



October 18, 2016

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

Chair Felicia Marcus and Board Members
c/o Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Sent via electronic mail to: commentletters@waterboards.ca.gov

RE: Comment Letter – Water Quality Enforcement Policy

Dear Chair Marcus and Board Members:

On behalf of the California Coastkeeper Alliance, representing California Waterkeeper groups spanning the coast from the Oregon border to San Diego, we appreciate the opportunity to comment on the Water Quality Enforcement Policy (Draft Policy). The Waterkeepers are California’s water quality pollution watchdogs, with active patrolling, monitoring, and citizen suit enforcement of the Clean Water Act. The Waterkeepers are natural partners for Regional Water Board enforcement; and in some regions, Waterkeepers and Regional Water Board enforcement staff work closely together. For example, Los Angeles Waterkeeper frequently identifies non-filers with the Industrial Stormwater Permit for the Los Angeles Regional Board to take action. However, lack of resources by both the Waterkeepers and Regional Water Board staff underscores the need for a strategic approach to water quality enforcement.

The federal Clean Water Act and state Porter-Cologne Act require California to implement and enforce programs to control water pollution. The Clean Water Act, enforceable through U.S. EPA, state and citizen action, focuses on “point source” discharges to surface waters, including stormwater. State law, by contrast, requires controls on all pollution sources into both surface and ground water. Despite strong federal and state laws on the books, many of California’s waterways remain seriously polluted. This is due in part to inconsistent and incomplete enforcement. Enforcement currently focuses on discharges from traditional pipe discharges while generally neglecting key polluted runoff sources, such as stormwater and agriculture.

We strongly support many of the proposed Amendments in the Draft Policy. However, the State Water Board needs to make fundamental shift in culture if it is going to effectively enforce water quality standards. We offer the following recommendations to help the State Water Board prioritize and improve enforcement:

- Explicitly state that water quality enforcement is a top priority and direct Water Boards to adopt permits and policies with clear, enforceable standards;
- Direct all Water Boards to set a goal - and report annually - enforcement actions taken in response to a water quality violation;
- Require all permits and policies to contain a finding that they are enforceable and that the Water Board is capable and committed to reviewing and enforcing violations;
- Direct Water Boards to identify an Enforcement Coordinator whose sole job responsibility is water quality enforcement;
- Invest resources into an automated system to better use data algorithms to prioritize cases;

- Support and defend the ability to use “potential for harm to human health” when determining liability;
- Base “susceptibility to cleanup” on whether clean up actually occurred;
- Defend the definition of “high-volume discharges” to be between 100,000 and 2,000,000 gallons;
- Collapse violation days by a unit of five days to one for all violations occurring over 30 days;
- Declare the Water Boards’ ability to issue a subpoena, and only allow an “ability to pay” penalty reduction if the discharger has provided proof of that inability;
- Do not preclude the recovery of attorney costs and the costs associated with preparing for a hearing;
- Impose a 75 percent limit on the amount of liability that can be applied to an ECA in economically disadvantaged communities;
- Hold ECAs to the 50 percent limit when the discharger is the project manager;
- Direct Regional Boards to have a list of pre-approved SEPs that is reviewed and revised annually;
- Invest in site inspectors that are low-level, in-house staff familiar with water quality permits;
- Direct Regional Boards to issue enforcement notices for violations uncovered during audits; and
- Provide the public with a summary of California TMDLs and progress towards attaining each TMDL waste load allocation.

1. *The State Water Board should pronounce enforcement a top priority and order all future permits and policies to contain clear and enforceable standards.*

Enforcement of California’s water quality is nominal. Water Boards are generally unwilling or unable to hold dischargers accountable for achievement of water quality standards. Regional Water Boards conduct few inspections, audits and enforcement actions related to the number of facilities governed under respective water quality permits. The few audits conducted reveal egregious violations that lead to enforcement actions with minimal impact—small fines that do not result in water quality improvements. Meaningful enforcement of water quality standards largely results from action by citizen watchdog organizations.

