



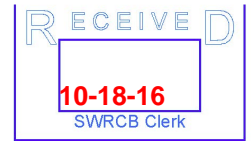
THE CITY OF SAN DIEGO

October 18, 2016

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

Sent via Electronic Mail: commentletters@waterboards.ca.gov

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



Croyts-Schooley
State Water Resources Control Board
1001 I Street, 16th Floor
Sacramento, CA 95814

Re: Comment Letter – Water Quality Enforcement Policy

Dear Ms. Townsend:

Thank you for the opportunity to provide comments on the proposed amendments to the State Water Resources Control Board's (Water Board) Water Quality Enforcement Policy ("Policy"). The City of San Diego's Public Utilities Department ("City") provides water services to the 1.3 million City and wastewater services to a larger metropolitan service territory of both City and regional customers, representing a population of approximately 2.4 million.

The Policy is critical in guiding the Water Board's approach to its enforcement of the regulated community. The City agrees with the Policy's intent to support fairness, transparency and consistency in enforcement actions. However, a number of the changes proposed in the document are at odds with this expressed goal. The Policy provides the Water Board with absolute discretion in determining penalties, making these assessments difficult for regulated agencies to predict and interpret.

Many of the new directives are also vague, and incorporate increasing reliance on policy considerations as opposed to actual proof of harm. When this approach is coupled with the significant increases in discretionary penalty assessment ranges included in the Policy, it creates a possibility that an isolated, accidental discharge from an agency acting in good faith could be subject to very large and possibly duplicative fines. This outcome is contrary to public policy.

The City is concerned that the Policy as proposed will encourage overly-punitive penalties that impose economic burdens on ratepayers that are out of proportion with the actual public health and environmental impacts of discharges. In an effort to craft an enforcement Policy that features a more targeted approach on bad-faith violators, the City offers the following comments on the proposed Policy amendments.



Importance of Fairness in Enforcement

The City agrees with the Policy's¹ stated goal of allowing enforcement to be adapted to "unique regional circumstances,"² but in order to maintain fairness and transparency, regulated agencies and the public must be able to compare any differences in assessments and the reasons for those differences.

The Policy should be amended to include a requirement that the Water Board make findings as to why proposed and assessed penalty amounts differ, to provide insight into its enforcement approach in practice.

Terminological Clarification

The proposed amendments to the Enforcement Policy use the terms 'civil liabilities,' 'administrative civil liabilities,' 'assessments' and 'penalties' throughout the document. Although the Water Board has always had the authority to impose Administrative Civil Liabilities (ACLs), a 'civil liability' typically refers to a court-imposed assessment, as opposed to one imposed by an administrative entity such as the Water Board.

The Policy language should clarify the nature and type of enforcement mechanism that applies to particular provisions and requirements and assure that the terminology is correctly applied.

Fair Enforcement and Good Faith

The Policy states guiding policy that at a minimum, "no competitive economic advantage is gained through non-compliance."³ The City understands the importance of enforcement in ensuring fidelity to regulations promulgated to protect and preserve the public health and environment. However, violations are often the result of isolated accidents as opposed to intentional efforts to gain economic advantages, especially in the context of wastewater agencies, who don't generally compete with each other to provide public services and whose jurisdictions are largely established.

The Policy should take good faith into consideration early in the process of determining enforcement actions, using the Water Board's discretion on a case-by-case basis to ensure that the enforcement process is both fair and constructive.

Informal Enforcement Options and Leniency Should be Available to All Good Actor Agencies, Not Just Those Serving Disadvantaged Communities

The City supports the consideration given in the Policy to the nature of the areas served by regulated entities, especially disadvantaged communities. Each agency experiences particular needs and challenges that arise as a result of its unique geographic and operational structure, and these circumstances should be taken into account in the enforcement context. The City strongly opposes any approach that dissuades consideration of Good Actor status based on income levels (ability to pay) alone.

The Policy should be amended to allow the use of informal enforcement and leniency for all agencies acting in good faith, not just those serving disadvantaged communities.

¹ All page references are to the redline/strikeout version of the Policy as provided by the Water Board.

