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October 18, 2016

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

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 City and County of San Francisco's Public Utilities Commission (SFPUC) thanks you for the opportunity to comment on the amendments to State Water Resources Control Board (SWRCB) Water Quality Enforcement Policy ("Policy"). The SFPUC serves safe and reliable drinking water to approximately 2.6 million residential, commercial, and industrial customers in the Bay Area. The SFPUC also provides sewer services for the City and County of San Francisco by operating and maintaining three wastewater treatment plants, 17 pump stations, and a 900 mile long combined sewer system. We thank SWRCB staff for its efforts to amend the Policy in order to achieve consistent and transparent enforcement throughout the state. The SFPUC also supports the development of a fair and transparent approach to enforcement and would like to suggest the additional revisions below for your consideration to ensure the proposed changes further these goals.

We appreciate the time SWRCB staff has devoted to amending this Policy and also would like to request that the SWRCB expand this effort by initiating a stakeholder engagement process regarding the proposed amendments. This will allow stakeholders to engage directly with SWRCB staff to discuss significant changes to the Policy and further analyze potential impact for future enforcement actions.

Thank you for your consideration.

Sincerely,

Michael Carlin
Deputy General Manager

- Cc: CJ Croys-Schooley, SWRCB
- Steven R. Ritchie, SFPUC
- Tommy Moala, SFPUC
- Laura Pagano, SFPUC
- Amy Chastain, SFPUC
- Tim Ramirez, SFPUC
- Ellen Natesan, SFPUC
- Casey Sondgeroth, SFPUC
- Anna Fedman, SFPUC
- John Roddy, SFCOA

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SFPUC Comments on Proposed Amendments to SWRCB Water Quality Enforcement Policy

A. General Comments

The section below consists of the SFPUC's broad comments and concerns regarding provisions of the proposed changes to the Policy. Subsequent sections contain detailed recommendations for specific sections of the Policy; all page references are to the comparison version of the Policy as provided by the SWRCB:

1. The Initial Statement of Reasons states that proposed changes to the enforcement process are intended to provide more consistent application throughout the state. The Initial Statement of Reasons also states that an economic impact assessment concluded that the amendments would not result in "change to the civil administrative penalties ultimately reached utilizing the amended policy." The SFPUC supports the SWRCB's efforts to improve consistency and avoid economic impact. However, some of the proposed modifications would increase discretion of Regional Water Boards and increase potential penalties. For example, for a high volume discharge violation, a maximum penalty of \$2.00 per gallon has been replaced with an allowable range from \$2.00 to \$10.00; the Degree of Culpability minimum multiplier was increased from 0.5 to 1.0; and the minimum multiplier for the History of Violations conduct factor is 1.0 with no apparent maximum. Justifications were not provided for these increases.

Recommendations: The SFPUC requests that the SWRCB reexamine the proposed changes to ensure more consistent application of civil liabilities throughout the state. For changes that could result in an increase in penalties, please provide the rationale for the increase and example liability calculations to help dischargers better understand how penalties will be calculated.

2. The proposed amendments would diminish the incentive for good behavior because there is little discernment in how the Policy will be applied to egregious violators as opposed to municipalities which operate their systems in accordance with industry wide practices.

Recommendations: Throughout the proposed Policy the SFPUC requests that the SWRCB add qualifiers as to the nature of the violation (e.g., gross negligence vs. accidental omission). For example, accidental violations should be better qualified in the definitions of "Potential for Harm" and "Deviation from Requirement" in Step 3 (Page 21). Also, the SFPUC requests that this Policy not increase the minimum multiplier for Degree of Culpability Conduct factor to account for unintentional and unavoidable discharges and to continue to encourage good behavior.

3. The existing policy appears to have been drafted with a predominant focus on POTW related discharges and this approach does not adequately address the issues specific to other types of discharges, such as potable water, for which the Policy is also being used to guide enforcement action.

Recommendations: The SFPUC requests that SWRCB reexamine the proposed changes to address potable drinking water discharges in a manner consistent with treatment of recycled water discharges.

B. Detailed Recommendations

Ranking Violations (page 6).

1. The Initial Statement of Reasons states that the proposed amendments were developed to help ensure more clarity and transparency. However, the consequences of the proposed change from Class I/II/III to Class I/II is not clear. An explanation of the financial implications for future enforcement actions should be provided. The Initial Statement of Reason states that Class II and III violations are often conflated with each other. However, the rationale for eliminating Class III violations, rather than more clearly delineating these classifications, was not provided.

Recommendations: The SFPUC recommends providing a clear definition of Class II violations, an analysis of how this new classification structure would affect penalties, and the rationale for using two categories instead of three.