The lack of resources is often cited as the primary barrier to enforcement, but we observe that the lack of clear, enforceable standards and tendency toward self-reporting makes enforcement nearly impossible. Clear and precise permits is a critical tool for effective enforcement. For example, stormwater permits should contain numeric pollution limits wherever feasible, as opposed to subjective conditions that make enforcement staff intensive. The State Water Board must also improve enforcement of conditions on polluted runoff (such as agricultural runoff) discharges, as well as all discharges to groundwater.

As water quality programs have evolved, we have witnessed an exchange of enforceability, either by citizens or the Boards themselves, for the perceived trade-off of discharger participation. This trend is concerning, as we replace enforceable standards for burdensome reporting, planning, and exemptions. For example, the recently affirmed Los Angeles County MS4 Phase I Permit provides an alternative method of compliance to receiving water limitations if dischargers participate in additional stormwater capture strategies. In contrast, an investment of Water Board resources on permit drafting processes to create defensible permits with objective technology and water quality based requirements would generate a fair, firm, transparent, and consistent Enforcement Policy.

We strongly encourage the State Water Board to explicitly state that water quality enforcement is a top priority and direct Water Boards to adopt permits and policies with clear, enforceable standards.

Do not adopt permits or policies that the Water Board is not willing to enforce. Too often we encounter experiences where we recognize the Water Board will not - or cannot - enforce their own requirements. In sometimes instances, the Water Board even state the inability to review their own requirements, and therefore unable to enforce violations. Just as an example, when the 2016 emergency conservation regulations were adopted, the State Water Board stated that it would be unable to review the water

suppliers' conservation programs, and hinted that they would need to rely on NGOs to bring violations to their attention.¹ The Enforcement Policy should dictate that no permit or policy will be adopted unless the Water Board can commit to enforcing the permit or policy when a violation occurs. The State Water Board should require all permits and policies to contain a finding that they are enforceable and that the Water Board is capable of reviewing and enforcing any violation.

2. *The State Water Board should set a statewide goal – and direct Regional Water Boards to set regional goals – for enforcement actions resulting from water quality violations.*

California is not seeing an improvement in water quality standards. In 2009, the State Water Board adopted the Enforcement Policy to further its mission to protect and enhance the quality of the waters of the State by defining an enforcement process that addresses water quality problems in the most firm, fair, efficient, effective, and consistent manner. The State Water Board also adopted the Policy to provide guidance that enables Water Board staff to expend its limited resources in ways that openly address the greatest needs, deter harmful conduct, protect the public, and achieve maximum water quality benefits.

The Enforcement Policy is not leading to meaningful enforcement that provides a deterrent to violating water quality standards. There is no deterrent to violating water quality standards because the Water Boards are not actually enforcing water quality standards. The overwhelming majority of enforcement is administrative violations - like the failure to submit documents in a timely manner. Water Boards are not reading the vast majority of SWPPPs, Annual Reports, NOIs, or other reports, to see if they are internally consistent, reflect facts on the ground, or incorporate other data or analysis submitted to the State or Regional Water Boards.

The State Water Board needs to begin assessing punitive fines or appropriate remediation to deter discharges from violating the law. Instead, the Water Boards prefer to use a more “informal enforcement response” when responding to permit violations. The State Water Board defines “informal enforcement responses” as “a phone call or staff enforcement letter.” The Water Boards over reliance on informal enforcement responses is crippling the state’s ability to achieve water quality standards. Of the 3,271 stormwater enforcement actions taken in FY 2013 – 2014, only 6 actions resulted in a compliance action and only 23 resulted in penalties. 3,242 stormwater enforcement actions resulted with an “informal enforcement response” – 99 percent of all enforcement actions. There must be a deterrent to violating water quality standards. Phone calls or letters are not enough to deter violators from continuing to exceed water quality standards.

