CALIFORNIA ASSOCIATION of SANITATION AGENCIES

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7/23/13 Board Meeting- Items 7-10
Various MMPs
Deadline: 7/16/13 by 12 noon

July 11, 2013

Via Electronic Mail

Felicia Marcus, Chair, and Members
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

c/o Ms. Jeanine Townsend, Clerk to the Board
Email: commentletters@waterboards.ca.gov

Re: **Comments on Four Proposed Orders Imposing Mandatory Minimum Penalties on Entities Within the Los Angeles Region – July 23 Board Meeting [Mantini Management Inc., Lincoln Avenue Water Company, Lubricating Specialties Company, Rodeo Owner Corp.]**

Dear Chair Marcus and Members of the Board:

The California Association of Sanitation Agencies (CASA) appreciates the opportunity to provide comments on four proposed orders imposing mandatory minimum penalties (MMPs) against the following entities: (1) Lincoln Avenue Water Company (ACL Complaint No. 0E-2010-0016); (2) Lubricating Specialties Company (ACL Complaint No. 0E-2010-0006); (3) Mantini Management, Inc. (ACL Complaint No. 0E-2010-0035); and (4) Rodeo Owner Corp. (ACL Complaint No. 0E-2011-0038).

CASA is a statewide association of municipalities, special districts, and joint powers agencies that provide wastewater collection, treatment, and water recycling services to millions of Californians. Our association does not routinely comment on individual enforcement actions, and these comments do not address the substance of the specific allegations against any of the above-identified entities. Our concern, and the impetus for these comments, is a broader one that transcends the individual facts in these proposed orders. Specifically, we are concerned that enforcement actions are being taken against entities six (6) to ten (10) years after the incidents giving rise to the actions took place, long after the applicable statutes of limitation have expired and long after any U.S. Environmental Protection Agency (EPA) or citizen suit action could be filed under the Clean Water Act (CWA). These proposed orders are untimely and the product of unreasonable delay, and thus valid arguments are being raised regarding expiration of the statute of limitations, application of the doctrine of laches, and other equitable defenses.

For example, the incidents giving rise to the action against Rodeo occurred during 2006 and the first half of 2007, more than 6 years ago. The same is true of the action against

Lincoln Avenue Water Company, where the incidents occurred during the fourth quarter of 2004, nearly 9 years ago, and the action against Lubricating Specialties Company, where the incidents occurred almost 10 years ago. This type of significant and unwarranted delay necessarily prejudices the parties against whom the actions are directed and far exceeds any statute of limitations time period that might otherwise be applicable.1

Specifically, neither the California Attorney General, the U.S. Environmental Protection Agency (EPA), nor a citizens group alleging violations under the Clean Water Act could pursue a judicial or administrative action against these entities based on the alleged violations, as each would be prohibited from doing so due to the applicable statutes of limitation.[2] California Code of Civil Procedure section 338(i) sets forth a 3-year statute of limitations for commencing an action under the Porter Cologne Water Quality Control Act, and federal statutes impose a five-year statute of limitations for actions that might be taken by EPA or a citizens group. (See 28 U.S.C. §2462.) As noted above, the alleged violations for three of these enforcement actions took place 6, 9, and 10 years ago respectively. Neither the State Water Board Office of Enforcement nor a Regional Water Board should be prosecuting alleged violations of Waste Discharge Requirements or NPDES permits that are otherwise barred by federal and state statutes of limitation.

Moreover, the term of a related statute of limitations period (as described above) has been used by courts to determine the reasonableness of any delay in enforcement when determining the applicability of laches. *(See Brown v. State Personnel Board* (1985) 166 Cal. App. 3d 1151, 1158-1160 ("In cases where no statute of limitations directly applies, but there is a statute of limitations governing an analogous action at law, the period may be borrowed as a measure of the outer limit of reasonable delay in determining laches").) CASA believes that each of these actions (and others like them) may be and often should be barred by the doctrine of laches. While the doctrine of laches originated in the judicial system, the underlying motivations for application of this equitable doctrine are no less important or pertinent in the administrative enforcement context. For example, extended delay can cause prejudice to a defendant where witnesses or evidence are no longer available, witnesses forget what they observed, or where the defendant incurs costs based on the assumption that the failure to prosecute within a reasonable period of time demonstrates an intent not to prosecute

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1 (*See 3M Co. v. Browner,* 17 F.3d 1453, 1456-57 (D.C.Cir. 1994)("[s]tatutes of limitations ... reflect the judgment that there comes a time when the potential defendant 'ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations.'").)