2. Under the proposed changes, acute toxicity effluent limit violations would be considered a Class I violation. However, inclusion in this classification is not appropriate because false positives for acute toxicity tests are common. Additionally, positive toxicity test results are usually ephemeral, appear sporadically, and are caused by factors difficult to identify and often beyond the discharger's control. Also, oftentimes these violations do not pose any immediate or substantial threat to water quality; a toxic result in the laboratory does not necessarily translate into toxic impacts in the receiving water. As an example, polymers used for settling suspended solids may be toxic to fish in a purified effluent, but are unlikely to be toxic in a natural water body because the polymers quickly bind to suspended solids in the receiving water, becoming non-toxic.

Recommendation: The SFPUC requests that discharges violating acute toxicity effluent limitations be removed as a Class I violation.

3. Under the proposed changes, discharges causing or contributing to exceedance of the primary maximum contaminate levels (MCLs) with a MUN beneficial use would be considered a Class I violation. However, MCLs are drinking water standards, and exceedance of the TTHM MCL will not necessarily contribute to an adverse impact on the beneficial uses of receiving waters.

Recommendation: The SFPUC requests that discharges exceeding primary MCLs be considered a Class II violation and only when the pollutant being addressed presents a risk after treatment at a drinking water treatment facility (i.e., is capable of passing through the treatment facility at levels of public health concern).

4. Currently fish kills are considered Class I violations under the proposed Policy. However, the meaning of "demonstrable detrimental impacts" is not clear. For instance, it is unclear if a single dead fish will be treated the same as numerous dead fish under this classification. Also the Policy does not address classification of exotic non-native species as opposed to a native species of special concern.

Recommendation: The SFPUC requests that if fish kills are considered a Class I violation, this provision account for the specifics (number of fish, species etc.) of the incident.

5. The proposed Policy considers an exceedance of a turbidity threshold of 100 NTU a Class I violation. However, under the Statewide Treated Drinking Water Permit Order 2014-0194-DWQ receiving water limitations are based on water quality objectives contained in Regional Water Quality Control Boards' Basin Plans and permitted discharges could exceed this 100 NTU threshold. The Statewide Treated Drinking Water Permit contains turbidity action levels, or limits applicable to specified discharges:

- Groundwater Supply Well Operations must comply with a turbidity action level of 100 NTU. "An exceedance of the turbidity numeric action level of 100 NTU is not a violation of this Order, but any exceedance does require that the Discharger take action..."
- Ocean discharges must comply with the effluent limitation of 225 NTU

The proposed policy appears to classify any discharge with more than 100 NTU as a Class I violation which is inconsistent with the Statewide Treated Drinking Water Permit.

Recommendation: The SFPUC requests that the turbidity threshold of 100 NTU be removed, or revised to defer to the specific turbidity limits in the applicable NPDES permit.

Susceptibility to Cleanup or Abatement (page 16, Step 1, Factor 3).

6. The existing Policy and proposed changes currently assign a multiplier of 1 if less than 50% of the discharge is susceptible to cleanup and abatement. However, this condition punishes agencies for their location; many agencies operate facilities located near surface water bodies where cleanup is frequently impossible. For instance, if a discharge enters San Francisco Bay due to its vicinity to local facilities, mixing would occur immediately and prevent any type of cleanup. In addition, this policy unfairly penalizes dischargers whose spills are not susceptible to cleanup due to rapid dissipation (which have a lower impact on water quality than other discharges). For example, an oil spill would receive more favorable treatment than a sewage spill under this factor.

Recommendation: The SFPUC requests decreasing the score from 1.0 to 0.5 for the condition when less than 50% of a discharge is not susceptible to cleanup or abatement.

7. Compliance with the Statewide Treated Drinking Water Permit Order 2014-0194-DWQ relies on natural attenuation of chlorine residual; it is included as a suggested BMP. However, the proposed Policy states natural attenuation is not considered cleanup or abatement.

Recommendation: The SFPUC requests that this inconsistency be removed from the Policy. Penalties should be less for discharge violations of contaminants that naturally attenuate (or have been abated) versus contaminants that cannot be removed from the environment once discharged.

Per Gallon and Per Day Factors (page 18-19, Table 1-2).

8. The Initial Statement of Reasons does not provide adequate rationale for the proposed changes in the Per Gallon Factors in Table 1 and Per Day Factors in Table 2. With the single exception of factors with a Potential for Harm score of 8, all factors were increased.

Recommendations: The SFPUC recommends providing the basis for the proposed numeric changes in Tables 1 & 2, as these changes will cause significant increases in penalties for discharge violations.

High Volume Discharges (page 19).

9. The Initial Statement of Reasons does not provide adequate rationale for the volume thresholds proposed in this section, nor for the per gallon amount range of \$2 to \$10. The \$2 per gallon charge used to be the ceiling for large discharges and now it is the minimum, allowing for a substantial increase in fines for discharges that fall under this category.