The reason 99 percent of all stormwater enforcement actions result with an “informal enforcement response” is likely because the Water Boards decline to enforce actual water quality violations. Instead, Water Boards seem content to only enforce administrative violations. To meet water quality standards, there must be enforcement of water quality standards. The State Water Board should direct all Water Boards to set a goal - and report annually - enforcement actions taken in response to a water quality violation.

¹ *State officials confirmed Tuesday that although they required each agency to send in paperwork documenting its projected supply and demand, they did not verify the numbers and took the agencies at their word. "We're not going to go looking under rocks to see if they were fudging." "If somebody else discovers that, the board does retain the authority to take action."* See Paul Rogers, California Drought: 84 percent of water agencies choose zero as conservation target, (August 16, 2016); available at: http://www.eastbaytimes.com/california/ci_30254472/california-drought-84-percent-water-agencies-choose-zero?source=rss.

3. *Require each Regional Water Board to appoint an Enforcement Coordinator and direct the State Water Board to hold a quarterly enforcement coordination meeting.*

With limited resources, enforcement prioritization is critical. The current Policy requires the Water Boards to prioritize cases for formal discretionary enforcement. However, the Policy does not detail how to undertake the prioritization process. This results in uneven enforcement and varying differences between regions. We strongly support the proposed requirement that each Water Board select an Enforcement Coordinator. It is critical that the Water Boards have at least one staffer that is dedicated *solely* to enforcement for the region. Enforcement divisions are greatly understaffed with too many other responsibilities. The Enforcement Coordinators' job responsibility should be solely focused on enforcement.

We applaud the Policy requirement directing Water Board enforcement staff to meet periodically to prioritize cases. However, it is also important that the state do a better job coordinating and sharing best enforcement practices to maximize minimal resources. The State Water Board can play a key role to ensure each Regional Board is properly prioritizing cases, that they are making enforcement a priority, and that best practices are shared with other regions. Therefore, the Policy should direct the State Water Board to hold quarterly enforcement meetings between the Enforcement Coordinators.

4. *The Water Boards should invest resources into an automated system using data algorithms to prioritize enforcement cases.*

We strongly support retaining the goal of automating case prioritization through data algorithms. The current Policy establishes a goal of automating case prioritization through data algorithms. However, the State Water Board states that the existing classification system is unduly burdensome and unworkable due to the difficulty of applying it in a timely and consistent manner. The State Water Board goes on to find that Regional Boards and public have a hard time discerning under which classification a violation should fall, either Category II or Category III. However, the proposed Amendments would eliminate Class III violations entirely – so that concern has been addressed. With the removal of Class III violations, we do not see the remaining justification to eliminate automating case prioritization entirely.

Moving away from enforcement prioritization based on data algorithms is the wrong direction. The California Waterkeepers are increasing reliance on data algorithms to prioritize citizen suit enforcement. Using data to prioritize enforcement reduces our burdensome workloads by identifying which permittee violations are the most egregious. It is not clear from the draft Amendments why using data to prioritize enforcement is burdensome. If non-profit groups have the resources to use data algorithms to streamline enforcement than there is no excuse why the Water Boards cannot maximize its data to prioritize enforcement. Without better justification, the Policy should direct the Water Boards to pool resources – and if necessary contract a firm – to develop a properly automated system to enhance the use of data algorithms to prioritize enforcement.

5. *The Water Boards should support and defend the ability to use the “potential for harm to human health” when determining liability.*

The current regulations require the Water Boards to calculate the factor of potential for harm due to discharge violations by determining the actual or threatened impact to beneficial uses. This requirement has detrimentally limited the Water Boards from adequately assessing potential or actual harm to human health.

We strongly support the Amendments clarification that calculating the potential for harm to human health entails considering the actual and potential harm of the discharged material in the context of the potential impacts to beneficial uses more generally. We also strongly support the clarification that potential harm can be used if actual harm cannot be quantified due to a discharger's untimely reports, inadequate monitoring, or other practical limitations. Therefore, we strongly encourage the State Water Board to

retain the proposed Amendments clarifying the consideration of potential for harm to human health when determining liability.

