason this factor should not apply to unplanned, emergency discharges of drinking water.

V. Draft Policy Section VI.A: Penalty Calculation Methodology

The Draft Policy states, "Fairness does not require the Water Boards to compare an adopted or proposed penalty to other actions." Draft Policy, p. 9. Yet, there is no assurance that the Water Boards are enforcing the Water Code fairly and consistently without considering how other similar enforcement matters are addressed. The Draft Policy practically directs the Water Boards to disregard comparing one enforcement action to another. And yet the Draft Policy states, "It is the intent of the State Water Board, by establishing this penalty calculation methodology, to help ensure that these powerful liability provisions are exercised in a transparent, fair, and consistent manner." (Id.) How can this intent be realized without some consideration of whether similarly situated dischargers are being treated similarly?

STEP 1 – Actual Harm or Potential for Harm for Discharge Violations

The term "Potential Harm" in the Draft Policy must be adequately defined. As in the current Policy, the Draft Policy includes the term "Potential Harm" when referencing how "harm" should be evaluated in a discretionary enforcement action. The Draft Policy adds an explanation as to why potential for harm, instead of actual harm, is appropriate in such enforcement actions: "Because actual harm is not always quantifiable due to untimely reporting, inadequate monitoring, and/or other practical limitations, potential harm can be used under this factor." Draft Policy, page 11. Although we agree with SWRCB that actual harm may be difficult to quantify in many circumstances, we are concerned that the term "Potential Harm" as used in the Draft Policy is going to prove problematic in many cases, as that term is vague, theoretical and subject to multiple interpretations. The term "Potential Harm" should, at a minimum, be based in potential harm that could actually occur under the relevant factual setting, and must be grounded in science, through studies, literature or other





CALIFORNIA WATER SERVICE

scientific bases. Moreover, if evidence of actual harm (or lack thereof) is available and presented to SWRCB, the Policy should state that such evidence should be favored over more speculative "potential" harm.

Factor 1: The Degree of Toxicity of the Discharge

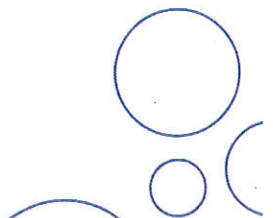
The Draft Policy states, "Evaluation of the discharged materials' toxicity should account for all the characteristics of the material prior to discharge, including, but not limited to, whether it is partially treated, diluted, concentrated, and/or a mixture of different constituents." Draft Policy at p. 11. The policy should also take into account whether the material is harmful or beneficial to human health, such as drinking water. Otherwise drinking water has the potential be considered as toxic as sewage, which is entirely inappropriate, and would fail to account for all of the characteristics of the drinking water prior to discharge.

Factor 2: Actual Harm or Potential Harm to Beneficial Uses

The Draft Policy states, "The Water Boards may consider actual harm or potential harm to human health, in addition to harm to beneficial uses." Draft Policy at 12. To that end, the policy should acknowledge that by its very nature drinking water is beneficial to human health.

Factor 3: Susceptibility to Cleanup or Abatement

This factor, as written, is inappropriate in the context of potable water discharges. The way the language currently exists, an oil spill would receive a more favorable score than a *de minimus* potable water discharge simply by virtue of the fact that oil is more susceptible to cleanup than potable water. Unplanned discharges of potable water, such as a main break, can almost never be contained and recaptured. The water lost from the pipe cannot be taken back out of the receiving water once the two are mixed; in other words, it is not possible to separate the discharge. The Draft Policy should include special





CALIFORNIA WATER SERVICE

exception language in Factor 3 to account for the low threat nature a potable water discharge. As mentioned above, natural degradation of residual chlorine is an authorized BMP in the General NPDES Permit for Drinking Water Discharges, but it is explicitly not considered for cleanup credit in Factor 3.