² Policy, p. 1

³ Policy, p. 3

Reclassification of Enforcement Priorities for Discretionary Enforcement Actions

The amendments outline a broad reclassification of the Water Board's enforcement priorities that raises questions regarding the relative significance of the various violation types. It is unclear whether the types are listed in order of significance, and what constitutes a "level of disregard"⁴ for regulatory program requirements. Other items in the list imply that enforcement actions could be taken for discharges that are not actually harmful, such as in the second bullet, wherein the current language "regardless of level of treatment" could be confused with recycled or potable reuse water operations.

The City requests that the Water Board's process for determining and ranking enforcement priorities be clarified and limited to those discharges that are not permitted or have significant exceedances of limits contained within respective NPDES permits. In addition, the City requests the following modifications to the enforcement priorities section of the Policy:

- (1) Add "unless permitted" prior to the bullet list,*
- (2) Clarify the scope of the first priority bullet to remove drinking water reservoirs and other low-threat discharges,*
- (3) Clarify the application of "regardless of level of treatment" criterion in the second bullet,*
- (4) Clarify the third bullet, which could be inappropriately interpreted as applying all California Toxics Rule receiving water objectives as a Water Quality-Based Effluent Limit,*
- (5) Clarify the fifth bullet to incorporate dilution and mixing for low-threat discharges, and*
- (6) Clarify that the tenth bullet regarding turbidity only applies to inland surface waters and excludes discharges from wells that are part of the drinking water system.*

Clarify New Standard for Mandatory Enforcement Actions

The Policy amendments state an enforcement timeframe that commences within eighteen (18) months from when the violations become known, "absent good cause."⁵

To clarify the contours of this enforcement timeframe exception, the City requests that the Water Board define 'good cause' as used in the amendments, and that the 18-month period not begin until the violations are issued to the discharger.

Penalty Calculation Methodology Should Require Evidence Consistent with Policy

The actual process of calculating monetary penalties should be clear, consistent and guided by policy goals, with particular assessments determined as a result of the Water Board's consideration of facts, evidence and circumstances on a case-by-case basis. The Policy as proposed to be amended would allow ACLs to be based on "policy-based findings" alone, without evidentiary support. A more standardized and objective approach is preferable in order to maintain fairness and transparency in water quality enforcement throughout the state.

⁴ Policy, p. 6

⁵ Policy, p. 10

In order to ensure fairness and transparency in enforcement, the Policy should be amended to require that monetary penalty assessments be based on evidence that is consistent with policy, not policy alone.

Clarify 'Reasonable Time' for Cleanup

The amended Policy considers susceptibility to cleanup and actual cleanup efforts undertaken for a particular discharge in mitigating assessments imposed. The City supports the consideration of this factor, since a primary goal of the Enforcement Policy is the protection and preservation of public health and the environment. Proposed amendments to the Policy modify this factor to also include a temporal element requiring the cleanup or abatement to be performed within a "reasonable amount of time."⁶ It is unclear how this standard will be applied in practice.

The City requests that the Water Board clarify the duration of 'reasonable time' as used in the cleanup and abatement factor.

Significant Increases in Penalties Should be Tailored to Actual Threat Level and Bad Faith

The Policy contains increases in the numeric calculation of penalties in many areas, including increased liability for non-Class 1 violations, increased per-gallon and per-day multipliers, and disallowing Water Board consideration of a discharger's cleanup efforts unless they are voluntary. When viewed together, these changes produce benchmark enforcement assessments that are much higher than under the current Policy. The City understands the importance of enforcement in ensuring compliance with state standards, but these penalties will create significant new costs for ratepayers. Penalties should be structured in a way that isn't unnecessarily burdensome for agencies with a proven record of good faith and compliance and only an isolated discharge.

The City requests that the Policy be modified to provide the Water Board with a broader range of available monetary assessments and lower minimum penalties, especially for good faith actors, and restore the language allowing violations arising from the same incident to be enforced through a single liability amount.

Conclusion

Thank you again for allowing us the opportunity to comment on the Draft 2016 Water Quality Enforcement Policy. If you have any questions, please feel free to contact me or Ms. Carolyn Ginno at (858) 654-4286.

Sincerely,



Cathleen C. Pieroni
External Water Policy Program Manager

CG/mle

⁶ Policy, pp. 16-17