6. *The State Water Board should support and retain the Amendment to base “Susceptibility to Cleanup” on whether clean up actually occurred.*

We support the Amendments to base “Susceptibility to Cleanup” on whether clean up actually occurred. The existing Policy requires the Water Boards to apply a “0” for the “Susceptibility to Cleanup” factor if 50 percent or more of a discharge is susceptible to cleanup and abatement. The regulations do not require consideration of whether cleanup or abatement has actually occurred.

Permit violators should not be given a lower enforcement score only because there is the potential for cleanup. Permittees should actually have cleaned up the violation before any reduced score is offered. However, some Regional Boards are giving violators a “0” score based on the potential for cleanup when no cleanup has actually occurred. Therefore, the State Water Board should retain the proposed Amendments to clarify that “Susceptibility to Cleanup” must be based on whether actual cleanup occurred.

7. *The State Water Board should support and retain the definition of “high-volume discharges”.*

The State Water Board should define “high-volume discharges”. The existing Enforcement Policy does not define what constitutes a high-volume discharge. The Amendments would define high-volume to be between 100,000 gallons and 2,000,000 gallons. This definition is critical, as we have witnessed numerous permittees argue that sewage spills substantially under 100,000 should be considered high-volume discharges. By defining high-volume discharges, Water Boards will no longer be susceptible to the argument that substantially smaller violations should constitute high-volume discharges.

We agree with the State Water Board that these Amendments are necessary to clarify what constitutes a high-volume discharge and is subject to a reduced multiplier for per gallon penalties. We request the State Water Board vigorously defend the currently proposed definition of “high-volume discharges” to be between 100,000 and 2,000,000 gallons.

8. *The State Water Board should collapse violations days by a unit of five days to one for all violations that occur over 30 days.*

The State Water Board should require all collapsed violations to be five days to one for all violations over 30 days. The current Enforcement Policy grants the Water Boards discretion to collapse the number of days of violation if a violation is not causing daily detrimental impacts to the environment or the regulatory program. The Water Boards have discretion to collapse the number of days of violation if it finds that a violation results in no economic benefit from the illegal conduct that can be measured on a daily basis. The existing method for assessing this alternative multiple-day calculation includes an irregularity whereby some violations lasting longer than 30 days are calculated as having lasted for a shorter duration than those violations lasting fewer than 30 days.

We support the proposed Amendments to change the method of collapsing days and fix the irregularity so that violation days 30 through 60 are collapsed by a unit of five days to one, rather than 30 to one. However, we do not understand the justification for capping this proposed change at 60 days. The irregularity being addressed is also applicable for violations lasting longer than 60 days. Therefore, the State Water Board should collapse violation days by a unit of five days to one, rather than 30 to one, for all violations occurring over 30 days – without any ceiling.

9. *The State Water Board should declare its ability to issue a subpoena, and require all dischargers to prove their inability to pay the enforcement fine.*

The Water Boards should be issuing subpoenas to obtain information on whether a business has the ability to pay. Water Code penalty provisions require the Water Boards to consider whether a violator has the ability to pay a proposed liability and the effect the proposed penalty will have on its ability to continue its business before assessing a penalty. The proposed Amendments would clarify that the Water Boards can issue subpoenas to obtain information on the ability to pay. It is very important that the Water Boards use of the subpoena to obtain information on a business's ability to pay, and if a dischargers fails to comply with such a subpoena that person has waived its right to challenge a finding of ability to pay. The California Waterkeepers deal with this on an ongoing basis, as the ability to pay is a specific element that must be satisfied under the federal enforcement policy. Therefore, the State Water Board should declare its ability to issue a subpoena to obtain information on whether a business has the ability to pay.