[2] *See* 28 U.S.C. § 2462 ("Time for commencing proceedings. Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued…"); *see also United States v. C&R Trucking,* 537 F.Supp 1080, 1083 (1982)(suit by EPA under CWA §311); *United States v. Outboard Marine Corp.,* 104 F.R.D. 405, 409 (1984)(suggesting § 2462 bars CWA §309 suit); *Sierra Club v. Chevron USA, Inc.*, 834 F.2d 1517, 1520–22 (9th Cir. 1987)(application of §2462 to citizen suit); *3M Co. v. Browner,* 17 F.3d, 1453 (D.C.Cir. 1994)(applying federal statute of limitations in §2462 to EPA administrative penalty actions).

the alleged violations. Such complications arise in the administrative context as readily as the judicial one.

Finally, these types of delayed enforcement actions are directly contrary to the State Water Resources Control Board's Water Quality Enforcement Policy. The State Water Board's 2010 Enforcement Policy indicates that Water Boards should issue MMPs "within eighteen months of the time that the violations qualify as mandatory minimum penalties." (2010 Enforcement Policy at pp. 8, 23.) The prior enforcement policy (which was the relevant document in effect when these alleged violations occurred) similarly indicated the Water Boards should "issue mandatory minimum penalties within seven months of the time that the violations qualify as mandatory minimum penalty violations…" (2002 Enforcement Policy at p. 29.) In the case of Rodeo, the ACL was not issued until July of 2011, roughly five years after the alleged violations occurred. Similarly, in the cases of Lubricating Specialties and Lincoln Water, the amended ACLs were not issued until August of 2010, approximately seven (7) years after the alleged violations occurred. All of these are clearly beyond the timeframe prescribed by both the 2002 and 2010 Enforcement Policies and should not have been pursued by the State Water Board's Office of Enforcement.

Presumably because of these significant and extraordinary delays, each of the proposed orders makes a concerted effort to preemptively refute any arguments regarding statutes of limitation, laches, or other similar defenses. The proposed orders, however, do not take into account case law specifically on point, and rely on relatively broad generalizations about the availability of these defenses. For example, in a 2009 Butte County Superior Court case, the court found that the Central Valley Regional Water Quality Control Board provided insufficient evidence to support findings that the doctrine of laches was unavailable to the administrative penalty recipient in that case. (*Tehama Market, et al v. Central Valley Regional Water Quality Control Board*, Butte County Superior Court, Case No. 141395, Ruling on Petition for Writ of Mandate (April 6, 2009).) This ruling suggests that in the event sufficient evidence were presented, the defense of laches would be available to an entity based on unreasonable delay by the State Water Board Office of Enforcement or a Regional Water Board and other principles of the doctrine. (*See Gates v. Department of Motor Vehicles,* 94 Cal. App. 3d 921, 925 (1979) (laches can bar untimely actions that result in prejudice in both administrative and quasi-adjudicative proceedings).)

To the extent that these enforcement actions are representative of a trend or pattern of practice statewide, CASA's members have a significant interest in how these actions are treated by the State Water Board. Given the importance of these issues to the clean water community, CASA strongly urges the State Water Board to reconsider and reject the portions of these orders that seemingly disallow any potential assertions regarding the applicable statute of limitations and the doctrine of laches, and requests that the four draft orders be amended to remove altogether these provisions of the order discussing the general applicability (or lack thereof) of laches to State Water Board enforcement actions or MMPs. Each case should be viewed on its own merits and on specific findings related to the facts of

each particular case so that future cases are not bound to follow these orders as binding precedent. We would also request that you consider the above-referenced concerns when reviewing these types of "delayed" enforcement actions in the future.

Thank you very much for the opportunity to provide our comments.

Very truly yours,

Adam Link
Director of Government Affairs