Table 1 – Per Gallon Factor for Discharges

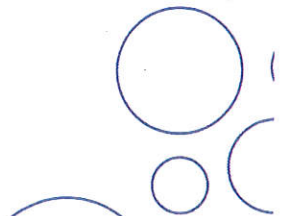
The Draft Policy almost universally increases the per gallon penalty factor, thereby increasing the calculated penalty that would otherwise apply. The Statement of Reasons explains that under the existing “rubric” there are weighting irregularities for penalties with potential for harm scores of “7” and “8”. This does not explain why the penalty factors are increased across the board. Nor does it explain why this increase is necessary to promote the stated goals behind the policy.

Deviation from Requirement

At Table 1 and Table 2, the extent to which a discharge deviates from a requirement affects the per gallon or per day penalty factor. However, the policy does not adequately explain how the Water Boards should evaluate the extent to which a discharge deviates from a regulatory requirement. The Draft Policy should clarify that an unplanned, emergency discharge of potable water that is otherwise in compliance with the Drinking Water Systems Permit is not a deviation from a regulatory requirement.

High Volume Discharges

The Draft Policy gives the Water Board discretion to impose per gallon penalties of between \$2.00 and \$10.00 for discharges that are between 100,000 gallons and 2,000,000 gallons for each discharge event. The current Policy sets \$2.00 as the maximum. The State Water Board should provide some justification for this five-fold increase. For discharges in excess of 2,000,000 gallons, or for discharges of recycled water that has been treated for reuse, the Draft Policy





CALIFORNIA WATER SERVICE

provides that the Water Boards may elect to use a maximum of \$1.00 per gallon. Given that drinking water is already treated to standards protective of human health, the Draft Policy should clarify that, just as with recycled water treated for reuse, the maximum per gallon fee for high volume discharges should be \$1.

Table 2 – Per Day Factor for Discharges

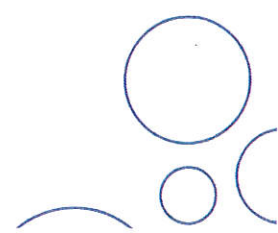
The Draft Policy increases the per day factor for calculating multi-day penalties compared to the existing policy. The State Water Board should explain why this increase is necessary to achieve the stated goals of the policy.

Table 4 – Violator’s Conduct Factors. Degree of Culpability

Please explain why an increase in this factor is necessary to fulfil the stated goals of the Draft Policy. Without any supporting evidence, this appears to be an arbitrary increase. In addition, if the record shows that the discharger is non-negligent and took appropriate steps to avoid or minimize the discharge, there should be an opportunity for the adjustment factor to reduce the penalty. As proposed, it is at best a neutral factor. Furthermore, Water Board staff are not experts in evaluating the culpability of an alleged discharger. While we understand why this factor plays a role in the State Water Board’s enforcement policy, the potential for different Water Boards to evaluate this factor differently is a good example of why the Policy should encourage enforcement staff to compare similar enforcement actions to promote consistency.

Table 4 – Violator’s Conduct Factors. History of Violations

Current Policy states that “where there is a history of repeat violations, a minimum multiplier of 1.1 should be used to reflect this.” This language allows the Water Board to consider the frequency of violations. Under the Draft Policy, a multiplier of 1.1 should apply where the discharger has any history of prior violations. As a result, a discharger could face a significantly increased penalty because it was penalized in the past for something that was wholly unrelated. In addition, this factor has the potential to unfairly penalize companies with





CALIFORNIA WATER SERVICE

extensive operations throughout the state. Cal Water operates 28 different drinking water systems in California. What may have transpired in one district should have no bearing on another.

Additionally, given the realities of today's water distribution infrastructure, accidental water main breaks are an inevitable part of potable water delivery and are not necessarily indicative of a discharger's conduct. Drinking water systems are highly regulated and investor-owned utilities are not at liberty to incur significant capital expenditures without the approval of the California Public Utility Commission. Cal Water recommends that the Water Boards retain flexibility when considering this factor when unplanned, emergency discharges of potable water are at issue, taking into account the unique circumstances involving drinking water purveyors.