The State Water Board should go beyond just having the discretion to issue subpoenas – it should require dischargers to prove their inability to pay. Similar to how the U.S. EPA handles “ability to pay”, the Regional Boards should not have the discretion to reduce the penalty due to inability to pay if there is no evidence to support the reduction. Therefore, the State Water Board should only allow a penalty reduction based on “ability to pay” if the discharger has provided proof of that inability.

10. *The State Water Board should not preclude Water Boards from recovering attorney costs and the costs associated with preparing for a hearing.*

The State Water Board should be precise as to what enforcement costs can be included in one's liability for a violation. The existing Policy grants the Water Boards discretion to add the costs of investigation and enforcement to the total liability under this factor. The regulations, however, fail to specify the methodology by which the costs of investigation and enforcement are calculated. The amendments would direct the Water Boards to base these costs on each staff person's hourly rate including benefits and overhead.

Costs should include all investigation and enforcement expenses. The State Water Board should be explicit that “overhead costs” include mileage, postage, expert costs, flights and travel, meals, and all other expenses necessary to investigate and enforce a violation.

The State Water Board should not preclude the recovery of attorney fees. The Amendments also clarify that attorney costs and costs associated with preparing for and attending a hearing may not be included. This is completely inappropriate. To not allow attorney costs and the costs associated with preparing a case provides a huge benefit to the discharger. This Amendment will encourage dischargers to challenge Administrative Civil Liability Orders before Regional Boards because there is no downside of a loss since they would not have to pay the opponent's attorneys' fees. Furthermore, enforcing violations requires staff attorney hours. To limit Water Boards from recouping legal hours limits the Water Boards' already dire lack of resources. We strongly encourage the State Water Board to remove the Amendment that would preclude the recovery of attorney costs and the costs associated with preparing for a hearing.

11. *State Water Board should impose limits on the amount of liability that can be applied to an ECA in economically disadvantaged communities.*

Existing Regulations grant the Water Boards discretion to approve settlement agreements that suspend a portion of monetary liability for completion of an Enhanced Compliance Action (ECA). Existing regulations establish that ECAs are subject to the same rules governing Supplemental Environmental Projects (SEP). Current regulations apply a 50 percent limit on the amount of liability that can be applied to SEPs, and thus to ECAs. The amendments would waive the 50 percent limit for ECAs in economically disadvantaged communities with a financial hardship.

The State Water Board should require a rigorous explanation as to why a Water Board waived its 50 percent cap for an ECA. We are generally supportive of the proposed Amendment, because special attention should be provided to disadvantaged communities. However, ECAs should not be encouraged if it takes away from the punitive nature of enforcement. Throughout California we have witnessed dischargers use ECAs in a self-serving manner to apply their penalty fine to improve private operations. Therefore, ECAs provide an unequitable benefit to the property owner because the violation fines improve their own operations that otherwise could have gone into a SEP or community project. Permittees should already be making investments to comply with the law. Allowing a violator to pay 100 percent of their enforcement fine into an ECA that will only go to improving their operation is inequitable. The State Water Board should impose a 75 percent limit on the amount of liability that can be applied to an ECA in economically disadvantaged communities.

The State Water Board should not waive the 50 percent limit for ECAs in economically disadvantaged communities where the discharger is managing the project. When a discharger manages their own ECA project it tends to be self-serving – only improving that particular discharger’s operations. However, a discharger that pays its ECA to a third party to manager the project seems to result in a less self-serving project that benefits more of the community. Therefore, we request the State Water Board continue to hold ECAs to the 50 percent limit when the discharger is the project manager.

12. The State Water Board should direct all Regional Boards to have a list of pre-approved SEPs.

The State Water Board or Regional Water Board may allow a discharger to satisfy part of the monetary assessment imposed in an administrative civil liability (ACL) order by completing or funding one or more Supplemental Environmental Projects (SEPs.) SEPs are projects that enhance the beneficial uses of the waters of the State, that provide a benefit to the public at large and that, at the time they are included in the resolution of an ACL action, are not otherwise required of the discharger.