The proposed wide range in per gallon fines also grants significant discretion to the Regional Water Boards. The majority of the proposed changes in this Policy appear to have been adjusted to maximize objectivity, whereas this new proposed discretion could potentially increase the fine by up to five times for a violation. This discretion could effectively eliminate the thoughtful objectivity in the other computed factors. It also creates a scenario where Regional Water Boards can use their discretion to propose a high penalty as part of a negotiating strategy rather than issuing a fair assessment of the impact at the outset.

Recommendation: The SFPUC recommends eliminating the per gallon amount range and instead maintain the standard of a maximum penalty of \$2.00/gallon to fairly and consistently assess large volume discharges.

10. Under the proposed changes, discharges of recycled water treated for reuse are allowed a maximum of \$1 per gallon. This Policy does not mention potable water discharges which like recycled water, generally do not pose a substantial threat to water quality. In many cases, the predominant pollutant of concern, chlorine residual, in recycled water is the same as potable water.

Recommendation: The SFPUC requests consistent treatment and adding a provision for potable water with a cap of \$1 per gallon.

Conduct Factors (page 23).

11. The Degree of Culpability range was modified from 0.5-1.5 to 1.0-1.5. This proposed range does not account for unavoidable, non-negligent, or unintentional violations. Increasing the minimum multiplier removes any "credit" for discharges that are completely accidental. If a neutral assessment is given there is no incentive for dischargers to become more proactive or continue to expand protective programs for when unexpected and unintentional incidents occur.

Recommendation: The SFPUC requests that this Policy incentivize good behavior by including a multiplier less than 1.0 (neutral).

12. The proposed changes to the History of Violations could be problematic for several reasons:
 - The minimum multiplier is proposed as 1.0, removing the possibility of "credit" for a discharger with a good compliance history.

Recommendation: The SFPUC requests that this Policy incentivize good behavior by including a minimum multiplier of 0.75 to recognize dischargers with positive compliance history.

- Use of the history of past violations in penalty calculations will result in public agencies with large systems being identified as relative bad actors even though their noncompliance incidents normalized to agency size may be the same or even better than the industry average.

Recommendation: The SFPUC requests that this penalty factor be adjusted to account for the size of the discharger (e.g., miles of pipeline).

- The language of the Policy has changed from “history of repeat violations,” to “any history of prior violations.” Thus, if there was ever one violation, however minor, the discharger will have a minimum of a 1.1 multiplier. Additionally the Regional Water Boards should also not have the discretion to hold old violations against dischargers indefinitely.

Recommendation: The SFPUC requests that the language “history of repeat violations” remain. It is also recommended that there should be a prescribed timeframe (e.g., five years) that the Regional Water Boards can consider when determining this multiplier.

- The Policy does not define what “numerous dissimilar violations” means and how that will be quantified or applied.

Recommendation: The SFPUC requests that this term be further clarified.

- The proposed range for History of Violations does not have a ceiling. With the proposed Policy, the Regional Water Boards would have the discretion to consider adopting a multiplier above 1.1 with no set maximum. Moreover, the proposed Policy encourages the Regional Water Boards to “consider adopting a multiplier above 1.1”, which could result in much higher multipliers and inconsistent factors throughout the state.

Recommendation: The SFPUC requests that an upper limit of 1.5 be specified in the Policy and guidance be provided for determining when to use this maximum multiplier.

Enhanced Compliance Actions (ECAs) (page 39).

13. The current Policy allows ECAs, which are projects that enable a discharger to make capital or operational improvements beyond those required by law, and are separate from projects designed to merely bring a discharger into compliance. The Regional Water Boards may suspend a portion of the monetary liability for ECA completion. Under the proposed changes, up to 50 percent of the liability may be used to contribute to Supplemental Environmental Projects (SEPs) and ECAs. Furthermore, under the proposed changes, the 50 percent limit may be waived for economically disadvantaged communities.

Recommendation: The SFPUC requests that this waiver also be applied to ECAs for improvements near environmentally sensitive areas. The SFPUC

believes it is important to prioritize financial investment near water bodies known to provide habitat for protected and endangered species. Like the SWRCB, the SFPUC is committed to protecting the beneficial uses of water bodies throughout California; prioritizing projects that protect aquatic life habitats will benefit present and future generations.

Appendix

14. Recommendation: The SFPUC requests that the SWRCB provide several examples of hypothetical liability calculations in the appendix so dischargers have a better understanding of how the complex methodology is applied. The SFPUC also requests examples of liability calculations under the existing Policy compared with the same facts under the proposed Policy to illustrate any changes the proposed amendments would create.