Finally, a reduction in the penalty should be potentially available if the discharger does not have a recent history of violations.

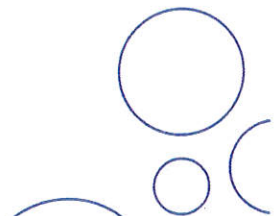
Table 4 – Violator's Conduct Factors. Cleanup and Cooperation

The State Water Board should explain why an increase in this multiplier, relative to the existing policy, is necessary to achieve the Draft Policy's stated goals. Without any supporting evidence, this appears to be an arbitrary increase.

Step 8 – Other Factors As Justice May Require

This section explains that an adjustment to a penalty may be appropriate if "The calculated amount is entirely disproportionate to assessments for similar conduct made in the recent past using the same Enforcement Policy." Cal Water believes this is appropriate. It should be noted that this evaluation expressly requires consideration of other, similar enforcement actions but elsewhere in the policy it is stated that such an evaluation is not required.

Step 10 – Final Liability Amount





CALIFORNIA WATER SERVICE

Under Step 10(B), Settlement Considerations, footnote 3, the Draft Policy sets forth a conclusory legal opinion regarding the applicability of statutes of limitations and the equitable defense of laches in administrative proceedings. Whether these defenses apply in any specific enforcement circumstance should be addressed during that enforcement action, based on the applicable law and precedent at that time. It is not appropriate to include such conclusory legal statements within the context of a generalized policy that could hamper a party's ability to appropriately raise such defenses in a site-specific enforcement setting. SWRCB should remove footnote 3.

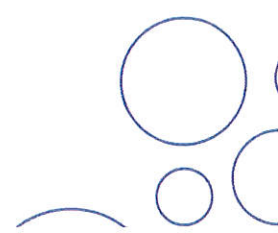
VI. Enhanced Compliance Action (ECA)

The 50% cap on an ECA (and/or SEP) imposes a counter-productive artificial constraint on settlement. In certain circumstances a proposed ECA or SEP may exceed 50% of the calculated penalty but will provide environmental benefits that make this worthwhile. Provided it meets the otherwise objective criteria for an acceptable project, an ECA or SEP in an environmentally sensitive area that exceeds 50% of the calculated penalty should be considered.

VII. Conclusion

Unplanned, emergency discharges of drinking water are different from discharge of waste. The Draft Policy should explicitly recognize this, just as the SWRCB did when it adopted the Drinking Water Systems Permit. Unplanned, emergency discharges of potable water should not be subject to formal enforcement proceedings if the discharger is otherwise in compliance with the Drinking Water Systems Permit. Otherwise, the Draft Policy will undermine the purpose and value of the Drinking Water Systems Permit.

The State Board should consider whether the Draft Policy will have the unintended consequence of frustrating settlement discussions. Cal Water has had to resolve two enforcement actions for emergency, unplanned discharges of drinking water in the last several years. Both cases settled with Cal Water agreeing to make a significant payment and implement a substantial ECA or SEP.





CALIFORNIA WATER SERVICE

If the Draft Policy had been in place when these actions were settled, the proposed penalties would have been significantly greater than originally calculated. Not only would this result have been unwarranted, but it could have frustrated two important settlement agreements that have or will confer important environmental benefits by virtue of implementing an ECA or SEP.

Cal Water supports the SWRCB's desire to promote fairness and consistency in its enforcement proceedings. However, there is no evidence to substantiate that any of the proposed changes in the Draft Policy will achieve this. Based on its experience, it is possible that the Draft Policy will do more harm than good. Before the SWRCB changes the existing enforcement policy, it should conduct a factual analysis to demonstrate that the proposed changes will have their desired effect and make that information available for public review and comment.

Thank you in advance for consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Lynne McGhee".

Lynne McGhee
Vice President, General Counsel

cc: Zack Walton, SSL Law Firm