A number of restoration and cleanup projects ripe for funding throughout the state; however often they are overlooked because the Regional Board does not have a SEP list. Therefore, the State Water Board should direct Regional Boards to have a list of pre-approved SEPs that is reviewed and revised annually, including the identification of SEPs in disadvantaged communities.

13. Water Boards should hire appropriate level of enforcement officers and ensure audits lead to enforcement violations.

The State Water Board should invest in more water quality inspectors, including those at lower pay-grades. For example, in Region One there are three stormwater inspectors. One for Construction, one for Industrial, and one for Municipal stormwater permittees. All three of these inspectors are "Water Resource Control Engineers" with relatively high salaries. The State Water Board notes that "[s]ignificant funds are spent annually on storm water audits, inspections and compliance evaluations". This is because limited resources are being spent for contractors, like Tetra-Tech, to perform stormwater audits, inspections, and compliance evaluations.

Another problem compounding the lack of enforcement is the inability to identify non-filers. For example, in Los Angeles County there is estimated to be more than 6,000 industrial facilities not enrolled in the Industrial Stormwater Permit. Los Angeles has 5 only inspectors for almost 3,000 permitted facilities – it is concerning to consider how many more water quality violations are occurring throughout the region due to the lack of resources to identify non-filers. Water quality violations are ubiquitous in Los Angeles, but those numbers do not represent an accurate account of industrial stormwater dischargers that are violating the Permit.

The Water Boards do not need advanced engineers, or contracted specialists, to perform audits, inspections, and compliance evaluations. Instead, the State Water Board should invest in inspectors who are low-level, in-house staff familiar with water quality permits.

Statewide we continually see audits that uncover egregious permit violations leading to minimal, if any, enforcement. Here are only examples we have witnessed resulting in little to no enforcement:

- Doggie Day Care Facility along a creek who had piles of dog excrement that were discharging directly to a creek when over irrigation occurred during the summer and when rains came during the winter. Neighbors reported time and time again that this was an ongoing problem and yet no enforcement was done.
- A grease hauler (pumped out grease from grease traps in restaurants) was twice caught in the back of a Costco after hours discharging the grease he had collected directly into the storm drain. Absolutely no enforcement occurred.
- A public park on over an acre of land was inspected twice, once by Tetra Tech and once by the Regional Board, in both instances after a qualifying rain event and with no sediment and erosion control BMPs installed.

The Water Boards need to take enforcement seriously by issuing enforcement violations following an audit. The State Water Board needs to improve water quality by directing Regional Boards to begin issuing enforcement notices for violations uncovered during audit events.

14. The State Water Board needs to improve enforcement reporting.

The Enforcement Report should provide progress towards attainment of TMDL goals. We are unaware of an existing resource the public can use to understand what TMDLs exist in California and what progress has been made to reach waste load allocations. A TMDL status update should be simple: what waterway is impaired, for what pollutant, what is the waste load allocation for each pollutant, and most importantly, what progress has been made to-date to attain that waste load allocation. Therefore, the State Water Board should provide the public with a simple, understandable summary of TMDLs in the state and progress towards attaining the corresponding waste load allocation.

The Enforcement Report should continue to address the “gap issue” of discharges that are currently not being enforced against because there is no formal regulatory program in place for them; for example, grazing in Region 3 or irrigated agriculture in Region 2. We have also noticed that in a number of cases the Regional Board cedes stormwater enforcement authority to the cities, who are hesitant to enforce against local business entities. Prioritizing municipal and construction stormwater permit enforcement in the Annual Report will help focus State Water Board efforts on determining the actual level of compliance, identify obstacles to improved enforcement, and adjust enforcement efforts accordingly.

We look forward to working with you to ensure that all permittees fairly comply with Clean Water Act and the Porter-Cologne Act to protect the water quality of California.

Sincerely,



Sean Bothwell
Policy Director
California Coastkeeper Alliance